Ninth Circuit Holds Statistics Alone Can Establish Prima Facie Case of Age Discrimination in a RIF

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On May 29, 2012, the Ninth Circuit Court of Appeals issued a decision clarifying the standard for plaintiffs to establish a **prima facie disparate treatment discrimination claim**. In *Schechner v. KPIX-TV,* No. 11-15294, 2012 U.S. App. LEXIS 10766 (9th Cir. May 29, 2012), the court held that a plaintiff's initial burden of proof is relatively low and can be met by the introduction of statistics showing an adverse impact on a protected category — in this case, older workers. While the plaintiffs met their initial burden here, the Ninth Circuit nevertheless affirmed the district court's grant of summary judgment in the employer's favor on plaintiffs' age discrimination claims under the **California Fair Employment and Housing Act ("FEHA").**

In March 2008, like many employers at the time and even now, defendant KPIX-TV ("KPIX") was faced with the task of having to reduce its annual budget. As part of its cost-cutting measures, KPIX implemented a reduction in force ("RIF"), resulting in the termination of five members of the "on-air" news team, including both plaintiffs. Each member of the RIF group was male and over the age of forty. Plaintiffs filed suit, claiming that their terminations were the product of age and gender discrimination in violation of the FEHA. Plaintiffs submitted reports by an expert statistician who concluded that the age disparity between the RIF group and the group of individuals that KPIX decided to retain was "statistically significant" and age "correlated closely" with the decision to terminate.

The Ninth Circuit held that "statistical evidence that shows a stark pattern of age discrimination" is sufficient to establish a *prima facie* case, even though "it does not address the employer's proffered non-discriminatory reasons for the discharge." *Id.* at *14-15. The Ninth Circuit proceeded to consider the legitimate, non-discriminatory reasons for the RIF offered by KPIX. Here, KPIX presented evidence of reasons for layoff decisions unrelated to age, such as that news anchors generally would not be subject to termination because they were the "face" of the station, that specialty reporters would not be subject to termination because they were being promoted to push the brand of the station, and that general assignment reporters would be subject to termination based on their respective dates of contract expiration. The Ninth Circuit concluded that KPIX had established non-discriminatory reasons for its RIF decisions, and that the plaintiffs were unable to show pretext.

This case highlights the importance of establishing a set of reasoned, job-related factors to be considered in deciding which employees to include in a RIF. Numbers suggesting an adverse impact

on protected classes can be problematic, but not necessarily fatal.

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