

AGE DISCRIMINATION: A SPREADING WORKPLACE EPIDEMIC

By Matthew A. Peluso, Esq.

Like many of his witticisms, Twain's famous quote on aging was based on an underlying serious and accurate insight: Aging isn't synonymous with incompetence. However, in our increasingly youth-dominated culture and workplace, the old adage that wisdom comes with age is under serious and increasing attack. A recent study by AARP found that one-third of workers over the age of 50 have either personally been subjected to age discrimination or know someone who has. Experience is no longer being valued in the workplace. "Paying one's dues" is neither respected nor rewarded. Senior employees are being intentionally targeted and terminated solely because of their age, while younger employees, despite their inexperience and tendency for transience, are given their jobs because of the lower salaries they can command.

Unfortunately, law enforcement departments are not immune from this concerning trend. The intractable economic recession over the last 4 years has negatively affected law enforcement as much as, if not more than, other professions. As a result of the economic crisis, our state and country have witnessed the rise of an aggressive and well-funded national and local political movement that blames unions and their members for all of our country and state's economic problems.

This combination of factors has encouraged counties and local municipalities to redress their own budgetary mismanagement by targeting and terminating highly experienced and usually decorated New Jersey law enforcement officers solely because they have reached a certain age, and, thus, a well-justified salary commensurate with their level of seniority, competence and years of service to the public. This discriminatory practice of blaming law enforcement officers for often exaggerated (and usually unrelated) budget problems has become the "knee-jerk" response by local and state governments to any alleged cost-cutting measures.

It is important that law enforcement officers, who risk their lives every day enforcing laws on behalf of others, know what their rights are when faced with this increasingly prevalent form of discriminatory employment practice. Local, state and federal laws prohibit this type of age discrimination, and law enforcement officers should not mistakenly believe that they have to meekly accept the premature end of their careers after years of service and at the stage of their lives when they most need their well-earned salaries.

As every law enforcement officer in this state knows, the terms and conditions of their employment, including promotion in rank, demotion and termination, are usually governed either by the controlling Collective Bargaining Agreement ("CBA") negotiated

on behalf of the officer by his or her local PBA or FOP unit, and/or by the employing municipality or county through its employee manual/handbook, as enforced through the New Jersey Civil Service Act, New Jersey Statute 11A:1-1, et seq. The CBA provides grievance procedures for addressing alleged disciplinary actions and employment-related complaints. For law enforcement officers governed either partially or exclusively by the civil service rules, their employee handbook/manual provides the policy, rules and procedures applicable to any complaints or disciplinary matters.

However, in addition to, and separate from, the CBA and civil service rules, the New Jersey legislature created the Law Against Discrimination ("LAD"), New Jersey Statute 10:1-1, et seq., to eradicate the "cancer" of discrimination from the workplace. Under the LAD, no employer can discriminate against an employee on the basis of their age, race or gender. The LAD prohibits discrimination in all aspects of the employer/employee relationship, including demotions, reassignment of duties, refusals to promote, terminations and involuntary ("forced") retirements.

The LAD is based on several longstanding federal statutes prohibiting discrimination in the workplace on the basis of race, gender and age, including Title VII of the Civil Rights Act of 1964 ("CRA") and the Age Discrimination in Employment Act of 1967 ("ADEA"). However, in certain ways, the LAD provides more protection to New Jersey workers than federal law by, for example, imposing less onerous burdens of proof on employees alleging discrimination than the CRA and ADEA.

To prove the elements of an age discrimination case under the LAD, an aggrieved law enforcement officer needs to prove that he or she: (1) was a member of a protected class (usually 40 years of age or older); (2) was qualified for the job he or she performed; and (3) suffered an adverse employment action (i.e., was terminated, denied promotion, reassigned, demoted or forced to retire) despite being qualified for the job, (4) in which their age was a contributing factor, thereby giving rise to an inference of discrimination.

However, under the LAD, and unlike current federal law, an officer is not required to prove that their age was the sole, or even a significant factor, in the decision to demote or terminate them. Rather, under the LAD, an officer is only required to prove that age played a contributing role in the adverse employment decision.

Also, an officer is not required to prove that they were directly replaced "exact job-for-exact job" by a younger employee. Rather, an officer is only required to prove that they were demoted, denied promotion or terminated while younger officers were treated favorably.

*"Age is an issue
of mind
over matter.
If you
don't mind,
it doesn't
matter."
~ Mark Twain*

Once an officer has established the elements of a claim under the LAD, a legal presumption is created that the municipality or county unlawfully discriminated. Then, the burden of proof in the case shifts to the municipality or county to come forward and prove a non-discriminatory basis for the termination, demotion or refusal to promote.

Last year I was honored to represent six former Passaic County investigators in an age discrimination case brought under the LAD against the County of Passaic and the former prosecutor of Passaic County, James F. Avigliano. All of these officers were highly qualified, decorated and dedicated career law enforcement officers.

Defendants argued that the investigators were terminated solely because of budget constraints at the county level. However, at trial, we argued that the alleged budgetary problems were exaggerated and that the investigators were intentionally targeted because of their age and higher salaries based on their longevity. At trial, we were able to show that by following the "last hired, first fired" plan proposed and approved by the local PBA, the alleged budgetary constraints could have been addressed with all of these senior officers keeping their jobs. Instead, younger officers, who were politically aligned with the former prosecutor, kept their jobs because the prosecutor was involved in a battle for reappointment.

After losing their jobs in 2008, my clients were finally vindicated in July of 2012 when a jury in Passaic County unanimously found that the defendants had wrongfully terminated them because of their age in violation of the LAD, and awarded them \$3.8 million dollars in compensatory and punitive damages. According to a National Boss Day study conducted by eBossWatch.com, this jury verdict was the 12th largest employment law judgment in the country in 2012, and the 2nd highest age discrimination verdict last year.

As author, John K. Hulett has written in his book, *Age Discrimination: An Epidemic In America Affecting People Of All Ages*: "Experience and wisdom are two qualities that come with age, and they cannot be purchased... [or] gifted, nor substituted for youth, greed and ignorance." The public needs experienced, competent and dedicated law enforcement officers protecting our citizens and neighborhoods. Such qualities should be valued in every profession, but, in law enforcement, they often mean the difference between life and death.

It is important that the law enforcement community speak out against and fight this disturbing trend of age discrimination in its ranks. Otherwise, such illegal discriminatory conduct will not only continue, but will encourage other types of discriminatory and blatant union "busting" conduct by state, county and local governments.

Matthew A. Peluso, Esq. is an attorney based in Princeton. He has 20 years of experience in numerous types of complex litigation, including criminal, employment, insurance and business law. Mr. Peluso has successfully represented police officers in employment and contract disputes involving wrongful termination, failure to promote, race, gender and age discrimination, hostile work environment and whistle-blower actions. Mr. Peluso is a graduate of the University of Miami School of Law and George Washington University. He can be reached at: (609) 306-2595. His e-mail address is: mpeluso@live.com. His experience can be reviewed on LinkedIn and on his website: <http://mpeluso.esq.webs.com>. The opinions expressed by Mr. Peluso in his article are not intended to provide legal advice. Anyone interested should consult a qualified attorney prior to making any significant employment or legal decision.

A person in a dark suit and white shirt is holding a large white sign. The sign has the text "ADVERTISING DOESN'T COST, IT PAYS" in large letters, with "IT PAYS" in red. Below that, it says "CALL 973.881.5100". There is a faint map of New Jersey in the background of the sign.

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