

MEMORANDUM OF LAW

DATE: October 27, 1987

TO: Cheryl Fisher, Equal Employment Investigative
Officer via Rich Snapper, Personnel Director
FROM: City Attorney
SUBJECT: Age Discrimination in Employment Amendments of
1986

You have asked this office for an opinion concerning the impact of the Age Discrimination and Employment Amendments of 1986 (Public Law 99-592, 100 Stats. 3342 1986) on The City of San Diego's compulsory retirement provision as set forth in section 141 of the San Diego City Charter and in section L-4 of the Personnel Manual.

In *EEOC v. Wyoming*, 460 U.S. 226, 75 L.Ed.2d 18, 103 S.Ct. 1054 (1983) the United States Supreme Court held that the extension of the Age and Discrimination Employment Act (29 U.S.C. . 621 et seq.) (the "Act") to cover local governments was a valid exercise of Congress' power under the Commerce Clause of the Constitution (art. I, . 8, clause 3). Section 631 of the Act, as originally enacted, prohibited, with certain limited exceptions, discrimination in employment against individuals who were at least 40 years of age but less than 70 years of age. In 1986, Congress enacted Public Law 99-592 to amend the Act to remove the maximum age limitation applicable to employees who are protected under the Act and for other limited purposes. 29 U.S.C. . 631 now reads in part as follows:

(a) Individuals at least 40.

The prohibitions in this Act 29 U.S.C. . 621 et seq. (except the provisions of section 4(g) 29 U.S.C. . 623(g)) shall be limited to individuals who are at least 40 years of age.

In addition, 29 U.S.C. . 623 was also amended in part as follows:

(i) It shall not be unlawful for an employer which is a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate

agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken -

(1) with respect to the employment of an individual as a firefighter or as a

law enforcement officer and the individual has attained an age of hiring or retirement in effect under applicable state or local law on March 3, 1983, and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purpose of this Act. 29 U.S.C. . 621 et seq.

29 U.S.C. . 630 was amended to provide for the following definitions:

(j) The term "firefighter" means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of fire fighting apparatus and equipment, including an employee engaged in this activity who was transferred to a supervisory or administrative position.

(k) The term "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal law of the State, and including an employee engaged in this activity who is transferred to a supervisory or administrative position. For the purpose of this subsection "detention" includes the duties of employees to guard individuals incarcerated in any penal institution.

San Diego City Charter section 141, entitled "City Employees Retirement System" reads in part:

No employee shall be retired before he reaches the age of 62 years and before he has completed 10 years of continuous service, except such employee may be given the option to retire at the age of 55 years after 20 years of continuous service with a

proportionately reduced allowance. Policemen, firemen and full-time lifeguards, however, who have had 10 years of continuous service may retire at the age of 55 years, except such policemen, firemen and full-time lifeguards may be given the option to retire at the age of 50 years after 20 years of continuous

service with a proportionately reduced allowance. ...

Retirement shall be compulsory at the age of 65 years, except that the Manager, or other department head, for the City's benefit may thereafter continue an employee who has reached such age limit in the City service from year to year.

As a result of the Age Discrimination and Employment Amendments of 1986 and the United States Supreme Court ruling in EEOC v. Wyoming, the compulsory retirement at age 65 years provision of section 141 of the San Diego City Charter has been preempted by a federal statute which has been construed to be controlling over local law. There is no longer a compulsory retirement age of 65 years for City employees except police officers and firefighters. Ironically, other members of the City's safety service, i.e., the lifeguards, have no compulsory maximum retirement age limit. However, the Act does not prohibit the mandatory early retirement of an employee who has become physically or mentally disabled and who can no longer perform the duties of his or her job classification. Such an employee may be discharged or compelled to retire without violating the Act.

JOHN W. WITT, City Attorney

By

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