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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

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(36 pp.)

JOAN STEVENSON,)
)
 Petitioner,)
 vs.)
)
 SUPERIOR COURT OF)
 LOS ANGELES COUNTY,)
)
 Respondent.)
)
 HUNTINGTON MEMORIAL HOSPITAL,)
)
 Real Party In Interest.)

(Los Angeles County
Superior Court No. GCOI 1606,
Hon. Coleman A. Swart, Judge)

REQUEST BY AMERICAN ASSOCIATION OF RETIRED PERSONS
FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND
AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF
AND PETITIONER JOAN STEVENSON

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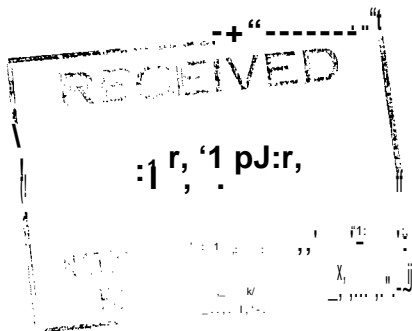


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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JOAN STEVENSON,

Petitioner,

vs.

SUPERIOR COURT OF
LOS ANGELES COUNTY,

Respondent.

HUNTINGTON MEMORIAL HOSPITAL,

Real Party In Interest.

(Los Angeles County
Superior Court No. GCOI1606
Hon. Coleman A. Swart, Judge)

**REQUEST BY THE AMERICAN ASSOCIATION OF RETIRED PERSONS FOR
PERMISSION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF
AND PETITIONER JOAN STEVENSON**

TO THE PRESIDING JUSTICE OF THE COURT OF APPEAL, SECOND APPELLATE
DISTRICT, DIVISION THREE AND ASSOCIATE JUSTICES:

The American Association of Retired Persons (AARP) requests permission to file
a brief as amicus curiae in support of plaintiff and petitioner Joan Stevenson. AARP is a
nonprofit membership organization of persons age 50 or older that is dedicated to
addressing the needs and interests of older Americans. AARP seeks through

education, advocacy, and service to enhance the quality of life for all by promoting independence, dignity and purpose.

More than one third of AARP's 32 million members are employed individuals, most of whom are protected by the federal Age Discrimination in Employment Act, 29 U.S.C. 5 621 et seq. (ADEA), and state discrimination laws. Approximately 3 million older persons in California are members of AARP.

One of AARP's primary objectives is to strive to achieve dignity and equality in the workplace through positive attitudes, practices, and policies regarding work and retirement. Through its research, publications, and training programs, AARP seeks to eliminate ageist stereotypes, to encourage employers to hire and to retain older workers, and to help older workers overcome the obstacles they face because of age.

AARP seeks to insure that older persons are judged on their ability, not age. To this end, AARP created a Worker Equity Initiative in 1985 to study and address issues affecting the employment of older workers. AARP has developed educational and advocacy programs to encourage and promote the employment of older workers. As part of its advocacy efforts, AARP has filed more than 100 amicus curiae briefs in the United States Supreme Court, federal appellate and district courts, and state courts regarding the proper interpretation and application of the federal and state discrimination laws to insure that the rights of older workers are fully protected.

In its 1994 Report to the Governor, the California Governor's Task Force for Employment of Older Workers announced that California has more residents age 40 and older than any other state. The Task Force also reported that "older individuals who wish to work are impeded by widespread misconceptions and myths about older workers as well as by shortcomings in the employment and training system." One of the

foremost barriers to older workers obtaining and retaining employment is age discrimination employment.

The issue presented by this case is whether age discrimination in employment violates a fundamental public policy of the state of California. The California Supreme Court has already held that both sexual harassment (Rojo v. Kliger (1990) 52 Cal. 3d 65, 276 Cal. Rptr. 130) and retaliation for reporting the sexual harassment of a coworker (Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 4 Cal. Rptr. 2d 874) violate fundamental public policies of California and give rise to a claim of wrongful discharge in contravention of public policy. In addition, California courts of appeal have held that discrimination based on sexual orientation (Leibert v. Transworld Systems. Inc. (1995) 32 Cal. App. 4th 1693, 39 Cal. Rptr. 2d 65) and pregnancy (Badih v. Myers (1995) 1995 Cal. App. LEXIS 677) also violate fundamental public policies. Finally, a recent decision by a California federal district court held that discrimination based on medical condition violates a fundamental public policy. Ely v. Wal Mart. Inc., 875 F. Supp. 1422 (C.D. Cal. 1995).

In stark contrast, the California Supreme Court ruled that there is no fundamental public policy that prohibits age discrimination by small employers. Jennings v. Marralle (1994) 8 Cal. 4th 121, 32 Cal. Rptr. 2d 275. However, to date, there is no definitive ruling by a California court as to whether age discrimination by employers with five or more employees violates a fundamental public policy.¹

¹ In Strauss v. A.L. Randall. Co. (1983) 144 Cal. App. 3d 514, 194 Cal. Rptr. 520, this Court held that since no common law remedy for age discrimination predated the statutory remedy, the Legislature intended the statute to provide the exclusive remedy for a wrongful discharge because of alleged age discrimination. 144 Cal. App. 3d at 524. However, the Supreme Court specifically rejected the "new right - exclusive remedy" doctrine of interpretation" in Rojo v. Kliger (1990) 52 Cal. 3d 65, 79, 276 Cal. Rptr. 130.

AARP, through its undersigned attorneys, is familiar with the questions involved in this case and the scope of their presentation and believes that there is necessity for additional argument regarding the following:

If the prohibition of age discrimination is not declared to be a fundamental public policy, a sharp distinction will be created between age discrimination victims and virtually all other discrimination victims. Age discrimination will be perceived as less egregious as other forms of discrimination and the right to employment based on ability as opposed to age will become "something less" than a civil right. Finally, if California's policy against age discrimination is viewed as less important and therefore unworthy of the "fundamental" classification, there could be significant adverse consequences for the vigor with which the prohibition is followed and enforced.² Since there are no logical or legitimate reasons for such a distinction, this Court should declare that age discrimination in employment violates a fundamental public policy of the state of California.

If this request is granted, the following brief amicus curiae in support of plaintiff and petitioner is respectfully submitted.

Respectfully submitted,
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² H. Eglit, "Agism in the Work Place: An Elusive Quarry," 13 Generations 32 (1989).

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

JOAN STEVENSON,

Petitioner,

vs.

SUPERIOR COURT OF
LOS ANGELES COUNTY,

Respondent.

HUNTINGTON MEMORIAL HOSPITAL,

Real Party In Interest.

(Los Angeles County
Superior Court No. GCO11606
Hon. Coleman A. Swat-t, Judge)

**BRIEF AMICUS CURIAE BY THE AMERICAN ASSOCIATION OF RETIRED
PERSONS IN SUPPORT OF PLAINTIFF AND PETITIONER JOAN STEVENSON**

TO THE PRESIDING JUSTICE OF THE COURT OF APPEAL, SECOND APPELLATE
DISTRICT, DIVISION THREE AND ASSOCIATE JUSTICES:

INTRODUCTION

Stereotypes about age and ability persist, in part, because of society's failure to fully attack and condemn ageist policies and practices. A comprehensive and concerted effort is needed to recognize that age discrimination is as debilitating to individuals and as harmful to society as other forms of discrimination.

In the California Fair Employment and Housing Act (FEHA), the California Legislature has recognized the harm employment discrimination - including age discrimination - causes to both individuals and society. The FEHA prohibits age discrimination on an equal basis as it prohibits other forms of employment discrimination. The prohibition of age discrimination in employment is sufficiently clear and well-established to constitute a fundamental public policy of the State of California. There is no logical or legitimate reason to hold otherwise.

STATEMENT OF THE CASE

The plaintiff, Joan Stevenson, worked at Huntington Memorial Hospital from its creation in 1952 until she was terminated sometime after December 30, 1992. Mrs. Stevenson's termination immediately followed a medically approved leave of absence, which had been authorized by her private physician and the defendant's medical representative.

The defendant's Personnel Policies and Procedures manual states that an employee on a medically approved leave of absence is entitled to "reinstatement to the same job classification and shift held prior to the commencement of a disability leave" or "if it is not possible for business reasons to guarantee reinstatement to the same job classification and shift, an employee will be reinstated to any available job." The defendant confirmed Mrs. Stevenson's right to reinstatement in a letter dated November 6, 1992. Mrs. Stevenson was released to return to work in November 1992. However, when she contacted the defendant, she was informed that she could not return to Huntington in any capacity. Mrs. Stevenson was 60 years old and just months short of eligibility for an early retirement offer when she was terminated. She was replaced by a much younger employee.

Mrs. Stevenson filed suit on December 30, 1993 alleging that her termination was motivated by her age and disability and breached contractual obligations. Her complaint contains four causes of action: breach of contract; violation of public policy (disability); violation of public policy (age discrimination); and breach of the covenant of good faith and fair dealing.

Mrs. Stevenson's public policy claims of age discrimination were stricken by demurrer in October 1994. In sustaining the defendants demurrer, the trial court ruled that the California Fair Employment and Housing Act (FEHA) is the exclusive remedy for claims of age discrimination in employment. Mrs. Stevenson petitioned this Court for issuance of a writ. On February 27, 1995, this Court issued an Alternative Writ of Mandate and Temporary Stay Order. As a result, the litigation of Mrs. Stevenson's breach of contract claims has been delayed until this Court decides whether there is a common law cause of action for age discrimination.

ARGUMENT

I. AGE DISCRIMINATION IN EMPLOYMENT VIOLATES A FUNDAMENTAL PUBLIC POLICY OF THE STATE OF CALIFORNIA.

The California Fair Employment and Housing Act (FEHA), Cal. Gov't Code f 12900 et seq., broadly prohibits employment discrimination. e F E H A neither expressly nor impliedly preempt[s] other rights of action on account of employment discrimination arising under state law, including common law." Blom v. N.G.K. Spark Plugs (USA) (1992) 3 Cal. App. 4th 382,4 Cal. Rptr. 2d 139. An individual who has been discharged from employment may elect to bring a nonstatutory cause of action for damages incurred as a result of the alleged wrongful discharge. "[A]n action for wrongful discharge will lie when...the basis of the discharge contravenes

a fundamental public policy.” Rojo v. Kliaer, (1990) 52 Cal. 3d 65, 89, 276 Cal. Rptr. 130, 146. If the individual elects to waive his or her statutory cause of action and proceed directly to court on common law claims, no exhaustion of administrative remedies is required. Exhaustion of the administrative remedy set forth in a statute is a precondition to bringing civil action on a statutorily cause of action only. m 52 Cal. 3d 65 at 83, 88.

There are only two requirements for a public policy to be considered “fundamental.” “[A] public policy is fundamental if it is expressed in a statute or constitution, rather than in case law and administrative rules and regulations,” Gantt v. Century Insurance Co. (1992) 1 Cal. 4th 1083, 1089-1095, 4 Cal. Rptr. 2d 874, and if it “benefits the public in general, not just the discharged employee.” Rojo v. Klioer 52 Cal. 3d 65 at 89. These two criteria were established for the following reasons:

‘A public policy exception carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions strikes the proper balance among the interests of employers, employees and the public. The employer is bound at a minimum, to know the fundamental public policies of the state and nation as expressed in their constitutions and statutes; so limited, the public policy exception presents no impediment to employers that operate within the bounds of law. Employees are protected against employer actions that contravene fundamental state policy. And society’s interests are served through a more stable job market, in which its most important policies are safeguarded.’

Ely v. Wal Mart, Inc., 875 F. Supp. 1422, 1425 (C.D. Cal. 1995) quoting Gantt v. Sentry Insurance Co. (1992) 1 Cal. 4th 1083 at 1095.

The prohibition against age discrimination in employment meets both of these criteria.³ Therefore, this Court should affirm that age discrimination violates a

³ The defendant attempts to impose a third requirement. Specifically, the defendant alleges that a “fundamental public policy cannot exist unless it has universal

fundamental public policy of the state of California and allow Mrs. Stevenson's wrongful discharge claim to go forward.

A. **A Fundamental Public Policy Against Age Discrimination in Employment is Clearly Stated in the California Fair Employment and Housing Act.**

California's condemnation and prohibition of age discrimination in employment is set out in several sections of the California Fair Employment and Housing Act. First, in FEHA 5 12920 the California Legislature declares it to be "the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of...age." Second, in 8 12921 the Legislature declares the "opportunity to seek, obtain and hold employment without discrimination because of...age...to be a civil right." Finally, 8 12941 (a) clearly describes what specific age-related employment practices are prohibited by the FEHA.

Although the defendant emphasizes that there is no statutory or constitutional provision other than the FEHA that prohibits age discrimination in employment, that fact is not dispositive.⁴ There is simply no requirement "that to be fundamental a public

application...", i.e. it must "apply uniformly to all employers and employees in the State of California." Brief of Real Party in Interest at 9, 10. There is no such requirement. For example, in Ely v. Wal Mart, Inc., 875 F. Supp. 1422 (C. D. Cal. 1995), the United States District Court for the Central District of California held that a violation of the Family Rights Act supports a claim for wrongful discharge in violation of public policy despite the fact that the Act only applies to employers with 50 or more employees.

⁴ Moreover, as amicus California Employment Lawyers Association (CEIA) emphasizes in its brief, the California Legislature has actually enacted numerous statutes that prohibit age discrimination. Brief for Amicus Curiae California Employment Lawyers Association at 5-9.

policy must be expressed in multiple statutes, or at least in some statute in addition to FEHA.” Ely v. Wal Mart, Inc., 875 F. Supp. 1422 at 1428.

The defendant relies on Jennings v. Marralle (1994) 8 Cal. 4th 121, 32 Cal. Rptr. 2d 275, to support its claim that a public policy that is expressed only in the FEHA cannot be “fundamental.” However, Jenninas merely said that “the inclusion of age b the oolicy statement of the FEHA alone is not sufficient to establish a ‘fundamental’ public policy for the violation of which an employer may be liable in a common law tort action.” 8 Cal. 4th 121 at 135 (emphasis added). As stated above, FEHA’s policy statement, 512920, is not the only section where the California Legislature spells out the prohibition of age discrimination in employment. In addition to declaring freedom from age discrimination in employment to be the “public policy” of the state and a ‘civil right,’ FEHA also provides a clear definition of “age”⁵ as well as a detailed description of what age-related employment practices are prohibited. & 5 12941 (a).

The fundamental public policy against age discrimination in employment is “sufficiently clear” and adequately expressed in these multiple provisions of the FEHA to meet the requirements set forth in Gantt v. Sentriv Insurance (1992) 1 Cal. 4th 1083, 1090, 4 Cal. Rptr. 2d 874, 878 (“the policy must be ‘fundamental,’ ‘substantial’ and ‘well-established’ at the time of the discharge”) quoting Folev v. Interactive Data Coro. (1988) 47 Cal. 3d 654, 669-670, 254 Cal. Rptr. 211. As a covered employer under the FEHA and the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. 3 621 et seq.⁶, the defendant was required to know that age discrimination is unlawful. n

⁵ FEHA 5 12926(b) defines “age” as “the chronological age of any individual who has reached his or her 40th birthday.”

⁶ The ADEA applies to private employers with 20 or more employees. 29 U.S.C. fj 630(b).

addition, the relevant sections of the FEHA put the defendant on notice regarding who is protected against age discrimination and what employment practices are considered discriminatory. See v. Wal 875 F. Supp. 1422, 1428 (C.D. Cal. 1995). In sum, recognizing a cause of action for wrongful discharge in contravention of the public policy against age discrimination in employment will “present[] no impediment to employers that operate within the bounds of law.” Gantt 1 Cal. 4th 1083 at 1095.

Other forms of discrimination have been declared to violate fundamental public policies notwithstanding the fact that the public policy in question was contained in a single statute. In Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 4 Cal. Rptr. 2d 874, the California Supreme Court held that an employee who was terminated in retaliation for supporting a coworker’s claim of sexual harassment may state a cause of action for tortious discharge against public policy. The Supreme Court explained that although the defendant “did not discriminate against Gantt on account of his sex within the meaning of the constitutional provision, there is nevertheless direct statutory support for the jury’s express finding that the defendant violated a fundamental public policy when it constructively discharged the plaintiff.” 1 Cal. 4th 1083, 1096, 4 Cal. Rptr. 2d 874, 882. The only basis for the fundamental public policy at issue in Gantt is that the FEHA specifically enjoins any obstruction of a Department of Fair Employment and Housing (DFEH) investigation. Cal. Gov’t Code 5 12975.

In Leibert v. Transworld Systems, Inc., (1995) 32 Cal. App. 4th 1693, 39 Cal. Rptr. 2d 65, the employee alleged that he was harassed and terminated on the basis of his sexual orientation. The Court of Appeal for the First District upheld the employee’s claim that the employer’s actions violated the fundamental public policy against

discrimination on the basis of sexual orientation expressed in @ 1101, 1102, and 1102.1 of the Labor Code.’ Because the court did not reach the question of whether the employee’s wrongful discharge in violation of public policy claim could also be upheld under his alternative constitutional theory, 32 Cal. App. 4th 1693 at 1703, his wrongful discharge claim was allowed to proceed despite the fact that only the state’s Labor Code expressed the fundamental public policy against discrimination on the basis of sexual orientation.

Finally, in Ely v. Wal Mart, Inc., 875 F. Supp. 1422 (C.D. Cal. 1995), the United States District Court for the Central District of California held that the Family Rights Act portion of the FEHA is an adequate source of fundamental public policy sufficient to support a wrongful discharge claim “in the sense required by Gantt and &j~: the public policy is contained in a statutory provision and it is policy ‘which inures to the benefit of the public at large rather than to a particular employer or employee.’” 875 F. Supp. 1422 at 1426.

B. The Fundamental Public Policy Against Age Discrimination Benefits the Public in General.

In addition to having a statutory or constitutional basis, a fundamental public policy must be “‘public’ in nature, i.e., [it must] inure[] to the benefit of the public at large rather than to a particular employer or employee.” Roio v. Kliaer 52 Cal. 3d 65, 89, 276 Cal. Rptr. 130, 145 citing Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654 at 669.

⁷ Sections 1101 and 1102 of the Labor Code prohibit discrimination on the basis of political activities or affiliations. Section 1102.1, effective January 1, 1993, provides that 53 1101 and 1102 also ‘prohibit discrimination or different treatment in any aspect of employment or opportunity for employment based on actual or perceived sexual orientation.’”

Age discrimination wastes valuable experience and skills and exacts a significant cost to employees, employers, and to the nation. Eliminating age discrimination on the job will ensure the best use of our nation's human resources. The California Legislature has formally acknowledged that age discrimination, like other forms of employment discrimination, "foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interest of employees, employers, and the public in general." Cal. Gov't Code 5 12920.

There is simply no question that prohibiting age discrimination in employment benefits not just older workers, but society at large. In commenting on the large numbers of older unemployed workers that prompted the passage of the federal Age Discrimination in Employment Act, (ADEA), 29 U.S.C. 5 621 et seq. in 1967, President Lyndon B. Johnson declared that, "In economic terms, this is a serious -- and senseless -- loss to a nation on the move...the problem is one of national concern and magnitude." H.R. Dot. No. 40, 90th Cong., 1 st Sess. 7 (1967).

In McKennon v. Nashville Banner Pub. Co., 115 S. Ct. 879 (1995) the U.S. Supreme Court declared that the federal age discrimination law 'reflects a societal condemnation of invidious bias in employment decisions. The ADEA is but a part of a wider statutory scheme to protect employees in the workplace nationwide.' 115 S. Ct. 879 at 884. The California FEHA's prohibition of age discrimination against employees age 40 and over is an important component of this "wider statutory scheme" to eliminate arbitrary age discrimination in employment. Indeed, virtually every state has enacted

legislation to prohibit age discrimination in employment. ^a This sweeping condemnation of age discrimination is a telling reflection of the fact that there is a "fundamental public interest in a workplace free from [age discrimination]." Rojjo v. Kliaer 52 Cal. 3d 65 at 90.

II. AGE DISCRIMINATION CANNOT AND SHOULD NOT BE DISTINGUISHED FROM OTHER FORMS OF DISCRIMINATION.

In a recent decision, the California Court of Appeal for the First District held that, "Employment discrimination, whether based upon sex, race⁹, religion or sexual orientation, is invidious and violates a fundamental public policy of this state." Leibert v.

⁸ Forty-six states plus the District of Columbia currently have laws prohibiting age discrimination against private and public employees. See Alaska Stat. 5 18.80.220(a)(l); Cal. Gov't Code Q 12941(a); Colo. Rev. Stat. 5 8-2-1 16; Conn. Gen. Stat. § 46a-60(a)(l); Del. Code Ann. tit. 19, § 710(7); D.C. Code Ann. 5 1-2502(2); Fla. Stat. § 760-01-1 0, 112.04344; Ga. Code Ann. §§ 34-1 -2(a), 45-1 9-20 to 42; Haw. Rev. Stat. 5 378-2; Idaho Code 3 67-5910(7); Ill. Rev. Stat. ch. 68, para. 1-103(A); Ind. Code § 22-9-2-1; Iowa Code § 601A.6(1)(2); Kan. Stat. Ann. § 44-1 115; Ky. Rev. Stat. Ann. 3 344.010(4); La. Rev. Stat. Ann. 9 972; Me. Rev. Stat. Ann. tit. 5, § 4572; Md. Code Ann. art. 498, § 16(a); Mass. Gen. Laws Ann. ch. 151B, 5 1(8); Mich. Stat. Ann. § 3.548(202); Minn. Stat. 55 181.81, 363.03(l), (2); Mo. Rev. Stat. 5 213.055(l); Mont. Code Ann. 5 49-2-303(l); Neb. Rev. Stat. 5 48-1003(l); Nev. Rev. Stat. 5 613.330(a); N.H. Rev. Stat. Ann. § 354-A:8(1); **N.J.** Rev. Stat. § 105-2.1; N.M. Stat. Ann. Q 28-1-7(A); N.Y. Exec. Law Q **296(3-a)(a)**; N.C. Gen. Stat. QQ 126-16, 143-416.2; N.D. Cent. Code § 14-02.4-02(l); Ohio Rev. Code Ann. § 4112.02; Okla. Stat. Ann. tit. 25, 3 1302.(l); Or. Rev. Stat. 5 659.030(l)(a),(b); 43 Pa. Cons. Stat. § 954(h); R.I. Gen. Laws 5 28-5-6(J); S.C. Code Ann. Q 1-13-30(c); Tenn. Code Ann. § 4-21-101; Tex. Rev. Civ. Stat. Ann. **art.** 5221 k, 5 1.04(a); Utah Code Ann. § 34-35-6(1)(a); Vt. Stat. Ann. tit. 21, § 495(c); Va. Code Ann. 5 2.1-116.10; Wash. Rev. Code Q 49.44.090(l); W. Va. Code § 5-1 1-3(q); Wis. Stat. Ann. 5 111.33(l); Wyo. Stat. 5 27-9-105(b).

Three states cover only public employees in their state laws. See Ark. Stat. Ann. § 12-3502; Miss. Code Ann. § 25-9-149; S.D. Codified Laws Ann. Q 3-6A-36.1. Alabama has no age discrimination in employment law. However, there is legislation currently pending in Alabama that would make age discrimination in employment unlawful in that state as well.

⁹ Although there is no case specifically ruling on the viability of a common law action for wrongful discharge in violation of California's policy against race discrimination, the California Supreme Court has stated that freedom from race discrimination is fundamental right. Jenninas v. Marralle (1994) 8 Cal. 4th 121, 134, 32 Cal. Rptr. 2d 275.

Transworld Systems, Inc. (1995) 32 Cal. App. 4th 1693, 1707, 39 Cal. Rptr. 2d 65.

What is noticeably absent from this list of “fundamental public policies” articulated by the courts is the prohibition of employment discrimination based on age.

Thus far, the California courts seem to have established a two-tiered system of public policies. The prohibitions of discrimination based on sex, sexual orientation, race, medical condition and retaliation for reporting discrimination have been designated as “upper-tier” or “fundamental” public policies. Age discrimination must not be the only form of discrimination relegated to the “bottom-tier.”

There is no legal or logical reason for age discrimination to be segregated as the only form of discrimination not to support a claim for wrongful discharge in violation of a fundamental public policy. As explained above, the prohibition of age discrimination meets the legal criteria for a fundamental public policy -- it is contained in a statutory provision and it benefits the public at large. And, as explained below, age discrimination is equally as wrong and as arbitrary as other forms of employment discrimination.

Isolating age discrimination on the “bottom tier” would create the perception that age discrimination is less serious or less wrong than other forms of discrimination. However, any distinction between age discrimination and other forms of discrimination is unfounded.

In the words of Claude Pepper, “Ageism is as odious as racism or sexism.”¹⁰ Ageism” violates the basic democratic principle that each person should be judged on the basis of individual merit rather than on the basis of group characteristics

¹⁰ 123 Cong. Rec. 27,121 (1977).

¹¹ The term ‘ageism’ was coined by Robert N. Butler, M.D. to describe the “deep and profound prejudice against the elderly which is found to some degree in all of us.” R.N. Butler, Why Survive?: Being Old in America 11 (1975). Butler defines ageism as, “a process of systematic stereotyping of and discrimination against old people because

such as race, sex and age." Age discrimination, like race discrimination and sex discrimination, results in unfair treatment on the basis of a characteristic - one which the individual has neither chosen nor has the power to change.¹³ The inequity of age discrimination has been depreciated because unlike race or gender, age is not viewed as immutable.¹⁴ However, the flaw in this argument is obvious. Individuals can only age in one direction -- older.¹⁵ So, "while aging is a process of change which is experienced by everyone, the attainment of 'old age' - the condition upon which age discrimination is based -- places an individual in a class to which he will always belong."¹⁶ Employers respond to older workers based on their stereotypic assumptions about aging. They look at chronological age and not at the person, just as many employers look at skin color or gender rather than capability.¹⁷

For these reasons, age discrimination must be denounced with the same intensity that other forms of discrimination are met with. One way this can be

they are old, just as racism and sexism accomplish this with skin color and gender." U. at 12.

¹² E. B. Palmore, Ageism: Negative and Positive 7 (1990).

¹³ H. Eglit, 3 Age Discrimination 1-4 (1986).

¹⁴ See e.g., 758 F.2d 1435, 1442 (11th Cir. 1985) ("Age discrimination is qualitatively different from race or sex discrimination because the basis of the discrimination is not a discrete or immutable characteristic of an employee which separates the members of the protected group indelibly from persons outside the protected group.")

¹⁵ H. Eglit, 2 Age Discrimination 30 (1986).

¹⁶ Note, Age Discrimination in Employment, 50 N.Y. L. Rev. 924, 930 n.37 (1975).

¹⁷ Note, Disparate Impact and the Age Discrimination in Employment Act, 68 Minn. L. Rev. 1038, 1064-65 (1984).

accomplished is by declaring that the prohibition of age discrimination is a "fundamental public policy" on an equal footing with those already designated as such.

CONCLUSION

The prohibition of employment discrimination based on age, which is clearly stated in several sections of the FEHA, demonstrates a fundamental public policy that is sufficient to support a claim for wrongful discharge in violation of public policy.

Age discrimination must not be treated differently from other forms of discrimination. Age discrimination in employment must be declared to violate a fundamental public policy of the state of California.

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