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EMPLOYMENT LAW LETTER

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Dress Codes

You want your employees to dress appropriately at work. Seems reasonable enough, right? But beware, restrictive dress codes can get you into trouble. At www.HRhero.com/news, you can find the following tools to help solve dress-code issues:

- HR Executive Special Report — Ten Commandments for Avoiding Religious Harassment & Discrimination Claims
- HR Sample Policy — Personal Appearance
- HR Executive Special Report — How to Discipline and Document Employee Behavior

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AGE DISCRIMINATION

Court rules award in police sergeants' failure-to-promote case was excessive

Although many employees who are nearing retirement age may be simply biding their time as they head down the homestretch, it's still very important that employers not let the sight of the finish line impact employment decisions affecting older employees. Not everyone is on the same track, and some employees may have different goals in mind. The following case shows what can happen when we make too many assumptions about our employees.

Facts

Francis Hogan and Michael Springstun were police sergeants for the city of Hollywood who were denied promotions to lieutenant in favor of younger officers. Hogan began working for the city's police department in 1976, becoming a sergeant in 1984. Springstun began his employment in 1980 and became a sergeant in 1993. Both officers received numerous commendations and good performance evaluations.

Springstun and Hogan both took the lieutenant's exam in 2000, a requirement for promotion to the position. Under the local civil service ordinance, police chiefs are to use the "rule of three" when hiring for an open job. Applicants are ranked according to their test scores, and the police chief can select any one of the top three candidates for the position at his discretion (so long as his decision isn't illegal or discriminatory). If there's another opening after the first one is filled,

the chief can select any of the three candidates still on the list. The list remains in effect for "a year or two."

Springstun ranked third on the initial list, and Hogan ranked fifth out of nine candidates. During the next couple of years, about seven employees were promoted to lieutenant, although Springstun and Hogan ranked higher than at least three of the officers promoted. Police Chief James Scarberry claimed Springstun and Hogan lacked leadership skills, although he admitted he hadn't observed their work or checked their personnel files.

Police headquarters was abuzz with comments about Springstun's and Hogan's ages, however. Springstun, 51 at the time of the last vacancy, and Hogan, 50 at the time of the last vacancy, heard from their supervisor, Lieutenant David Kordzikowski, that Scarberry felt "we were all dried up, old, and had nothing to give." The lieutenant also said the chief was anxious for them to retire, and he told them age was the reason they weren't getting promoted.

In fact, Springstun's personnel file contained an evaluation that included the statement, "I encourage you to maintain this attitude as you move closer to the retirement phase of your career." And Hogan had been discouraged from taking the lieutenant's exam by a member of the command staff, who told him, "You're too old for this now," and later

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said he was “part of the past, not part of the future.” The record did reflect, however, that the chief had promoted some officers over the age of 50 during this period.

After being rejected for all the promotions from the 2000 lieutenant’s exam list, Springstun and Hogan filed age discrimination complaints with the Florida Commission on Human Relations. Adverse job actions ensued almost immediately. For example, Springstun and Hogan were given less overtime and were investigated for things that other officers weren’t investigated for. Consequently, they amended their complaint to include a charge of retaliation.

The case ultimately went to a jury trial, and the jurors found in favor of the officers. The jury awarded each officer \$83,544 in back wages and \$1 million in compensatory damages for mental anguish, loss of dignity, and other injuries. The jury awarded each officer an additional \$100,000 on the retaliation claim.

The city asked the judge to disregard the verdict, reduce the award, or grant it a new trial. The judge denied its request, with the exception of the retaliation claim, and the city appealed. The officers appealed the retaliation decision.

Court’s ruling

After plowing through the lengthy *McDonnell Douglas* analysis required in discrimination cases that rely on circumstantial evidence, the court determined that the officers provided enough evidence for a jury to find their age “actually played a role” in the decision to hire younger officers instead of them and age had a “determinative influence” on the hiring outcome. The jury’s finding for the officers was allowed to stand. The court also reversed the trial court’s decision to override the jury’s finding of retaliation and ordered the lower court to enter judgment for the officers on that claim.

But the appellate court found that the excessive jury award “shock[ed] the conscience.” The court found little if any evidence of emotional injury and noted that similar cases ended with mental anguish awards in the range of \$5,000 to \$30,000. The appeals court sent the case back to the trial court to determine a more reasonable damages award. If the officers refuse the recalculated amounts, the lower court will need to conduct a new trial. *City of Hollywood v. Hogan*, 2008 WL 2261504 (Fla. 4th DCA, June 4, 2008).

Moral of the story

The reduction of the obviously excessive jury award is something of a hollow victory, considering the amount of time and money the city spent defending the case. Managers charged with making hiring decisions and advising the decisionmaker must be properly trained on state and federal law. There appears to have been a culture against the “older” officers on the force.

Remember, as the economy worsens, many people may choose to work beyond the time they can retire. You cannot make assumptions about your employees’ intentions. In fact, it’s those assumptions against older workers that the age discrimination laws were meant to eradicate. Don’t get caught in that mindset, or you may wind up in court.

➔ Find out more about avoiding age discrimination claims in the subscribers’ area of www.HRhero.com, the website for Florida Employment Law Letter. You have access to an HR Executive Special Report on the subject: “How to Manage Your Aging Workforce.” Just log in and scroll down to the link for all the Special Report titles. Need help? Call customer service at (800) 274-6774. ♣

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