

Division of Professional Relations  
1155 16th Street, NW  
Washington, DC 20036

DENNIS CHAMOT, *Editor*



No. 37  
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## FROM THE EDITOR . . .

### Report from New York

Good news on the Councilor front, for a change. It looks like we will keep our second Councilor for next year. CPC announced the new cutoffs at the Council meeting—800/2400. Our official count on the appropriate date was a bit over 800, so we retain both Councilors. We are not in the clear, though. As a result of our efforts to achieve some stability in these figures (we had wanted the cutoffs unchanged from year to year, as long as they were mathematically workable), petitions have been submitted to amend the by-laws so that the cutoffs would be adjusted every four years. On the surface, this looks quite good. However, we have a major membership effort ahead of us, and this is why. If the amendment passes at the Anaheim meeting, and our count at the end of this year is below the cutoff established next spring, we drop to one Councilor, *and remain at that level of representation for four years, 1988–91*. So let's get out and push for a thousand!

One of the most spirited discussions at the Council meeting revolved around the dues increase. According to the formulas currently in place, the dues were scheduled to rise by \$4.00, unless Council voted a lesser amount. Several Councilors (including yours truly) questioned the budgeting procedures devel-

oped recently, and thus spoke against the increase as a way to send a message. In particular, I was concerned about the "tail" (the publishing business) becoming so large that it not only wagged the "dog" (member-oriented activities), but virtually obscured the dog. In fact, the tail is now nine-tenths of the budget! With that kind of a ratio, it is easy to lose sight of what a membership society is all about. In the end, of course, the full dues increase went through. Also true to form, a call for a record vote was defeated.

The budgeting procedure was discussed at both the Economic Status Committee and the Professional Relations Committee meetings. If you have thoughts or suggestions on this issue, including suggestions for restructuring the Society, send them to me and I will pass them on to the appropriate folks.

### Low Dues

If any of you will be qualifying for retired or emeritus status, or if you already have, or if you know of chemists who qualify for either of these ACS membership categories, contact the Division's Secretary to secure the

same category of membership in the Division. In doing so, you will receive a reduction of your DPR dues. Our dues are pretty minimal to begin with, but this is just a small token in recognition of the past services of our older chemist colleagues.

Spread the word. Older chemists, younger chemists, women chemists, minority chemists, academic chemists, industrial chemists, *all* chemists are welcome in the membership oriented division!

### Special Note

Unemployed members may defer Division dues until they are re-employed. If you are in such an unfortunate condition, we would like to keep you in the Division until, and after, your situation improves. Contact the DPR Secretary, Dr. Paul Rebers, NADC, P.O. Box 70, Ames, Iowa 50010.

# SUCCESSFUL RESOLUTION OF AN AGE DISCRIMINATION SUIT

Erwin Klingsberg  
1597 Deer Path  
Mountainside, NJ 07092

I'd like to review the history of my lawsuit, and the events leading up to it, in the hope that something can be learned from the experience. I joined American Cyanamid in 1946, two years after receiving my Ph.D. degree from the University of Rochester. At first I did patent work, but in the 50s I went into research and I spent the rest of my 35 years with the company as a bench chemist doing synthetic work. For a time the research environment was tolerable, and my work produced a number of important benefits for the company. The most outstanding of these, but not the only one by any means, was the herbicide AVENGE<sup>®</sup>, which the company featured as a highlight in its own official history along with a few things like the sulfa drugs and aureomycin. AVENGE<sup>®</sup> was patented all over the world.

Unfortunately, however, this environment deteriorated dreadfully in the late 1960s. What happened, in a word, was that research was taken over by bookkeepers. Nothing was approved unless it could be justified in advance on bookkeeping principles. This meant, of course, that research simply went out the window, because anything that can be justified in advance on bookkeeping principles is not research.

The result was total demoralization and collapse of research. When it became clear that nobody in the Chemical Research Division was prepared to take corrective action or even to admit that a problem existed, I myself went to the chairman of the board of the company, and put the case to him. He freely admitted that things were in pretty bad shape and promised to do something about it, but never did. By that time the top management was beginning to wake up to the fact that the money being spent on research didn't seem to produce much result, and they commissioned a retiring research director who like me had spent many years with the company, to draw up a diagnosis of the ills of Cyanamid research. He produced a blistering indictment of the way research was managed—or rather mismanaged—in the company. His perspective was of course different from mine. He was a research director and I was a bench chemist, but we both came to similar conclusions: (1) Research at Cyanamid was a shambles; (2) It was very doubtful whether anything would be done about it.

By now you may be asking what all this has to do with age discrimination. The fact is, it has *everything* to do with age discrimination.

You see, to the bookkeeper, chemists are more or less interchangeable, like pencils or erasers. As far as the bookkeeper is concerned, if two chemists look alike, sound alike, smell alike—they are alike. The only difference that the bookkeeper *can* understand is that one chemist is being paid a little more than another. We who have made a life work of chemistry know that when it comes to productivity, chemists differ by orders of magnitude. In the course of a lifetime one chemist may produce nothing while another with similar training produces new products worth many millions of dollars, or at a university a string of papers that may win a Nobel prize.

All of this is far beyond the grasp of the bookkeeper. The bookkeeper looks at the price tags, and where possible will try to save 15% on a gross of pencils, or on a chemist. And here we come to the crux of the matter, because the chemist who is earning 15 or 20% more is, of course, the older chemist. But if your hiring and firing practices systematically favor chemists who are earning less money as against those who are earning more, then you are by the same token favoring younger chemists as against older chemists, and this, in fact and in law, is age discrimination, whether or not you intend it as such and whether or not you realize it.

One day, without any warning whatsoever, I was summoned by my boss and his boss and told, this is the end of the line for you. I replied on the spot, this is age discrimination and I am taking legal action.

I lost no time engaging an attorney, a man with a big reputation who was highly recommended by a number of people. He started out by sending a very polite, even deferential, letter to the chairman of the board, who of course knew me and knew very well what I had done for Cyanamid. My attorney suggested in his letter that we had a problem here that could be handled by a friendly discussion. The letter was ignored.

In this period of a few weeks immediately after my dismissal, I also went to the ACS, which took a great deal of interest in the case. However they told me that they would not intervene after a suit had been filed, so we held back to give them a chance to make their inquiries. The ACS consultants approached the company, but were only permitted to see a couple of people who hardly knew me, and who told them that this was an unfortunate action forced upon the company

by business conditions but did not reflect in any way upon Dr. Klingsberg, who was an outstanding man as everybody knew. Period. At this point we were still well within the six month statutory period for filing and I gave my attorney the green light to bring suit, which he did in March of 1982.

Now, a scientist who steps out of the laboratory into a law office may just be crossing the street but he or she is entering a different universe. Rather than spend a lot of time upon this point I will simply recommend a book that should probably be ready by anybody who is contemplating litigation, and by a lot of other people besides. It has a rather provocative title "All the Justice I Could Afford." The author is Eugene B. Goodman, the publisher is Harcourt Brace.

My experience was very different from Goodman's in most essentials, but the moral in both cases is, watch out for surprises. My attorney had some very nasty surprises in store for me, of which the nastiest was his choice of a court system. In New Jersey and no doubt in many other states there are parallel systems of courts, one with juries and one without, where the cases are heard only by a judge. Without saying anything about it, he filed suit in the so-called Chancery Division, where there are no juries. When I found out I was appalled. I believed all along that my case would play best before a jury, and I could not understand how a lawyer, supposedly representing my interests, could, without consulting me first, take this step that in effect deprived me of my constitutional right to a jury trial.

For this and other good and sufficient reasons I had to dismiss this lawyer, and I consider myself lucky that I found Paul Schachter, a far superior attorney who took over and by his very careful and thorough work brought the case to a successful conclusion. But even he was forced to conclude that, as a practical matter, there was no possibility of reinstating a jury trial.

The lawsuit began with the filing of my complaint setting forth the cause of action, in this case age discrimination. American Cyanamid, the defendant, replied by denying everything. With these formalities over, we then moved into what is called the discovery period, which can be rather prolonged and which is used to develop as thoroughly as possible the evidence and arguments on both sides. Before the courtroom proceedings begin, the opposing positions are developed fully and in documentary form, so that each side knows the other's position and the judge can study both, in advance. The discovery period began with written questionnaires,

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Lecture delivered April 14, 1986 at a DPR symposium on wrongful termination held at the American Chemical Society national meeting in New York City. The opinions expressed are those of the author.

submitted by me to the company and by the company to me.

The next stage consisted of depositions for both sides. Here we are a good deal closer to an actual court proceeding, inasmuch as the questions and answers are spoken rather than written, and again with the force of sworn testimony. Attorneys for both sides are present and there is an official stenographer to record everything, but the judge assigned to the case is not there. Another important difference from actual trial is that there is no cross examination.

By now the Cyanamid position had become clear. My contention was that they fired me because I was 60 years old. They denied this flatly and maintained that they fired me for cause. What was the cause? Very simple. In my annual performance reviews, my rating had slipped. I had been getting ratings of "Excels," but I slipped one notch, to "Satisfactory." So they fired me. There was never any contention that my performance at any time had ever been considered unsatisfactory. Not at all. Nor was there any contention that I had ever been warned that I had better improve my performance, or else—not at all. I had slipped down one notch from the top and that was it.

In my view, Cyanamid, was taking the following position:

We cannot deny that Dr. Klingsberg is an outstanding scientist with an international reputation. We cannot deny that his research is creating millions upon millions in profits for American Cyanamid. We cannot deny that during his 35 years of service he in fact proved to be one of the most valuable employees in the history of the company. But sad to relate, Dr. Klingsberg's performance rating slipped a notch, from Excels to Satisfactory. So we fired him. Without warning.

One might suppose that, in the courtroom, this manifest absurdity would have collapsed of its own weight. But naturally we did not want to take any chances, and we were in a position to shoot down this flimsy defense, ridiculous as it was, in several different ways.

In the first place, we could show that the entire performance review system was not taken seriously in the company, but was generally regarded as futile and counterproductive. We had in our possession management communications to this effect, and if necessary we could have backed it up by courtroom testimony. In addition, my last performance review was in the fall of 1980. A few months later, in the spring of 1981, I received a healthy raise, one of the biggest I had ever received. Furthermore, at about the same time early in 1981, my boss recommended me, in recognition of outstanding accomplishment, to be appointed Distinguished Research Fellow, at the top of the professional ladder. This represented a jump of several rungs up the ladder, to the highest position available to a non-management scientist.

It seems clear that at this stage of the game nobody was bothered very much by my performance review. And a few months after that I was fired, allegedly on the basis of that

same performance review.

In addition, I will remind you here of what happened when the ACS people came to see Cyanamid, and were told that there was absolutely no complaint about Dr. Klingsberg's performance, that the decision to fire him was the result of unfortunate business necessities that did not reflect upon him in any way. This of course flatly contradicted the defense that they cobbled together after I sued.

I of course was not the only employee who lost his job, far from it, and to continue the story here we should take a look at certain features of the law. I must mention Practicing Law Institute, a New York-based organization that offers short courses in many aspects of the law. You don't have to be a lawyer to attend, and each course comes with a handbook that summarizes the lectures and is a very useful adjunct to the course. I attended one of these courses in March 1983, on "Age Discrimination Problems in the Context of a Reduction in Work Force." One of the most important things I learned was the following: If a company is charged with discriminatory firings and argues that it was forced, by business or other conditions, to reduce its staff, this is not an acceptable defense by itself. If a reduction in staff was in fact necessary, the company must in addition show that the reduction was carried out in a nondiscriminatory fashion.

We had not disputed the occurrence of a reduction in work force; we were simply contending that it had in fact been carried out in highly discriminatory fashion. To prove this, we had to see the company employment records for the period in question. Cyanamid was, of course, not very eager to produce these records, but they went to the heart of the case, and here Paul Schachter's skill and determination paid off. He persuaded the judge to order them to be produced. What did they show? Remember that the occurrence of a reduction in work force had, from the beginning, been more or less tacitly accepted. An official of the company had deposed, under oath, that they had a surplus of organic chemists. We did have reason to be suspicious. Almost simultaneously with my dismissal, young chemists were hired for my own laboratory in Bound Brook, to do work for which I was perfectly well qualified. A couple of months later the company was advertising a vacancy in another laboratory location that suited me to a T. But until we could inspect the company records, we could not get a look at the whole picture. So we were just not prepared for the revelation that the company was hiring young chemists right along, and was systematically practicing illegal age discrimination by firing older chemists and replacing them with younger ones. These changed the whole basis of the case.

We had now reached the final stages of the pretrial period, and we had to give thought to the expert testimony. A number of distinguished chemists willingly agreed to testify on my behalf and I shall always be grateful for their support. Their most important task was to confront head-on the Cyanamid defense based on my performance review, by

testifying that my job performance had never deteriorated in any respect. This was easy to do because we had my monthly research reports, which showed what I had been doing from month to month during my last years with the company. It was clear that I continued to produce new products, which were creating great excitement in the applications department, where I was told that these were just what was needed to put new life into a badly demoralized sales organization. I had actually gone at my own expense to a scientific meeting in Austria in the summer of 1981 to give a research paper on this work in the hope of stimulating interest in its scientific and commercial possibilities. I was fired only a few weeks later.

A lawsuit is a tortuous process, and we had our share of postponements and delays. Time and again court-imposed deadlines were not met. All of this is of course to the advantage of the corporate defendant, and imposes an additional burden and expense on the plaintiff.

When the September trial date was finally at hand, the company, as so often happens, began to talk out-of-court settlement. A very high proportion of all lawsuits are settled in this way, partly because court calendars are overcrowded. Some experts say that the judges exert undue and excessive pressure on attorneys to reach settlements. Cyanamid's first offer was so ridiculous that my attorney refused to waste time by passing it on to me. Then they upped the ante, and when they started talking about a six-figure sum, Paul advised me to take it. I was very unenthusiastic for a number of reasons, but he did a fair amount of arm twisting and I finally agreed to accept. In retrospect I have come to believe that he was probably right, especially in the light of what I have since learned about the outcome of a number of other cases.

During this last stage, Cyanamid tried the usual gambit of including a secrecy clause in the settlement agreement, but I refused flatly. I believe that this secrecy is a very pernicious practice that has concealed from public view the seriousness of the discrimination problem, and this time I succeeded in hanging on to my Constitutional right—the right of free speech. As a consequence I am under no legal restraint but am perfectly free to stand before you today and tell the truth.

Through all the ups and downs of this lawsuit, my certainty never wavered, that my case was unlosable. And so it turned out, although not in the way that I had expected, or wanted.

The difficulties, expense and uncertainty of litigation are such that I would hesitate to recommend it except to somebody who, like me, has a case that is essentially impossible to lose. If you have such a case, and if you can find a competent, dedicated, trustworthy lawyer, then don't hesitate to sue.

From the beginning I felt it my duty to publicize this case in every way possible, and I believe that the ACS and in particular the Professional Relations Division has performed a great public service by organizing this symposium. Let us hope that it means

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ADDRESSED, PLEASE RETURN TO:  
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AMERICAN CHEMICAL SOCIETY  
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that the dimensions of this tragedy are finally being exposed to public view. We all know, from our own experience and that of our friends and colleagues, that Cyanamid's behavior is more or less typical, certainly of a large segment of the chemical and pharmaceutical industry. We have all heard story after outrageous story. I have a good friend employed as a group leader by a major company not far from here. He was authorized to hire five or six Ph.D.s to start a new project, but he hasn't been able to hire a single one, because his superiors refuse even to consider hiring any chemist past the age of 30 or 32.

There can be no doubt that these outrageous practices, both in hiring and firing, have done immense and lasting harm to the chemical profession in this country, and by the same token to the future prospects of the chemical industry itself.

This industry was created by chemists and

chemical engineers. It was not created by salesmanship or by stock manipulation, but by chemists and chemical engineers. Its future cannot be guaranteed by corporate take-over pirates, by advertising geniuses, or by bookkeepers—even by bookkeepers with MBA degrees. Its future, if it is to have a future, will have to be *created* by the same kind of people who created the industry in the first place: chemists and engineers. By its wanton and unconscionable waste and destruction of trained and experienced talent the industry has spread demoralization far and wide and has blighted the appeal of chemistry to bright young people choosing their life work. Make no mistake about it—word does get around, despite the inadequacy of the publicity that these events have, up to now, received. The industry will be paying the price for its misdeeds for a long time to come.

**Go for  
one  
thousand!**

**Use form,  
below.  
(Photocopies  
ok.)**

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### DPR Membership Application

I am a member of the American Chemical Society  
Enclosed is \$2.00 for dues through December 31, 1986  
(or \$4.00, through December 31, 1987).

My ACS membership number is: \_\_\_\_\_

Signature: \_\_\_\_\_

Printed Name \_\_\_\_\_  
Last First

Address: (As it appears on my C&EN mailing label.)

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\_\_\_\_\_  
\_\_\_\_\_

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