

5-5-1992

**Panel Allows Excerpt from Age Bias Claim The Decision By
Attorney (New York Law Journal)**

Deborah Pines

NYLJ

Panel Allows Age Bias Claim By Attorney

Exemption from Federal Law Refused on Appeal

BY DEBORAH PINES

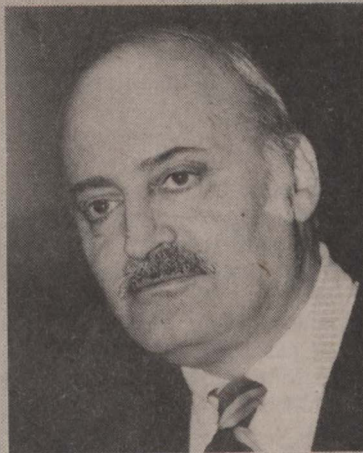
AN AGE-discrimination claim by a former Deputy Monroe County Attorney was properly allowed to go to trial because such jobs are not exempt from a key federal anti-bias act, a federal appeals panel in Manhattan ruled yesterday.

The claim by Lawrence F. Tranello, 64, does not fall under the section of the Age Discrimination in Employment Act that exempts appointees of an elected official on a policymaking level, Judge Roger J. Miner wrote for the U.S. Court of Appeals for the Second Circuit in *Tranello v. Frey*, 91-7944.

Because Mr. Tranello was appointed to the deputy's job in 1985 by the Monroe County Attorney — an appointed not an elected official — his position was not exempt regardless of whether it was "on the policymaking level," Judge Miner wrote.

The decision — joined by Circuit Judge Wilfred Feinberg and Southern District Judge Robert P. Patterson Jr., sitting by designation — affirms a denial of summary judgment to the county on the ADEA claim, issued last year by Western District Judge David G. Larimer. That claim was the only one to survive a motion to dismiss by three defendants: the County of Monroe, former County Executive Thomas

Excerpt from The Decision



PHOTOGRAPH BY FAYE ELLMAN

Judge Roger J. Miner

'We refuse to stretch the language and purpose of the exception to reach so broadly, lest the exception swallow the rule and defeat the statutory purpose.'

Judge Miner, in unanimous decision by appeals panel

R. Frey and former County Attorney Patrick M. Malgieri.

Mr. Tranello, a Republican, who had worked for the county in various posts since 1972, had alleged constitutional and contractual violations as well as the ADEA claim after he was fired in 1988 when Messrs. Frey and Malgieri, both Democrats, took office.

Continued on page 6, column 4

Age Claim Allowed

Continued from page 1, column 4

On appeal, the county chiefly maintained Mr. Tranello was exempt from ADEA coverage as a "policymaker." The county argued that the statute should be construed to mean that Mr. Tranello would not have to be an appointee of an elected official.

In addition, the county maintained that a 1991 U.S. Supreme Court ruling, exempting state court judges appointed by the Governor from ADEA coverage, mandates a "plain statement" in the statute indicating coverage, *Gregory v. Ashcroft*, 111 S. Ct 2395 (1991).

Judge Miner, however, found the threshold issue on exemptions is whether an employee is appointed by an elected official. The fact that Mr. Tranello's appointment was subject to approval by the County Executive, an elected official, does not make him an appointee of the County Executive, Judge Miner held.

"We refuse to stretch the language and purpose of the exception to reach so broadly, lest the exception swallow the rule and defeat the statutory purpose," Judge Miner wrote.

Judge Miner also found the "plain reading" test in *Gregory* irrelevant because it applied to state judges who were appointees of an elected official, while Mr. Tranello was not. While rejecting analogies to cases which involved appointees of elected county attorneys, Judge Miner cited positively a ruling last November by Southern District Judge Vincent Broderick allowing trial of an age discrimination claim brought by a Westchester Assistant County Attorney (*NYLJ*, Nov. 15, 1991).

In addition to ruling on the ADEA claim, Judge Miner also dismissed for lack of jurisdiction a cross-appeal filed late by Mr. Tranello challenging the portion of the district court's order granting summary judgment for the defendants.

Nira T. Kirmisch of Rochester represented Mr. Tranello. J. Mark Krause and Gerald L. Paley of Phillips, Lytle, Hitchcock, Blaine & Huber, represented Monroe County. Samuel A. Marcoson, Donald R. Livingston, Gwendolyn Young Reams and Vincent J. Blackwood of the Equal Employment Opportunity Commission in Washington, D.C., filed an amicus brief on behalf of Mr. Tranello.