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Legal Aspects of Assessing the Aging Physician

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Committees in San Diego County

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Meet Poppi



“People grow old by losing their enthusiasm, deserting their ideals, abandoning their joy of life and no longer looking forward to the challenges of adventure and change. Instead of yearning for retirement, the desire for a vigorous active life and the wish and ability to work hard and look forward with hope instead of fear often exists in men and women for 70 years or more Years may wrinkle the skin but to abandon enthusiasm wrinkles the soul and deadens the brain.”

- Remarks by Senator Young at Congressional Hearing on Age Discrimination and Employment Act (1967)



Concerns with Late-Career Practitioners

- The literature regarding Late Career Practitioners strongly suggests:
 - The number of physicians over 65 has increased significantly;
 - Older physicians are more prone to cognitive impairment, substance abuse, depression, and physiologic decline;
 - A strong correlation between adverse patient events and conditions associated with aging
 - E.g. J. Waljee, *et al.*, “Surgeon Age and Operative Mortality in the United States,” *Annals of Surgery*, Vol. 244, No. 3, September 2006.



Affirmative Duty to Monitor Quality of Care

- Hospitals and Medical Staffs are under an affirmative obligation to monitor and address the quality of care rendered by physicians
- Physician health is an essential element of the appointment and reappointment process and can be the basis for Medical Staff actions
- Impaired physician policies are required by the Joint Commission and Regulations (Standard MS 4.80)
- Failure of a Hospital or Medical Staff to monitor and address physician impairment is a patient safety issue and a risk management issue



Federal Anti-Discrimination Laws

- Title VII of the Civil Rights Act of 1964
- Age Discrimination in Employment Act (“ADEA”)
- Age Discrimination Act
- Americans with Disability Act (“ADA”)
- The Rehabilitation Act of 1973



State Anti-Discrimination Laws

- Almost every state has anti-discrimination laws prohibiting discrimination based on age and disability
- **California**
 - Fair Employment and Housing Act (“FEHA”)
 - Unruh Civil Rights Act (“UCRA”)



The Dilemma of the Aging Physician

- Affirmative duty to protect quality of care and monitor impaired physicians
- Anti-discrimination laws prohibit discrimination on the basis of age



History of Age Discrimination Laws

- **1950 Conference on Aging**
 - Initiated by President Truman
 - Pioneer study – “Man and his Years, an Account of the First National Conference on Aging”
 - Identifies trend for early retirement of 55-65 years old
 - Concluded most retirement was involuntary
 - Cited factors which restricted employment of older workers including general prejudice against older workers



History of Age Discrimination Laws

- **1961 – White House Conference on Aging**
 - States begin to legislate age discrimination
 - 11 states and Puerto Rico
 - Conclusions:
 - Greater number of older workers
 - Older workers widely discriminated against in obtaining work
 - Pertinent studies show chronological age is not, by itself, a reliable measure of ability to do job
 - Did not adopt model age discrimination act
 - Urged more study and education



History of Age Discrimination Laws

- Civil Rights Act of 1964 signed into law by Lyndon Johnson on July 2, 1964



History of Age Discrimination Laws

- **Title VII of the Civil Rights Act of 1964**
 - Makes it unlawful for employers to fail or refuse to hire or to discharge any individual, or discriminate with respect to compensation, terms, conditions, or privileges of employment on the basis of race, color, religion, sex or national origin
 - Expansion beyond racial discrimination to include other categories including religion, sex and national origin
 - Age discrimination not included
 - Viewed as different – not an immutable characteristic
 - “Age discrimination is not the same as the insidious discrimination based on race or creed prejudices. These discriminations result in non-employment because of feelings about a person entirely unrelated to his ability to do a job. This is hardly a problem for the older worker. Discrimination arises for him because assumptions are made about the effects of age on performance.” – Representative Burke



History of Age Discrimination Laws

- **Congressional Directive 715**

- Congress directed the Secretary of Labor, W. Willard Wirtz, to make a full and complete study of age discrimination in employment
- 1965 – Wirtz Report – “The Older American Worker”
- Identifies 5 basic characteristics about age discrimination in employment:
 1. Adoption of age limits for hiring and retirement
 2. Age limits markedly affect rights and opportunities of older workers
 3. Age discrimination is based on stereotypical assumptions regarding the abilities of older workers unsupported by objective facts
 4. Arbitrary removal of older workers is generally unfounded
 5. Age discrimination is profoundly harmful to the economy and inflicts unnecessary economic and psychological harm to older workers deprived to the opportunity to engage in productive and satisfying work



History of Age Discrimination Laws

- **1967 – Congress passes the Age Discrimination in Employment Act (“ADEA”):**
 - Prohibited age discrimination for individuals ages 40-65
 - Employers may not “fail or refuse to hire, or fire, any worker based on age”
 - Applied to employers with more than 20 employees
 - Did not apply to states or local governments
 - Administration and enforcement by U.S. Dept. of Labor



History of Age Discrimination Laws

- **Age Discrimination Act of 1975**
 - Prohibits age discrimination in all programs or activities receiving federal financial assistance
 - Includes state and local government



History of Age Discrimination Laws

- **1978 – Amendments to ADEA**
 - Extended age range of protected employees to 40-70
 - Eliminated mandatory retirement for most federal employees
 - Created exceptions for:
 - Highly paid executives
 - Companies not prohibited from imposing mandatory retirement for employees 65 years old who for 2 years before have been employed in a bona fide executive or high policy-making position
 - Tenured professors and teachers
 - Compulsory retirement of teachers and professors at 65 is not prohibited if serving under a contract of unlimited tenure at
 - » An institution of higher learning; and
 - » Local education agency



History of Age Discrimination Laws

- **1986 – Amendments to ADEA**
 - Removes upper age limit of 70, thus banning mandatory retirement
 - Allows state and local governments to keep in place age restrictions for firefighters and law enforcement officers
 - Directs Secretary of Labor and Equal Employment Opportunity Commission (“EEOC”) to conduct a study to determine whether physical and mental fitness tests are valid measurements of the ability and competence of law enforcement officers and firefighters
 - Increases compulsory retirement age of tenured professors to 70
 - Directs EEOC to study the consequences of eliminating mandatory retirement for professors



History of Age Discrimination Laws

- **1990 – Older Workers Benefit Protection Act**
 - Protects older workers from discrimination in implementation of employee benefit plans
 - Prohibits reduction in benefits based on age such as life insurance, health insurance, disability benefits, etc.
- **1990 – Americans with Disabilities Act (ADA)**
 - Prohibits discrimination based on disability in the private sector
- **2008 – ADA Amendments Act of 2008**
 - Intended to give broader protections for disabled workers and nullify court rulings that Congress deemed too restrictive



Age Discrimination in Employment Act (ADEA)

- **Congress' stated objective of the ADEA:**
 - Promote employment of older persons based on their ability rather than age;
 - Prohibit arbitrary age discrimination in employment;
 - Help employers and workers find ways of meeting problems arising from the impact of age on employment.



Age Discrimination in Employment Act (“ADEA”)

- **ADEA makes it unlawful for an employer to:**
 - Fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age; or
 - Limit, segregate, or classify employees in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s age;



Disparate Treatment vs. Disparate Impact?

- **Disparate Treatment:**
 - Employer policy or practice identifies age as a factor and treats employees differently
 - May have explanation/defense, but clearly intended to draw a line based on age
- **Disparate Impact:**
 - A policy which is neutral and not intended to discriminate, but ends up doing so
 - e.g., physical skills testing for law enforcement disproportionately excludes older workers or women
- **Pre-Text:**
 - Reason for adverse employment action was a pre-text for discrimination



Do the Exceptions Swallow the Rule?

- **Occupations where age-based restrictions are allowed:**
 - Pilots
 - Bus drivers
 - Law Enforcement
 - Firefighters
 - Judges
 - High Policy-Making Executives
 - Law Firms
 - Physicians
 - Cal. Gov't Code § 12942(c)



Stating a Claim Under the ADEA

- In order to state a *prima facie* case Plaintiff must establish:
 - Age 40 or above
 - Subjected to adverse employment action
 - A substantially younger person filled the position; and
 - Qualified to do the job
- If employee can establish a prima facie case, employer must proffer a legitimate, non-discriminatory reason for the action



Essential Elements of an ADEA Claim

- **Is Plaintiff an Employee?**
 - Employee vs. Independent contractor tests:
 - Common Law Agency Test
 - Economic Realities Test
 - Hybrid Test



Are Physicians Employees Under the ADEA?

- Courts usually rule that physicians are not employees in cases involving claims of discrimination based on medical staff membership
 - Kuck v. Bensen and St. Mary's Hospital (D. Me. 1986)
 - ER physician not an employee in ADEA claim
 - Bender v. Suburban Hospital (4th Cir. 1998)
 - Shah v. Deaconess Hospital (6th Cir. 2004)
 - ADEA claim by general surgeon
 - Vakharia v. Swedish Covenant Hospital (N.D. Ill. 1991)
 - ADEA claim by anesthesiologist
- But, *Salamon v. Our Lady of Victory Hospital* (2d. Cir. 2008)
 - Physician's employment status is a question for the jury



Exceptions/Defenses

- **Bona Fide Occupational Qualification (“BFOQ”)**
 - It is not a violation of the act if an employer establishes an age requirement in furtherance of a bona fide occupational qualification reasonably necessary to the normal operation of the business
- **Reasonable Factor other than Age (“RFOA”)**
 - Act does not prohibit an employer from discriminating based on reasonable factors other than age



The Bona Fide Occupational Qualification Test in Cases Involving Public Safety – Pilots

- **Pilots**

- **Federal Law**

- 1959 – Mandatory retirement at age 60 for commercial pilots
 - 2007 – Domestic flights with two pilots up to age 65; international flights require one pilot under 60

- **Case Law**

- Courts reject all challenges to pilot retirement at 60
 - Permit challenge to 60 retirement for flight engineers
 - Struck down restriction requiring new hires under 35
 - No cases challenging right of airlines or private companies to require pilots to submit to a medical exam



The Bona Fide Occupational Qualification Test in Cases Involving Public Safety – Air Traffic Controllers

- **Air Traffic Controllers**

- Federal Aviation Administration established maximum entry and retention age provisions
 - Maximum entry age is 30 years old
 - Exceptions for those with military or prior air traffic control experience
- Maximum retention age is 56 years old (with some exceptions)
- **Dungan v. Slater and Yap v. Slater** , 252 F.3d 670 (3d Cir. 2001) – court finds law constitutional and not in violation of ADEA or Equal Protection clause



The Bona Fide Occupational Qualification Test in Cases Involving Public Safety – Bus Drivers

- **Bus Drivers**
 - Usery v. Tamiami – Established Test for Age Restrictions on Bus Drivers:
 - Employer (bus company) must prove that:
 - The age restriction is reasonably necessary to the essence of the business – the safe transportation of passengers;
 - It reasonably believed that all or substantially all of individuals over age restriction could not operate a bus safely; or
 - The safety risks cannot reasonably be ascertained by tests or means other than an age-based restriction
 - Usery highlights case-by-case nature of the analysis



The Bona Fide Occupational Qualification Test in Cases Involving Public Safety – Bus Drivers

- **Bus Drivers**

Hodgson v. Greyhound, 499 F.2d 859 (7th Cir. 1974)

- Issue – whether Greyhound lines could refuse to hire bus drivers over 40
- Greyhound demonstrated that it had reasonable cause to believe that safety would be endangered by hiring drivers over 40
- Question of BOFQ requires analysis of economic and human risks involved in hiring unqualified applicant
- Where job clearly requires a high degree of skill and risks in hiring an unqualified applicant are great, burden imposed on employer to justify age limitation will be lighter.



ADEA Exemption for Law Enforcement Personnel

- 1974 - Congress establishes mandatory retirement system for federal law enforcement officers and firefighters. 5 U.S.C. § 8335
 - Specifically exempts federal law enforcement and firefighters from ADEA
 - Requires automatic retirement at age 55 or 20 years of service
- 1986 Amendments to ADEA allow states and localities to impose age restrictions for hiring and retirement of law enforcement officers
 - Exception was supposed to be temporary but it still exists today



Mandatory Retirement for Judges

- 33 States have mandatory retirement statutes for Judges
 - Age range is from 70 (20 states) to 90 (Vermont)
- Many of these provisions are in state constitutions which make them harder to reverse
- Justification is based on concern supported by studies which show cognitive decline- attention, memory, language processing and decision making
- Federal Judges are appointed for life



Tenured Professors

- ADEA originally allowed mandatory retirement for tenured professors and teachers at 70 years old
 - Exemption expired in 1994
- California Government Code section 12942(c)
 - Expressly permits mandatory retirement
- Pre-emption?



Waiver of Right to Bring an Age-Discrimination Claim

- Unlike other civil rights causes of action, an individual can waive rights to bring an age discrimination claim
- Arises in context of collective bargaining agreements and contractual arrangements
 - Voluntary submitting to retirement age
- Government Code Section 12942



Challenges to Age-Based Testing as Violation of ADEA

- **EEOC v. Wyoming 460 US 226 (1983)**
 - Supreme Court strikes down mandatory retirement for game wardens at 55.
 - Goal of ensuring that game wardens are physically fit must be done on individualized basis, not simply based on age.
- **E.E.O.C. v. Com. of Mass., 987 F.2d 64, 67 (1st Cir. 1993)**
 - Court strikes down Massachusetts law requiring all state employees over 70 to take an annual physical examination as violation of the ADEA
 - » “Massachusetts is not being asked to abandon the public policy of determining the fitness of its employees. Instead, pursuant to the ADEA, Massachusetts may not pick an arbitrary age as the point at which to measure the physical preparedness of its employees.”



Challenges to Age-Based Testing as Violation of ADEA

- Epter v. New York City Transit Auth., 127 F. Supp. 2d 384, 387 (E.D.N.Y. 2001).
 - Policy requiring all candidates for supervisory positions over 40 years old to submit to physical examination is facial evidence of intentional discrimination
 - BFOQ defense requires that TA show evidence to support its argument that a substantial basis exists for believing that all, or nearly all employees above 40 lack the qualification for Station supervisor
 - No evidence that lack of physical preparedness would pose a danger to general public
 - Court distinguishes cases where public safety involved, i.e., police officers



Americans with Disabilities Act (“ADA”)

- **Title I**

- Prohibits employers from discriminatorily terminating an otherwise qualified individual due to a disability
- Must make “reasonable accommodations” unless would cause an “undue hardship” to employer
- Must engage in interactive process with employee to find ways to reasonably accommodate



Americans with Disabilities Act (“ADA”)

- **Elements of a claim under Title I of the ADA:**
 - Employee
 - Same analysis as under ADEA – employee vs. independent contractor
 - Disabled
 - Otherwise qualified to perform job requirements, with or without a reasonable accommodation
 - Discharged solely because of disability



Americans with Disabilities Act (“ADA”)

- **Title III:**

- Prohibits discrimination on the basis of disability with respect to public accommodations
- No employment relationship requirement
- Courts have held Title III of the ADA applies to non-employee medical staff members
 - *Menkowitz v. Pottstown Memorial Medical Center*, 154 F.3d 113 (3d. Cir. 1998) – Hospital violated Title III when it summarily suspended medical staff privileges of physician with Attention Deficit Disorder, despite psychologist’s report that it would not affect his ability to treat patients.



Screening Exams under the ADEA and ADA

– EEOC Guidance on Disability Related Inquiries and Medical Examinations- 2000

- EEOC expresses concern that employers use information gathered in mental and physical examinations to discriminate against individuals with disabilities.

– *“The ADA's provisions concerning disability-related inquiries and medical examinations reflect Congress’ intent to protect the rights of applicants and employees to be assessed on merit alone, while protecting the rights of employers to ensure that individuals in the workplace can efficiently perform the essential functions of the job.”*



ADA Prohibition of Disability-Related Inquiries

- Title I of the Americans with Disabilities Act limits an employer's ability to make disability related inquiries or require medical examinations at three stages:
 - **Pre-Offer** – prohibits all disability related inquiries and medical exams even if related to the job.
 - **Post-Offer** – conditional offer but before starts work-employer can make disability related inquiries and conduct medical examination as long as all employees in the same job category required to have exam
 - **During Employment** – employer may make disability related inquiries and require medical examination only if “job related and consistent with business necessity.”



ADA Prohibition of Disability-Related Inquiries

- Job related and consistent with business necessity –
 - When employer has reasonable belief that:
 - An employee's ability to perform essential job functions will be impaired by a medical condition; or
 - An employee will post a direct threat due to a medical condition
 - Generally, an employer can request an examination and documentation from employee regarding disability so long as reasonably related to job functions and based on reliable information that job performance and/or safety may be impaired.



Periodic Testing and Monitoring

- Employers may require periodic examinations of employees in positions affecting public safety- police officers and firefighters
- Where examinations are required by safety regulations, employee cannot assert ADA as barrier to employer compliance with regulation, e.g. bus drivers and pilots required to undergo regular medical exams
- Direct Threat - Employer may require examination if it reasonably believes employee poses a direct threat to safety of him or herself, or others.
- Question of whether employee poses a direct threat must be based on individualized assessment of employee's ability to safely perform job duties.



Conflict Between ADEA and ADA

- ADEA does not permit testing whereas ADA does
- Testing under ADA must be narrowly-tailored
- The more narrowly you tailor, the more likely you are to risk violating ADEA



Responding to Concerns of Age-Related Impairments

- Interactive process for addressing impairments
- Must make reasonable accommodations
 - Examples: create co-management privileges to transition from independent privileges to refer-and-follow
 - Refer-and-follow privileges are ambulatory privileges that allow physicians to refer patients to the hospital, order ancillary studies from an outpatient setting, and follow their patients in the hospital



Considerations in Crafting Late-Career Practitioner Policy

- **What age?**
 - University of Virginia – 70
 - Stanford – 75
 - Age should be directly related to increased risk of age-related impairments
- **Type of screening?**
 - Cognitive? Physical? “Fitness for Duty”?
- **Frequency of screening?**
 - Annual? Bi-Annual with reappointment?
- **Who pays?**
 - Hospital? Medical-staff? Physician? Combination?
- **Who performs the screening?**
- **Who selects physician(s)?**



Implications for Physicians, Hospitals & Patients

- There is no clear-cut answer
- Courts will decide on a case-by-case basis
- Hospitals must respect physician's rights every step along the way
- Potential Liability for Failure to Act



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