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SUPREME COURT DEVELOPMENTS

"ECHOES OF ANIMAL FARM: High Court Rules Some 'Aged' People Have Greater Protection Under Age Discrimination Statute."

By Howard R. Besser

After reading the unprecedented - indeed startling- February 24th Supreme Court decision in *Gen. Dynamics Land Sys. v. Cline*, No. 02-1080, 2004 U.S. LEXIS 1623, I was reminded of George Orwell's dictum ["all animals are equal, but some animals are more equal than others"] in *Animal Farm*. The majority in *Cline* literally modified the protection for persons over 40 established in the Age Discrimination Employment Act (ADEA), in certain circumstances now to be limited to "aged" persons, only those over 50. The almost total lack of any cogent rationale or case support for the result not only does great violence to the statute and is unprecedented under the Act, but also will result in considerable uncertainty concerning future case interpretations of ADEA.

The published article by Mark Biggerman, who argued the case before the Supreme Court, ably sets out the issues in the case and its history in the federal court system. Prior to discussing the Supreme Court's treatment, I would only add that the 6th Circuit majority made clear that it must construe the statute "consistent with [its] plain language; that is, by assigning to the words of the statute their primary and generally understood meaning." *Cline v. Gen. Dynamics Land Sys.*, 296 F.3d 466, 467 (6th Cir. 2002). Indeed, the majority wrote that "courts must apply a statute as its language directs, *not in accordance with a judicial supposition as to what the legislature might better have written*." *Id.* at 469. (Emphasis added). Thus, the majority reasoned that the Act meant what it said, i.e., that "ADEA requires us to hold that employment age discrimination against *any* worker at least 40 years of age is prohibited...." *Id.* at 470 (alteration in original). In other words, "[i]f Congress wanted to protect only those workers who are *relatively older*, it clearly had the power and acuity to do so. It did not." *Id.* at 472 (alteration in original).

Met with this wholly accurate and virtually universally applied delineation of the statute in its own words, the Supreme Court's 6-3 decision by Justice Souter determined that the class of over 40 denied retirement health benefits (unlike those over 50 who received them) had no claim under the Act. The Opinion reasoned that the statute's text and history point to it "as a remedy for unfair preference based on relative youth, leaving complaints of the relatively young outside the statutory concern." Syllabus *Cline*, 2004 U.S. LEXIS 1623 at *4. A review of the "high points" of this Opinion is illustrative as to how, and perhaps why, the Court has apparently embarked on this wholly new and unprecedented approach to defining unlawful employment discrimination.

The majority referenced testimony at hearings on the then-proposed legislation that employment opportunities "are likely to contract" or "shrink" as workers age. Met with such generalized statements, the Court opined that the "record" reflected that "as between two people, the younger is in the stronger position, the older more apt to be tagged with a demeaning stereotype." *Id.* at *16. (The Court apparently saw no stereotype in its own generalized characterizations.) No details or examples of any kind were offered for this apparently uniform conclusion.

Worse yet, the Opinion divided those ostensibly within the statute's purview between "'older' workers... relative to 'younger' ones." *Id.* at *18. To emphasize its radically new approach apparently granting greater protection under the Act to this subgroup of "older workers," the Court twice defines a formal rule of law: "We hold that Congress expressed a prohibition by using a term in a commonly understood, narrow sense ('age' as 'relatively old age')." *Id.* at *21. *See also*, a nearly identical determination made on pages 29-30 predicated solely on "social history [which] reveals an understanding of age discrimination as aimed at the old...." (so that the statutory preference to "age" in fact means "old age").

In this manner, referencing totally undefined "social history," "common experience," and a naked determination that complaints "of the relatively young [are] outside the statutory concern," the Court engrafts a totally new definition of coverage for the 34-year old Act. *Id.* at *23-29. Accordingly, "the statute doesn't mean to stop an employer from favoring an older worker over a younger one." *Id.* at *37.

Justice Scalia's brief dissent merely recites ADEA's statutory language and, with approval, the EEOC's interpretive regulation (dismissed by the majority as "clearly wrong") to the effect that when two applicants in the protected group (i.e. over 40) apply for the same position, the employer must not make its hiring decision on the basis of age, but rather on some other factor.

I find the dissent of Justice Thomas (joined by

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Justice Kennedy) both more correct as a matter of law and based upon virtually all prior precedent. Citing the "plain language" of the Act, he argues that "[t]his should have been an easy case." Like the Circuit, he begins with the statute's language concluding that "the phrase 'discriminate… because of such individual's age', 29 U.S.C. § 23(a)(1), is not restricted to discrimination because of relatively older age." *Cline*, 2004 U.S. LEXIS 1623 at *40 (Thomas, J., dissenting). Further, he finds the "plain reading" of ADEA is supported by the EEOC's regulatory interpretation as the agency charged with administering the Act. *Id*. at *45.

As a former chair of EEOC, he cites the Court's position (i.e. its new definition of covered comparative older age) as both "untenable" and "straining credulity." He also cites the only relevant legislative history on this issue, an exchange between Senators Yarborough and Javits with approval, although the statute being clear, the history is deemed merely to confirm its plain reading. *Id*.

However, I regard Part II of his dissent as the most significant. There, he savages the majority's new approach to legislative interpretation, relying largely on totally unspecific "social history": "(after quoting the Court), the Court does not define 'social history,' although it is apparently something different from legislative history, because the Court refers to legislative history as a separate interpretive tool in the very same sentence. *Indeed, the Court has never defined 'social history' in any previous opinion, probably because it has never sanctioned looking to 'social history' as a method of statutory interpretation ....*" *Id*. at *47-48. (Emphasis added.)

I have thought it necessary to cover the case's Opinions in this detail largely because the decision presents such a radical departure not only from the prior case law on this Act, but indeed from the past careful analyses of each of the federal employment discrimination laws. I can only hope that this frankly bizarre and strange decision is but an anomaly.

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