

## CA COURT HOLDS DISCRIMINATION VIOLATES UNFAIR COMPETITION LAW

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A California court of appeal recently extended California's unfair competition law to cover age and other forms of discrimination.

Richard Herr, who was over 40, was an exemplary employee for Nestle U.S.A., Inc. (Nestle). During his employment, Nestle's European upper management team issued a company-wide "objectives" memorandum, stating that Nestle would "continue hiring, identifying and developing young people to have in the long-term, enough resources for future management."

Over the course of several years, Nestle passed over Herr for several promotions in favor of younger, less experienced employees. Eventually Herr resigned, and sued Nestle for age discrimination under the California Fair Employment and Housing Act (FEHA). In addition, he alleged that Nestle had engaged in unfair competition in violation of Business & Professions Code section 17200.

A jury concluded that Nestle intentionally discriminated against Herr because of his age and awarded Herr more than \$5 million for the FEHA violation. The court then concluded that Nestle's age discrimination constituted an unfair and unlawful business practice under section 17200. The court found that employers who discriminate against older-and typically more highly compensated-employees have an unfair competitive advantage against employers who comply with FEHA.

The court rejected Nestle's contention that section 17200 was intended only to protect consumers from the effects of unfair competition, and not to protect employees from employment discrimination. The court ordered Nestle to repudiate certain discriminatory business policies and disclose to its entire workforce the details of Herr's \$5 million judgment.

The court of appeals upheld both the verdict and the court's order. Based on these conclusions, the court ordered Nestle to issue a memo to all employees repudiating the discriminatory objectives memo and communicating all aspects of Herr's judgment to all Nestle employees.

This case demonstrates the potential scope of section 17200 unfair competition claims against employers. Failing to control workplace discrimination can lead to adverse financial consequences and substantial employee morale problems when employers are forced to take steps like those imposed on Nestle. *Herr v. Nestle, U.S.A., Inc.* 109 Cal. App 4th 779 (2003)

### What Should You Do?

- Have your legal counsel review broad statements of employment policy for material that can be interpreted as contrary to anti-discrimination law.
- Base personnel decisions on objective considerations of individual performance.
- Carefully review adverse employment decisions involving employees over the age of 40, especially for those who have received good performance reviews, prior to implementing them.

