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Court Rules Against State Dept. in Age Bias Case By FREDERIC J. FROMMER Associated Press Tuesday, August 07, 2012 1:43 PM EDT

WASHINGTON - (AP) A divided appeals court panel ruled Tuesday that the State Department improperly dismissed a former employee solely because he turned 65.

The U.S. Court of Appeals for the District of Columbia ruled 2-1 that former employee John R. Miller was protected by the Age Discrimination in Employment Act. The court rejected the State Department's claim that the law's age discrimination protections didn't apply in Miller's case. State argued for an exemption because Miller was hired in France under a contract that followed French practice of mandating retirement at 65.

Miller is a U.S. citizen who worked in the U.S. embassy in Paris as a safety inspector and was hired as "locally employed staff." He was dismissed in 2007 when he turned 65. The appeals court decision reverses a lower court that had accepted the department's argument and dismissed the case. Tuesday's decision returns the case to the district court for action consistent with the higher court ruling.

In the majority opinion, Judge Merrick B. Garland wrote that the age discrimination law exempts aliens employed outside the U.S., but there is no exemption for U.S. citizens. Judge Judith W. Rogers joined Garland's opinion. Garland and Rogers were appointed by Democratic President Bill Clinton.

"Because Miller is a U.S. citizen employed by a federal agency who was forced to retire solely because he turned sixty-five, ... (the age discrimination law) would appear to begin and end the matter," Garland wrote. "Unless another act of Congress subsequently exempted employees like Miller from the ADEA's general coverage."

The State Department argued there was such a law. It said the Basic Authorities Act, under which Miller was hired, permitted the department to exclude him from the ADEA's protections. But Garland and Rogers were not persuaded.

"As the Supreme Court has repeatedly reminded us, Congress does not, one might say, hide elephants in mouseholes," Garland wrote. "Exemptions from the statutory protections afforded to U.S. citizens against discrimination by their own government are surely elephants. And the provisions the State Department cites as purportedly authorizing such exemptions are surely mouseholes \_ and well-camouflaged ones at that."

Garland wrote that whenever Congress has wanted to exempt groups of citizens or specified circumstances from anti-discrimination laws, "it has done so clearly. It has not hidden those decisions in obscure references that require trips through multiple statutes, only to end in still further ambiguous provisions."

In a dissent, Judge Brett M. Kavanaugh called the case "not a close call."

"The problem for Miller is that federal law allows the State Department to maintain a mandatory retirement policy for personnel employed abroad," wrote Kavanaugh, an appointee of Republican President George W. Bush.

"Congress does not have to specifically address subsidiary issues encompassed by broad statutory wording," he added. "Under the majority opinion's theory, by contrast, a statute exempting 'animals' from a statutory ban on

swimming in a river wouldn't apply to dogs because the statute didn't specifically refer to dogs. That's not how courts interpret laws."

Miller's lawyer, Marshall Perkins, said in an email that his client will be seeking lost wages when the case resumes in U.S. District Court.

"Mr. Miller always believed that the State Department was wrong to terminate him solely on the basis of age when he turned 65, as Mr. Miller was fully capable of continuing in his embassy employment," Perkins said.

The State Department said it wouldn't comment because the case is still active.