

Statistical Evidence May Show *Prima Facie* Age Discrimination in California, Federal Court Rules

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Employees can use statistical evidence to establish a *prima facie* case of age discrimination under California Fair Employment and Housing Act (“FEHA”), the federal appeals court in San Francisco has held. *Schechner v. KPIX-TV*, No. 11-15294 (9th Cir. May 29, 2012). The statistics, however, must present a sufficiently strong showing of a stark contrast in impact on protected classes, the Court emphasized. The plaintiffs in this case, however, failed to overcome the “same actor inference” to show the employer’s legitimate business reasons for their layoff were pretextual. Therefore, the Court affirmed summary judgment in favor of the employer.

Background

William Schechner and John Lobertini were television news reporters in San Francisco at KPIX-TV, an affiliate of CBS Broadcasting, Inc. Two KPIX managers had signed Schechner to a two-year contract in 2005, when he was 62 years old, and to one-year contracts in 2007 and 2008. The same two managers signed Lobertini to a two-year contract in October 2006. He was 46 years old at the time.

In 2008, due to a decline in advertising revenues, CBS required all of its affiliates to reduce their annual budgets by 10 percent. The two managers decided to lay off Schechner, Lobertini, and three other on-air employees, each of whom was over age 50. (At the time, Schechner and Lobertini were 66 and 47, respectively.) The managers decided news anchors would not be laid off because they were the “face” of KPIX. “Specialty reporters” also would not be laid off because “they were the people that we were promoting and pushing the brand of the station.”

Schechner and Lobertini sued KPIX for age discrimination under the FEHA. In opposition to the employer’s motion to dismiss, the plaintiffs submitted expert analysis that concluded, “Those individuals laid off, as a group, are older than the group of those not laid off, and the disparity between the two groups is statistically significant.” The expert opined that the age of employer’s on-air talent “correlates closely” with those selected for layoff.

On the other hand, KPIX’s statistical expert opined that the plaintiffs’ expert failed to account for the decision-making process KPIX said it followed.

The district court granted the employer’s motion and dismissed the employees’ claims. It ruled that because the plaintiffs’ statistical analysis failed to account for the employer’s legitimate non-discriminatory reasons for laying them off, the statistical results failed to show a stark pattern of discrimination. Thus, the plaintiffs failed to establish a *prima facie* case. The plaintiffs appealed.

Applicable Law

California applies the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), when interpreting the FEHA. To establish a *prima facie* case of age discrimination, the employee must demonstrate he was:

- (1) at least 40 years old,
- (2) performing his job satisfactorily,
- (3) discharged, and
- (4) either replaced by substantially younger employees with equal or inferior qualifications or discharged under circumstances otherwise giving rise to an inference of discrimination.

After the employee establishes a *prima facie* case, the burden then shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse employment action. If the employer satisfies its burden, the employee must prove the reason advanced by the employer was mere pretext for unlawful discrimination.

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The appellate court found the plaintiffs satisfied the first three elements of their *prima facie* case. Thus, the issue was whether the employees' expert's analysis, which did not account for the employer's non-discriminatory reasons for selecting the plaintiffs for layoff, failed to satisfy the fourth element.

The Court observed that, although it had questioned the strength of employees' statistical evidence at the *prima facie* stage in recent cases, it nevertheless allowed those cases to move forward to be resolved on the issue of pretext. It explained such an approach was consistent with the principle that only a minimal degree of proof is necessary to establish a *prima facie* discrimination case. Disagreeing with the lower court, the Court concluded that an employee who submits statistical evidence showing a *stark* pattern of age discrimination establishes a *prima facie* case within the *McDonnell-Douglas* framework and such statistical evidence need not fail to establish a *prima facie* case for not addressing the employer's proffered non-discriminatory reasons for the discharge.

The Court ruled the plaintiffs had established a *prima facie* case because the expert analysis showed stark age disparities between the on-air talent who were retained as compared to those who were laid off. It cautioned, however, that this does not open the door to employees to use *any* statistical evidence, regardless of its strength, to establish a *prima facie* case. Such evidence must be sufficiently strong to show a *stark* impact on the protected class, the Court stressed.

"Same Actor" Inference

The Court found the employer met its burden against the plaintiffs' *prima facie* case by offering a legitimate, non-discriminatory reason for the layoffs. On the issue of pretext, the Court held the employees did not prove the employer's reason for the layoff was pretext for age discrimination because the employer was entitled to rely on the favorable "same-actor inference." This inference posits, "[W]here the same actor is responsible for both the hiring and the firing of a discrimination plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory motive."

The Court found it significant that the KPIX managers signed Schechner and Lobertini to new contracts shortly before the plaintiffs were laid off. It concluded this strongly suggested the employer had no discriminatory motive. Thus, the Court affirmed the dismissal of the age discrimination claims.

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While statistical evidence of disparate-treatment age discrimination is allowed to establish a plaintiff's *prima facie* case for age discrimination under FEHA, a court would evaluate the strength of that evidence, requiring a showing of a stark impact on the protected class. Jackson Lewis attorneys are available to answer inquiries regarding this case and other workplace developments.

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