



2000

Book Review

Kenneth J. Kowalski
Cleveland State University, k.kowalski@csuohio.edu

Follow this and additional works at: https://engagedscholarship.csuohio.edu/fac_articles

 Part of the [Civil Rights and Discrimination Commons](#), and the [Elder Law Commons](#)

[How does access to this work benefit you? Let us know!](#)

Original Citation

Kenneth J. Kowalski, Book Review, 4 Ohio Lawyers Weekly 2291 (2000), reviewing L. S. Platt & C. Ventrell-Monsees, *Age Discrimination Litigation*, James Publishing (2000)

This Book Review is brought to you for free and open access by the Faculty Scholarship at EngagedScholarship@CSU. It has been accepted for inclusion in Law Faculty Articles and Essays by an authorized administrator of EngagedScholarship@CSU. For more information, please contact research.services@law.csuohio.edu.

Illness

he motion for forced Jeffrey didn't repre- immediate danger of m to himself or oth- case was heard by which reversed the Then the case came

Comprehend

that antipsychotic ntally ill patients. bt that a number of rious risk of side ef- manent, and in rare out the drugs, most ever recover. er, to say the least, against their will. ouglas wrote in our right to refuse med- ndamental right in personal security, autonomy are cher- e rights are "inher- lual." But Justice the right to refuse solute and it must ed by a compelling st."

that one such come state's interest in y ill people from or others. But with ise, we have broken

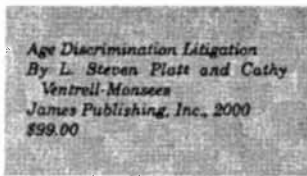
vote, we held that a sort of "paternal" a mentally ill pa- fuse antipsychotic sound frightening state acting pater- recognized and ac- that gives the state ens who are unable s.

in't give doctors a on to administer d to the patient's n in this case sim- stances in which he permission of addition to cases is a threat to him- old standard — able to grant per- e when no other as effective and n the best interest

rote, "We have at- decision that ac- right to refuse an- tion, and yet tal illness some- of the capacity to tment decisions." er noted that a fail- ate's parental pow- ould result in the se patients who, eatest, refuse med- not have the capac- ir decision. We be- is inhumane and, le."

entally ill patients out for now it is the

ADEA Litigation Guide Helpful And Functional



BY KENNETH J. KOWALSKI

Any attorney representing or contem- plating the representation of a plaintiff in an age discrimination suit would find

"Age Discrimination Litigation" very help- ful. While the book would also be of in- terest to defense at- torneys, both for its discussion of current issues in age discrim- ination litigation and its insights into the strategies that might be used by plaintiffs' counsel, it is aimed at plaintiffs' employ- ment lawyers.

The authors are both experienced liti- gators in this area. Platt has litigated many cases on behalf of employees, has served on numerous bar association's employment and civil rights law committees, has been in- volved in EEOC rulemaking negotia- tions and is current president of the National Employment Law Association. Ventrell-Monsees, former director of the age discrimination litigation project at the AARP, has litigated age discrimina- tion class actions, authored many amicus briefs and is renowned for her ex- pertise in age discrimination issues. They share their extensive knowledge of ADEA law, strategies and some very fine forms.

Functional Format

The text is contained in a functional, two-inch thick loose-leaf binder and is logically organized into fifteen chapters discussing age discrimination law, client intake and evaluation of cases on through discovery, trial, settlement and attorney fees. In other words, it follows the progression of a case. There are also forms (sample letters, interrogatories, jury instructions, etc.) that are quite usable since they are available both as part of the text and on a CD-ROM disc in- cluded in the purchase price.

The result is an excellent guide not only to the nuts and bolts of litigation in the courts, but also to the pre-filing as- pects of representation. For instance, there is a chapter on client intake and claim investigation that gives very prac- tical suggestions on how to go about as- sessing clients and cases. There are ex- haustive lists of questions designed to help determine whether the particular factual circumstances would support a

solo or small firm practitioners embark- ing on their first age discrimination case, and even more so for attorneys starting out in practice, as a guide for approach- ing not only prospective age discrimina- tion cases but also other types of clients and cases.

Interwoven throughout the discus- sions of the various phases of an age discrimination case are citations to case law dealing with important issues that are likely to arise. For instance, in the chapter dealing with summary judgment, there is an excellent discus- sion of the burdens of proof and how

pretext evidence is dealt with by the courts.

As in that chapter, when the precedent of different circuits varies on a particular point, the authors give a circuit-by-cir- cuit explanation, complete with cita- tions to leading cases. In addition, there are often citations to other sources, such as law review articles, EEOC Policy Guide- ance Notices, etc.

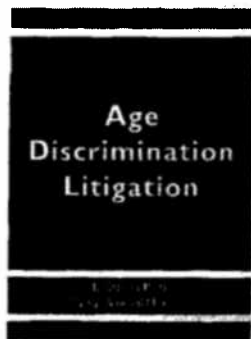
The authors have also provided a num- ber of valuable checklists, such as one de- lineating time limits for filing discrimi- nation charges and for filing suit, and another for information to seek through interrogatories.

Practice Tips

The most helpful feature of the book, however, may be the "Practice Tips" that appear frequently throughout the text. These tips are concise, practical suggestions to help the practitioner fo- cus on key facts and issues. Many of them provide guidance on how to frame issues and on what facts to look for and emphasize. Examples include: a recom- mendation that document requests not be limited to the employee personnel file and structured annual reviews; an admonition that a negotiated letter of reference in final form be attached to a settlement agreement; a suggestion that plaintiff's counsel consider moving for summary judgment in unequal ben- efit cases because the employer will bear the burden of proof on the equal costs affirmative defense; etc.

Especially noteworthy are a chapter devoted to discrimination in employee benefits and another dealing with Re- ductions in Force (RIFs), both areas of unique concern to older workers.

The benefits chapter does an excel- lent job of explaining the various possi- ble claims for benefits discrimination under both the ADEA and ERISA, in- cluding: claims involving early retire- ment incentive programs; claims con- cerning pension benefits; claims based on the denial or reduction of severance pay; and claims for facially discrimina-



Only Sen. Scott Oelslager, R-C, that he cast his dissenting vote t quired to make any additional pay already included in overhead cost that don't charge for records to be Blessing noted that the bill, spc in 12 different forms this season General Assemblies.

The possible fees are in line wi County, he said. Under those prov retrieval fee, then \$1 per page for 50 and 20 cents per page for page the best we could do," Blessing as

Pay Raise For Elk

Ohio lawmakers have sent Gov local, county and statewide elect

- State lawmakers, beginning 20 From base pay salary of \$42,
- House Speaker and Senate Pre From \$66,133 to \$80,549.

- Governor: No change under current law to \$151,044.

- Lt. Governor: No change under current law \$68,295 to \$79,173.

- State Auditor, Secretary of Sta No change under current law \$96,250 to \$99,138.

- Chief Justice of the Ohio Supr No change under current law \$128,650 to \$132,500.

- Associate Justice of the Ohio S No change under current law \$120,750 to \$124,350.

Finan Named Se

Senate President Richard Fina Senate for the 124th Ohio Legial Finan, a Cincinnati Republica its require him to leave the Senz Republicans control the Senat in the Nov. 7 election, pending a The Republican Senate caucus dent pro tempore, Jay Hottinger and Randy Gardner of Bowling

Governor Oppos

A measure that would requir have Gov. Bob Taft's support an Anti-smoking groups say the t efforts to create widespread sm

Local health boards now hav The legislation would give that county health board wanting to approval of all city councils and

"That process could take yea Jennifer Tisone Price, an Ameri The House had approved the it, but then word came that Taft "In its current form, he wou secretary.

Corson said she could not sa change before Taft would appro effects the measure would hav Senate President Richard Fir full Senate did not vote on the i

But bill sponsor and fellow Re the measure was held back afte ernor's concerns.

The bill's intention was to gi officials whom citizens could bolc are appointed and don't necessa He said he hopes a comprom journals in December.

The Cancer Society and othe bill since Schuler introduced it "We've been hoping that the We felt that he was indeed the Schuler said he has had no c But Bob Morehead, presiden said boards of documents, obta

plating the representation of a plaintiff in an age discrimination suit would find "Age Discrimination Litigation" very helpful. While the book would also be of interest to defense attorneys, both for its discussion of current issues in age discrimination litigation and its insights into the strategies that might be used by plaintiffs' counsel, it is aimed at plaintiffs' employment lawyers.

The authors are both experienced litigators in this area. Platt has litigated many cases on behalf of employees, has served on numerous bar association's employment and civil rights law committees, has been involved in EEOC rulemaking negotiations and is current president of the National Employment Law Association. Ventrell-Monsee, former director of the age discrimination litigation project at the AARP, has litigated age discrimination class actions, authored many amicus briefs and is renowned for her expertise in age discrimination issues. They share their extensive knowledge of ADEA law, strategies and some very fine forms.

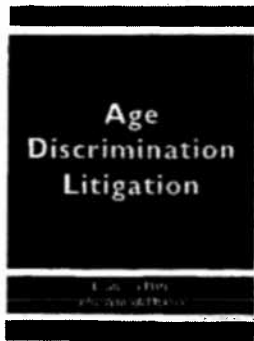
Functional Format

The text is contained in a functional, two-inch thick loose-leaf binder and is logically organized into fifteen chapters discussing age discrimination law, client intake and evaluation of cases on through discovery, trial, settlement and attorney fees. In other words, it follows the progression of a case. There are also forms (sample letters, interrogatories, jury instructions, etc.) that are quite usable since they are available both as part of the text and on a CD-ROM disc included in the purchase price.

The result is an excellent guide not only to the nuts and bolts of litigation in the courts, but also to the pre-filing aspects of representation. For instance, there is a chapter on client intake and claim investigation that gives very practical suggestions on how to go about assessing clients and cases. There are exhaustive lists of questions designed to help determine whether the particular factual circumstances would support a claim under applicable law, as well as whether the client is one the attorney would want to represent.

Included in the chapter — and on the CD-ROM — is an intake questionnaire and a sample retainer agreement. This chapter would be especially helpful to

Kenneth Kowalski is Assistant Director of the Employment Law Clinic at Cleveland-Marshall College of Law at Cleveland State University. The Clinic provides representation of employees in various matters, including discrimination litigation. The views expressed herein are not necessarily those of the Clinic or the College of Law.



judgment, there is an excellent discussion of the burdens of proof and how pretext evidence is dealt with by the courts.

As in that chapter, when the precedent of different circuits varies on a particular point, the authors give a circuit-by-circuit explanation, complete with citations to leading cases. In addition, there are often citations to other sources, such as law review articles, EEOC Policy Guidance Notices, etc.

The authors have also provided a number of valuable checklists, such as one delineating time limits for filing discrimination charges and for filing suit, and another for information to seek through interrogatories.

Practice Tips

The most helpful feature of the book, however, may be the "Practice Tips" that appear frequently throughout the text. These tips are concise, practical suggestions to help the practitioner focus on key facts and issues. Many of them provide guidance on how to frame issues and on what facts to look for and emphasize. Examples include: a recommendation that document requests not be limited to the employee personnel file and structured annual reviews; an admonition that a negotiated letter of reference in final form be attached to a settlement agreement; a suggestion that plaintiff's counsel consider moving for summary judgment in unequal benefit cases because the employer will bear the burden of proof on the equal costs affirmative defense; etc.

Especially noteworthy are a chapter devoted to discrimination in employee benefits and another dealing with Reductions in Force (RIFs), both areas of unique concern to older workers.

The benefits chapter does an excellent job of explaining the various possible claims for benefits discrimination under both the ADEA and ERISA, including: claims involving early retirement incentive programs; claims concerning pension benefits; claims based on the denial or reduction of severance pay; and claims for facially discriminatory benefit plans. (Regarding the last of these, there is even a Practice Tip for attorneys in the Sixth Circuit, warning of that court's insistence on proof of discriminatory animus, contrary to precedent in other circuits.) While the complexities of ERISA could not possibly be thoroughly covered in a portion of a chapter, the discussion serves as a useful starting point.

As anyone who practices in this area is well aware, over the past few years an entire body of law has developed concerning RIF cases. Thus, this topic de-

■ continued on PAGE 33

From \$66,133 to \$80,549.

- Governor: No change under current law until 2007, when salary would rise to \$151,044.
- Lt. Governor: No change under current law until 2007, when salary would rise to \$68,295 to \$79,173.
- State Auditor, Secretary of State, Treasurer and Attorney General: No change under current law until 2003, when salaries would rise to \$96,250 to \$99,138.
- Chief Justice of the Ohio Supreme Court: No change under current law until 2002, when salary would rise to \$128,650 to \$132,500.
- Associate Justice of the Ohio Supreme Court: No change under current law until 2002, when salary would rise to \$120,750 to \$124,350.

Finan Named Senate President

Senate President Richard Finan was re-elected to the most powerful Senate for the 124th Ohio Legislature, which is to convene in early Finan, a Cincinnati Republican, has been Senate president since it requires him to leave the Senate after completing his term in to Republicans control the Senate by a 21-12 margin and maintain in the Nov. 7 election, pending an appeal of one race.

The Republican Senate caucus also elected Bruce Johnson of Cincinnati pro tempore, Jay Hottinger of Newark as assistant president and Randy Gardner of Bowling Green as majority whip.

Governor Opposes Smoking Bill

A measure that would require elected officials to approve smoking have Gov. Bob Taft's support and didn't move forward in the Legislature. Anti-smoking groups say the tobacco industry pushed the bill as efforts to create widespread smoking bans.

Local health boards now have the authority to regulate all public. The legislation would give that power to local elected officials. A county health board wanting to impose a countywide smoking ban approval of all city councils and township trustees.

"That process could take years. This bill creates a bureaucratic Jennifer Tison Price, an American Cancer Society spokeswoman. The House had approved the measure and the full Senate was expected, but then word came that Taft planned to veto the bill.

"In its current form, he would veto it," said Eileen Corson, Taft secretary.

Corson said she could not say what aspects of the bill the Senate change before Taft would approve it. However, she said he was expected effects the measure would have on local control and public health. Senate President Richard Finan, a Cincinnati Republican, would full Senate did not vote on the bill as expected.

But bill sponsor and fellow Republican Rep. Robert Schuler, also the measure was held back after Taft's office contacted Senate leadership's concerns.

The bill's intention was to give the power to mandate smoking officials whom citizens could hold accountable rather than health care are appointed and don't necessarily have to follow the will of the public.

He said he hopes a compromise can be reached before the current sessions in December.

The Cancer Society and other anti-smoking associations have a bill since Schuler introduced it in April 1999.

"We've been hoping that the governor would commit to stopping. We felt that he was indeed the last chance," Price said.

Schuler said he has had no contact with the tobacco industry. But Bob Morehead, president of the Association of Ohio Health said boards of documents, obtained under terms of the 1998 settlement, prove the industry has tried for at least 10 years to draft that previous Legislatures did not pass.

"The tobacco industry lobbyists can't get at the boards of health pointed, but they have influence over elected officials" because contributions, Morehead said.

One of the documents Price disclosed was a Phillip Morris memo. It shows that one of the tobacco company's Midwest lobbyists, crafted legislation which requires elected officials to vote on any ordinance put forward by their board of health before it can be that it would create "a bureaucratic nightmare of hoops boards before they can get their smoking ban proposals on the books."

Neither Phillip Morris nor its lobbyists have worked on the bill, said Brendan McCormick, a company spokesman.

However, he said the company has "taken positions on similar past.

The coalition of anti-smoking groups also includes the American Lung Association and the American Lung Association.

...difference that I am aware of is ethics. When I was in school, we had a one-hour lecture on ethics. To pass, you simply had to sign in and sign out. That was your ethics course. That was before Watergate. Now, it is what, a two- or three-credit-hour course?

In recent years, a significant amount of ethics issues have come to the attention of the courts, mainly where one side is trying to force the other lawyer off the case, a conflict of some kind. In my opinion, this change is not only related to Watergate but also related to the fact that the practice of law is more like a business than it ever was. It is still a profession, but it is very competitive.

Q. What led you to teach at Cleveland-Marshall College of Law?

...being this was that I was disappointed in some of the trial work being done before me.

So, sometime around 12-15 years ago, I called the law school and asked about teaching some evening classes in trial advocacy.

Q. What were some of the problems or weaknesses you noticed about new attorneys that made you decide to try and do something about it at the instruction level?

A. Well, this is not the norm, but the lack of being prepared on both the facts and the law occurred too often. I guess what really bothered me was that it was no specific thing. When it happened, it was not just a little error here or there. It was often glaring.

...or exhibits appears to be foreign to many attorneys, in my experience.

In addition, the courtesies extended between attorneys seem to have diminished in some sense. I see more disagreeable disagreements in court than ever before. I find this disturbing. But I think it is partially as a result of the increasing influence of the business of law over the practice of law.

Q. What other courses did you teach at Cleveland-Marshall College of Law and why?

A. I taught federal jurisdiction for about three semesters. It is a very difficult course from the students' perspective. Actually, part of the difficulty of federal jurisdiction is that you have

federal jurisdiction in Florida. Sometimes it is a dry subject, but this situation will keep the interest up.

Q. On that note, how would you like to be a circuit court judge in southern Florida at this time?

A. It would be very exciting. The issues are very interesting and profound. I am curious what impact this will have in the next five years on how we conduct federal elections, especially that of the President.

It is a fascinating area of federal jurisdiction because how much can the federal government tell the states to do regarding the presidential campaign? □

■ Continued from PAGE 31

The *Print* PRINT

serves the entire chapter devoted to it in this book.

There is a very thorough discussion of the special problems inherent in RIF cases due, in part, to the unfortunate tendency of some circuits, including the Sixth, to place a higher *prima facie* burden of proof on plaintiffs in RIF cases than is used in other discrimination cases.

The authors do an excellent job of advising attorneys on how to avoid characterization of their case as a RIF case or, if that is not possible, how to discover and marshal the evidence to successfully prove discrimination despite the down-sizing arguments of the employer.

The CD-ROM included contains 85 forms that can be opened and edited using either WordPerfect or Microsoft Word. The instructions indicate that the forms are accessible using Windows 95 or 98, Windows 3.1 or Macintosh. (This reviewer was able to access the forms on a PC with Windows NT without any problem.)

The CD-ROM is easy to use, and for those extremely computer-illiterate attorneys, there is a user guide with easy-to-follow instructions and a question-and-answer section that addresses almost any question one might have. For instance, one of the questions is on the subject of sharing the forms with others. (Sharing among attorneys of the same firm at one physical location is permitted.) There is also a directory of the forms on the CD, with numbers corresponding to chapters of the text.

On The Down Side

So, what's not to like? The main drawback of the book for Ohio practitioners is the almost total concentration on federal law and the concomitant lack of discussion of compensatory damages. Because such damages can be recovered under Ohio law but not under the ADEA, most plaintiff attorneys bring a state law claim along with — or instead of — the federal claim. Thus, a discussion of the sort of

emotional distress suffered by victims of age discrimination would be helpful.

Also missing is any mention of unemployment compensation results and proceedings. Representation of an age claimant in an unemployment hearing, or simply listening to the audio tape of the hearing, which is available in Ohio for only fifteen dollars, can provide some valuable information about the employer's position.

In the chapter on discovery, there is no mention of Federal Rule of Civil Procedure 26 and its mandatory disclosure requirements. Nor is there any mention of the limits imposed by many courts on the numbers of interrogatories and requests for admissions. Both the Northern and Southern District Courts of Ohio have such limits. The Northern District also limits the number of depositions depending on the complexity of the case. (To be fair, I must note that it does appear that the form interrogatories provided could meet limits imposed by local rules.)

One feature of the book relating to its

discussions of substantive law may be viewed as negative by some but positive by most. I am here referring to the repetition in the book of some of the substantive case law. For instance, the burdens of proof in age discrimination cases are discussed in the chapters on client intake, discovery, proof, and summary judgment. While there is consequently some redundancy, I do not think the busy practicing attorney involved in a specific phase of litigation will object to finding relevant case law in the discussion of that phase, even though it is also discussed elsewhere.

But these are minor deficiencies, and on balance are far outweighed by the positive aspects of the book. The cost is relatively modest, especially considering the inclusion of the CD-ROM with forms. Annual updates are promised, though one would hope that the cost of updates will not be prohibitive, as is the case with some treatises. Nevertheless, even without updates, this book could prove to be invaluable for employment lawyers, especially those representing older employees. □

CHECK OUT OHIO LAWYERS WEEKLY ON THE INTERNET!

<http://www.ohiolawyersweekly.com>