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COMMENTARY

Another Look at Pa.'s Judicial Retirement Age Provision

Editor's note: The author represents several judges in the lawsuit challenging Pennsylvania's mandatory judicial retirement age.

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Special to the Legal

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In a recent column, "A Look at the Lawsuit Challenging Pa.'s Judicial Retirement Age," published January 15 in *The Legal*, Howard Bashman opined about two cases challenging the constitutionality of the Pennsylvania constitutional provision requiring that all commonwealth judges retire at the age of 70. The column highlighted Bashman's view that "it does not appear particularly likely that the lawsuits to invalidate that mandatory retirement age will ultimately prove successful." He is, of course, entitled to his opinion, but his column overlooks some important facts and arguments that militate to the contrary.

While Bashman was correct that the eight judges in the two separate lawsuits acknowledged in their complaints that decisions more than 20 years ago by both the U.S. Supreme Court and the Pennsylvania Supreme Court rejected similar challenges, he neglected to point out that both equal protection law and society's understanding of aging have changed measurably over this time period. As Dauphin County Judge Lawrence F. Clark Jr. — who is not a plaintiff in either action — said recently, "There are serious bedrock fundamental issues" as to whether not only federal law, but the Declaration of Rights that forms the basis of the state constitution, are being breached by the mandatory judicial retirement rule. Clark said, "In our nation we do not permit generalizations to be the yardstick by which we measure the merits of any man or woman." The judge also commented that a key question raised by the case is "why an otherwise competent judicial officer who just happens to arrive at 70 can't continue to perform the functions of the office." In fact, judges are the only commonwealth employees who are subject to a mandatory retirement rule.

Certainly the earlier decisions by the U.S. Supreme Court and the Pennsylvania Supreme Court might have to be reconsidered for the lawsuits to be successful, but that has been true of many cases in the history of both courts. Apparently, there was no argument in the earlier U.S.

Supreme Court case that there is a fundamental right to work; nor was there consideration by the court of an alternative provision, one already existing in Pennsylvania's constitution — that permits selective removal of judges based on demonstrated infirmity.

To the extent the mandatory retirement provision is an attempt to prevent incapacitated judges from causing harm by continuing to act as judges, Pennsylvania's additional alternative provision ensures against this harm, and thus the mandatory provision only serves to force capable judges to retire. Moreover, Pennsylvania judges over the age of 70 are able to work on "senior status," performing the same duties as judges under the age of 70, although they are not similarly compensated. There is no suggestion that their "judging" is less able than younger judges. Nor is there any reason to elect and pay for new judges to serve in their place when they are fully competent to perform their judicial duties.

To date, those who have been discriminated against on the basis of age have not been treated as a protected class, but there are commentators who believe they should. And certainly it is at least arguable that the right to work should be considered just as fundamental as, for example, the right to privacy. We will soon see whether the Supreme Court is willing to expand historical notions of equal protection to groups who are "almost suspect" and to rights that are "almost fundamental." The cases that challenge state laws that refuse to recognize the right of gay people to marry may be the occasion for further equal protection teaching by the court.

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Bashman's article recites his tentative view that appellate judges may have an easier time remaining productive as they age because appellate judging is less physically and emotionally exacting than the job of being a trial court judge. Bashman cites no science to support his view and I expect that many judges would disagree. Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit draws no such distinction. In his view, most judges, trial or appellate, get better as they get older because judging is about wisdom and experience and both tend to increase with age.

My conversations with the late Judge Albert Sheppard, a much admired state court judge who railed against the mandatory retirement rule, convinced me that this provision made no sense and, of course, Sheppard's performance up until his death seemed to prove his point. And certainly, there is no better case against mandatory retirement than the hard work by the late federal Judge Louis Pollak, who remained productive well into his late 80s. Certainly one can find examples of judges to make the opposite point, but the real point is that generalizations do not work in this area and that generalizations and stereotypes should not be enforced by our state government.

We will all wait to see how the courts handle these issues, but with regard to Bashman's conclusion, I respectfully dissent. •