

CONVICTS CAN TAKE CARE OF PENNSYLVANIA'S ELDERLY: PENNSYLVANIA COURT RULES THAT PROVISION OF OLDER ADULT PROTECTIVE SERVICES ACT UNCONSTITUTIONAL

EXECUTIVE SUMMARY

On December 30, 2015, the Pennsylvania Commonwealth Court struck down a provision of the Older Adults Protective Services Act that barred individuals convicted of certain crimes, such as murder and rape, from working in nursing homes or other health care facilities serving the elderly. In *Tyrone Peake et. al. v. Commonwealth of Pennsylvania*, the court ruled that Section 503(a) of the Older Adult Protective Services Act violated the state's constitutional right to due process.

DETAILS OF CASE

The lead plaintiff in the case, Tyrone Peake, was convicted of automobile theft when he was eighteen years old and served three years of probation but was never imprisoned. Peake, now 52 years old, received his associate's degree in behavioral health and has been able to obtain several jobs despite his criminal record. Yet, Peake is precluded from obtaining employment with a nursing home facility or elder care facility. Peake along with the other plaintiffs filed a petition for review seeking declaratory and injunctive relief from the lifetime employment ban of the Older Adult Protective Services Act. In the petition for review, plaintiffs alleged that recent social science research shows that lifetime employment bans are built on a faulty premise because the risk of recidivism declines over time and eventually loses any meaningful value in predicting future criminal conduct.

The Older Adult Protective Services Act (the "Act") requires that all applicants seeking employment at a nursing home or other health care facility providing services to elder adults must submit to a criminal history background check. In 1997, Section 503 of the Act was amended and provided that a health care facility is prohibited from hiring or retaining an employee if the criminal background check reveals the applicant has been convicted of a crime from a list of offenses that includes rape, kidnapping and murder. At the time of the amendment's enactment, all employees who had been working at a health care facility for less than a year were required to undergo the criminal history background check. If the background check revealed a disqualifying conviction, the health care facility was required to terminate the employee as of July 1, 1998. However, health care facilities were not required to terminate employees with disqualifying convictions who had been employed for more than one year. This category of employees would be banned from future employment with another health care facility if they chose to leave their current job. Categorizing employees in this manner raised a constitutional challenge, and the Pennsylvania Supreme Court concluded that there was no rational basis for prohibiting employment of those individuals working less than a year compared with those individuals who had maintained their jobs for more than one year. However, the Pennsylvania Supreme Court limited the ruling only to the individual petitioners in that case. Following the ruling, the Pennsylvania Department of Aging did adopt an interim policy that permitted applicants with disqualifying conditions to become eligible for employment for working in nursing home facilities by working five years in the dependent care field. The Pennsylvania General Assembly never repealed or significantly amended the lifetime employment ban of the Act.

In ruling on the case, the court held that the Act is not substantially related to the objective purpose of protecting older adults. The court applied the "plainly legitimate sweep" standard in evaluating whether the Act is facially constitutional. This standard examines whether a statute is facially invalid when its constitutional deficiency is so evident that proof of actual unconstitutional applications is unnecessary. In this case, the lifetime employment ban is facially unconstitutional because it applies only to individuals not employed in a nursing home facility for at least one year as of July 1, 1998 and establishes an impermissible irrefutable presumption of unfitness for employment for anyone ever convicted of a crime.

PRACTICAL TAKEAWAYS

State officials have not indicated if they will appeal this decision, but nursing home and elder care facilities should continue to monitor this case. If the state chooses not to appeal this case, nursing home and elder care facilities should consider reevaluating their hiring practices in light of this decision.

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