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SUPREME COURT: SMALL PUBLIC EMPLOYERS NOW SUBJECT TO ADEA

Is This A Prelude To Individual Liability?

Insights
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In a unanimous 8-0 decision, the United States Supreme Court issued its first ruling of the new term today and delivered a blow to small public-sector employers fending off age discrimination lawsuits. The Court ruled that the Age Discrimination in Employment Act (ADEA) applies to all states and political subdivisions regardless of the number of people the public entity employs. Today's ruling in *Mount Lemmon Fire District v. Guido* has implications for small public employers—who must now comply with the ADEA—but also raises the serious specter for individual liability under the ADEA for all employers.

LOWER COURTS DISAGREE ON STATUTORY TEXT

The ADEA provides that "employers" may not discriminate against persons on the basis of age. The ADEA originally applied only to private employers, but in 1974, Congress amended the definition of "employer" to read as follows:

The term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees. . . . The term *also means* (1) any agent of such a person, and (2) a State or political subdivision of a State. . . .

29 U.S.C. §630(b) (emphasis added).

For decades after the ADEA was amended, courts interpreted this definition to find that states and political subdivisions with fewer than 20 employees were not subject

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to the ADEA. This was well-settled law in the 6th, 7th, 8th, and 10th Circuit Courts of Appeal.

But this all changed, starting with a budget shortfall at the Mount Lemmon Fire District, a political subdivision of Arizona. The Fire District laid of John Guido and Dennis Rankin, the two oldest fulltime firefighters, due to the shortfall. Guido and Rankin claimed that the Fire District discriminated against them on the basis of their age in violation of the ADEA, and the Equal Employment Opportunity Commission (EEOC) agreed. When Guido and Rankin sued in federal district court, however, the district court held that the Fire District was not subject to the ADEA because it employed fewer than 20 individuals.

In a June 2017 opinion, the 9th Circuit Court of Appeals reversed. In its holding, the appeals court held that the language of the ADEA unambiguously stated that the statute applied to all state and political subdivisions without regard to the number of employees. A circuit conflict was created, and the Supreme Court granted review of the case to resolve the conflict.

UNANIMOUS RULING FROM SCOTUS CREATES NEW LIABILITY

The fundamental issue in *Mount Lemmon Fire District v. Guido* was whether the phrase "also means" in the definition clause added new categories of employers or merely clarified the employers identified in the first sentence of the clause. Guido and Rankin argued that this language added new categories of employers to the ADEA's reach under the plain meaning of the statute, while the Fire District argued that the language merely clarified that states and their political subdivisions are a type of "person" discussed in the first sentence of the definition.

The Fire District supported its conclusion in multiple ways, but three are particularly important. First, the Fire District argued that the Court should interpret the ADEA similarly to Title VII of the Civil Rights Act of 1964, which prohibits discrimination based upon race, sex, and other protected categories. Notably, Title VII applies only to employers with 15 or more employees, regardless of whether the employer is private or public. Second, the Fire District argued that individuals would be exposed to direct liability as agents of employers if the Court held that "also means" was additive. Third, the Fire District argued that requiring small

government agencies to comply with the ADEA would lead to service disruptions due to the cost of compliance and risk of litigation.

The Court, in a unanimous opinion by Justice Ginsberg (Justice Kavanaugh took no part in the decision as he did not take part of the oral arguments in the case), agreed with the individuals and the 9th Circuit and found that the plain, ordinary meaning of the words "also means" were additive in character. This interpretation made the portion of the definition related to state and political subdivisions an additional category of employers subject to the ADEA that was separate from the 20-employee minimum requirement. Additionally, the Court noted that the wording of the statute grouped public employers with agents, which also does not have a numerical limitation.

The Court shot down the Fire District's argument that the ADEA should be interpreted similarly to Title VII. The Court determined that while the ADEA and Title VII are often interpreted similarly, Congress intentionally chose to word the amendments of the two statutes differently. The better comparator, according to the Court, was the Fair Labor Standards Act (FLSA), which, like the ADEA, was amended in 1974 and also applies to all state and political subdivisions regardless of the number of employees they have. In reaching this conclusion, the Court noted that many aspects of the ADEA are based upon the FLSA. Importantly, the FLSA imposes direct liability on individuals for violations of the act.

The Supreme Court also sidestepped whether its holding had implications for imposing individual liability under the agent clause of the statute. In a footnote, the Court stated simply: "We need not linger over possible applications of the agent clause, for no question of agent liability is before us in this case."

Finally, the Court rejected the Fire District's argument of potential service disruption as a potential result of such as ruling. The Court noted that the EEOC had applied the ADEA consistent with the Court's holding for 30 years and that a majority of states have state laws that prohibit age discrimination by public entities regardless of size, and no reports of service deficiencies as a result of prohibiting age discrimination had been documented.

IMPACT ON PUBLIC SECTOR EMPLOYERS

First and foremost, this holding affects local governments and special districts created by those governments or the states. In particular, special districts provide many critical services to local communities. The employer in this case, for example, is a fire protection district, which provides fire protection, EMS, rescue, and public assistance to a 12.5 square mile area of the Santa Catalina Mountains the Coronado National Forest in Arizona. Without this special district, that remote area would be without such services. There are tens of thousands of these special districts and similar governmental units around the country providing much needed services to the public.

Just like small private-sector employers, special districts often have few employees with limited budgets and, as a result, are ill-equipped to handle costly age discrimination litigation. These unexpected lawsuits can destroy a special district's operating budget and result in limiting the crucial public services they provide or even require layoffs.

Moreover, small government agencies should also consider the holding's effect on their settlement and severance agreements. As many employers know, the ADEA provides for additional restrictions on waiving claims under the statute in settlement agreements, including providing the employee 21 days to review any agreement and seven days to revoke it after acceptance. Now that they are potentially liable under the ADEA, smaller public entities should have their severance and settlement agreements reviewed by counsel for necessary revisions.

A PRELUDE TO INDIVIDUAL LIABILITY?

Aside from the direct and obvious impact on small public employers, the Court's decision may open a path for courts to impose liability on individuals even though the Court expressly declined to rule on the issue. Specifically, because the Court held that "also means" adds to the first sentence of the definition of "employer" and does not simply clarify it, not only would a "State or political subdivision of a State" be in another type of employer under the ADEA, but so would "any agent of such a person."

An employee, of course, is normally understood to be an agent of the employer. Further, the Court noted that an apt

comparison to the ADEA was not Title VII but the FLSA—and under the FLSA, individuals can be held liable.

More employee-friendly courts, like the 4th Circuit and the 9th Circuit, and many other district courts, may use *Mount Lemmon* as a launching pad to hold individuals directly liable under the ADEA. If the issue were to reach the Supreme Court in the future, there is a plausible majority in favor of agreeing with such a decision: the four liberal justices plus Chief Justice Roberts, who, during oral argument in *Mount Lemmon*, commented that he was not "sure what's so bad about direct agent liability."

CONCLUSION

In light of *Mount Lemmon*, small public employers should reassess their antidiscrimination policies and procedures—as well as their severance and settlement agreements—to ensure compliance with the ADEA. All employers should stay tuned for further case developments regarding whether individuals may become directly liable under the ADEA.

This Legal Alert provides an overview of a specific Supreme Court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.