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Supreme Court Expands Reach of ADEA

By Mordy Yankovich



Mordy Yankovich

In a decision dated Nov. 6, 2018, the United States Supreme Court broadened the scope of the Age Discrimination in Employment Act of 1967 (ADEA) to cover state and local governments regardless of number of employees. *Mount Lemmon Fire District v. Guido*, 859 U.S. ____ (2018).

By way of background, the ADEA only applies to private employers who have 20 or more employees. There had been a split in the federal circuit courts as to whether this limitation, i.e. that the ADEA only covers employers with 20 or more employees, applies to state and local governments. *Kelly v. Wauconda Park District*, 801 F.2d 269 (7th Cir. 1986) (holding that the ADEA does not cover government employers with less than 20 employees); *Cink v. Grant County*, 635 Fed. Appx. 470 (10th Cir. 2015) (same);

Mount Lemmon Fire District v. Guido, 859 F.3d 1168 (9th Cir. 2017) (holding that government employers are covered by the ADEA regardless of number of employees).

The facts of the case are straightforward. Mount Lemmon Fire District, a political subdivision in Arizona, terminated the employment of a 46-year-old man and a 54-year-old man, two of its oldest full-time firefighters, amid budget cuts. Both firefighters filed suit alleging that the Fire District discriminated against them on the basis of their age. The Fire District moved to dismiss the suit on the basis that it did not have the requisite number of employees to qualify under the ADEA. The Ninth Circuit Court of Appeals denied the employer's motion, and the Supreme Court granted *certiorari* to resolve the dispute among the circuits.

The dispute is based on differing statutory interpretations. The applicable provision of the ADEA states as follows:

The term employer means a person en-
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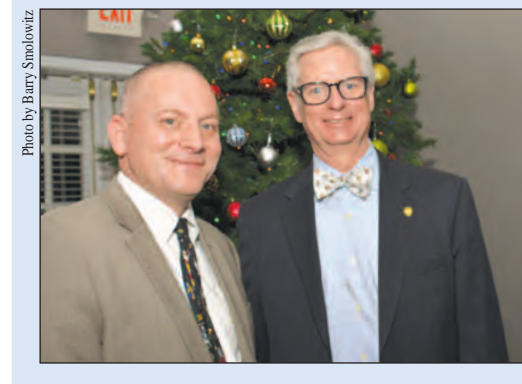


Photo by Barry Smolowitz

Ring in the Holiday Season with the SCBA

Glenn Warmuth and Academy Dean Patrick McCormick enjoyed an opportunity for collegiality at the Suffolk County Bar Association's Annual Holiday Party on Dec. 14. More photos, page 17.

PRESIDENT'S MESSAGE

Looking Inward to Look Outward

By Justin Block

Believe it or not, the holiday season is actually here. Some retailers believe that the holiday season starts just after Labor Day. Many of us (including this writer) resist that notion, waiting until at least Halloween passes to start thinking about the holidays. During a short weekend jaunt to visit friends in Pennsylvania at the very beginning of November, it pained me to no end to find out that SiriusXM already had a holiday music channel. Oh the humanity!

Many dread the holidays. Shopping, whether for food or for presents (or presents of food); cooking; cleaning in anticipation of relative staying for just slightly too long; wrapping and hiding pres-

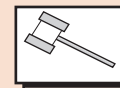
ents; traffic on Route 110, Route 347 or on the Meadowbrook Parkway (or anywhere near any of the malls); or the added pressure of clients wanting "everything wrapped up by the end of the year." All of these, and some others not listed here, including those who tell us, smugly, that "I'm already done with my shopping," are stressors that tend to diminish, if not totally interfere with, the joy of the holidays we might otherwise feel.

I daresay that none of us are exempt. Some dread the holidays for other reasons . . . watching as other people enjoy



Justin Block

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BAR EVENTS

**Swearing in & Robing Ceremony
Monday, Jan. 14 at 9 a.m.**

**Touro Law Center
225 Eastview Drive, Central Islip**

Join us to honor our distinguished members of the Judiciary at their Swearing-in ceremony. For further information, call the Bar Center.

**Save the date
Thursdays in the Courthouse –
Lunch and Learn Series
Central Islip Courthouse, Central
Jury Room from 12:45 – 2 p.m.**

- December 13, 2018
- January 10, 2019
- February 14, 2019
- March 14, 2019
- April 11, 2019
- May 9, 2019

FOCUS ON PERSONAL INJURY SPECIAL EDITION

Money — Mega-Contributors and Successful Political Campaigns

By Justin A. Giordano

“Money can’t buy me love,” the signature line from the Beatles’ song, “Can’t Buy Me Love,” was released in 1964. With regard to the American political arena the equivalent or parallel expression might go something like this: “Money can’t buy me a winning campaign.”

Three salient examples from recent years to the present immediately come to mind. Namely, and in chronological order, on June 9, 2014 in Virginia’s 7th District Republican Congressional Primary, Republican House of Representatives majority leader Eric Cantor was defeated by David Brat, a political novice, tea party activist, and professor at Randolph-Macon College. In that election fundraising filings showed that Mr. Cantor brought in and spent over \$2 million while his opponent raised and spent about \$200 thousand. In other words, majority leader Cantor outspent Mr. Brat by a ratio of 10 to 1. Nonetheless Mr. Brat emerged as the clear winning candidate on Election Day.

The second example and what the overwhelming majority of experts, pollsters, historians, and observers of the political scene have labeled the most significant and unexpected outcome in the history of American presidential elections, was the Nov. 8, 2016 contest. The two presidential contenders were former Secretary of State, New York State Senator, and First Lady

Hillary Clinton and building magnate and television personality Donald Trump. The latter had never run for any political office and the 2016 presidential race constituted his first foray into field. Amazingly and in complete contrast to his opponent, Mr. Trump started right at the highest level of the political pyramid and this at the tender age of 70. Secretary Clinton had the backing of the entire Democratic Party establishment, including the active campaigning of the then current and outgoing president, Barack Obama, who according to the polls enjoyed a solid level of popularity. In addition, many, if not most, of the Republican Party establishment as well as prominent conservative intellectuals such as columnist and commentator George Will, and the neo-conservative editor and publisher of the political magazine “The Weekly Standard,” William (Bill) Krystal. Furthermore, Ohio Governor John Kasich refused to endorse the Trump candidacy and he along with former Republican President George Bush, Sr., among others, publicly stated that they did not vote for the 2016 Republican standard bearer. Furthermore, most of the Wall Street financiers as well as the virtual entire Hollywood community staunchly opposed Trump and strongly supported his opponent. The aforementioned were among the most vocal and/or well-known opponents of then can-



Justin Giordano

didate and now President Donald J. Trump, but they were far from being the only ones. Lastly and to add to the seemingly one-sidedness of the contest, every major newspaper endorsed the candidacy of Secretary Clinton, while none endorsed her opponent. But since campaign success, especially as it is unfolding is generally measured by its fundraising prowess, the Clinton campaign raised and spent close to \$1.2 million versus approximately \$646 million, or a ratio of roughly 2 to 1. If one includes expenditures from external parties, some experts have concluded that the actual ratio may have been more 3 to 1 in Clinton’s favor. But be that as it may what is obvious is that the gap between the two candidates was unmistakably very wide and deep. Yet on election night the result that shocked pundits, the nation, and the world for that matter favored Trump.

The most recent of this trio of examples is New York’s 14th Congressional district Democratic Party primary held on June 26, 2018. It featured 28-year-old Alexandria Ocasio-Cortez, a former bartender, organizer for Bernie Sanders’s unsuccessful presidential campaign, activist and member of the Democratic Socialists of America against 10-term incumbent Rep. Joe Crowley, the fourth-ranking Democrat in the U.S. House of Representatives. The latter had outraised and outspent his opponent by a margin of 10

to 1 and as in the previous two cases had the full support, endorsement, and the formidable political machinery of their party behind them. Yet once again the heavy favorite and presumably can’t lose candidate was solidly defeated.

Money, free speech and results

There has been and continues to be in many quarters a great deal of angst, consternation, and opposition against the U.S. Supreme Court “Citizens United” decision, which in essence and in its most basic interpretation, confirmed to a substantial degree that the use of money in election campaigns is a form of protected free speech. There have also been many attempts on imposing severe limitations on via legislation or the judiciary on financial expenditures and contributions by various parties and individuals to campaigns and candidates. One of the major attempts in the last two decades was the McCain-Feingold legislation. Ultimately the legislation was not enforced and ironically when one of its two authors, Senator John McCain, became the Republican Party’s presidential nominee and accepted the federally mandated maximum allowed funds for his 2008 presidential run, he ran. On the other hand, his opponent in that presidential election, President Barack Obama, turned down public funding and instead raised many more times that amount from individuals, organizations, and others. In that case

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CYBER

Cyber Risk and Cyberinsurance

By Victor Yannacone

The rapid evolution of cyber coverage and the lack of a standard industry-wide form has left plenty of room for variation from policy to policy. Combined with the constant emergence of new cyber risks, nuances in policy language create confusion over exactly what’s covered and what’s not.

You can be sure that Cyber insurance does not cover every loss arising from use of a computer.

But first a dire warning.

Free Wi-Fi could cost you your license

Lawyers seeking internet access outside of the safety of their office or home networks and firewalls should avoid public Wi-Fi. Stay off open public Wi-Fi networks including hotel, airport, and coffeeshop Wi-Fi hotspots. Use your secure and encrypted cellphone as a personal hotspot, so you’re not relying on a public Wi-Fi system. If you have a password protected account with a national or local WiFi service provider you can log onto that if your

computer, tablet or cellphone data is encrypted.

Do you really have cyberinsurance protection?

Find out whether your policy covers losses from social engineering schemes, business interruption, reputational harm, and property damage resulting from a network breach. Some of these secondary coverages may be tacked on as endorsements, but they certainly do not come standard.

Traditional cyber coverages include first-party breach response—forensic investigation, notification and credit monitoring, and third-party protection for lawsuits arising either out of a breach that violated privacy laws, or a network failure that disrupted services for clients.

These coverages are consistent in most standalone cyber policies. However, conventional cyberinsurance, is primarily designed to cover network security and privacy liability.



Victor Yannacone

No standard form used by all carriers. Policy wording, terms and conditions and exclusions can, and do, vary from one insurer to the next.

In 2017 there were 170 U.S. insurers writing policies and collecting premiums on cyberinsurance. Policy differentiation is often how carriers seek to find their own niche in a crowded market.

Don’t believe that your cyber and other property and casualty policies together will protect you and your firm from emerging risks.

Tangible losses resulting from a network security issue or phishing may not be covered under cyber, property or even a “crime” policy.

Beware of which carrier you buy your cyberinsurance from.

Cost should not be the only consideration. Cost does not reflect the strength of a carrier’s claims team or their risk mitigation

services. A less expensive policy may not come with a dedicated claims staff, which means claims and breach response are handled more slowly.

Consider the relationships the carrier maintains with loss prevention vendors, like security, PR, and forensics firms. Those relationships often determine the speed of claims response and the extent of customer service. Risk control services and a dedicated claims team are just as important as a policy itself.

Cybersecurity is different today

Cybersecurity used to be all about preventing attacks. A breach either occurred or it didn’t. Now, cybersecurity has become not a problem to be solved but a risk to be managed. It is no longer whether an attack will occur, but when and how will you manage the breach and recover from the loss of data, business interruption, and damage to your professional standing.

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FREEZE FRAME

Congrats to the happy couple!

SCBA member Ashley M. Valla married Michael Daniele on Nov. 10, 2018. Congratulations to the happy couple!



FREEZE FRAME



Memories of warmer temperatures

It was nice enough in October for the members of the Appellate Practice Committee to hold their meeting on the outdoor patio of the SCBA.

Cyber Risk and Cyberinsurance (Continued from page 16)

How to calculate the impact of a cybersecurity event

Cyber risk is here to stay. It is a broad and diverse risk domain and it is here to stay. Not only is the cyberthreat landscape continually evolving, but technology is permeating all aspects of the “Law” at an increasing rate. Every modern law firm is now a cyber company and almost every process in a legal practice has a cyber component from word processing and document finishing through complying with court document styling and filing rules.

Business impact is the key starting point for evaluating cybersecurity risk. Only you can determine the elements of cyber-

security risk facing you as an attorney and your firm. If you haven’t yet, you should as soon as possible.

Unfortunately, no one, especially an attorney in any firm smaller than a megafirm, can accurately calculate the probability of a cybersecurity event, and neither can your insurance underwriter.

Consider Cloud security

Many law firms are relying on the Cloud for services such as Microsoft Office, Google Docs and Adobe DC, but if you use identity and access management, you need a directory to keep the identities. That directory has to be secure or it becomes an in-

vasion and open door to hackers.

Identity and access management is needed to ensure that you can configure who is who, who is authenticated, and what devices, applications, or data they can access.

What specific encryption you need will largely depend on what you need to encrypt and whether you need to encrypt data at rest, in flight, or both. You will likely use more than one encryption service to protect data at the file, database, and network levels.

Finally, you really have to proactively monitor your security systems and constantly update and upgrade them.

Be safe.

Note: Victor John Yannacone Jr. is an advocate, trial lawyer, and litigator practicing today in the manner of a British barrister by serving of counsel to attorneys and law firms locally and throughout the United States in complex matters. He has been continuously involved in computer science since the days of the first transistors in 1955 and actively involved in design, development, and management of relational databases. He pioneered in the development of environmental systems science and was a co-founder of the Environmental Defense Fund. He can be reached at (631) 475-0231, or vyannacone@yannalaw.com, and through his website <https://yannalaw.com>.

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