

DATE: **2009 November 3**
PODCAST: **The Undercover Lawyer**
TITLE: **Episode 3: Age Discrimination Summary Judgement and an Exciting Announcement**

Welcome to the "Hostile Work Place" podcast 7, I'm your host, the Undercover Lawyer. This is Episode 7 of the "Hostile Work Place" podcast and our feature segment today will be on a hostile workplace based on age, age discrimination, and there's a brand new case called Parks versus Lebar-Friedman, otherwise known as the trade journal Drugstore News where Elizabeth Parks was terminated after 26 years with the company. This case just came out October 2nd, 2008. We're also going to have a great, quick tip for you about a little used way to gain extra leverage against your employer if you want to negotiate a severance or file a complaint with the state agency or EEOC.

But before we get to the main segments of the show, our announcements. Our listener comment line is still available, and we've had some comments, so many that the next show is going to feature them. The comment line should you want to call in and tell us your story is 360-450-5750. I am a firm believer in the best way to learn about all the different ways that employment is actually put into practice, and what really happens to people is to tell the stories that are really happening to real people out there. The best way is to call in and let me know.

A couple of new offerings that are coming your way, there's going to be a CD audio version of the book so that if you want to listen to it in your car or perhaps listen to it while you're simply working around the house, but my thought is particularly when one's commuting to work via headphone or a CD player or an iPod or your car. There have just been many requests for the CD version or an audible version. So I'm going to start working on that and hopefully have it available in February or March.

Then also right now, the book is halfway translated into Spanish, meaning that the first half of the book is translated into Spanish, the second half is yet to be finished. It should be done mid-January, and I hope to have it available by the beginning of February for Spanish speakers. This came from multiple requests from people whose native language was Spanish, they knew enough English to find the book online and read it, but they would have been more comfortable with the Spanish version and knew many people who wanted the Spanish version. So I gave in to their request and

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hired a translator, we're going to make it available hopefully by February 1 of this year. It would be exciting to be able to share this advice with a large group of people who experiences a lot of discrimination and oftentimes does not know or is not fully aware of their rights under US law.

Then finally the announcement that I'm most excited about is that we are going to add a premium section of the website called the Employment Law Academy, and there're even a tagline that's been suggested on the forum, "Join the resistance." I'm actually going to incorporate that into a new, little logo and some of the material for the Employment Law Academy. It's going to feature video course that if you join the academy - and there will be fee - you'll have access to video courses, all new courses that I've never offered before on such thing as: how to get employment benefits, how to file a winning EEOC complaint, the legal rights of job seekers, as well as much of the great content that's in the book. All those strategies will be available in both audio form and video form through the academy, as well as there will be premium forums where I will be present frequently and answering questions for anyone who's a member of the academy.

So the academy will be organized into employment law courses, none of which are just theory, all of which are all about how you can use practical applications of the law to make your work life better, to fight back against the bad boss or bully co-worker and take back your work place. That's what this is all about, that's the resistance that we refer to. There's a group on the free forum right now and many of them will be making the jump into the academy when it opens. I hope you will consider visiting with them on the forum and seeing what the excitement is all about. There have been some posts there with suggested topics for the Employment Law Academy. If you have some that you would like to see, tell me what you would like to learn from an Employment Law Academy, what do you wish you knew that could help you think, make your work place better. That's what I want to know and I'll try to give it to you.

Now for us feature segment which is Elizabeth Parks versus Drugstore News. Elizabeth Parks is someone whom is a lot like many of the people who come to the website,

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listen to this podcast and who have joined the forums. She was a long-term employee of magazine called Drugstore News. She had worked there for 26 years in the State of New York as an editor, ultimately she was a senior magazine editor, and she had been a writer. She alleged that she was terminated due to her age. The company, Drugstore News, her employer, vehemently denied that she was terminated due to her age. But they weren't exactly clear on why she was terminated, sometimes it was business reasons, sometimes it was her job performance. The only thing they were consistent about was that it wasn't her age, and even then they weren't always consistent about that. What happened was that she worked there beginning in July of 1976, and was ultimately let go in June of 2003 when she was 62 years old. At that time, she had written the beauty column for a little over a year and she was terminated.

Here's what happened, she has been writing the beauty column for about a year, but as she's writing her column on beauty at age 62, her photo, the author photo, isn't appearing in the magazine at the end of the articles the same way it does for all the other writers. Then she notices that the other writers that are being hired are much younger women in their 20's, mainly in their 20's, one or two in their 30's. The magazine is shifting its focus from drugstore new, traditional drugstore topics, medicinal topics, items that are traditionally associated with pharmacies to kind of the new pharmacy which is health and beauty focused. So, she thinks - feels like - her picture is being left out, all the new hires are being brought on because of their youth, and the pictures left out because of her age. Suddenly she feels like she's being picked on things that had never been an issue before. She had been a writer there for 26 years, and a good one, her personnel file is clean; nothing but good reports for 25 years except for the last year. Then suddenly she's being written up for vague type things such as her articles are overwritten or she has a tendency to be too wordy and her articles required heavy editing, things that have never been a problem even though she has been performing her job exactly the same way for 25 years.

So shortly before she's let go, she has a performance review which is moderate in nature, it's not damning but it's not glowing. Then she also has an account of

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drugstore news, forums actually, that write a thank you letter to her editor just raving about the great article she wrote about clip-on sunglasses which were kind of a funny topic in and of themselves. But this account, Forbes, couldn't stop raving about the accuracy of Parks' interview with their point person. Nevertheless, just two weeks later, she's terminated and she's told that the reason is "business reasons." Parks is not told that the reason she's let go is her job performance. So, what happens? Twenty-six years of a clean record and then suddenly you're pushed out in the last year, young people are being hired, the company won't use your photo next to your articles anymore, it feels a little bit like age discrimination. So, she files a lawsuit.

In the course of discovery during the lawsuit where the two sides have to exchange documents and your attorney requests all the e-mails, memorandums, your personnel file and any drafts of articles that could have gone in your personnel file, all those documents are exchanged. Parks comes across some interesting stuff, she finds out that shortly after she got to start writing the beauty column in the magazine the senior executive director of the magazine contacted the HR manager and "set in motion," a "scenario" to terminate Parks. So Parks found additional e-mails were a senior member of HR sent an e-mail a junior member of HR saying please prepare to terminate Parks. The junior member of HR actually e-mailed back a few days later and said, "Hey, firing Parks because of a reduction in workforce, because we're eliminating positions, that's going to look like age discrimination and is going to likely resolve in lawsuit. We don't want to do that, I'm afraid that that's not a good move." It wasn't, they were right, but the alternative they chose wasn't much better.

So another e-mail confirms that the company won't terminate Parks due to a reduction in workforce but instead the senior HR person said, "This is an employment issue." Instead, the senior HR person said, "This is a performance issue." The senior HR person then said to a manager of Parks that he should get her on a 30-day performance plan right away. That manager then sent an e-mail back to the senior HR person, and what does it say?" It says, "My sense of Parks job performance is she's not producing the quality of work that the magazine expects from its senior editors, and certainly not on par with other senior editors." That's his sense, what is his sense

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based on? Is that water cooler gossip, what the heck is that? Then they e-mail back to the HR person from the manager, it says, "I'm not sure if this is the kind of thing you're looking for, but this is what I can put together on late notice in a Thursday."

So it's obvious what is happening here, the senior HR person is contacting the line manager saying, "What can you tell us negative about her job performance, what kinds of specifics can you give us?" The harried manager who doesn't have enough time in the day to get the normal job done just responds with, "My sense is that she's not up to par. Isn't this what you're looking for? I'm in a rush, that's all I have time to do today." At last somebody there, maybe the junior HR person, has enough good sense to realize they still didn't have enough to terminate Parks. So she continues working for them, writing her beauty column, her picture has never appeared next to articles unlike all the young women who are writing articles for the magazine, then she's finally terminated. In the course of the lawsuit, this evidence comes out.

So, she files her lawsuit and supports it based on this information that's discovered. But the magazine denies that it is terminating her due to age, even after all these stuff. Now this case for out of court came from what's called a summary judgment motion. If you're not familiar with it, what a summary judgment motion is the defense, in this case the Drugstore Magazine, files a motion with the judge and says, "Hey judge, even if you take Parks side of the story as true, if you just use her words, her documents, if you just apply those facts to the law, we win. Drugstore Magazine wins, there's no age discrimination. So, there's no need for a trial because the judge applies the law, the jury weighs the competing evidence about the facts. So if the defendant can use the plaintiff's version of the facts, so we don't need a jury to weight the facts. Judge will apply the law, it's over, defense wins, throw the case out." That is the defense team's favorite way to get a case ended before it goes to the jury trial. Defendant employers especially are terrified of jury trials because the sympathy is always the plaintiff employee.

Take it from me, this is what I have made my living doing for more than 20 years, and I always want to get out on summary judgment. That's the phrase we defense lawyers

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use, and we want to avoid going to trial if at all possible. If we do go to trial, we would prefer it to be in front of the judge or in front of an arbitrator but not in front of a jury who's going to have that sympathy factor with the employee. So this case I'm telling you about, this written opinion, the issue is does Parks get to take her case to the jury or does Drugstore New get the case thrown out before trial, that's what's at issue right here. So Parks' lawsuit is for age discrimination under the Federal Age Discrimination in Employment Act or ADEA. Here's the specific language of the ADEA, it makes it "unlawful for an employer to discharge any individual or otherwise discriminate against any individual with respect to their compensation terms, conditions or privileges of employment because of such individual's age.

So see how it's not just termination that the ADEA prohibits happening based on age, but also changing the terms, conditions or privileges of someone's employment which could be a demotion, could be pay, it could be recognition; all kinds of concrete things that you get, job goodies, a more prestigious title even or the good times off the best shifts. If you are losing those things because of your age or any other protected class, then that would run a foul - for age, the ADEA. But the point being is it doesn't have to be termination. So Parks to win, she has to prove four things. For her to get over, get past to the summary judgment motion and get to a jury, she has to show the judge that she has some kind of evidence for these four things. The four things are, one is she was within the protected age group; in this case, she and Drugstore News did not dispute that she was over 40. She was in the protected age group, she was 62. Number two, she performed her duties satisfactorily. Now this is one of the elements that the employee and the boss or the company, the employer, always disagree about, whether or not the employee was doing the job satisfactorily. The thing is, at the summary judgment stage, this stage, it's a much lower bar than the company thinks, which is good news for you the employee. I'll expand on that in a second.

The third element is that the employee was terminated or lost some condition or privilege of their employment, termination is absolutely - there's no contesting in this case that she was terminated. So, element number three is satisfied. Yes, she was terminated. Then number four, the termination occurred under circumstances that

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give rise to an inference of discrimination. In other words, that's just the legal way of saying the termination looked fishy, it looked like age discrimination. That's all that means. So, this one again is disputed. The employee says, "Absolutely, this looks like age discrimination." The company says, "No, these circumstances don't look anything like age discrimination."

So those are the four elements, the two sides agree that she was old enough to qualify for ADEA protection, she's over 40, and they agree she was discharged, elements one and three. So the dispute is about elements two and four, whether she performed her job satisfactorily; and four, whether or not the termination happened under fishy circumstances. I said I was going to expand on the second element, whether or not she was doing her job to a satisfactory level, trying to avoid that word satisfactorily because they have a hard time with it. So, too satisfactory level. The good news for you as an employer is that she only has to show that she is performing her job to the level of minimum qualifications, and that shows that she is doing her job to a satisfactory level. It does not mean you were doing your job to an optimal level or you were doing your job to the best level of anyone in your department or even better than half the people in your department. You just have to show that you are meeting minimum qualifications. You're just basically competent, that's all that means. It's going to be really tough for an employer that you are not even meeting qualifications of minimal competence especially if you've been there for 26 years. The court even says, "There's no way to contest that she has the minimum qualifications for a job that she has been performing for years. It's obvious that she has the minimum qualifications if she's been able to do the job at all, let alone for years and years." So she gets over that hurdle.

Then the court evaluates, does she have any evidence at all for the other disputed element, number four, that the termination of her employment looked fishy at the time. One of the things the court will look for is that Parks terminated and then replaced by a significantly younger employee. If that happens, if Parks can show that, then she does evidence to support that fourth element of the claim, she gets to go to trial in front of jury and the jury gets to hear about it all, which is a nightmare for

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Drugstore News. Now Drugstore News comes to the judge and argues hard that there's absolutely no replacement of her by a younger employee, did not happen, not at all. "We eliminated her job and she was not replaced." But remember that exchange of documents that happened? Well, guess what some of the stuff in there said. That said occurred, that stuff contradicted the testimony of the individuals who were testifying to the judge in behalf of Drugstore News.

So there was one document that refers to all of Park's duties being transferred to an employee named Molly Prior who was 23 years old. Second, there were e-mails from one of the HR people to one of the managers saying, "We will replace Parks position with someone else," which suggest that it's going to be replaced by another person, not eliminated the way the company claimed. Then there's another e-mail discussing Parks termination that says, "We need to set the scenario an immediate motion, please outline a rationale as to why Molly Prior services would be preferred over Parks." Well, that's pretty close to a smoking gun, isn't it that 62 year old Parks is going to be replaced by 23 year old Molly Prior. Then there's an org chart that is out a year after Parks left, and Parks name is replaced from the previous org chart with the name of a 33 year old new hire who's also a female. So, all these things point to the plaintiff employee, Parks, being replaced by a much younger employee even though the company says, "No, we didn't replace her at all, those people just absorbed her duties among them, and her position was eliminated to save money." The documents from the case contradicted the story of the testimony of the employer's side. So there's a fact issue, you have to weigh the believability of the documents versus the believability of the testimony. Who does that? Not a judge, but a jury.

Now the company actually gets to say, "Okay, despite the fact that looks like discrimination and she has some evidence for all four elements, we actually have a non-discriminatory reason to let her go which was the quality of her writing, the types of stories she was doing, her tendency to overwrite and her need for heavy editing. If the company does that - and they did in this case, they came out with one of the write-ups that was given to her during the last year - and said this shows that we had a non-discriminatory reason to let her go, then Parks needs to show that basically that is

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a lie, that the real reason was age discrimination. Parks succeed at that because there was the evaluation done by Parks supervisor just a couple of weeks before she was terminated. What the courts said was that it could reasonably be read to mean that she was by and large meeting the company's standards. What I think that means is what I see all the time, and that is they've got an employee appraisal system that has got 1-5 ratings where 1 is poor, 2 is fair, 3 is meet expectations, 4 is exceeds expectations, 5 is excellent or super good. What happens is if you get a 4 or a 3, everyone in the company thinks that's really bad. But when a 3 is satisfactory, you get all 3, you put it in front of a judge or a jury and the 3 says satisfactory right on the form, then you know what satisfactory means? It means satisfactory.

So, it could reasonably be read to mean that she is basically doing her job with basic competence. She's not a total screw up, there's room for improvement, and that she is getting by. I'll bet anything that that's what that appraisal says and that the company was saying, "No, everyone knows that a 3 is horrible," and the judge is saying, "Listen, satisfactory means satisfactory. So, you don't get to claim it looks fishy when you say she's doing a satisfactory job and you terminate her for poor performance two weeks later." Then there was the issue of the compliment coming from a customer.

So, what does that mean to you? If you think that your company is out to torpedo your performance and get rid of you, you interact with the public, if you interact with customers or even if you have internal customers elsewhere in the company, try to get someone to write a complimentary letter of your performance about how good you are in dealing with people, about your attention to detail, whatever your strengths are, have them send that to your manger, cc you and cc HR so everyone knows that it's been sent multiple places. They can't pretend it never happened, and you're getting compliments about your performance write when your company is trying to build a case to let you go. That will undercut them. It's a great strategy, one that many people that don't think about but is easy to do. Here it is in a court case tarrying, showing that the employer's reason of terminating her for poor performance was not believable and that she got to go to trial.

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The last reason that her company's reason of its performance is not believable, according to the judge, is the company's very own letter that says you're being terminated for business reasons. What happens here, you would be amazed to how a mean, angry, awful boss can suddenly lose their spine when it comes time to give an employee a termination letter, they don't have the guts to write on the paper you're a poor performer and that's why you're being let go. Just because someone yells doesn't mean that they are brave. In fact, it probably means the opposite. When these people terminate an employee, they don't want to write on a piece of paper and hand it to the employee words that says, "You're a bad performer and that's why you're being let go." It's much easier and non-confrontational to write on the piece of paper "you're being let go for business reasons," something vague that can't be proved and let's everyone have good feelings. What that means is that come litigation time the company can't say "she was being terminated for poor performance" because their own letter says it was business reasons, it wasn't poor performance, and that come back to bite people.

Cowardly supervisors' natural tendency to leave performance off of a termination letter will only hurt the employer and help you the employee when it comes time to fight about what the real reason was that someone was let go. So because of those things, combined with the lack of her photograph in the magazine and the company's hiring for three years of nothing but women under the age of 35, the court decided it was plenty of reason to show that the termination did look fishy, did smell of age discrimination and the non-discriminatory reason the company gave about performance was not believable at all. So she gets to go to a jury.

At this stage what the judge does is it denies the Drug Store News summary judgment motion, meaning the case is not kicked out of court before trial, Parks gets to go to a jury trial. What happens here is that suddenly the employer gets very serious about settlement discussions because the employer doesn't want to go to jury trial and they're willing to start upping the amount that their willing to settle the case for because they want to avoid that jury trial. So the question I always get when I go over

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one of these cases with someone is what happened to trial because this case means she gets to go to trial. Usually, just winning summary judgment is a win if you're a plaintiff or the employee because that means the employer will settle with you for much more money than you would get if you tried to settle before summary judgment.

I'll try to find out, but I'm going to guess that it's already settled. If not already, it's getting real close to settlement because Drug Store isn't going to want to try this to a jury. Just think about if you're their attorney, you've got all these e-mails where you're setting her up, you've got a pattern of hiring younger people, you have contradicting statements about why you're terminating her; if I were their attorney, I would advise them to look at paying some serious settlement dollars, and that to a jury we'd be looking at well in six figures, maybe approaching seven figures if there's some outrageous comments by a manager somewhere that we could end up paying to Parks if we were to lose to a jury. So, you should assume that this case will settle, and for a substantial sum. However, I will try to find out as time goes on and let you all know in the future episode.

Now for our quick tip of the show. The quick tip for today is something that a forum member did that I thought was just so smart that I had to tell everyone else about it. What does was is this person was considering filing an EEOC claim against their employer. They were also considering going to HR and trying to get HR to step in a hostile work environment caused by a bad boss. But what the employee found out was that their same employer was already under a consent decree with the EEOC, which means that some previous employee had made a claim of discrimination with the EEOC. It had been mediated and the employee and the employer has settled and signed what's called a consent decree. One of the terms was that they would cease discriminating on the basis of age for three years, that they would put a poster up in the workplace about employee's rights under anti-discrimination laws and a few other things. Why it is so smart is because the current employee who's a member of our Undercover Lawyer forums is going to bring the same kind of claim. So, the discrimination that's happening to our friend is the same sort of thing that the company agreed to stop doing previously. The current claim is a double-whammy, the

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employer is going to have to deal with our friend's charge and the fact that our friend bringing a charge violates the old settlement agreement, and they'll have to deal with that violation, too. So it's two violations in one.

Rather than going straight to the EEOC, the employee is going to go straight to HR and say, "Listen, I don't see these posters around and I found this consent decree. You guys are doing all the same stuff to me that's in here. Are you willing to take this seriously or am I going to go to the EEOC and file a charge?" Really, what the employee is saying is, "Are you willing to settle with me? Is that important to you or do you guys have your heads stuck in the sand so deep that I'm going to have to go to the EEOC and bring up the old charges again?" A lot of extra leverage that our friend has because they have discovered this old claim that still has a pending settlement agreement. What you want to do is to go online and search for your company's name; if your company has a parent company, their name, you can even go to WestLaw.com and use your credit card to pay for just a single search or a couple of searches and you can have a consultant help you fashion the search so that you find the results you're looking for. You only pay for one search or two, and then you'll get the results of learning whether there's anything out there, any legal documentation that your company assigned lately.

I mentioned in the website on how I kind of got into this by helping my own sister with an issue, she was able to find her employer or her company getting into trouble with other employees in multiple states, and that she was able to go interview some of them, the employees, get some tips on where to look and how to deal with a company. So don't overlook the fact that you can learn from people who have gone before you at the very same company, maybe even dealt with the very same bosses and gone through the very same legal procedures. There's this tendency to feel like you're all alone in the world when you are dealing with a bad boss and a hostile company who seems to be out to get you. You're not, it's happening to people all over the US, just look at our forums and the growth of the podcast. But also it's happened to people at your same company who came before you, and you can connect with them in today's Internet age much easier than you could in the past, learn from

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them and how they dealt with the exact same company. It's something that you really must try to do, and it will reap huge benefits and dividends for you. It will gain you a lot of leverage in dealing with your company. That is our quick tip for today's show.

In sum as we close, if you have enjoyed the show, please consider going to iTunes and subscribing to the podcast so it automatically downloads onto your iPod every time you sync with iTunes. Then leave a comment about halfway down on the middle of the page for the Undercover Lawyer "Hostile Work Place" podcast. You can see something that says write a comment, you click on that and you can leave a few words about you find this helpful, whatever is honest, you can go ahead and right down and that would be great. I'd appreciate it and it would help spread the word to other people who would be encouraged in knowing that there's others out there like them and they really have the power to push back against the bad boos. So, join the resistance and spread the word. I look forward to seeing you on the forums and talking to you next time at the "Hostile Work Place" podcast. This is your friend in the fight, the Undercover Lawyer, have a great week.

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