

Morgan, Lewis  
& Bockius LLP

C O U N S E L O R S   A T   L A W

*125 years*  
1 8 7 3 1 9 9 8

## A Positive Outcome from a Novel Claim

Lawrence B. Fine and Richard G. Rosenblatt

Item #4219

---

Philadelphia  
Los Angeles  
Pittsburgh  
Brussels  
Singapore

Washington, D.C.  
Miami  
Princeton  
Frankfurt  
[www.mlb.com](http://www.mlb.com)

New York  
Harrisburg  
London  
Tokyo  
Jakarta



# USA MORGAN, LEWIS & BOCKIUS LLP

## A positive outcome from a novel claim

**I**magine the following situations? (1) You interview an applicant with sterling credentials but limited experience. At least on paper, the application has everything for which your company is looking for. Yet, managers have second thoughts about hiring the applicant because of a concern that he or she is too young (eg 25 years old) and, therefore, perhaps immature or too inexperienced. Because of these concerns, the company hires an older applicant.

Or (2), your company has a young rising star who consistently receives outstanding performance appraisals. A promotion opportunity presents itself, and the young rising star applies. Concerned about the perception of placing such a young employee into a high profile position, your company opts for a more senior employee with lesser credentials.

Do you think that these decisions may constitute illegal age discrimination? Conventional thinking is that anti-age discrimination laws are intended to protect older workers (ie those older than 40). Numerous jurisdictions, however, have anti-age discrimination laws that contain no reference to an age 40 minimum or which expressly prohibit discrimination against any person older than 18. These jurisdictions include: Alaska, Connecticut, Florida, Hawaii, Iowa, Kansas, Maine, Maryland, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, Oregon, Vermont, Virginia and the District of Columbia.

Whilst this paper cannot possibly interpret the statutes for each of the above jurisdictions, the recent decisions in New Jersey Superior Court's Appellate Division in *Bergen Commercial Bank v Sisler*, illustrates the potential ramifications of state laws that do not contain an age 40 minimum for persons claiming age discrimination.

In Bergen Commercial Bank, the employer bank recruited Michael Sisler to become vice president of credit card operations, with an annual salary of \$70,000. Shortly before this start date, the bank's chairman asked Mr Sisler his age. Mr Sisler replied that he was 25 years old. As alleged by Mr Sisler, the

bank's chairman was shocked to learn Mr Sisler's youth. Accordingly the chairman advised Mr Sisler not to reveal his age to anybody cause it would be embarrassing if other bank personnel were to learn that the bank had hired such a young vice president at such a high salary. Shortly after Mr Sisler started working, the bank's chairman, along with its president and chief executive officer, expressed dissatisfaction with Mr Sisler's work and advised Mr Sisler that the bank was considering terminating his position.

They suggested that Mr Sisler accept a reassignment to a consultant position. When Mr Sisler refused the reassignment, he was demoted. Thereafter, within five months of commencing employment, the bank terminated Mr Sisler's contract.

Mr Sisler sued, alleging that he had been discriminated against on account of his age. Specifically, Mr Sisler claimed that the bank had terminated his contract because of the perception that he was too young.

Mr Sisler did not assert his claim under the federal Age Discrimination in Employment Act (the Adea), which requires a claimant to be at least 40 years old in order to fall within the protection of the Act. Rather, Mr Sisler brought his claim under the New Jersey Law Against Discrimination (the NJLAD), which does not expressly provide that an adversely affected employee or applicant must be at least 40 years old.

In contrast to the federal statute, the NJLAD prohibits discrimination on the basis of 'age' without any minimum age specifications. Although the NJLAD does not state that one must be at least 40 years old to sue for age discrimination, the bank moved to dismiss Mr Sisler's claim on the ground that Mr Sisler was under 40. In support, the bank cited prior decisions holding that the courts should interpret the NJLAD consistently with the Adea and, therefore an age 40 minimum should apply.

The bank placed heavy reliance on a 1993 Appellate Division decision in *Burke v Township of Franklin*, which had required an age complainant under the NJLAD to be at least 40 years of age. Relying on *Burke*, the trial court accepted the bank's argument and dismissed Mr

Sisler's lawsuit. Mr Sisler appealed. Mr Sisler's appeal presented a three-judge panel of the Appellate Division with two issues. First, the panel had to decide whether a person must be 40 or older to sue for age discrimination under the NJLAD. Second, the panel had to decide whether a claim of 'reverse age discrimination' was permitted under the NJLAD.

Addressing the issue of whether a person must be 40 or older to sue for age discrimination under the NJLAD, the panel first considered an argument by Mr Sisler that an earlier Appellate Division panel had incorrectly decided *Burke v Township of Franklin*. Typically, a panel of one appellate court will not depart from precedent of a prior panel without the prior decisions being overruled by a higher appellate court of the full court sitting en banc. Nonetheless, citing a variety of considerations, including:

1 That the NJLAD was silent as to a minimum age for private sector employees to sue;

2 That the statute did establish a minimum age (40) for public employees to sue; and

3 That the NJLAD expressly excluded from protection persons older than 70, the Bergen Commercial court stated: 'We... must respectfully decline to follow *Burke*'. In short, the court held that any employee or applicant of a private employer need not be at least 40 to sue for age discrimination under the NJLAD.

The court then addressed whether the NJLAD prohibits discrimination against persons on the ground that they are 'too young'. Referring to precedent recognising claims of reverse discrimination on the basis of race and gender, the court held that the NJLAD does authorise claims of reverse age discrimination. Specifically, the court held: 'By offering evidence that [the bank] viewed [Mr Sisler's] young age in a negative light, [Mr Sisler] established himself as a member of a broader protected class: persons discriminated against due to age'. The court went on to state that Mr Sisler could prevail on his claim if he proved that:

# USA MORGAN, LEWIS & BOCKIUS

- (1) He was performing his job at a level that met his employer's expectations;
- (2) Nevertheless, he was terminated; and
- (3) His employer hired someone else to perform the same work after his termination.

Given the conflict between the Appellate Division's decisions in *Burke* and *Bergen Commercial*, it is likely that the New Jersey Supreme Court ultimately will resolve whether the NJLAD permits persons younger than 40 to sue for age discrimination. Given the differing language between the *Adea* and the NJLAD, moreover, we believe that the

reasoning in *Bergen Commercial*, which allows claims by employees younger than 40, is more likely to prevail.

*Bergen Commercial* may have implications well beyond New Jersey. As noted above, many other jurisdictions have age discrimination statutes that either contain no age minimum or which expressly permit any person older than 18 to sue for age discrimination.

The lesson of *Bergen Commercial* is that employers – especially those in New Jersey and jurisdictions with similar age discrimination statutes – would be wise not to consider or refer to the age of any person, even if younger than 40, as a reason for an adverse employment action.

In certain circumstances, at least in theory, this should be easy. Rather than referring to the person's age, the employer might refer to a perceived lack of experience or maturity necessary for a position.

*Bergen Commercial* raises serious concerns, however, when a young applicant or employee has experience and maturity and the real reason for an adverse employment action is that older employees may react negatively to having a younger boss. This is a legitimate issue that arises frequently in the workplace and is one of which all employers with employees in jurisdictions with statutes similar to New Jersey's should be mindful.

