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Supreme Court No.

S034510

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

JANET JENNINGS,

Plaintiff,
and Respondent,

(Court of Appeal No. G012912)

vs.

(Orange County Superior Court
No. 627736, Hon. Thomas N.
Thrasher, Jr., Judge)

JAMES J. MARRALLE, D.D.S.,
A.P.C., et al.

Defendants
and Petitioners.

SUPREME COURT
FILED

JAN 10 1994

DECISION OF THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT

Robert Wendroff, Clerk

REQUEST BY CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION
FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND
AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF
AND RESPONDENT JANET JENNINGS

JOSEPH POSNER, INC.
State Bar No. 62428
16311 Ventura Blvd., Ste. 555
Encino, California 91436-4303
(818) 990-1340

Attorney for California
Employment Lawyers Association

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TO THE CHIEF JUSTICE OF CALIFORNIA AND THE ASSOCIATE JUSTICES OF
THE SUPREME COURT:

The California Employment Lawyers Association (CELA) requests
permission to file a brief as amicus curiae in support of plaintiff
and respondent Charles Hunter. CELA is a statewide organization of

attorneys primarily representing plaintiffs in employment termination and discrimination cases.

CELA, through its undersigned attorneys, is familiar with the questions involved in this case and the scope of their presentation and believes that there is necessity for additional argument on the following points:

- The Legislature has enacted not one but four sets of statutes declaring age discrimination to violate public policy. There is more than sufficient statutory support, therefore, for Ms. Jennings' wrongful termination action in violation of public policy;

- Both empirical experience and research studies show that the American workforce is getting older, and as a consequence age discrimination is likely to increase. To carry out the state's public policy of eradicating discrimination, a plaintiff in an age discrimination case should have the right to proceed on all available bases.

If this request is granted, the following brief in support of plaintiff and appellant is respectfully submitted.

Respectfully submitted,

JOSEPH POSNER, INC.

By 

JOSEPH POSNER,
Attorneys for California Employment
Lawyers Association, Amicus Curiae

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AMICUS CURIAE BRIEF BY CALIFORNIA EMPLOYMENT
LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF
AND RESPONDENT JANET JENNINGS

TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA AND ASSOCIATE
JUSTICES OF THE CALIFORNIA SUPREME COURT:

INTRODUCTION

Age discrimination is a widespread, pervasive evil that
threatens to become more of a problem as the American workforce

ages. The Legislature has recognized the problem by enacting a number of statutes declaring the public policy of the state to be against age discrimination. Plaintiffs suing on an age discrimination basis should be able to hold an entity liable, regardless of whether that entity is subject to the Fair Employment & Housing Act (FEHA), Government Code Section 12900.

ARGUMENT

1. THE LEGISLATURE HAS DECLARED UNEQUIVOCALLY THAT DISCRIMINATION BECAUSE OF AGE VIOLATES PUBLIC POLICY. THEREFORE, ANY EMPLOYER WHO DISCRIMINATES BECAUSE OF AGE IS LIABLE FOR WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY.

"The Legislature of the State of California finds and declares that the use of chronological age as an indicator of ability to perform on the job and the practice of mandatory retirement from employment are obsolete and cruel practices. The downward trend toward involuntary retirement at ages from 55 years represents a highly undesirable development in the utilization of California's worker resources. In addition, this practice is now imposing serious stresses on our economy and in particular on our pension systems and other income maintenance systems."

The above paragraph is not a quotation from the Fair Employment & Housing Act (FEHA), Government Code Section 12900 et

seq. Nor is it a quotation from any part of the Labor Code. Instead, it is Section 1 of Statutes, 1983, Chapter 666, which amended two sections of the Education Code, Section 88033 concerning age limits for community college employees, and Section 45134, concerning employment of those in elementary or secondary education. Subdivisions (a) and (b) of both sections say:

"(a) Notwithstanding any other provisions of law, no minimum or maximum age limits shall be established for the employment or continuance in employment of persons a part of the classified service.

"(b) Any person possessing all of the minimum qualifications for any employment shall be eligible for appointment to that employment, and no rule or policy, either written or unwritten, heretofore or hereafter adopted, shall prohibit the employment or continued employment, solely because of the age of any such person in any school employment who is otherwise qualified therefore."

Even earlier, in 1945 - almost 50 years ago - the Legislature declared public policy concerning persons employed under the state civil service system. Government Code Section 19700 says:

"The board, its executive officer, or any appointing power shall not adopt any rule, either written or unwritten, prohibiting the employment of any person in any state position who is otherwise qualified therefor, solely because of his or her age, except as provided in Section 18932."

Section 18932 exempts from the operation of Section 19700 persons employed in public health or safety or having the powers and duties of a peace officer.

In 1961, the Legislature spoke again by enacting Unemployment Insurance Code Section 2070:

"It is the public policy of the State of California that manpower should be used to its fullest extent. This statement of policy compels the further conclusion that human beings seeking employment, or retention thereof, should be judged fairly and without resort to rigid and unsound rules that operate to disqualify significant portions of the population from gainful and useful employment. Accordingly, use by employers, employment agencies and labor organizations of arbitrary and unreasonable rules which bar or terminate employment on the ground of age offend the public policy of this state."

To back up what it said, the Legislature told the Employment Development Department to help older workers, in Unemployment Insurance Code Section 2075:

"The department shall carry on a continuing program of education, information, research, study, and community organization concerning the problems of older workers in seeking, obtaining and holding employment without discrimination on account of age. The department shall create such local advisory agencies as in its judgment will aid in effectuating the purposes of this section, and may empower

them to study the problems of discrimination on account of age and all problems relating to employment programs for older workers, and to foster through community effort cooperation among the various groups and elements of the population of the state and to make recommendations to the department for the development of policies and procedures to carry out the purposes of this section. Such advisory agencies shall be composed of representative citizens serving without pay."

The Legislature also told the Employment Development Department to write and distribute books and pamphlets to get rid of age discrimination in Section 2076:

"The department shall issue such publications and such results of research and other activities as in its judgment will tend to minimize or eliminate discrimination in employment on account of age."

How, then, can Dr. Marralle say that age discrimination is not a substantial and fundamental concern of our Legislature? (Marralle opening brief ("Marralle"), pp. 11-15). Notice that nothing in any of these sections exempts the small employer from the obligation not to discriminate. In the 1983 amendments to the Education Code, the Legislature did not say that it was okay for a small employer to be obsolete and cruel. Nor did the Legislature tell the Employment Development Department to research, write and disseminate anti-age discrimination information to all employers

except those who had five employees or less.

Instead, what comes through from these statutes is that except for certain categories of workers for whom age is a bona fide occupational qualification, California has a firm, well-established policy applicable to all enterprises and all citizens alike prohibiting discrimination against the older employee. Such a clear statement of public policy is exactly what this court had in mind when it decided Gantt v. Sentry Insurance, 1 Cal. 4th 1083 (1992). Therefore, while Dr. Marralle may be exempt from FEHA liability, he is not exempt from common law liability under Rojo v. Kliger, 52 Cal. 3d 65 (1990) and Government Code Section 12993(a).

2. AGE IS AN IMMUTABLE CHARACTERISTIC AND BECAUSE AGE AFFECTS ALL OF US, AGE DISCRIMINATION IS AN AFFRONT TO A HUGE AND GROWING SEGMENT OF AMERICAN CITIZENS.

The singer Bob Dylan once said that you don't have to be a weatherman to tell which way the wind is blowing. Likewise, you don't have to work at the Department of the Census or be a social demographer to know that America as a whole is getting older. Through advances in medicine and avoidance of known hazards to life and health, more people are living longer than ever before. But not only are people living longer; they are also living better. Gone are the days when someone at 55 or 60 had almost reached the end of his or her life span, with a concomittant destruction of the individual's physical and mental abilities. One need only look at the world of entertainment, at such dynamic and vital performers as

George Burns, Bob Hope, Jessica Tandy, Hume Cronyn and many others, to realize that the ability to live a full, rewarding and professionally active life does not stop with the attainment of a given age. And as medical research and techniques improve, the numbers of individuals able to carry on productive careers far beyond the age at which they used to be dead is going to keep on going up. Why should we let the Dr. Marralles of the world consign such productive citizens to the scrap heap?

Thus, one can only wonder at Dr. Marralle's blindness (Marralle, p. 13) where he says that age is not an immutable characteristic. Does he know something that the rest of us do not? Has he taken a line from the movie "Back to the Future" and found a way to turn back the clock? Has he, perhaps, found the legendary Fountain of Youth?

Dr. Marralle is wrong in another respect. According to him (Marralle, p.14), our society honors its elders. If society honors its elders the way Dr. Marralle treated Ms. Jennings, we are indeed in deep trouble. The reality is that while more and more citizens are enjoying more and more productive years, the older stereotypes still remain. One need look no further than Ewing v. Gill Industries, 3 Cal. App. 4th 601 (1992) to see a graphic example of bigoted, age-related stereotypes. The tragedy - the real human tragedy - is that such stereotypical thinking leads exactly to the sort of cruel practices which the Legislature condemned in Chapter 666, Statutes, 1983.

Dr. Marralle misses the point completely. It is precisely

because more of us are living longer that age discrimination is as illegal and as destructive as discrimination based upon any other non-job-related classification. It is precisely because employers, both big and small, will be able to hurt more citizens by age discrimination that we should allow Ms. Jennings' suit to proceed.

3. RESEARCH TELLS US THAT UNTIL WE DISPEL THE MYTHS SURROUNDING THE OLDER WORKER WITH EFFECTIVE ENFORCEMENT OF PUBLIC POLICY, AGE DISCRIMINATION IS LIKELY TO INCREASE.

Studies reinforce what lawyers who handle age discrimination cases know from experience. Because the court is unlikely to have a copy, we append to this brief an article entitled "Refuting Ageist Stereotypes About Older Workers", excerpted from "Ageism: The Segregation of a Civil Right", by Cathy Ventrell-Monsees and Laurie McCann, original publisher and date unknown, reprinted in The Employee Advocate, Supplement Volume 23, Fall, 1993, pages 92-100. Ventrell-Monsees and McCann tell us that productivity is ageless, and point out that "some intellectual functions may even improve with age, particularly when older persons remain active and involved". Ibid. p. 93. They say that older persons who remain in the work force into their 60s, 70s or 80s are likely to represent a self-selected group of healthy individuals who cost an employer less for benefits than younger workers. Ibid. They emphasize that "professors, writers, lawyers, doctors, judges and many others remain motivated and are high achievers throughout their lives, perhaps in part because they control their jobs and their

perceptions of their value to the job." Ibid. p. 94. They reinforce what employment lawyers know when they tell us that many older persons want and need to work: "Labor force participation rates for older women have been on the increase for many years. More older men are now remaining in the work force later in life and their numbers will continue to rise as the baby boomers age." Ibid. p. 95, fn. reference omitted.

They also describe a phenomenon which has been discussed little if at all as a contributor to discrimination - the fear of aging:

"The fear of aging also appears to contribute to discrimination. For example, if a manager in his 50s has an employee who isn't performing (who happens to be in his 60s), the manager may think, 'I don't want that (i.e., getting old and unproductive) to happen to me.' Since fear and avoidance often go hand-in-hand, the manager's reaction may be to remove the source of his fear about himself -- namely the older employee."

Ibid. pp. 95-96.

If this court doesn't allow Ms. Jennings to sue, age discrimination is likely to get worse. Ventrell-Monsees and McCann report that part of the stereotype problem is caused by older workers themselves, who contribute to the problem by accepting discrimination rather than challenging it. Ibid. Some workers feel that if they report age discrimination, they will be labeled "old". Ibid. p. 96. Other workers feel that it is futile to

complain or challenge age discrimination, and thus the authors conclude that the incidence of such discrimination is much greater than reported. Ibid. p. 96.

We believe that Ventrell-Monsees and McCann are correct. As America ages, the need for effective mechanisms to challenge age discrimination is greater and will become more so. Until employers learn that they cannot discriminate on the basis of age with impunity, they will continue to do so. Persons such as Ms. Jennings should be given every legal tool available in order to combat what the California Legislature itself has recognized is a pervasive, growing national problem. For these reasons, we believe that this court should reinforce its historic commitment to ending discrimination in the work place by allowing Ms. Jennings' suit to go forward.

Respectfully submitted,

JOSEPH POSNER, INC.

By 

JOSEPH POSNER,
Amicus Curiae on behalf of
Plaintiff Jennings

APPENDIX

REFUTING AGEIST STEREOTYPES ABOUT OLDER WORKERS

Much has been written about Americans' negative perceptions of aging.¹ Rather than calling these perceptions "myths," as some writers do,² they should be treated and dealt with as discriminatory stereotypes that impede the employment of older persons.

The most common stereotypes about older workers can be summarized as follows:

1. Older workers are less productive than younger workers.
2. Older workers are more expensive than younger workers.
3. Older workers are less adaptable and more rigid than younger workers.
4. Older people want to retire early; they don't want to work.

The facts clearly refute these stereotypes.

¹ E. Palmore, Ageism: Negative and Positive (1990); Achenbaum, W., & Kusnerz, E., Images of Old Age, (1978); Anesllo, E., Age and Ageism in Children's First Literature, 2 Educational Gerontology 211 (1977); Austin, D., Attitudes Toward Old Age, 25 Gerontologist 431 (1985); Axehod, S., & Eisdorfer, C., Attitudes Toward Old People, 16 Journal of Gerontology 75 (1961); Bauou, G., & Smith, P., Aging, Ageism and Society (1979); Brathwaite, V., Old Age Stereotypes, 41 Journal of Gerontology 353 (1986); Kogan, N., Attitudes Towards Old People, 62 Journal of Abnormal and Social Psychology 44 (1973); Levin, J. & Levin, W., Ageism: Prejudice and Discrimination Against the Elderly (1982); Palmore, E., Gerontophobia versus Ageism, 12 Gerontologist 213 (1972); Rosen, B. & Jerdee, T., The Influence of Age Stereotypes on Managerial Decisions, 61 Journal of Applied Psychology, 428 (1976).

² K. Dychwald, Age Wave 30 (1989); U.S. Dept. of Health and Human Services, Older Workers: Myths and Reality (1984); AARP, Workers Over 50: Old Myths, New Realities (1986).

1. Productivity is ageless: Studies consistently demonstrate that aging has no impact on job performance or productivity except in jobs that are physically demanding.¹ Indeed, research reveals that some intellectual functions may even improve with age,² particularly when older persons remain active and involved.³ Older employees generally have better attendance records than younger employees.⁴ Older employees also demonstrate a greater degree of commitment to quality and loyalty to their employer than do younger employees.⁵

2. Costs and Benefits: While the costs of some benefits increase with age (health, life, and disability insurance), surveys reveal that older workers tend to use less overall medical benefits than younger employees.⁶ Companies report that younger employees with dependents are in reality more expensive than older employees.⁷ Older persons that remain in the workforce into their 60s, 70s, or 80s, are likely to represent a self-selected group of healthy individuals.⁸ They also incur fewer workplace injuries in proportion to their workforce participation.

When other types of "costs" are examined, the facts reveal that older workers are not more expensive to hire, train or retain. There is no evidence to support the belief that the cost of job training increases with age.⁹ Indeed, the cost of retraining older employees to update their technological skills may be considerably less than the enormous cost of training new hires who lack basic literacy skills as well as workplace

skills.¹⁰ The short life cycle projected for skills and technology in the future may also mean continual retraining of "new" as well as "old" workers, which would minimize the perceived "savings" of young recent hires.

The data on "replacement" cost incurred by companies when an older employee leaves also debunks the myth about monies saved by replacing an older employee with a young, less expensive employee. The perceived "savings" is actually a cost equal to 193 percent of the former employee's salary.¹¹ This cost is likely to rise as the labor market tightens and skilled or experienced workers become more scarce.¹²

3. Adaptability: Studies show that interest, motivation, and skill do not decline with age.¹³ Yet, employers perceive older workers as resistant to change, slow to learn new skills, and uncomfortable with new technologies.¹⁴

The question is: is aging the cause of a perceived lack of motivation or is it the job itself. Professors, writers, lawyers, doctors, judges, and many others remain motivated and are high achievers throughout their lives perhaps in part because they control their jobs and their perceptions of their value to the job. For older employees, particularly in large companies, supervisors or the corporate climate may send signals which communicate that older employees are of decreasing value to the company.

In addition, negative stereotypes that pervade a corporate culture may actually inhibit older workers' abilities to meet

their supervisors' expectations.¹⁵ If older employees are expected to be less ambitious, unwilling to learn, and unadaptable, they may become so as a result of a self-fulfilling prophecy. On the other hand, when older employees are intellectually stimulated and challenged on the job, the more likely the employees (old and young) will be motivated to continue their employment.¹⁶

4. Work and Retirement: The fact is that many older persons want and need to work. Labor force participation rates for older women have been on the increase for many years.¹⁷ More older men are now remaining in the workforce later in life and their numbers will continue to rise as the baby-boomers age.¹⁸

The stereotypes of aging held by employers only account for part of the age discrimination problem. Older workers themselves contribute to the problem because they have accepted discrimination rather than challenged it. Older workers accept the status quo in a number of ways. The self-fulfilling prophecy caused by negative stereotypes about aging reinforces discriminatory conduct, as discussed above. Some researchers also suggest that older workers accept lower and fewer salary increases in recognition of the difficulty of finding comparable employment elsewhere.¹⁹

The fear of aging also appears to contribute to discrimination. For example, if a manager in his 50s has an employee who isn't performing (who happens to be in his 60s), the manager may think, "I don't want that (i.e., getting old and

unproductive) to happen to me." Since fear and avoidance often go hand-in-hand, the manager's reaction may be to remove the source of his fear about himself--namely the older employee.

The fear of being labeled "old"²⁰ can also account for the underreporting of age discrimination. An older worker who has been treated differently on the job is more likely to characterize the treatment as unfair rather than as age discrimination.²¹ In a 1985 Gallup survey of workers age 40 and older, only six percent indicated that they had experienced age discrimination.²² However, the perception of discrimination increased with age.²³ Ten percent of the respondents age 63 and older claim to have suffered from age discrimination.²⁴ Moreover, since the survey did not reach the unemployed or underemployed, these numbers are likely to be much lower than the true picture.

In a 1988 survey of AARP members in Michigan, one of every five respondents age 50 or older reported personally suffering from discrimination on the job or facing negative bias because of age.²⁵ Of this large number that faced discrimination, ninety percent did not take any legal action because they said it wouldn't do any good or it was too difficult to prove a case.²⁶

Older workers' beliefs in the futility of complaining about or challenging age discrimination on the job suggest that the incidence of discrimination is much greater than reported. This belief may indeed perpetuate discrimination because employers recognize that older workers will not generally challenge a

discriminatory practice or stand up for their rights. Ageist employment policies and practices will continue until older workers demonstrate that they are not willing to accept discrimination any longer.

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2. Staudinger, Cornelius & Baltes, The Aging of Intelligence: Potential and Limits, 503 The Annals 43, 45 (1989).
3. Schaie, The Seattle Longitudinal Study: A 21-year Exploration of Psychometric Intelligence in Adulthood in Longitudinal Studies of Adult Psychological Development 33 (K.W. Schaie, ed. 1983); Arbuckle, Gold, & Andres, Cognitive Functioning of Older People in Relation to Social and Personality Variables, 1 Psych. and Aging 55 (1986).
4. Dychtwald, Age Wave, at 41.
5. AARP, Workers Over 50: Old Myths, New Realities at 10 (1986).
6. Id. at 11.
7. Id.
8. Robinson, P.K., Age, Health and Job Performance in Age, Health, & Employment 71, 150-151 (1986); U.S. Dept. of Health and Human Services, Older Workers: Myths and Realities (1984); Clark, R.L., Aging and Labor Force Participation in Aging and Technological Advances 52 (1984); Brousseau, K.R., After Age Forty: Employment Patterns and Practices in the United States, in After Forty: The Time for Achievement, 171 (1981).
9. U.S. Dept. of Health and Human Services, Older Workers: Myths and Realities (1984).
10. The Olsten Corp. reports that corporations now spend \$30 billion in skills training. Yet this figure includes only a small portion spent by companies that provide training in basic literacy skills. Daily Lab. Rep. [BNA], Vol. 172, A-4 (Sept. 5, 1991). Given the recognized need for a substantial investment in literacy training for future job entrants, much more than \$30 billion will be needed to address the skills/training gap. See W.B. Johnson & A.H. Packer, Workforce 2000: Work and Workers for the 21st Century (1987).

11. S. Herchenroether, "Retain or Replace? Not So Rhetorical a Question," Looking Ahead Vol. XIII, 39 (1990).
12. Id. at 40.
13. Doering et al., The Aging Worker 60, 80 (1983); National Alliance of Business, Invest in Experience: New Directions for An Aging Workforce 10 (1985); Robinson, P.K., Age, Health, and Job Performance, In Age, Health, & Employment 70 (1986).
14. AARP, Workers Over 50: Old Myths, New Realities (1986).
15. B. Hassel & P. Perrewew, An Examination of the Relationship of Age Discrimination to Employee Psychological States, publication pending, Journal of Managerial Issues (1991).
16. Dychtwald, Age Wave, at 174.
17. Id. at 177.
18. The Bureau of Labor Statistics projects that the labor force participation rate of men over age 55 is expected to rise from 39.3 percent in 1990 to 41.8 percent by 2005, reversing a decline in the ratio over the last 15 years. The participation ratio for women age 55 and older is expected to increase from 23 percent in 1990 to 28.7 percent in 2005. Daily Lab. Rep. [BNA], No. 223, at B-1 (Nov. 19, 1991).
19. Secretary of Labor, Labor Market Problems of Older Workers, 55 (1989).
20. "Old" is of course a relative term. The federal Age Discrimination in Employment Act designates anyone age 40 or older as "old" and deserving of legal protection. The Senior Community Service Employment Program sets 55 as the beginning age group for older workers.
21. AARP's Worker Equity Department annually receives an estimated 2500 calls and letters from older workers with employment problems. A majority of these people characterize their treatment as unfair, rather than as discriminatory.
22. Secretary of Labor, Labor Market Problems of Older Workers 56 (1989).
23. Id.
24. Id.

25. AARP, Michigan Age Discrimination Poll (1988).

26. Id.

No. S034510

(CERTIFICATE OF SERVICE BY MAIL - Section 2015.5, C.C.P.)

Sallie M. Hill certifies that she is a citizen of the United States, over 18 years of age, a resident of the County of Los Angeles, and not a party to the within action; that her business address is 732 East Washington Boulevard, Los Angeles, California 90021; that on the 30th day of December, 1993, she served the within Request for Permission to File Amicus Curiae Brief & A.C. Brief on the following named parties in said action, by placing a true copy thereof in an envelope addressed to the attorney(s) of record as follows:

Marvin D. Mayer, Esq.
One City Boulevard West
Suite 1400
Orange, CA 92668

Office of the Clerk
Orange County Superior Court
(For: Hon. Thomas N. Thrasher)
700 Civic Center Dr., West
Box 1994
Santa Ana, CA 92701

Bruce W. Hamby, Esq.
200 E. Katella Avenue
Suite 206
Orange, CA 92667

Clerk
Court of Appeal
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I certify under penalty of perjury that the foregoing is true and correct.

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December 30, 1993

Sallie M. Hill



Loring Mitchell Legal Briefs
732 S. WASHINGTON BOULEVARD
LOS ANGELES, CALIFORNIA 90021-3088
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