



## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iv
I. JURISDICTION (Howard Flaxman and Jessica Pollock) .....	1
A. Can Individuals Sue States in Federal Court?.....	1
B. Respondents Subject to Prohibitions .....	3
1. Those Covered by the Definition of “Employer”.....	3
a. Integrated Enterprise Test .....	3
b. Individual Liability .....	6
2. Who Is an Employee?.....	7
II. PROCEDURE (Michael J. Ossip and Jennifer J. Aresco) .....	9
A. Statute of Limitations.....	9
1. The Statute of Limitations for Filing an Administrative Complaint.....	9
2. 180/300 Day Distinction.....	11
3. Single Filing Rule .....	11
4. Continuing Violation Rule.....	12
5. Statute of Limitations for Suing After Administrative Remedies Are Exhausted.....	14
6. Arguments for Tolling Filing Deadlines .....	15
a. Equitable Tolling .....	16
b. Equitable Estoppel.....	17
B. Administrative Procedures .....	18
1. The EEOC’s Investigatory Powers.....	18
2. Exhaustion of Administrative Remedies Requirement .....	19

III.	BURDENS OF PROOF (Michael J. Ossip and Susan E.G. Hamilton)	21
A.	Disparate Treatment	21
1.	<u>Prima Facie</u> Case	22
a.	Direct Evidence	22
b.	Indirect Evidence	24
2.	The Employer's Burden of Production and the Plaintiff's Burden to Prove Pretext	27
3.	Business Judgment	30
B.	Disparate Impact	32
C.	Hostile Environment Liability Under the ADEA	34
IV.	AFFIRMATIVE DEFENSES (Michael J. Ossip and Jennifer J. Aresco)	35
A.	After-Acquired Evidence	35
B.	Other Defenses	37
1.	Waiver and Estoppel	37
2.	Reasonable Factors Other Than Age	39
3.	Mixed Motive Cases	39
4.	BFOQ	40
V.	BENEFITS (Michael I. Bernstein and David M. Safon)	41
A.	Age-Based Distinctions	41
1.	Releases	44
a.	Validity	44
b.	Pre-Dispute Agreements to Arbitrate	45
c.	Post-Oubre, Tender Back Cases	46

d.	Post-Oubre OWBPA Regulations .....	47
VI.	THE REDUCTION IN FORCE (Michael I. Bernstein and David M. Safon) .....	49
A.	The <u>Prima Facie</u> Case .....	49
B.	Evidence.....	50
VII.	REMEDIES (Eugene Cavallucci).....	52

## TABLE OF AUTHORITIES

### CASES

<b><u>Abdu-Brisson v. Delta Air Lines,</u></b> No. 94-CIV-8494, 1999 WL 944505 (S.D.N.Y. Oct. 19, 1999) .....	43
<b><u>Aikins v. Tosco Ref-g Co.,</u></b> No. C-98-00755-CRB, 1999 WL 179686 (N.D. Cal. Mar. 26, 1999) .....	47
<b><u>Aka v. Washington Hosp. Ctr.,</u></b> 156 F.3d 1284 (D.C. Cir. 1998) .....	28
<b><u>American Airlines, Inc. v. Cardoza-Rodriguez,</u></b> 133 F.3d 111 (1st Cir. 1998) .....	10, 16
<b><u>Arnett v. California Pub. Employees Retirement Sys.,</u></b> 179 F.3d 690 (9th Cir. 1999), <u>cert. granted and vacated on other grounds,</u> No. 99-850, 2000 WL 29269 (U.S. Jan. 18, 2000) .....	31, 32, 42, 43
<b><u>Banks v. Travelers Cos.,</u></b> 180 F.3d 358 (2d Cir. 1999) .....	23
<b><u>Baron v. City of Highland Park,</u></b> 195 F.3d 333 (7th Cir. 1999) .....	30, 31
<b><u>Beaver v. Rayonier, Inc.,</u></b> 188 F.3d 1279 (11th Cir. 1999) .....	22
<b><u>Bennett v. Coors Brewing Co.,</u></b> 189 F.3d 1221 (10th Cir. 1999) .....	10, 18, 46
<b><u>Bennett v. Total Minatome Corp.,</u></b> 138 F.3d 1053 (5th Cir. 1998) .....	30
<b><u>Bohse v. Metropolitan Water Reclamation Dist.,</u></b> 30 F. Supp.2d 1047 (N.D. Ill. 1998) .....	10, 13, 17
<b><u>Bottge v. Suburban Propane,</u></b> No. 98-CV-1865, 1999 WL 1210888 (N.D.N.Y. Dec. 15, 1999) .....	7
<b><u>Bradley v. Harcourt, Brace &amp; Co.,</u></b> 104 F.3d 267 (9th Cir. 1996) .....	23
<b><u>Brocklehurst v. PPG Indus., Inc.,</u></b> 123 F.3d 890 (6th Cir. 1997) .....	30

<b><u>Brown v. CSC Logic, Inc.</u></b> , 82 F.3d 651 (5th Cir. 1996) .....	23
<b><u>Brown v. McDonnell Douglas Corp.</u></b> , 113 F.3d 139 (8th Cir. 1997) .....	24, 31
<b><u>Bullington v. United Air Lines, Inc.</u></b> , 186 F.3d 1301 (10th Cir. 1999) .....	12
<b><u>Carlson v. WPLG/TV-10</u></b> , No. 94-0228-CIV, 1996 WL 713007 (S.D. Fla. Apr. 23, 1996) .....	35
<b><u>Chriaramonte v. Fashion Bed Group, Inc.</u></b> , 129 F.3d 391 (7th Cir. 1997), <u>cert. denied</u> , 523 U.S. 1118 (1998) .....	22
<b><u>Cleveland v. Policy Management Sys. Corp.</u></b> , 526 U.S. 795 (1999) .....	38
<b><u>Coco v. Elmwood Care, Inc.</u></b> , 128 F.3d 1177 (7th Cir. 1997) .....	25
<b><u>Combs v. Plantation Patterns</u></b> , 106 F.3d 1519 (11th Cir. 1997), <u>cert. denied</u> , 522 U.S. 1045 (1998) .....	29
<b><u>Cordes v. Gaymar Indus.</u></b> , 1999 U.S. Dist. LEXIS 13717 (W.D.N.Y. June 22, 1999) .....	50
<b><u>Coupe v. Federal Exp. Corp.</u></b> , 121 F.3d 1022 (6th Cir. 1997), <u>cert. denied</u> , 523 U.S. 1020 (1998) .....	40
<b><u>Cullen v. Olin Corp.</u></b> , 195 F.3d 317 (7th Cir. 1999) .....	51
<b><u>Damon v. Fleming Supermarkets of Fla., Inc.</u></b> , 196 F.3d 1354 (11th Cir. 1999) .....	26
<b><u>Dasgupta v. University of Wis. Bd. of Regents</u></b> , 121 F.3d 1138 (7th Cir. 1997) .....	13
<b><u>Debs v. Northeastern Illinois Univ.</u></b> , 153 F.3d 390 (7th Cir. 1998) .....	24
<b><u>Delazaro vs. Lehigh Univ.</u></b> , No. 98-CV-432, 1999 WL 54566 (E.D. Pa. Jan. 29, 1999) .....	34
<b><u>Devlin v. Transportation Communications Int'l Union</u></b> , 175 F.3d 121 (2d Cir. 1999) .....	44

**Diaz v. Antilles Conversation & Export, Inc.**,  
**62 F. Supp.2d 463 (D.P.R. 1999)** ..... **6, 17**

**DiBiase v. SmithKline Beecham Corp.**,  
**48 F.3d 719 (3d Cir.), cert. denied, 516 U.S. 916 (1995)** .....**32**

**Dilla v. West**,  
**4 F. Supp.2d 1130 (M.D. Ala. 1998),**  
**amended on other grounds, 31 F. Supp.2d 1347 (M.D. Ala. 1999)** .....**31**

**District Council 37 v. New York City Dep't of Parks and Recreation**,  
**113 F.3d 347 (2d Cir. 1997)** .....**33**

**Dobson v. Strain**,  
**No. 97-3463, 1999 WL 246652 (E.D. La. Apr. 23, 1999)** .....**41**

**Donovan v. Dairy Farmers of Am., Inc.**,  
**53 F. Supp.2d 194 (N.D.N.Y. 1999)** .....**40**

**EEOC v. American & Efirid Mills, Inc.**,  
**964 F.2d 300 (4th Cir. 1992)** ..... **18, 19**

**EEOC v. AT&T Co.**,  
**36 F. Supp.2d 994 (E.D. Ohio 1998)** .....**15**

**EEOC v. Dillard Dep't Stores, Inc.**  
**1998 WL 25548 (N.D. Tex. Jan. 9, 1998)** .....**19**

**EEOC v. Manville Sales Corp.**,  
**27 F.3d 1089 (5th Cir. 1994), cert. denied, 513 U.S. 1190 (1995)** .....**25**

**EEOC v. McDonnell Douglas Corp.**,  
**191 F.3d 948 (8th Cir. 1999)** ..... **50, 52**

**Ellis v. United Airlines, Inc.**,  
**73 F.3d 999 (10th Cir.), cert. denied, 517 U.S. 1245 (1996)** ..... **31, 32**

**Ellison v. Premier Salons Int'l, Inc.**,  
**164 F.3d 1111 (8th Cir. 1999)** .....**44**

**Ercegovich v. Goodyear Tire & Rubber Co.**,  
**154 F.3d 344 (6th Cir. 1998)** .....**25**

**Evans v. Atwood**,  
**38 F. Supp.2d 25, 30 (D.D.C. 1999)** .....**32**

**Fagan v. New York State Elec. & Gas Corp.**,  
186 F.3d 127 (2d Cir. 1999) .....41

**Fairchild v. Forma Scientific, Inc.**,  
147 F.3d 567 (7th Cir. 1998) .....24

**Fisher v. Ultradata Corp.**,  
No. 3:98CV1024L, 1999 WL 362788 (N.D. Tex. June 4, 1999) ..... 50, 51

**Gantt v. Wilson Sporting Goods Co.**,  
143 F.3d 1042 (6th Cir. 1998) .....32

**Gorman vs. Imperial Metal and Chem. Co.**,  
No. 97-4764, 1999 WL 124463 (E.D. Pa. Feb. 12, 1999) .....5

**Grace v. Ansul, Inc.**,  
61 F. Supp.2d 788 (N.D. Ill. 1999).....39

**Griggs v. Duke Power Co.**,  
401 U.S. 424 (1971) .....34

**Gustafson, Inc. v. Bunch**,  
No. 397CV2102D, 1999 WL 766020 (N.D. Tex. Sept. 24, 1999) .....44

**Halloway v. Milwaukee County**,  
180 F.3d 820 (7th Cir. 1999) ..... 23, 24, 25

**Harris v. SmithKline Beecham**,  
27 F. Supp.2d 569 (E.D. Pa. 1998),  
aff'd, 1999 U.S. App. LEXIS 34166 (3d Cir. Nov. 19, 1999) .....19

**Hartnett v. Chase Bank of Texas National Association**,  
59 F. Supp.2d 605 (N.D. Tex. 1999) ..... 15, 16, 17, 45

**Hazen Paper Co. v. Biggins**,  
507 U.S. 604 (1993) ..... 31, 33, 42, 43

**Helm v. South African Airways**,  
No. 84-CIV-5404, 1987 WL 13195 (S.D.N.Y. June 25, 1987) .....8

**Henkin v. AT&T Corp.**,  
No. 1:98-CV-2198, 1999 WL 1399675 (N.D. Ga. October 13, 1999) .....42

**Hennessey v. Good Earth Tools, Inc.**,  
126 F.3d 1107 (8th Cir. 1997) .....23

**Hernandez Arce v. Bacardi Corp.**,

<b>37 F. Supp.2d 112 (D.P.R. 1999)</b> .....	<b>16</b>
<b><u>Hiler v. Brown,</u></b> <b>177 F.3d 542 (6th Cir. 1999)</b> .....	<b>6</b>
<b><u>Hipp v. Liberty National Life Insurance Co.,</u></b> <b>65 F. Supp.2d 1314, 1340 (M.D. Fla. 1999)</b> .....	<b>36</b>
<b><u>Hoffman v. MCA, Inc.,</u></b> <b>144 F.3d 1117 (7th Cir. 1998)</b> .....	<b>21, 22</b>
<b><u>Hollander v. American Cyanamid Co.,</u></b> <b>172 F.3d 192 (2d Cir. 1999), <u>cert. denied</u>, 120 S. Ct. 399 (1999)</b> .....	<b>28</b>
<b><u>Hopper v. Hallmark Cards, Inc.,</u></b> <b>87 F.3d 983 (8th Cir. 1996)</b> .....	<b>25</b>
<b><u>Houston v. Sidley &amp; Austin,</u></b> <b>185 F.3d 837 (7th Cir. 1999)</b> .....	<b>14</b>
<b><u>Hu v. Skadden, Arps, Slate, Meagher &amp; Flom LLP,</u></b> <b>No. 97-CIV-2256, 1999 WL 1095347 (S.D.N.Y. Dec. 2, 1999)</b> .....	<b>8</b>
<b><u>Hunt v. District of Columbia Dept. of Corrections,</u></b> <b>41 F. Supp.2d 31 (D.D.C. 1999)</b> .....	<b>16</b>
<b><u>International Bd. of Teamsters v. United States,</u></b> <b>431 U.S. 324 (1977)</b> .....	<b>32</b>
<b><u>Isenbergh v. Knight-Ridder Newspaper Sales, Inc.,</u></b> <b>97 F.3d 436 (11th Cir. 1996), <u>cert. denied</u>, 521 U.S. 1119 (1997)</b> .....	<b>26</b>
<b><u>Iwata vs. Stryker Corp.,</u></b> <b>59 F. Supp.2d 600 (N.D. Tex. 1999)</b> .....	<b>8</b>
<b><u>Jackson v. E. J. Brach Corp.,</u></b> <b>176 F.3d 971 (7th Cir. 1999)</b> .....	<b>28</b>

<b><u>Jones v. Westinghouse Elec. Corp.</u></b> , 1999 U.S. Dist. LEXIS 5750 (D. Md. Mar. 26, 1999) .....	49
<b><u>Kames v. Summit Stainless, Inc.</u></b> , 586 F. Supp. 324 (E.D. Pa. 1984) .....	3
<b><u>Keller v. Orix Credit Alliance, Inc.</u></b> , 130 F.3d 1101 (3d Cir. 1997) .....	35
<b><u>Kellett vs. Glaxo Enters., Inc.</u></b> , No. 91-CV-6237, 1994 WL 669975 (S.D.N.Y. Nov. 30, 1994) .....	5
<b><u>Kelly v. Drexel Univ.</u></b> , 94 F.3d 102 (3d Cir. 1996) .....	31
<b><u>Kennedy v. Chubb Group of Insurance Companies</u></b> , 60 F. Supp.2d 384 (D.N.J. 1999) .....	6
<b><u>Kimel v. Florida Bd. of Regents</u></b> , 120 S. Ct. 631 (2000) .....	1
<b><u>Kohn v. AT&amp;T Corp.</u></b> , 58 F. Supp.2d 393 (D.N.J. 1999).....	6
<b><u>Kopec v. City of Elmhurst</u></b> , 193 F.3d 894 (7th Cir. 1999).....	40
<b><u>Krenik v. County of Le Sueur</u></b> , 47 F.3d 953 (8th Cir. 1995) .....	28
<b><u>Langlie v. Onan Corp.</u></b> , 192 F.3d 1137 (8th Cir. 1999) .....	51
<b><u>Levy v. United States General Accounting Office</u></b> , Nos. 97-CIV-4016, 97-CIV-4488, 1998 WL 193191 (S.D.N.Y. 1998), <u>aff'd</u> 175 F.3d 254 (2d Cir.), <u>cert. denied</u> , 120 S. Ct. 183 (1999) .....	12
<b><u>Losciale v. Port Auth. of NY, NJ</u></b> , No. 97-C 1999 WL 587928 (S.D.N.Y. Aug 4, 1999) .....	51
<b><u>Lyes v. City of Riviera Beach</u></b> , 166 F.3d 1332 (11th Cir.), <u>judgment entered by</u> , 169 F.3d 1322 (11th Cir. 1999) .....	6
<b><u>Maier v. Lucent Techs., Inc.</u></b> , 120 F.3d 730 (7th Cir. 1997) .....	32
<b><u>Manzi v. DiCarlo</u></b> ,	

**62 F. Supp.2d 780 (E.D.N.Y 1999) .....20**

**Martin v. Nannie and Newborns, Inc.**  
**3 F.3d 1410 (10th Cir. 1993) .....12**

**McDonnell Douglas Corp. v. Green**,  
**411 U.S. 792 (1973) ..... 21, 24, 27**

**McKennon v. Nashville Banner Publ-g Co.**,  
**513 U.S. 352 (1995) ..... 35, 36**

**McKenzie v. Lunds**,  
**63 F. Supp.2d 986 (D. Minn. 1999) .....14**

**McVay vs. Johnson**,  
**No. 98 CV 4909, 1999 WL 294783 (E.D.N.Y. March 24, 1999) .....6**

**Morris v. Northrop Grumman Corp.**,  
**37 F. Supp.2d 556 (E.D.N.Y. 1999) ..... 20, 49**

**Morton v. ICI Acrylics, Inc.**,  
**69 F. Supp.2d 1038 (W.D. Tenn. 1999).....11**

**Mullin v. Raytheon Co.**,  
**164 F.3d 696 (1st Cir. 1999), cert. denied, 120 S. Ct. 44 (1999) ..... 32, 33, 34**

**Nichols v. Loral Vought Sys. Corp.**,  
**81 F.3d 38 (5th Cir. 1996) .....25**

**Norton v. Sam's Club**,  
**145 F.3d 114 (2d Cir.), cert. denied, 119 S. Ct. 511 (1998) .....27**

**O'Bryan v. KTIV Television**,  
**64 F.3d 1188 (8th Cir. 1995) .....24**

**O'Connor v. Consolidated Coin Caterers Corp.**,  
**517 U.S. 308 (1996) .....26**

**Occidental Life Ins. Co. of Cal. v. EEOC**,  
**432 U.S. 355 (1977) .....15**

**Oubre v. Entergy Ops.**,  
**522 U.S. 422 (1998) ..... 46, 47**

**Owen v. Thermatool Corp.**,  
**155 F.3d 137 (2d Cir. 1998) .....21**

<b><u>Papa v. Katy Indus., Inc.</u></b> 166 F.3d 937 (7th Cir. 1999), <u>cert. denied</u> , 120 S. Ct. 526 (1999) .....	3, 4
<b><u>Pemrick v. Stracher</u></b> , 67 F. Supp.2d 149 (E.D.N.Y. 1999).....	7
<b><u>Pipitone v. United States</u></b> , 180 F.3d 859 (7th Cir. 1999) .....	53
<b><u>Pitasi v. Gartner Group, Inc.</u></b> , 184 F.3d 709 (7th Cir. 1999) .....	51
<b><u>Pleva v. Norquist</u></b> , 36 F. Supp.2d 839, <u>affd</u> 195 F.3d 905 (7th Cir. 1999) .....	41
<b><u>Price v. Marathon Cheese Corp.</u></b> , 119 F.3d 330 (5th Cir. 1997) .....	22
<b><u>Pruitt v. First Am. Nat'l Bank</u></b> , No. 98-5643, 1999 WL 552578 (6th Cir. July 23, 1999) .....	31
<b><u>Reeves v. Sanderson Plumbing Prods., Inc.</u></b> , 197 F.3d 688 (5th Cir. 1999), <u>cert. granted</u> , 120 S. Ct. 444 (1999) .....	24, 29, 39
<b><u>Regel v. K-Mart Corp.</u></b> , 190 F.3d 876 (8th Cir. 1999) .....	51
<b><u>Rhodes v. Guiberson Oil Tools</u></b> , 75 F.3d 989 (5th Cir. 1996) .....	27
<b><u>Richter v. Hook-SupeRx, Inc.</u></b> , 142 F.3d 1024 (7th Cir. 1998) .....	26
<b><u>Romig v. City of Iola</u></b> , 34 F. Supp.2d 1265 (D. Kan. 1998) .....	12
<b><u>Rosenberg v. Merrill Lynch, Pierce, Fenner &amp; Smith, Inc.</u></b> , 170 F.3d 1 (1st Cir. 1999) .....	45
<b><u>Scelza v. North Fork Bank</u></b> , 33 F. Supp.2d 193 (E.D.N.Y. 1999) .....	39, 52

<b><u>Schindler v. Bierwirth Chrysler/Plymouth, Inc.,</u></b> 15 F. Supp.2d 1054, 1958 (D. Kan. 1998) .....	23
<b><u>Seitzinger v. Reading Hosp. &amp; Med. Ctr.,</u></b> 165 F.3d 236 (3d Cir. 1999) .....	17
<b><u>Seres v. Liberty Chevrolet, Inc.,</u></b> No. 98-CIV-5999, 1999 WL 11779 (S.D.N.Y. Jan. 12, 1999) .....	7
<b><u>Sherman v. American Cyanamid Co.,</u></b> 1999 WL 701911 (6th Cir. 1999), <u>petition for cert. filed</u> , No. 99-1245 (U.S. Jan. 25, 2000) .....	27
<b><u>Sherman v. Commissioner of Internal Rev.,</u></b> No. 11665-97, 1999 Tax Ct. Memo LEXIS 236 (June 18, 1999) .....	52
<b><u>Showalter v. University of Pittsburgh Med. Ctr.,</u></b> 190 F.3d 231 (3d Cir. 1999) .....	49
<b><u>Sifre v. Department of Health,</u></b> 38 F. Supp.2d 91 (D.P.R. 1999) .....	6
<b><u>Simon v. Safelite Glass Corp.,</u></b> 128 F.3d 68 (2d Cir. 1997) .....	38
<b><u>Smith v. Berry Co.,</u></b> 165 F.3d 390 (5th Cir. 1999) .....	36
<b><u>Smith v. Borough of Wilkesburg</u></b> 147 F.3d 272 (3d Cir. 1998) .....	28
<b><u>Smith v. City of Des Moines,</u></b> 99 F.3d 1466 (8th Cir. 1997) .....	33, 39
<b><u>Smith v. World Ins. Co.,</u></b> 38 F.3d 1456 (8th Cir. 1994) .....	37
<b><u>Solon v. Gary Community Sch. Corp.,</u></b> 180 F.3d 844 (7th Cir. 1999) .....	41
<b><u>Soto v. Corporation of the Presiding Bishop of the Church of Jesus Christ Latter-Day Saints,</u></b> 73 F. Supp.2d 116 (D.P.R. 1999) .....	16
<b><u>Spencer v. Stuart Hall Co.,</u></b> 173 F.3d 1124 (8th Cir. 1999) .....	50

**St. Mary's Honor Ctr. v. Hicks,**  
**509 U.S. 502 (1993) ..... 28, 30**

**Suhy v. AlliedSignal,**  
**44 F. Supp.2d 432 (D. Conn. 1999) .....46**

**Taggi v. United States,**  
**35 F.3d 93 (2d Cir. 1994) .....53**

**Talbot v. Mobil Corp.,**  
**46 F. Supp.2d 468 (E.D. Va. 1999) .....13**

**Texas Dep't of Community Affairs v. Burdine,**  
**450 U.S. 248 (1981) .....27**

**Thiele v. Merrill Lynch, Pierce, Fenner & Smith,**  
**59 F. Supp.2d 1060 (S.D. Cal. 1999) .....46**

**Tork v. St. Luke's Hosp.,**  
**181 F.3d 918 (8th Cir. 1999) .....37**

**Tumolo v. Triangle Pac. Corp.,**  
**46 F. Supp.2d 410 (E.D. Pa. 1999) .....34**

**Turlington v. Atlanta Gas Light Co.,**  
**135 F.3d 1428 (11th Cir.), cert. denied, 119 S. Ct. 405 (1998) .....25**

**Tuttle v. Missouri Dep't of Agriculture,**  
**172 F.3d 1025 (8th Cir.), cert. denied, 120 S. Ct. 186 (1999) ..... 49, 51**

**Vannoy v. OCSEA Local 11,**  
**36 F. Supp.2d 1018, 1022 (S.D. Ohio 1999) .....49**

**Vaughan v. MetraHealth Cos.,**  
**145 F.3d 197 (4th Cir. 1998) .....28**

**Walton v. McDonnell Douglas Corp.,**  
**167 F.3d 423 (8th Cir. 1999) ..... 22, 23**

**Webber vs. Industrial Controls and Equipment, Inc.,**  
**No. 98-CV-0375E (M), 1999 WL 354505 (W.D.N.Y. May 17, 1999) .....5, 9**

**Wendt v. New York Life Ins.,**  
**No. 94-CIV-6132, 1998 WL 118168 (S.D.N.Y. Mar. 16, 1998) .....41**

<b><u>Whitehead v. Oklahoma Gas &amp; Elec. Co.</u></b> <b>187 F.3d 1184 (10th Cir. 1999)</b> .....	<b>37, 45</b>
<b><u>Williams v. Cigna Fin. Advisors, Inc.</u></b> <b>56 F.3d 656 (5th Cir. 1995)</b> .....	<b>46</b>
<b><u>Williams v. Vitro Servs. Corp.</u></b> <b>144 F.3d 1438 (11th Cir. 1998)</b> .....	<b>23</b>
<b><u>Woodhouse v. Magnolia Hosp.</u></b> <b>92 F.3d 248 (5th Cir. 1996)</b> .....	<b>22</b>
<b><u>Zaben v. Air Prods. &amp; Chems., Inc.</u></b> <b>129 F.3d 1453 (11th Cir. 1997)</b> .....	<b>21</b>

## STATUTES

<b>42 U.S.C. ' 1981</b> .....	<b>47</b>
<b>29 U.S.C. ' 621 <u>et seq.</u></b> .....	<b>1</b>
<b>29 U.S.C. ' 626(b)</b> .....	<b>1, 10, 15</b>
<b>29 U.S.C. ' 630(b)</b> .....	<b>3, 7</b>
<b>29 U.S.C. ' 633(b)</b> .....	<b>11</b>

## RULES

<b>Fed. R. Civ. P. 15(c)</b> .....	<b>14</b>
------------------------------------	-----------

**I. JURISDICTION (Howard Flaxman and Jessica Pollock)**

**A. Can Individuals Sue States in Federal Court?**

Earlier this year, the Supreme Court held in Kimel v. Florida Board of Regents, 120 S. Ct. 631 (2000), that although the Age Discrimination in Employment Act, 29 U.S.C. ' 621 et seq. (A~~A~~DEA@), does contain a clear statement of Congress=~~=~~intent to abrogate the states=~~=~~immunity, such abrogation exceeds Congress=~~=~~authority under section 5 of the Fourteenth Amendment. Therefore, the Court ruled that the ADEA is not applicable to state employees.

According to the Court, to determine whether a federal statute subjects states to suit by individuals, the congressional intent must be ~~A~~unmistakably clear@in the language of the statute. The ADEA provides that its provisions ~~A~~shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section.@ 29 U.S.C. ' 626(b). Section 216(b) provides for suits by individuals against states in any federal or state court of competent jurisdiction. Thus, Justice O=Connor wrote, the plain language of the statute provides for a suit by individuals against the states. Id. at 640.

Section 5 of the Fourteenth Amendment grants to Congress such authority to abrogate the states=~~=~~sovereign immunity by allowing suits against the states to be brought by individuals. In addition, Congress, under this section, determines ~~A~~whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.@ Id. at 644 (quoting City of Boerne v. Flores, 521 U.S. 507, 517 (1997) (citations omitted)). Nevertheless, this section also limits Congress=~~=~~power to abrogate state immunity because Congress cannot ~~A~~decree the substance of the Fourteenth Amendment=~~s~~ restrictions on the States. ~~Y~~ It has been given the power to enforce,

not the power to determine what constitutes a constitutional violation.@ Id. (quoting Flores, 521 U.S. at 519).

The Court has applied this congruence and proportionality test to proposed legislation, and has held, in some instances, that Congress did not uncover sufficient evidence of widespread discrimination to justify abrogating state immunity. See, e.g. Religious Freedom Restoration Act of 1993; and the Patent and Plant Variety Protection Remedy Clarification Act. Applying the same test to the ADEA, the Court concluded that the statute is not appropriate legislation under section 5 of the Fourteenth Amendment because the substantive requirements of the ADEA that are imposed on the states are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act.@ Id. at 635. Justice O'Connor noted that in the three unconstitutional age discrimination claims it had decided, all of the classifications based on age did not violate the Equal Protection Clause. In addition, utilizing language that might be relied upon by defendants in the private sector, the Court noted that older persons have not experienced a history of purposeful unequal treatment,@ and that old age does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it.@ Id. at 645.

The fact that older persons have not been historically discriminated against was not the only inquiry made by the Court. The legislative record, according to the Court, also confirmed that the ADEA is an inappropriate abrogation of state immunity. Id. at 636. The Court observed that Congress never identified any pattern of discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation.@ Id.

In light of the above analysis, the Court held that the ADEA is an inappropriate abrogation of state immunity. While this decision eliminates the right of a state employee to sue

his or her employer in federal court, the Court noted that state employees remain protected by state age discrimination statutes, and may recover damages from their state employers in almost every State in the country. Id. at 650.

**B. Respondents Subject to Prohibitions**

1. Those Covered by the Definition of Employer

a. Integrated Enterprise Test

The ADEA covers employers who employ 20 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. See 29 U.S.C. § 630(b). An employer with fewer than 20 employees can be covered by the ADEA if it is considered, along with another company whose employees, in the aggregate amount to over 20, an integrated enterprise. In applying this test, the court considers the following familiar factors: (i) the interrelation of operations; (ii) common management; (iii) common control of labor relations; and (iv) common ownership or financial control between the parent and subsidiary corporations. Based upon these factors, the court determines whether, even if the corporations are nominally separate, they comprise an integrated enterprise under the law. It is important to note, however, that not one of the relevant factors is itself controlling. See Kames v. Summit Stainless, Inc., 586 F. Supp. 324, 327 (E.D. Pa. 1984).

Recently, the Seventh Circuit in Papa v. Katy Industries, Inc., 166 F.3d 937 (7th Cir. 1999), cert. denied, 120 S. Ct. 526 (1999), determined that the focus of the four-part integrated enterprise test should be whether the parent corporation made the personnel decision, or whether that entity committed the discriminatory act. In reexamining the proper standard by which courts should consider the integrated enterprise test, the court noted that the purpose of this test is not to encourage or condone discrimination, but rather to spare very small firms from the potentially

crushing expense of mastering the intricacies of the anti-discrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail. @

Id.

The court further opined that this purpose or policy is unaffected by whether the small corporation is owned by a wealthy or poor person or by an individual or another corporation. Consequently, the court outlined three situations in which a small corporation should not be exempt under the ADEA and should instead be characterized as an integrated enterprise. The first situation is where the traditional conditions are present for piercing the corporate veil. The second is where an enterprise might purposefully divide itself into a number of corporations for the purpose of eluding liability under the anti-discrimination laws. For these types of cases, the corporations should be aggregated to determine how many employees each corporation has. Finally, the third situation is where the parent corporation directs the discriminatory act or policy of which the employee of the subsidiary was complaining. In that event, the parent, provided that the sum of its employees and those of the subsidiary employing the plaintiff exceeds 20, would be the liable entity. In Papa, there was no suggestion that any of the situations enumerated above existed; therefore, the court found that the parent company did not direct the plaintiff's termination.

Although coming to a similar conclusion as the one reached in Papa (based on the fact that only an employee of the smaller entity was involved in the alleged discriminatory decision), the United States District Court for the Western District of New York took a slightly different approach in Webber vs. Industrial Controls and Equipment, Inc., No. 98-CV-0375E (M), 1999 WL 354505 (W.D.N.Y. May 17, 1999). There, the court noted that in the four-part enterprise test, the second factor (centralized control of labor relations) was the central concern. The

crucial inquiry when examining the second factor is which entity actually made the relevant employment decision. While evidence to support each of the four factors is not required to determine the integrated status of an entity, it would be prudent for plaintiffs to establish all factors because courts do not readily find that related entities are single employers in discrimination cases. @ Id. at \*2. See also Kellett vs. Glaxo Enters., Inc., No. 91-CV-6237, 1994 WL 669975, at \*2 (S.D.N.Y. Nov. 30, 1994). The Webber court determined that because there was no evidence that anyone apart from a person at the smaller firm was involved in the decision to terminate the plaintiff from his employment, the two firms were not sufficiently interrelated at the time of the plaintiff's termination such that they should be deemed a single employer for purposes of establishing a claim under the ADEA. 1999 WL 354505, at \*3. See also Gorman vs. Imperial Metal and Chem. Co., No. 97-4764, 1999 WL 124463 (E.D. Pa. Feb. 12, 1999) (utilizing the following factors to find an integrated enterprise: (i) a parent company representative was in charge of the subsidiary; (ii) the companies shared employees; (iii) after the parent acquired the subsidiary the subsidiary began using the parent's employee evaluation procedures; and (iv) present or former parent company employees acted as the subsidiary's human resources manager).

Significantly, in a case that did not discuss the ADEA, the Eleventh Circuit last year determined that the integrated enterprise test was inappropriate in determining whether separate state or local entities should be counted as a single employer for purposes of meeting the statutory definition under Title VII. Lyes v. City of Riviera Beach, 166 F.3d 1332 (11th Cir.), judgment entered by, 169 F.3d 1322 (11th Cir. 1999).

b. Individual Liability

Last year, in Kennedy v. Chubb Group of Insurance Companies, 60 F. Supp.2d 384 (D.N.J. 1999), the United States District Court for the District of New Jersey held that there is no basis for imposing individual liability under the ADEA. See also Kohn v. AT&T Corp., 58 F. Supp.2d 393 (D.N.J. 1999) (holding that individuals cannot be held liable under the ADA and ADEA).

Similarly, the Eastern District of New York has declined to recognize individual liability under the ADEA. McVay vs. Johnson, No. 98 CV 4909, 1999 WL 294783 (E.D.N.Y. March 24, 1999). See also Diaz v. Antilles Conversation & Export, Inc., 62 F. Supp.2d 463 (D.P.R. 1999) (dismissing with prejudice the claims against individual defendants, even though the First Circuit and the Supreme Court have yet to decide the issue of individual liability under ADEA); and Hiler v. Brown, 177 F.3d 542, 546 (6th Cir. 1999) (refusing to hold individuals liable under the Rehabilitation Act, since the ADA, ADEA and Rehabilitation Act borrowed the definition of "employer" from Title VII). But see Sifre v. Department of Health, 38 F. Supp.2d 91 (D.P.R. 1999) (reiterating a former holding that in the context of Title VII, an individual defendant can be held personally liable under an alter ego theory where a supervisor is more than a mere supervisor, but rather, the equivalent of the employer, even though in the case at hand, the court did not apply the alter ego theory because the plaintiffs did not make such allegations regarding their individual supervisors).

Several courts held in 1999 that individuals could not be sued under the ADEA in their official capacity. See Bottge v. Suburban Propane, No. 98-CV-1865, 1999 WL 1210888 (N.D.N.Y. Dec. 15, 1999). In this case the plaintiff argued that she was entitled to bring Title VII and ADEA claims against the defendants in their official capacities even if they would not be liable individually liable for damages. Id. at \*2. The court held that this distinction between the

official and personal capacities was Amisplaced since it would place this court in the position of holding someone liable without providing plaintiff with a remedy at law.@ Therefore, the court held that the individual liability bar under Title VII and the ADEA applies to individual defendants in their official capacities as well as to situations where the plaintiff seeks prospective injunctive release against such individuals under both Title VII and the ADEA. See also Pemrick v. Stracher, 67 F. Supp.2d 149 (E.D.N.Y. 1999) (holding that the fact that the defendants were sued only in their official capacities was irrelevant, since Title VII and the ADEA do not authorize such official capacity suits); Seres v. Liberty Chevrolet, Inc., No. 98-CIV-5999, 1999 WL 11779 (S.D.N.Y. Jan. 12, 1999) (noting that there is Anothing to show that Congress intended to permit suits against individuals in their official capacity, and is not for the courts to provide some type of moral sanction against those who may or may not have engaged in prohibited conduct@).

## 2. Who Is an Employee?

The ADEA defines Aemployee@ as Any individual employed by an employer.@ See 29 U.S.C. ' 630(f). The 1984 amendments to the ADEA extended the ADEA=s coverage to Americans employed overseas by American companies or their subsidiaries. See 29 U.S.C. ' 630(f). Congress did not extend ADEA's protections to foreign nationals working abroad for American companies or their subsidiaries. See Helm v. South African Airways, No. 84-CIV-5404, 1987 WL 13195, at \*7 (S.D.N.Y. June 25, 1987).

Non-citizens working outside of the United States are not protected because they are not considered employees under the ADEA. In Iwata vs. Stryker Corp., 59 F. Supp.2d 600 (N.D. Tex. 1999), the court analyzed the definition of employee. In this case it was undisputed that Stryker Corporation was the American parent of its foreign subsidiary. It was also uncontested

that, although the plaintiff was a resident alien in the United States prior to and after his employment with the subsidiary, he was a citizen of Japan at all relevant times. In light of this alone, it was abundantly clear to the Court that plaintiff does not fall within the sphere of protection contemplated by Title VII or the ADEA. *Id.* at 604. The plaintiff also argued that Stryker controlled the Japanese subsidiary, thereby making Stryker and the subsidiary a single employer under Title VII and the ADEA. Nevertheless, the court found the degree of control, if any, that Stryker exercised over the subsidiary, irrelevant because the plaintiff was not protected under either statute.

As stated above, citizens of the United States are protected by the ADEA if they are working abroad for an American-controlled corporation. The United States District Court for the Southern District of New York last year found that conducting employment interviews in the United States and making hiring decisions in the United States for the employment of individuals working abroad does not suffice to render the employment within the United States for ADEA purposes. *Hu v. Skadden, Arps, Slate, Meagher & Flom LLP*, No. 97-CIV-2256, 1999 WL 1095347 (S.D.N.Y. Dec. 2, 1999) (citing *Denty v. SmithKline Beecham Corp.*, 109 F.3d 147, 150 (3d Cir.), *cert. denied*, 522 U.S. 820 (1997)). In *Hu*, the plaintiff, a Chinese citizen legally residing in the United States, brought an age discrimination claim due to the law firm's refusal to hire him to work in its Beijing and Hong Kong offices. The court noted that extraterritorial application of the ADEA extends only to United States citizens working abroad for United States employers and not to non-citizens applying for work in United States companies abroad. The ADEA would have applied to the plaintiff as a non-citizen only if he sought work in the United States. 1999 WL 1095347, at \*2. Significantly, the court held that the fact that the law firm conducted employment interviews and made hiring decisions in the United States did not suffice

to render the employment within the United States for ADEA purposes. Id. Though applied for in New York, the employment was deemed to be based abroad. Thus, the court held that a non-citizen, regardless of his residency, was not protected under the ADEA when applying for a job in a United States company based abroad.

## **II. PROCEDURE (Michael J. Ossip and Jennifer J. Aresco)**

### **A. Statute of Limitations**

A plaintiff bringing an ADEA claim faces two filing deadlines. The first deadline pertains to filing an administrative claim, and the second relates to the filing of a lawsuit in district court after these administrative remedies have been exhausted. A number of recent decisions have addressed several issues relating to these filing deadlines.

#### **1. The Statute of Limitations for Filing an Administrative Complaint**

The first requirement in bringing an ADEA action is that an aggrieved employee file a charge alleging age discrimination with the EEOC within 180 days after the alleged unlawful act occurred or, in a case where initial resort to state procedures is mandated, within 300 days after the occurrence of the act, or within thirty days after the individual receives notice of the termination of state proceedings, whichever comes first. 29 U.S.C. § 626(d).

The first step in addressing statute of limitations issues is to establish the date that a plaintiff's cause of action accrued and the statute of limitations began to run. The traditional rule is that the limitations period begins to run at the time of the discriminatory act, or, under the federal common law discovery rule, on the date on which the claimant discovers he has been injured. See Bennett v. Coors Brewing Co., 189 F.3d 1221 (10th Cir. 1999) (action accrues on the date the employee is notified of an adverse employment decision); Bohse v. Metropolitan Water Reclamation Dist., 30 F. Supp.2d 1047 (N.D. Ill. 1998). The Bennett case involved an

early retirement package offered by Coors. As part of the package, the plaintiffs signed a release, which contained a consideration and revocation period, stating that they would not sue Coors. When the claimants subsequently learned that Coors hired replacement personnel for their positions, they filed an ADEA claim with the EEOC. The court of appeals sided with the defendant, finding that the claims arose on the last day of the revocation period, not when the plaintiffs learned that Coors hired replacement employees. The court reasoned that While the hiring of new, younger employees might be evidence of Coors' alleged discriminatory intent . . . it is the alleged discriminatory discharge that appellants seek to redress. Id. at 1235. Accord American Airlines, Inc. v. Cardoza-Rodriguez, 133 F.3d 111 (1st Cir. 1998) (finding that the triggering event for the running of the statute of limitations was an employees' election to participate in the employer's voluntary early retirement program and that their claims arose when the employees signed the invalid waiver that was part of the program).

2. 180/300 Day Distinction

Whether a plaintiff will need to meet the 180 day or 300 day filing limit depends on whether he lives in a deferral state. If a state has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, it is a deferral state and the 300 day limitation period applies. 29 U.S.C. § 633(b). In Morton v. ICI Acrylics, Inc., 69 F. Supp.2d 1038 (W.D. Tenn. 1999), the court needed to determine whether the discriminatory act occurred in a deferral state, Tennessee, or a non-deferral state, Mississippi. Morton was employed and terminated in Mississippi; thus, the defendant argued that the 180-day limit would bar Morton's claim. Morton claimed, however, that the discriminatory act--the decision to terminate her--came from defendant's corporate headquarters in Tennessee. The court disagreed and held that the discriminatory act occurred in Mississippi. Therefore, plaintiff's claim was barred. A contrary decision, the court reasoned, would result in employer manipulation of the location of decisionmaking.

3. Single Filing Rule

Another issue in Morton was whether the single filing rule would allow piggybacking by plaintiffs whose time limit for filing had already run. See Morton, 69 F. Supp.2d at 1044. The single filing rule permits the timely application by one plaintiff to satisfy the statute of limitations for all plaintiffs in the lawsuit. In order for the rule to apply, however, the joining claim must be related to a timely filed claim which arose out of similar discriminatory actions in the same time period. Id. at 1042. In Morton, six of eleven plaintiffs did not file timely charges with the EEOC. The court held that the untimely plaintiffs could not save their claims by

Apiggybacking on the timely filing of another plaintiff as such a finding would effectively eviscerate the statute of limitations. *Id.* at 1045.

In Levy v. United States General Accounting Office, Nos. 97-CIV-4016, 97-CIV-4488, 1998 WL 193191 (S.D.N.Y. 1998), aff'd 175 F.3d 254 (2d Cir.), cert. denied, 120 S. Ct. 183 (1999), the court restated its previous holding that the single filing rule cannot be used to excuse a plaintiff from failing to file a timely complaint in federal court. The rule only excuses failure to file charges with an administrative agency.

#### 4. Continuing Violation Rule

In appropriate circumstances, courts continue to recognize a continuing violation theory to avoid the statute of limitations issue. A plaintiff may recover for acts occurring prior to the statutory limitations period if at least one instance of the discriminatory practice occurs within the filing period and the earlier acts are part of a continuing policy or practice that includes the act or acts within the statutory period. *Romig v. City of Iola*, 34 F. Supp.2d 1265 (D. Kan. 1998). In *Romig*, the court relied upon the following Tenth Circuit test to determine whether there was a continuing violation or whether the incidents were discrete and unrelated: (1) subject matter--whether the violations constitute the same type of discrimination; 2) frequency; and 3) permanence--whether the nature of the violations should trigger an employee's awareness of the need to assert her rights and whether the consequences of the act would continue even in the absence of a continuing intent to discriminate. *34 F. Supp.2d* at 1271 (quoting Martin v. Nannie and Newborns, Inc., 3 F.3d 1410, 1415 (10th Cir. 1993)).

In Bullington v. United Air Lines, Inc., 186 F.3d 1301 (10th Cir. 1999), the plaintiff was denied the position of flight officer in 1993, March 1995, and May 1995. Although the plaintiff indicated to her supervisor that she believed she was the victim of discrimination after she was

denied the position in 1993, she did not file a charge with the EEOC until after the 1995 rejection. The court concluded that although the three rejections were similar, they did not represent a continuing violation. Rather, the 1993 event was a discrete and salient event which put Ms. Bullington on notice that United had violated her rights. @ Id. at 1311. Because she did not file a charge after the 1993 event, her claim was barred.

Not every court of appeals has adopted a specific test similar to the one utilized in the Tenth Circuit. See Talbot v. Mobil Corp., 46 F. Supp.2d 468, 471 (E.D. Va. 1999) (noting that the Fourth Circuit has not adopted a definitive test to distinguish between continuing violations and multiple discrete actions). For example, the Fourth Circuit has construed continuing violations narrowly, stating that a continuing violation is one that could not reasonably have been expected to be made the subject of a lawsuit when it first occurred because its character as a violation did not become clear until it was repeated during the limitations period. @ Id. This is also the position adopted by the Seventh Circuit. See Dasgupta v. University of Wis. Bd. of Regents, 121 F.3d 1138 (7th Cir. 1997); Bohse, 30 F. Supp.2d at 1051 (describing three different continuing violation theories). Under the Fourth Circuit's definition, the plaintiff in Talbot could not establish a continuing violation. Mobil eliminated Talbot's position in 1996 after concluding that there were too many older people in the upper echelon positions. @ Nevertheless, Talbot continued to work in a temporary position @ until 1998 when his duties were transferred to a younger employee and Mobil terminated him. The court found that the statute of limitations had run on the 1996 discrimination claim because no act connected it to the 1998 termination.

5. Statute of Limitations for Suing After Administrative Remedies Are Exhausted

For a plaintiff to bring an ADEA suit, he must wait until 60 days after the charge has been filed with the EEOC to allow time for investigation or conciliation. A plaintiff is not required to obtain a right-to-sue letter from the EEOC. If a plaintiff does decide to wait until the EEOC officially terminates proceedings, he has ninety days within which to file suit after receiving notice from the EEOC.

In McKenzie v. Lunds, 63 F. Supp.2d 986 (D. Minn. 1999), the court held that the plaintiff's claim was time-barred because his amended complaint was filed after the 90-day filing period had lapsed. Although the plaintiff filed his original complaint within the 90-day period, he did not allege that he had been subjected to discrimination until he filed his amended complaint--more than 90 days after the EEOC issued the right-to-sue letter. The court held that the plaintiff could not rely on Fed. R. Civ. P. 15(c), the relation back doctrine, because the conduct alleged in the initial Complaint cannot be said to have arisen out of the same set of facts as asserted in his amended claim. Id. at 999. Because his amended complaint could not relate back, the plaintiff's claim was time-barred.

The 90-day period begins to run when the claimant receives actual notice of her right to sue, except where the claimant failed to receive notice through her own fault. In Houston v. Sidley & Austin, 185 F.3d 837 (7th Cir. 1999), the court answered the question of when a plaintiff is deemed to have received a right-to-sue letter. The claimant received notice from the Post Office that it was holding a certified letter which would be returned to the sender by a specified date. Houston picked the letter within the time specified by the Post Office, but filed her claim more than 90 days after the date of the letter. The Fifth Circuit held that when the

EEOC sends a right-to-sue letter by certified mail, the ninety-day limitations period presumptively begins to run on the day the plaintiff actually received the letter. @ Id. at 839.

In Hartnett v. Chase Bank of Texas National Association, 59 F. Supp.2d 605 (N.D. Tex. 1999), the court addressed whether the 90-day deadline for filing an action after receipt of a right-to-sue letter applies to claims filed after the 1991 Civil Rights Act became effective, but which are based on incidents occurring prior to the Act's effective date. The court held that the 90-day limitations period applied to claims filed after the effective date regardless of when the allegedly wrongful actions occurred.

The District Court for the Southern District of Ohio has held that the EEOC is not bound by the 90-day statute of limitations for filing claims under the ADEA. EEOC v. AT&T Co., 36 F. Supp.2d 994 (E.D. Ohio 1998). The court held that Congress did not mean to imply that the EEOC is a person subject to the requirement to file suit within the 90-day statute of limitations under 29 U.S.C. ' 626(e). The court based its reasoning on a Supreme Court decision with respect to a Title VII claim. Occidental Life Ins. Co. of Cal. v. EEOC, 432 U.S. 355 (1977). In Occidental, the Supreme Court affirmed the Ninth Circuit's ruling that the EEOC was not subject to a statute of limitations in the absence of unequivocal legislative directive.

#### 6. Arguments for Tolling Filing Deadlines

Many claimants barred by the statute of limitations attempt to resurrect their claims by presenting tolling or estoppel claims. Although courts often conflate equitable tolling and equitable estoppel, they are distinct concepts. Equitable estoppel prevents a defendant from asserting untimeliness as a defense where the defendant has taken active steps to prevent the plaintiff from litigating in a timely manner. American Airlines, Inc. v. Cardoza-Rodriguez, 133 F.3d 111, 124 (1st Cir. 1998). Equitable tolling is appropriate when the plaintiff demonstrates

excusable ignorance of his statutory rights.@ Soto v. Corporation of the Presiding Bishop of the Church of Jesus Christ Latter-Day Saints, 73 F. Supp.2d 116 (D.P.R. 1999) (plaintiff could not rely on the equitable tolling doctrine where the employer posted EEOC notices advising employees of the ADEA); see also Hunt v. District of Columbia Dept. of Corrections, 41 F. Supp.2d 31 (D.D.C. 1999) (the court will only use its power to toll the statute of limitations in extraordinary and carefully circumscribed instances).

a. Equitable Tolling

The Fifth Circuit has held that equitable tolling may apply to the period for filing an EEOC charge in three situations: (1) during the pendency of an action before a state court that has jurisdiction over the subject matter of the suit, but that is the wrong forum under state law; (2) until the claimant knows or should know the facts giving rise to the discrimination claim; and (3) when the EEOC misleads the claimant regarding the nature of his rights under the applicable anti-discrimination statute. See Hartnett, 59 F. Supp.2d at 605.

In Hartnett, the plaintiff claimed that he was psychologically disabled after being fired and thus he could not file his charge with the EEOC. After reviewing the factual record detailing the plaintiff's claim, the court rejected this argument. Accord Hernandez Arce v. Bacardi Corp., 37 F. Supp.2d 112 (D.P.R. 1999) (diagnosis of mental or emotional disability does not automatically toll the limitations period under the ADEA). The plaintiff also argued that applying the doctrine of equitable estoppel would keep his claim from being time-barred. Specifically, he claimed that the defendant induced him to refrain from pursuing legal action regarding his employment. The court also rejected this argument because it was not supported by the factual record. See Hartnett, 59 F. Supp.2d at 614-15.

Under the equitable tolling doctrine, a plaintiff would be allowed to sue even after the statutory time period for doing so had elapsed if the plaintiff had been prevented from filing suit in a timely manner due to inequitable circumstances. Seitzinger v. Reading Hosp. & Med. Ctr., 165 F.3d 236, 240 (3d Cir. 1999). In Seitzinger, the plaintiff's attorney missed the filing deadline for her client's ADEA claim by one day. Under normal circumstances, an attorney's delinquency is chargeable to the client. In this case, though, the plaintiff had questioned her lawyer as to whether the complaint was filed on time and the lawyer misrepresented to the plaintiff that it was so filed. The court held that there was enough lawyer misconduct to justify equitable tolling.

In Diaz v. Antilles Conversion & Export, Inc. 62 F. Supp.2d 463 (D.P.R. 1999), the court held that given the specifics of the case, misinformation provided by the EEOC was not sufficient to equitably toll the limitations period for filing an ADEA charge with the EEOC. The plaintiff claimed that an EEOC representative told him that the EEOC did not have jurisdiction over his case. Although some circuit courts of appeal have held that actions by the EEOC may justify equitable tolling, in this case the plaintiff had an attorney prior to the expiration of the limitations period and thus, equitable tolling is inappropriate when the plaintiff has consulted with counsel during the statutory limitation period. @ Id.

b. Equitable Estoppel

Equitable estoppel only applies if the defendant takes active steps to prevent the plaintiff from suing in time. @ Bohse v. Metropolitan Water Reclamation Dist., 30 F.Supp.2d 1047, 1051 (N.D. Ill. 1998) (stating that tolling is appropriate where the defendant promises not to plead the statute of limitations). In Bohse, the plaintiff claimed that his supervisor repeatedly promised that he would be promoted and gave him perks, such as a use of a company car, which are

usually reserved to people in more senior levels. Despite the fact that other persons were promoted, Mr. Bohse failed to file a charge with the EEOC. In an effort to toll the statutory period, Mr. Bohse claimed that the promises his supervisors made him prevented him for pursuing his claim. The court disagreed, finding that: (1) the supervisors did not have the power to bind the employer, and (2) the defendant did not do anything to prevent the plaintiff from suing in time. See id. at 1051-52.

The court in Bennett v. Coors Brewing Co., 189 F.3d 1221 (10th Cir. 1999) was also asked to consider plaintiffs' estoppel arguments. Plaintiffs claimed that Coors deceived them by making fraudulent representations concerning the proposed downsizing. The court confused the theories of equitable estoppel and tolling, deciding this issue under the theory of tolling even though plaintiffs argued that it was the defendant's practices which prevented the claimants from bringing their suit. Nonetheless, the court found that the district court should review plaintiffs' claim because the plaintiffs alleged sufficient facts to support applying the tolling doctrine.

## **B. Administrative Procedures**

### **1. The EEOC's Investigatory Powers**

Courts should generally enforce administrative subpoenas where the administrative agency demonstrates that 1) it has authority to make such an investigation, 2) it has complied with due process requirements, and 3) the information requested is relevant to the investigation. EEOC v. American & Efird Mills, Inc., 964 F.2d 300, 302 (4th Cir. 1992). The subpoenaed party may attempt to defeat enforcement by showing the request is excessive or unduly burdensome. Id. at 303.

In an EEOC subpoena enforcement action, a court has enforced a subpoena under circumstances indicating that the ADEA gives the EEOC broader powers than those accorded by

Title VII. EEOC v. Dillard Department Stores, Inc., No. CA 3-97-CV-0986-R, 1998 WL 25548 (N.D. Tex. Jan. 9, 1998). Title VII only allows the EEOC to utilize its power in connection with properly filed charges, whereas the ADEA gives the EEOC authority to investigate potential claims and enforce subpoenas independent of individual employee charges. American & Efird Mills, Inc., 964 F.2d at 304. In Dillard Department Stores, the EEOC brought charges against the defendant alleging that Dillard denied both applicants and employees over the age of 40 either promotions or entrance into management training programs. The EEOC based its charge on information obtained from a newspaper article. To investigate further, the EEOC subpoenaed the defendant's records regarding the pool from which it selected entry-level managers. The defendant refused to comply but because of the broad authority the ADEA gives to the EEOC, the court subsequently enforced the subpoena.

## 2. Exhaustion of Administrative Remedies Requirement

The district court only has jurisdiction over ADEA claims if those claims had been included in a charge filed with the EEOC or if the claims are based on conduct occurring after the filing of the charge with the EEOC, but reasonably related to the conduct alleged in the charge. In Harris v. SmithKline Beecham, 27 F. Supp.2d 569 (E.D. Pa. 1998), aff'd, 1999 U.S. App. LEXIS 34166 (3d Cir. Nov. 19, 1999), the plaintiff filed a charge with the EEOC claiming that she was discriminated against on the basis of her race. She failed to check the box for Age@ discrimination. The court dismissed her ADEA claim holding that the plaintiff did not exhaust her administrative remedies.

If a claim is not included in the EEOC charge, the EEOC may still consider it if it is reasonably related to the allegations in the plaintiff's complaint. In Morris v. Northrop Grumman Corp., 37 F. Supp.2d 556 (E.D.N.Y. 1999), the defendant sought to dismiss the

plaintiff's charges on the ground that the plaintiff had failed to first file a charge with the EEOC. Morris's EEOC charge stated that "Although I have requested to be considered for promotion into supervisory positions numerous times I have been passed over in favor of white employees who are younger than I am." *Id.* at 575. Based on this language, the EEOC could reasonably be expected to investigate Morris's claim. Furthermore, the court recognized that where the plaintiff is unrepresented by counsel, he may be disadvantaged in filing his lawsuit.

As a general rule, persons who have not been named as respondents in an EEOC charge may not be subsequently named in an ADEA lawsuit. *See Manzi v. DiCarlo*, 62 F. Supp.2d 780 (E.D.N.Y. 1999). The purpose of this requirement is to put the defendant on notice, but where an unnamed party has received adequate notice to allow it to participate in conciliation proceedings, the claim will not be barred. *Id.* The Second Circuit has also recognized an "identity of interest" exception to the naming requirement which relies on four factors: (1) whether the role of the unnamed party could, through reasonable effort by the complainant, be ascertained at the time of the filing of the EEOC complaint; (2) whether, under the circumstances, the interests of a named [party] are so similar to the unnamed party that it would be unnecessary to include the unnamed party in the EEOC proceedings; (3) whether its absence from the EEOC proceedings resulted in actual prejudice to the interests of the unnamed party; and (4) whether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party. *See id.* at 787.

### **III. BURDENS OF PROOF (Michael J. Ossip and Susan E.G. Hamilton)**

#### **A. Disparate Treatment**

To prevail on a claim brought under the ADEA, a plaintiff bears the burden of proving by a preponderance of the evidence that "but for" a discriminatory motive based on age, the plaintiff would not have been subjected to an adverse action. See, e.g., Hoffman v. MCA, Inc., 144 F.3d 1117, 1121 (7th Cir. 1998). A plaintiff must establish that age was a determinative factor in the adverse employment decision, but not necessarily that it was the sole reason for the action. See, e.g., Owen v. Thermatool Corp., 155 F.3d 137, 139 (2d Cir. 1998); Zaben v. Air Prods. & Chems., Inc., 129 F.3d 1453, 1457 (11th Cir. 1997).

In order to survive a motion for summary judgment, a plaintiff must establish a prima facie case of age discrimination. This may be accomplished by presenting one of the following: (1) direct evidence of discriminatory intent; (2) circumstantial evidence of discriminatory intent which complies with the test set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); or (3) a statistical pattern of discrimination. See, e.g., Zaben, 129 F.3d at 1457. Once the plaintiff establishes a prima facie case, the employer then has the burden to *produce* a legitimate, nondiscriminatory reason for the plaintiff's discharge. Id. If the employer does so, the plaintiff then has the burden to prove that the employer's asserted reason is merely a pretext for discrimination. Id.

1. Prima Facie Case

a. Direct Evidence

One of the ways a plaintiff can establish her prima facie case is through direct evidence that age was a substantially motivating factor in the decision. See, e.g., Woodhouse v. Magnolia Hosp., 92 F.3d 248, 254 (5th Cir. 1996). Direct evidence can take the form of age-related comments, actions, or documents which the trier of fact can interpret as an acknowledgment of the employer's discriminatory intent. See Hoffman, 144 F.3d at 1121-22. In order to establish the requisite intent, the plaintiff must show a nexus between the comments, actions or documents and the adverse action. See, e.g., Walton v. McDonnell Douglas Corp., 167 F.3d 423, 427 (8th Cir. 1999) (finding that plaintiff failed to link age-related remarks to the decisional process leading to his layoff); Price v. Marathon Cheese Corp., 119 F.3d 330, 337 (5th Cir. 1997) (holding that the remarks in question were stray because they were neither close in time to the discharge nor related to the discharge decision). Thus, the plaintiff must usually show that the decision-maker in question engaged in the discriminatory action or that the decision was tainted by the discriminatory actions of another person. See, e.g., Chriaramonte v. Fashion Bed Group, Inc., 129 F.3d 391, 396 (7th Cir. 1997) (stating that evidence must relate to the motivation of decision-maker), cert. denied, 523 U.S. 1118 (1998); Hoffman, 144 F.3d at 1122 (stating that if the plaintiff can show that the attitudes of the person who made the remarks "tainted" the decision of the decision-maker, the discriminatory remarks may be relevant evidence of discrimination).

Stray remarks will not usually suffice to establish discrimination. See, e.g., Beaver v. Rayonier, Inc., 188 F.3d 1279, 1285-86 (11th Cir. 1999) (finding that decision-maker's comment that he wanted to attract younger engineer-type employees or supervisors did not rise to the

level of direct evidence of age discrimination); Halloway v. Milwaukee County, 180 F.3d 820, 827-28 (7th Cir. 1999) (finding that remarks encouraging the plaintiff to retire were not direct evidence of discrimination); Walton, 167 F.3d at 426-28 (finding that supervisor's reference to two employees younger than the plaintiff as "his kids" was not direct evidence of age discrimination).

It is more difficult for a plaintiff to establish an inference of age bias if both the hiring decision and the termination occur while the plaintiff is a member of the protected class. See, e.g., Hennessey v. Good Earth Tools, Inc., 126 F.3d 1107, 1109 (8th Cir. 1997) (where plaintiff was hired at age 55 the evidence "suggests that Good Earth was not influenced by ageism in firing him four years later"); Brown v. CSC Logic, Inc., 82 F.3d 651, 658 (5th Cir. 1996) (finding no evidence of age bias where employee was hired at age 54 and terminated at age 58)

The courts continue to grapple with cases in which the same actor makes both the hiring and firing decisions. In 1998, the Eleventh Circuit held that when the same actor does the hiring and firing a permissible inference arises that a discriminatory motive did not exist. Williams v. Vitro Servs. Corp., 144 F.3d 1438, 1443 (11th Cir. 1998). See also Bradley v. Harcourt, Brace & Co., 104 F.3d 267, 270-71 (9th Cir. 1996) (holding that where the same actor is responsible for both the hiring and firing of an employee, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory motive). But see Banks v. Travelers Cos., 180 F.3d 358, 366-67 (2d Cir. 1999) (refusing to require district court judges to instruct jurors on the same actor inference); Schindler v. Bierwirth Chrysler/Plymouth, Inc., 15 F. Supp.2d 1054, 1958 (D. Kan. 1998) (refusing to apply an inference of no discrimination when the same person who hired the plaintiff was involved in the firing, because the ultimate termination decision was a group effort); O'Bryan v. KTIV Television, 64 F.3d 1188, 1192-93

(8th Cir. 1995) (same). Additionally, courts may be reluctant to find discriminatory animus when the decision-maker(s) responsible for terminating an employee is also in the class protected by the ADEA. See, e.g., Reeves v. Sanderson Plumbing Prods., Inc., 197 F.3d 688, 694 (5th Cir. 1999) (rejecting plaintiff's age discrimination claim in part because at least two of the people who made the decision to terminate were over age 50), cert. granted, 120 S. Ct. 444 (1999); Fairchild v. Forma Scientific, Inc., 147 F.3d 567, 572 (7th Cir. 1998) (holding that the fact that the decision-maker was older than the terminated employee was significant in evaluating the evidence of discrimination).

b. Indirect Evidence

In cases in which the employee cannot prove discrimination through direct evidence, courts continue to rely on the analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), to determine if a plaintiff has established a prima facie case to support the inference of age discrimination. See, e.g., Debs v. Northeastern Illinois Univ., 153 F.3d 390, 395 (7th Cir. 1998). To establish a prima facie case under the McDonnell Douglas analysis, 411 U.S. at 802-03, a plaintiff must show: 1) that he was over age 40 at the relevant time; 2) he was qualified for the position or performing his job satisfactorily; 3) he suffered an adverse employment action; and 4) that similarly situated individuals who are younger were treated more favorably. See, e.g., Halloway, 180 F.3d at 825-26.

The prima facie case basically requires the plaintiff to establish that she was treated differently from a similarly situated younger individual or group of individuals. See, e.g., Halloway, 180 F.3d at 827 (rejecting plaintiff's age discrimination claim in part because he failed to show that he was treated any differently from younger employees in his position); Hopper v. Hallmark Cards, Inc., 87 F.3d 983, 989 (8th Cir. 1996) (holding that statistical evidence that all

managerial-level employees discharged within eighteen-month period were over 40 did not raise an inference of age bias because the statistics did not show that the retained employees were "similarly situated").

The plaintiff must further show that he was at least as qualified as the younger employee who received better treatment. See, e.g., *Coco v. Elmwood Care, Inc.*, 128 F.3d 1177, 1179-80 (7th Cir. 1997) (holding that a discharged employee who was replaced by much younger person could not proceed to the pretext stage without first establishing that he was meeting his employer's legitimate expectations); *Nichols v. Lorai Vought Sys. Corp.*, 81 F.3d 38, 42 (5th Cir. 1996) (finding that experience and tenure alone did not prove that the older plaintiff was more qualified than his younger co-workers). But see *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1433 (11th Cir.) (holding that an ADEA plaintiff, unlike a Title VII plaintiff, must show only that he was qualified for the job, and need not show that another person with equal or lesser qualifications received the job, in order to establish a prima facie case), cert. denied, 119 S. Ct. 405 (1998). The plaintiff need not show, however, that he was better qualified than the younger employee. See, e.g., *EEOC v. Manville Sales Corp.*, 27 F.3d 1089, 1096 n.5 (5th Cir. 1994) (holding that the plaintiff could prevail without showing that he was clearly better qualified than the employees who were not terminated), cert. denied, 513 U.S. 1190 (1995). The plaintiff is also not required to show an "exact correlation" between himself and the younger employee, so long as they were similarly situated. See, e.g., *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352-53 (6th Cir. 1998) (requiring "precise comparability" would undermine the remedial purpose of the ADEA).

In *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 313 (1996), the Supreme Court held that a plaintiff can establish a prima facie case by showing that a younger

person was treated better than himself, even if that "younger" person was also in the protected age group. In this case, the plaintiff was age 56 when he was fired and replaced by a 40 year-old employee. Id. at 309. The Court of Appeals for the Fourth Circuit affirmed summary judgment for the employer on the basis that the plaintiff had failed to show that he was replaced by someone outside the protected class. Id. at 310. The Supreme Court reversed, concluding that the fact that one person in the protected class has lost out to another person in the protected class is irrelevant, so long as he has lost out because of his age. Id. at 312. The Court emphasized that where the replacement employee is *significantly younger* than the claimant, that will be a more reliable indicator of bias than the fact the plaintiff was replaced by someone outside the protected class. Id. at 313.

After the decision in Consolidated Coin, in determining when an age gap will support an inference of bias, courts have examined the age difference between the candidates, rather than simply assessing whether they were in or out of the protected class. See, e.g., Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1360 (11th Cir. 1999) (finding that a five year age difference satisfied the substantially younger requirement); Richter v. Hook-SupeRx, Inc., 142 F.3d 1024, 1028-29 (7th Cir. 1998) (holding that a 54 year-old who was replaced by a 45 year-old did not make out a prima facie case because he was not replaced by someone substantially younger); Isenbergh v. Knight-Ridder Newspaper Sales, Inc., 97 F.3d 436, 440 (11th Cir. 1996) (holding that the 60 year-old plaintiff established a prima facie case by showing that the candidate selected was 16 years his junior), cert. denied, 521 U.S. 1119 (1997).

2. The Employer's Burden of Production and the Plaintiff's Burden to Prove Pretext

If the plaintiff/employee can establish a prima facie case, the burden then shifts to the defendant/employer to articulate a legitimate, non-discriminatory reason for the adverse personnel action. The employer's burden is not one of proof, but rather one of producing some evidence which, if believed by the trier of fact, would support a finding that unlawful discrimination did not motivate the employer's actions. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981); Norton v. Sam's Club, 145 F.3d 114, 118 (2d Cir.), cert. denied, 119 S. Ct. 511 (1998).

If the employer articulates a legitimate reason for the action taken, the plaintiff then has the burden to prove that the reason proffered by the defendant was a pretext for age discrimination. McDonnell Douglas, 411 U.S. at 804-05. An employer is entitled to judgment in its favor if the evidence taken as a whole would not allow a jury to infer that the actual reason for the adverse employment action was discriminatory. See, e.g., Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 992 (5th Cir. 1996) (en banc).

In order to establish pretext, a plaintiff must prove that either: (1) the proffered reason has no basis in fact; (2) the proffered reason did not actually motivate the discharge; or (3) the reason was insufficient to motivate a discharge. See, e.g., Sherman v. American Cyanamid Co., 1999 WL 701911, at \*4 (6th Cir. 1999), petition for cert. filed, No. 99-1245 (U.S. Jan. 25, 2000).

The Supreme Court made clear in St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507 (1993), that the plaintiff always retains the ultimate burden of proving that discrimination occurred. The trier of fact's rejection of the employer's proffered reasons for its actions, while potentially sufficient to create an inference of intentional discrimination, does not mandate a

finding for the plaintiff. Id. at 511. Thus, once the employer produces a legitimate reason for its actions, the plaintiff has the burden of persuading the trier that the employer's proffered reason is false and that discrimination based on a protected characteristic prompted the action. Id. at 507-08.

The Supreme Court's Hicks holding has led to a split in the circuit courts, with some requiring a plaintiff to prove pretext plus discrimination, and others simply requiring plaintiffs to prove pretext. Compare Hollander v. American Cyanamid Co., 172 F.3d 192, 200 (2d Cir. 1999) (holding that a plaintiff has to show pretext-plus in order to survive summary judgment), cert. denied, 120 S. Ct. 399 (1999); Vaughan v. MetraHealth Cos., 145 F.3d 197, 204 (4th Cir. 1998) (holding that plaintiff must show "not just a pretext, but a pretext for age discrimination") and Krenik v. County of Le Sueur, 47 F.3d 953, 958 (8th Cir. 1995) (same) with Jackson v. E. J. Brach Corp., 176 F.3d 971, 984 (7th Cir. 1999) (holding that in order to defeat summary judgment, the plaintiff only needs to show that the employer's proffered reason is false; but at trial, the plaintiff also needs to show that discrimination motivated the employer's actions); Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1293 (D.C. Cir. 1998) (en banc) (adopting a presumption that discrediting an employer's articulated reason will suffice to escape summary judgment); Smith v. Borough of Wilkensburg, 147 F.3d 272, 280 (3d Cir. 1998) (holding that jurors are entitled to infer that the plaintiff's ultimate burden of demonstrating intentional discrimination is met if they disbelieve the employer's explanation for its decision); Combs v. Plantation Patterns, 106 F.3d 1519, 1535 (11th Cir. 1997) (holding that evidence sufficient to discredit a defendant's proffered nondiscriminatory reasons for its actions is sufficient to support a finding of discrimination), cert. denied, 522 U.S. 1045 (1998).

Not only are the circuits split on this issue, but many of their holdings are not clear about what a plaintiff needs to show in order to defeat summary judgment as opposed to what a plaintiff needs to show to win at trial. This split in the circuits has led the Supreme Court to grant certiorari from an unpublished Fifth Circuit decision in order to decide how much proof a worker must produce after the employer articulates a legitimate reason for its actions in order

avoid summary judgment. Reeves v. Sanderson Plumbing Prods., Inc., 197 F.3d 688 (5th Cir.), cert granted, 120 S. Ct. 444 (1999). The plaintiff in Reeves sued under the ADEA after he was fired by his employer at the age of 57. Id. at 690-91. The plaintiff had worked for the defendant for 40 years and put forth evidence that two months before he was fired, the company's director of manufacturing told him he was too damn old to do the job. Id. at 691. The defendant responded that the plaintiff was fired because of unsatisfactory work performance, including his failure to follow company policies and falsification of attendance records. Id. at 692. The defendant further disputed the plaintiff's claim by showing that at the time he was fired the company employed two other managers who were over age 60. Id. at 693.

The Fifth Circuit dismissed the plaintiff's case, holding that he failed to prove that the employer's articulated reasons were a pretext for age discrimination. Id. at 692. The court stated that to establish pretext, a plaintiff must prove not only that the employer's stated reason for its employment decision was false, but also that age discrimination had a determinative influence on the employer's decision-making process. Id. (citations omitted).

The petition for certiorari poses the question whether direct evidence of discriminatory intent is required under the ADEA to avoid judgment as a matter of law for the employer. Thus, the Supreme Court will address how it believes the circuit courts should apply Hicks, 509 U.S. at 511. If the Court upholds the Fifth Circuit's decision, it will be more difficult for employees to survive summary judgment, because unless an employee proves that the employer's articulated reason is false and that age-discrimination triggered the action, the employer is entitled to judgment as a matter of law. Id. at 692. The Court is expected to decide this issue before the end of June 2000.

3. Business Judgment

The burden of proving pretext is especially difficult for an employee to carry when the employer's actions or decisions were based on an exercise of business judgment. See, e.g., Baron v. City of Highland Park, 195 F.3d 333, 342 (7th Cir. 1999) (citation omitted) (holding that the court should not sit as a "superpersonnel department" that reexamines the City's business decision not to promote the plaintiff to the position of fire lieutenant); Bennett v. Total Minatome Corp., 138 F.3d 1053, 1061 (5th Cir. 1998) (finding that a French subsidiary's decision to replace the plaintiff with an employee who could speak French was a valid business judgment, and not a pretext for discrimination); Brocklehurst v. PPG Indus., Inc., 123 F.3d 890, 898 (6th Cir. 1997) (holding that a jury instruction that allowed the jury to consider the "fairness" of the employer's decision when assessing the credibility of a business judgment was erroneous). "[T]he overall correctness or desirability of the employer's proffered reasons" usually are not relevant to the determination of pretext. Baron, 195 F.3d at 341; see also Ellis v. United Airlines, Inc., 73 F.3d 999, 1006 (10th Cir.), cert. denied, 517 U.S. 1245 (1996).

In the context of reductions in force (RIF), plaintiffs will generally not be able to raise an inference of age discrimination solely by questioning the employer's business judgment as to the necessity for the RIF. For instance, in Kelly v. Drexel Univ., 94 F.3d 102, 109 (3d Cir. 1996), the court held that the employee's assertion that the employer actually had no economic necessity for reducing the work force and eliminating his position did not raise an inference of age discrimination. The court emphasized that discrimination statutes are not intended to force employers to maintain status quo. Id.

Employers may make business judgments based on factors that are correlated with age, like grade level and salary, without violating the ADEA. See, e.g., Hazen Paper Co. v. Biggins,

507 U.S. 604, 608 (1993); Pruitt v. First Am. Nat'l Bank, No. 98-5643, 1999 WL 552578, at \*6 (6th Cir. July 23, 1999) (finding that an employer telling an employee that because of her high salary she could not work overtime, was evidence of a business decision not age discrimination); Brown v. McDonnell Douglas Corp., 113 F.3d 139, 142 (8th Cir. 1997) (finding that the employer was concerned with the employee's performance relative to his salary, not relative to his age); Dilla v. West, 4 F. Supp.2d 1130 (M.D. Ala. 1998) (holding that the Army's business judgment to hire young air traffic controllers because of concern that a large percentage of its controllers would soon be eligible for retirement, was non-discriminatory), amended on other grounds, 31 F. Supp.2d 1347 (M.D. Ala. 1999), and aff'd, 179 F.3d 1348 (11th Cir. 1999).

## **B. Disparate Impact**

Disparate impact claims, unlike disparate treatment claims, do not require proof of an employer's discriminatory motive. International Bd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). These claims are predicated on proof that an employer uses practices that are facially neutral in their treatment of different groups but . . . in fact fall more harshly on one group than another and cannot be justified by business necessity. @ Id.

The question of whether disparate impact analysis applies in age discrimination cases, as opposed to Title VII cases, continues to split the circuit courts. Compare Mullin v. Raytheon Co., 164 F.3d 696, 703-04 (1st Cir. 1999) (holding that disparate impact claims are not recognizable under the ADEA), cert. denied, 120 S. Ct. 44 (1999); Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042, 1048 (6th Cir. 1998) (stating that there is a considerable doubt as to whether an age discrimination claim may exist under a disparate-impact theory); Maier v. Lucent Techs., Inc., 120 F.3d 730, 734 (7th Cir. 1997) (holding that disparate impact claims are not cognizable under ADEA); Ellis, 73 F.3d at 1007 (same); DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 732

(3d Cir.) ("it is doubtful that traditional disparate impact theory is a viable theory of liability under the ADEA"), cert. denied, 516 U.S. 916 (1995); and Evans v. Atwood, 38 F. Supp.2d 25, 30 (D.D.C. 1999) (holding that the ADEA does not allow for disparate impact claims) with Arnett v. California Pub. Employees Retirement Sys., 179 F.3d 690, 696-97 (9th Cir. 1999) (holding that disparate impact claims are cognizable under the ADEA), cert. granted and vacated on other grounds, No. 99-850, 2000 WL 29269 (U.S. Jan. 18, 2000)<sup>1/</sup>; District Council 37 v. New York City Dep't of Parks and Recreation, 113 F.3d 347, 351 (2d Cir. 1997) (same); and Smith v. City of Des Moines, 99 F.3d 1466, 1470 (8th Cir. 1997) (same).

The Supreme Court has not definitively decided this issue, and recently denied certiorari in a case in which the First Circuit held that disparate impact claims are not cognizable under the ADEA. Mullin, 164 F.3d at 703-04. The First Circuit held that proof of intentional discrimination is a prerequisite to a finding of liability under the ADEA. Id. The court relied first on the Supreme Court's language in Hazen Paper, which stated that "disparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA." Mullin, 164 F.3d at 700-01. The First Circuit cited the Supreme Court's emphasis that Congress passed the ADEA due to "its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes," and this rationale is inapposite in instances where employment decisions are "wholly motivated by factors other than age." Id. (quoting Hazen, 507 U.S. at 610-11).

---

<sup>1</sup> Arnett was vacated and remanded on other grounds in light of the holding of the Supreme Court in Kimel v. Florida Bd. Of Regents, discussed in Section I. above, that the ADEA does not validly abrogate the states' sovereign immunity.

Based on this language, the First Circuit concluded that imposition of disparate impact liability would not address the evils that Congress was attempting to purge when it enacted the ADEA. Id. at 701. The court contrasted Title VII, which was enacted in an effort to equalize employment opportunities for individuals whose employment prospects had been dimmed by past discriminatory practices, with the ADEA, which was intended to address contemporaneous employment conditions not past discriminatory practices. Id. The court held that because of the divergence in the purposes of Title VII and the ADEA, the Supreme Court's Title VII disparate impact analysis in Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971), should not be mechanically applied in ADEA cases. Mullin, 164 F.3d at 701.

The First Circuit also relied on the plain language of the ADEA, which provides that A[i]t shall not be unlawful for an employer . . . to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age.@ Id. at 701-02 (citing 29 U.S.C. ' 623 (f)(1)). This language permits employers to use factors other than age as grounds for employment-related decisions that differentially impact members of the protected class. Id.

The court found further support for its conclusion from the fact that in 1991 Congress specifically amended Title VII to allow for disparate impact claims and did not similarly amend the ADEA. Id. at 703 (citing Pub. L. No. 102-166, ' 105, 105 Stat. 1071, 1074-75 (1991)). This divergence in the two statutes led the court to conclude that Congress never intended to make a disparate impact claim available under the ADEA. Id.

### **C. Hostile Environment Liability Under the ADEA**

Last year, the United States District Court for the Eastern District of Pennsylvania extended recent Supreme Court precedent developed in the context of sexual harassment to age discrimination cases. Delazaro vs. Lehigh Univ., No. 98-CV-432, 1999 WL 54566 (E.D. Pa.

Jan. 29, 1999). A subsequent decision included respondeat superior liability in its enumeration of the test under which a plaintiff may make out a hostile work environment age discrimination claim. Tumolo v. Triangle Pac. Corp., 46 F. Supp.2d 410 (E.D. Pa. 1999). Although the court noted that the Third Circuit had not reached the question of whether a claim based on hostile work environment existed under the ADEA, it recognized that three other circuits have acknowledged such claims. Id. at 412 n. 2 (citing Crawford v. Medina General Hosp., 96 F.3d 830, 834 (6th Cir. 1996); Sischo-Nownejad v. Merced Community College Dist., 934 F.2d 1104, 1108 (9th Cir. 1991); Young v. Will County Dept. of Pub. Aid, 882 F.2d 290, 294 (7th Cir. 1989)). Consequently, the court listed the five elements of such a claim: (1) intentional discrimination because of age which is (2) pervasive and regular, and which (3) has detrimental effects that (4) would be suffered by a reasonable person of the same age in the same position; and (5) the existence of respondeat superior liability. Id. at 412.

#### **IV. AFFIRMATIVE DEFENSES (Michael J. Ossip and Jennifer J. Aresco)**

##### **A. After-Acquired Evidence**

In McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995), the Supreme Court resolved a split in the courts of appeals over whether after-acquired evidence acts as a bar to recovery on an ADEA claim. This issue arises when the employer discovers some wrongful conduct on the part of the employee that, in the absence of discrimination, would have led to discharge if it had been discovered earlier. The Court held that after-acquired evidence cannot serve to preclude the entire action, but it could be a basis to limit the plaintiff's damages.

Subsequent cases have held that a plaintiff's remedies are restricted to backpay measured from the date of the injury to the date of the discovery of the employee wrongdoing. See, e.g., Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101 (3d Cir. 1997); Carlson v. WPLG/TV-10, No. 94-

0228-CIV, 1996 WL 713007 (S.D. Fla. Apr. 23, 1996). In McKennon, the Court left the door open for some alteration of the backpay award based upon "extraordinary equitable circumstances that affect the legitimate interests of either party." McKennon, 513 U.S. at 362. In reaching its decision, the Court expressly recognized concerns that employers could engage in extraordinary discovery into the employee's background or performance on the job to defeat claims under the ADEA.

In Smith v. Berry Co., 165 F.3d 390 (5th Cir. 1999), the defendant was unable to meet its burden of establishing that it would have discharged the plaintiff notwithstanding her age. Berry sought to limit Smith's award of back pay by claiming that Smith would have been discharged because (1) she taped a meeting she had with her supervisor, and (2) because she went on unapproved travel while on medical leave. Berry claimed that both of these actions violated company policy and were grounds for dismissal. In denying the defendant's post-trial motion for judgment as a matter of law, the court found that it was a matter of fact for the jury to determine whether Smith in fact violated policy and whether Berry would have fired her for such a violation. Given the factual disputes involved in the case, the court concluded that the jury could have reasonably found that Berry failed to meet its burden.

In Hipp v. Liberty National Life Insurance Co., 65 F. Supp.2d 1314, 1340 (M.D. Fla. 1999), the court did not reduce the backpay award because it found that there were "extraordinary equitable circumstances that affect[ed] the legitimate interests of either party." See McKennon, 513 U.S. at 362. The court reviewed other cases on the subject and concluded that employers had been successful in limiting backpay only where they had offered evidence of wrongdoing such as stealing documents, stealing property, committing plagiarism, lying on employment applications, and committing sexual harassment. The plaintiff in Hipp was accused

of violating company rules by working for another company while in defendant's employ.

Because this action violated company policy, but was not otherwise illegal, the court refused to limit his award. Furthermore, the court found that the plaintiff was forced to look for other employment because of the discrimination he suffered in the employ of the defendant. Given these facts, the court found that the plaintiff's actions were an attempt to mitigate his damages and that it would be unjust to penalize him for actions caused directly by the Defendant's unlawful conduct.

## **B. Other Defenses**

### **1. Waiver and Estoppel**

Estoppel has been rejected as a defense to an ADEA claim of constructive discharge. Smith v. World Ins. Co., 38 F.3d 1456 (8th Cir. 1994). In that case, the employer argued that the plaintiff was estopped from bringing a claim for constructive discharge because he signed an agreement stating that he voluntarily accepted a retirement package. The court disagreed, holding that if Smith could prove that the employer constructively discharged him in violation of the ADEA, the employer could not have "clean hands" necessary to invoke the defense. Id. at 1463. In order to establish constructive discharge, Smith would have to demonstrate that the employer created a work environment so intolerable as to compel a reasonable employee to quit. See Tork v. St. Luke's Hosp., 181 F.3d 918 (8th Cir. 1999) (holding that a feeling of unfair criticism is not grounds for a constructive discharge claim). If, however, Smith failed to prove the claim of constructive discharge, the defense of estoppel would be available to the employer but would be unnecessary because the employer would prevail. Either way, estoppel could not be invoked to dismiss an action.

Although waivers have traditionally been used to estop plaintiffs from bringing ADEA suits, the Tenth Circuit recently addressed the attempted use of an invalid waiver to establish age discrimination. In Whitehead v. Oklahoma Gas & Elec. Co., 187 F.3d 1184 (10th Cir. 1999), the appellants claimed that the waivers Oklahoma Gas asked them to sign were invalid and that this fact, by itself, established age discrimination. The court of appeals disagreed, holding that there is a difference between bringing an age discrimination suit and a claim that the OWBPA has been violated.

The doctrine of judicial estoppel has been successfully applied, however, to preclude protected-age former employees from asserting (as part of their prima facie cases) that they were able to perform their job duties in a satisfactory manner where they claimed disability from performing their job duties by filing for Social Security disability benefits (SSDI). In Simon v. Safelite Glass Corp., 128 F.3d 68 (2d Cir. 1997), the defendant claimed that because plaintiff had filed for SSDI benefits, he was not able to show that he was qualified to perform the duties required by the position as required by the ADEA. See id. at 68. The court agreed, holding that plaintiff's SSDI claim estopped him from bringing his ADEA claim.

Whether this result would still obtain is unclear. In a case brought under the Americans With Disabilities Act, the Supreme Court recently addressed the use of inconsistent statements regarding one's ability to work. In Cleveland v. Policy Management Systems Corp., 526 U.S. 795 (1999), the Court held that receipt of Social Security Disability Insurance benefits did not estop the recipient from pursuing a claim under the ADA. The Court held that the plaintiff was entitled to have an opportunity to present an explanation as to the discrepancy between statements given in her SSDI applications stating that she is totally disabled, and her ADA claim

which was premised on the fact that she could perform the essential functions of her job.

Although this holding has not yet been extended to the ADEA, its reasoning may be persuasive.

## 2. Reasonable Factors Other Than Age

An employer can also defend against claims of age discrimination by offering evidence that reasonable factors other than age motivated the decision. In Scelza v. North Fork Bank, 33 F. Supp.2d 193 (E.D.N.Y. 1999), the employer's evidence that plaintiff was terminated as part of a reduction in work force undertaken to yield "economies of scale . . . by elimination of duplicative job positions" rebutted the presumption of age discrimination. Additionally, the court found that the evidence plaintiff presented, which consisted primarily of showing that younger employees retained their positions, failed to establish that the reduction in force was a pretext for discrimination. See also Reeves, 197 F.3d 688 (where multiple decisionmakers recommended discharge, one manager's remarks that plaintiff was (1) so old he must have come over on the Mayflower, and (2) "too damn old to do the job" were not enough to establish pretext). But see Grace v. Ansul, Inc., 61 F. Supp.2d 788 (N.D. Ill. 1999) (despite employer's claim that it would have terminated plaintiff for unsatisfactory performance, evidence that (1) employer said it never would have promoted the plaintiff if it knew his true age, and (2) that a manager said the employer should "get rid of all you 59 year-olds" was enough to survive summary judgment motion). See generally City of Des Moines, 99 F.3d at 1471 (employer provided evidence of "business necessity" for requirement that firefighters at rank of captain or below pass annual physical test because of fire suppression activities requiring use of breathing apparatus).

3. Mixed Motive Cases

Mixed motive is another defense available to employers under the ADEA. In contrast to pretext cases where the burden of persuasion never shifts from the plaintiff, in mixed-motive cases once the plaintiff introduces evidence that an impermissible factor influenced the employer's decision, the burden shifts to the employer to demonstrate that it would have made the same decision anyway. The defense must be raised in the employer's pleadings and can be used where there is credible evidence of both permissible and impermissible factors influencing the challenged employment action. Donovan v. Dairy Farmers of Am., Inc., 53 F. Supp.2d 194 (N.D.N.Y. 1999). Although the defendant in Donovan did not specifically plead mixed-motive, the court permitted the defense because the language used in the pleadings and during the trial put the plaintiff on notice that defendants intended to present this defense. The court reasoned that because (1) the defendant's first affirmative defense stated "Defendants' employment decisions with respect to the Plaintiff were based upon legitimate, non-discriminatory reasons," and (2) a mixed-motive defense had been denied in the summary judgment stage of the litigation, plaintiffs were on notice that the defense would be raised. Id.

4. BFOQ

An age restriction can be a bona fide occupational qualification for certain jobs, such as for airline pilots employed by carriers subject to Federal Aviation Administration regulations prohibiting the employment of pilots age sixty and over. Coupe v. Federal Exp. Corp., 121 F.3d 1022 (6th Cir. 1997), cert. denied, 523 U.S. 1020 (1998). The Seventh Circuit recently held that under section 623(j), which permits a city to refuse to hire law enforcement personnel based on age, a city does not have to prove that age was a bona fide occupational qualification for the position of police officer. It merely needs to establish that its decision not to hire the plaintiff

was made pursuant to a bona fide hiring plan. Kopec v. City of Elmhurst, 193 F.3d 894 (7th Cir. 1999).

Employee exemptions under the ADEA offer a defense in some cases. The ADEA provides a narrow exemption for a "bona fide executive" or a "high policymaking employee." Wendt v. New York Life Ins., No. 94-CIV-6132, 1998 WL 118168, at \*7 (S.D.N.Y. Mar. 16, 1998) (senior vice-president who managed several projects and took leadership role in several major projects was "bona fide executive" whose retirement could be compelled at age 65); see also Pleva v. Norquist, 36 F. Supp.2d 839, aff'd 195 F.3d 905 (7th Cir. 1999) (Board of Zoning Appeals Chairperson is a policymaker and thus not covered under the ADEA). The ADEA also excludes from protection any elected public officers and any person appointed to such officer's personal staff. Dobson v. Strain, No. 97-3463, 1999 WL 246652 (E.D. La. Apr. 23, 1999) (finding that a sheriff's deputy was a member of the sheriff's personal staff and thus excluded from ADEA coverage).

## **V. BENEFITS (Michael I. Bernstein and David M. Safon)**

### **A. Age-Based Distinctions**

In Fagan v. New York State Electric & Gas Corp., 186 F.3d 127, 133 (2d Cir. 1999), the Second Circuit reconfirmed both the legality of voluntary early retirement incentive plans and that the existence of such a lawful plan (here offered to employees age 55 or over) is not evidence of age discrimination. The Seventh Circuit, in Solon v. Gary Community School Corp., 180 F.3d 844, 851 (7th Cir. 1999), held that an early retirement incentive plan (AERIP<sup>®</sup>), on its face, was violative of the law where it defined the *maximum* age at which retirement would be deemed *early*.<sup>®</sup> Under the plan, early retirement for teachers could occur at age 58, but no later than just prior to age 62. Thus, teachers who retired on their 58th birthdays received

monthly benefits for the maximum 48 months, while teachers who retired later received the same monthly amounts, but fewer payments because the payments terminated at age 62. According to the court, prescribing a minimum age for early retirement is permissible under the ADEA, but the setting of a presumptive age limitation on early retirement is not. The court explained:

The ERIPs would permit a 58-year-old teacher with plans to retire at age 62 to retire immediately and receive four years of incentive payments. Yet, a 66-year-old teacher with plans to retire at age 70, but otherwise identically situated with her younger colleague (same number of years of creditable service, same accumulated pension benefits, and so on), would receive nothing if she chose to retire at once, notwithstanding that her retirement would be just as premature as that of her 58-year-old colleague. Individuals like this more senior teacher, for whom early retirement comes later than their 62nd birthday, suffer a concrete injury by virtue of the express terms of the ERIPs, just as surely as they would if their age disqualified them from receiving performance bonuses, wage increases, or promotions.

*Id.* at 850. The court distinguished the plan at issue from a defined benefit plan that provides for bridge payments (social security supplements) between early retirement and the age at which the employee first becomes eligible for reduced or unreduced social security benefits, the latter arrangement being expressly sanctioned by the OWBPA. *Id.* at 854.

Relying on the Supreme Court's decision in Hazen Paper, 507 U.S. 604 (1993), a federal district court recently reaffirmed that consideration of seniority as a factor did not render a voluntary retirement incentive plan violative of the ADEA because age and years of service are analytically distinct. Henkin v. AT&T Corp., No. 1:98-CV-2198, 1999 WL 1399675 (N.D. Ga. October 13, 1999).

According to the Ninth Circuit, the seniority exemption articulated in Hazen Paper applies only to decisions involving actual, as opposed to potential, years of service. Arnett, 179 F.3d 690. In that case, the plaintiff sued on the basis that the statutory formula for calculating

disability benefits under the California Public Employees Retirement System violated the ADEA. *Id.* at 692-93. Under the state employees' disability benefits plan in Arnett, an eligible employee injured on the job received the lesser of (1) 50% of final compensation or (2) the amount the employee would have received in retirement benefits had s/he continued to work until age 55. The plan was violative of the ADEA, the court stated, because the calculation of potential years of service was strictly a function of age, rather than merely empirically correlated with age as is the case with actual years of service. *Id.* at 695. In denying summary judgment for the employer, the court held that a formula, under which age of hire is the sole basis for lower benefits, violates the ADEA if the statute was enacted for discriminatory rather than economic reasons. *Id.* at 694-95. The court distinguished this case from Hazen Paper, because in that case, the amount of benefits to which the employee was entitled was based on his/her actual years of service, which permitted the employer to ignore age. *Id.* at 694. In contrast, the amount of benefits to which the employees in Arnett were entitled was entirely a function of their age upon being hired. *Id.* at 694. Thus, the court concluded that potential years of service is analytically distinct from actual years of service, because one is simply correlated with age, whereas the other is a strict function of age. *Id.*

In Abdu-Brisson v. Delta Air Lines, No. 94-CIV-8494, 1999 WL 944505 (S.D.N.Y. Oct. 19, 1999), Delta Air Lines had hired several hundred former Pan Am pilots following Pan Am's filing for bankruptcy in 1991. The Delta Pilots Medical Benefit Plan required all employees to work for Delta for 10 years before Delta would pay the entire cost of their post-retirement medical insurance premiums. A new provision waived the 10-year requirement for any pilot who had reached the age of 50 by January 1, 1992 and who was on Delta's seniority list as of August 27, 1991. None of the former Pan Am pilots was on the list until November 1991 and,

accordingly, none qualified for the waiver. The court held that these eligibility criteria related not to age, but to the employees' prior employment, and were, therefore, lawful.

The Second Circuit, in Devlin v. Transportation Communications International Union, 175 F.3d 121, 128 (2d Cir. 1999), held that a union's elimination of a death benefit fund paying \$300 in the event of a member's or retiree's death did not violate the ADEA, despite the argument that "more people die when they are older than when they are younger."

1. Releases

a. Validity

In Gustafson, Inc. v. Bunch, No. 397CV2102D, 1999 WL 766020 (N.D. Tex. Sept. 24, 1999), the court confirmed that a waiver of future ADEA claims is precluded by the OWBPA, as such a waiver is not considered "knowing and voluntary." For the waiver to be considered "knowing and voluntary," the OWBPA requires, in the case of an individual termination, that the employee be afforded at least 21 days within which to consider the proposed waiver agreement. The Eighth Circuit held, however, this does not preclude an employer from revoking its offer, if the offer has yet to be accepted, within that 21-day period. Ellison v. Premier Salons Int'l, Inc., 164 F.3d 1111, 1114 (8th Cir. 1999). According to the court, moreover, the OWBPA "does not entitle employees to the best possible separation agreement in exchange for the waiver of their ADEA rights." Id. at 1115.

A release offered as part of an exit incentive or other employment termination program that fails to comply with the OWBPA's 45-day requirement will not preclude an ADEA claim. However, as held by the Tenth Circuit, such a violation of the OWBPA does not, by itself, establish age discrimination. Whitehead, 187 F.3d at 1192.

In Hartnett v. Chase Bank of Texas National Association, 59 F. Supp.2d 605, 615 (N.D. Tex. 1999), the employer, in conjunction with its release, *offered*, but did not provide, OWBPA-required information, *i.e.*, the classes or groups of employees to whom the early retirement plan was being offered, and the job titles and ages of all individuals eligible and ineligible for the program. The court, nonetheless, found the employer had complied with the law, inasmuch as the employee had never claimed he had asked for or been denied the information.

b. Pre-Dispute Agreements to Arbitrate

In Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 13 (1st Cir. 1999), the court held the OWBPA does not preclude pre-dispute arbitration agreements. To hold otherwise, the court stated,

would be to ignore the Supreme Court's repeated statements that arbitral and judicial fora are both able to give effect to the policies that underlie legislation. A party who agrees to arbitrate does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. @ Gilmer [v. Interstate/Johnson Lane Corp.], 500 U.S. at 26, 111 S. Ct. 1647 (quoting Mitsubishi [Motors Corp. v. Soler Chrysler-Plymouth, Inc.], 473 U.S. at 628, 105 S. Ct. 3346) (internal quotation marks omitted). Interpreting the OWBPA to preclude pre-dispute arbitration agreements would run afoul of the presumption that arbitration provides a fair and adequate mechanism for enforcing statutory rights.

Id. at 13-14.

Although it acknowledged the Ninth Circuit had yet to consider the impact of the OWBPA on such agreements, a federal district court in California reached a different conclusion and declined to enforce a pre-dispute arbitration agreement with respect to age discrimination claims. Thiele v. Merrill Lynch, Pierce, Fenner & Smith, 59 F. Supp.2d 1060 (S.D. Cal. 1999). The pre-arbitration agreement, the court explained, did not comply with the OWBPA's requirements because it had been signed before the ADEA claim arose and did not expressly

refer to ADEA rights or claims. Id. at 1065. In so deciding, the court expressed its disagreement with the holding of the Fifth Circuit, in Williams v. Cigna Financial Advisors, Inc., 56 F.3d 656 (5th Cir. 1995), that limited application of the OWBPA to separation agreements only, but otherwise upheld the mandatory arbitration provision of the AForm U-4@ agreement commonly used in the securities industry.

c. Post-Oubre, Tender Back Cases

In 1998, the Supreme Court held that a release that failed to comply with the OWBPA could not bar an ADEA claim, even where the plaintiff declined to tender back the benefits s/he received in exchange for the release. Oubre v. Entergy Ops., 522 U.S. 422 (1998). The Court, however, declined at that time to address whether an employee's refusal to tender back benefits, in such circumstances, barred claims other than those asserted under the ADEA. Id. at 842.

In Suhy v. AlliedSignal, 44 F. Supp.2d 432 (D. Conn. 1999), the court followed Oubre, holding that a release signed in connection with a reduction in force did not comply with the OWBPA, and that the plaintiff did not have to tender back severance benefits he received in order to proceed on his ADEA claim. In Bennett v. Coors Brewing Co., 189 F.3d 1221, 1233-34 (10th Cir. 1999), the Tenth Circuit adhered to Oubre with respect to claims asserted under the ADEA, but held that the employee's failure to tender back severance benefits can act as ratification of the waiver as to state law claims.

In Aikins v. Tosco Refining Co., No. C-98-00755-CRB, 1999 WL 179686 (N.D. Cal. Mar. 26, 1999), the plaintiff accepted the severance payments he had received in exchange for a release and later brought an action against his former employer alleging discrimination under 42 U.S.C. ' 1981, Title VII and certain California statutes. The court held that Oubre did not preclude a finding that the release was binding as to these claims. Still, in light of disputed facts

regarding whether the plaintiff truly intended to ratify the release, it denied the defendant's motion for summary judgment.

d. Post-Oubre OWBPA Regulations

In July 2000, the Equal Employment Opportunity Commission plans to issue a final rule addressing issues raised by the Oubre decision. Though the Commission promulgated final regulations on ADEA waivers effective July 6, 1998, those regulations did not focus on the tender back issue. The proposed rule provides as follows:

- i. An individual who claims a waiver agreement was not knowing and voluntary under the ADEA is not required to tender back the consideration s/he received in exchange, before filing a lawsuit or a discrimination charge with the Commission or any state or local fair employment practices agency. Retention of the consideration does not preclude a challenge to the waiver agreement, nor does it constitute ratification of the waiver agreement.
- ii. A clause in an agreement that requires tender back is invalid under the ADEA.
- iii. Any arrangement that imposes a condition precedent, a penalty or any other limitation adversely affecting an individual's right to challenge a waiver agreement, such as a covenant not to challenge such an agreement, is invalid under the ADEA, whether it is part of the agreement or contained in a separate document.
- iv. A provision permitting an employer to recover its costs, attorneys' fees and/or damages for breach of any such covenant or arrangement is not permitted.
- v. An employer may not unilaterally abrogate its duties under a waiver agreement to any signatory, even if one or more of the signatories or the Commission successfully challenges the validity of the agreement under the ADEA. (The Commission's example: A[A]n employer must continue to pay its agreed share of health insurance premiums pursuant to a group waiver arrangement even if one of the ex-employees challenged the validity of the waiver.®)
- vi. Where a court determines, in its discretion, that an employer is entitled to restitution, recoupment or setoff against a damage award in favor of an

employee who successfully challenged a waiver agreement and prevailed on the merits of an ADEA claim:

-The restitution, recoupment or setoff amounts cannot exceed the lesser of the consideration given the employee for signing the waiver agreement or the amount recovered by the employee, and cannot include any costs, attorneys' fees or other amounts claimed as damages attributable to an alleged breach of an impermissible covenant or other arrangement, as described above.

-Where more than one plaintiff is involved, any reduction must be applied on a plaintiff-by-plaintiff basis. No individual's award may be reduced based on the consideration received by any other person.

-Factors that may be relevant to determining whether, or in what amount, a reduction should be granted, include, but are not limited to:

(a) whether the waiver also purports to apply to claims asserted beyond the ADEA and, if so, the employer apportioned the consideration paid in exchange for the waiver agreement among such other waived claims. If there was no such apportionment by the employer, the apportionment should be on an equitable basis.

(b) whether the employer's failure to comply with ADEA waiver requirements was inadvertent, in bad faith or fraudulent.

(c) the nature and severity of the employment discrimination, including whether the employer's violation of the ADEA was willful. If willful, any deduction from the award should be made only after the damages have been doubled pursuant to ADEA

(d) the employee's and the employer's financial circumstances.

(e) the reduction's effect on the purposes and enforcement of the ADEA and the deterrence of future violations by the employer.

**VI. THE REDUCTION IN FORCE (Michael I. Bernstein and David M. Safon)**

**A. The Prima Facie Case**

The circuit courts continue to differ in their articulation of a prima facie case of age discrimination in the context of a reduction in force. See, e.g., Showalter v. University of Pittsburgh Med. Ctr., 190 F.3d 231, 234-35 (3d Cir. 1999) (plaintiff was member of protected class, was discharged although qualified for the job, and employer retained unprotected workers); Tuttle v. Missouri Dept of Agriculture, 172 F.3d 1025, 1029-1030 (8th Cir.), cert. denied, 120 S. Ct. 186 (1999) (plaintiff was in protected age group, was discharged although [s]he satisfied applicable job qualifications, plus some additional showing that age was factor in termination). See also Jones v. Westinghouse Elec. Corp., 1999 U.S. Dist. LEXIS 5750 (D. Md. Mar. 26, 1999) (plaintiff was member of protected class, was selected for discharge from group of candidates performing at same level as lowest level of persons retained, and residual workforce contained substantially younger individuals performing at lower level than plaintiff, or some other evidence employer did not treat age neutrally); Morris, 37 F. Supp.2d at 579 (plaintiff was member of protected age group, was discharged although qualified to assume another position had it been available at time of discharge, and discharge occurred under circumstances suggesting age was a factor); Vannoy v. OCSEA Local 11, 36 F. Supp.2d 1018, 1022 (S.D. Ohio 1999) (plaintiff was member of protected class, suffered an adverse employment action although qualified for position lost or gained, plus additional direct, circumstantial or statistical evidence tending to indicate plaintiff was singled out for impermissible reasons); Fisher v. Ultradata Corp., No. 3:98CV1024L, 1999 WL 362788 (N.D. Tex. June 4, 1999) (plaintiff was member of protected class, suffered adverse employment decision although qualified to assume another available position at time of discharge or

demotion, and evidence exists from which factfinder reasonably might conclude employer intended to discriminate in reaching its decision).

In Spencer v. Stuart Hall Co., 173 F.3d 1124, 1130-31 (8th Cir. 1999), the Eighth Circuit held that remarks tending to show age bias, but that were remote in time and made by nondecisionmakers, did not establish the additional showing of intentional age discrimination required in some jurisdictions.

## **B. Evidence**

Consideration of such criteria as retirement eligibility, salary and seniority in making decisions for a reduction in force, even when those factors correlate with age, has been held not to constitute age discrimination. See, e.g., EEOC v. McDonnell Douglas Corp., 191 F.3d 948 (8th Cir. 1999); Cordes v. Gaymar Indus., 1999 U.S. Dist. LEXIS 13717 (W.D.N.Y. June 22, 1999) (without evidence linking term senior to age, employer's reference to senior status is not relevant factor); Fisher, supra (A[d]ischarging an employee because of his high salary is not sufficient alone to support a finding of age discrimination because the ADEA prohibits discrimination based upon age, not salary).

Performance, as well, continued to be a lawful basis upon which an employer may make reduction in force determinations. See Langlie v. Onan Corp., 192 F.3d 1137, 1140 (8th Cir. 1999).

So, too, may an employer rely on its business judgment in deciding to reduce its workforce and, even then, the Eighth Circuit ruled, the employer need not prove financial distress to make its reduction in force legitimate. See Regel v. K-Mart Corp., 190 F.3d 876, 880 (8th Cir. 1999). Nor must an employer necessarily prove its business decision was an efficient

one. Tuttle, 172 F.3d at 1032-33 (Employers are free to make their own business decisions, even inefficient ones, so long as they do not discriminate unlawfully).

That an employer's decision in choosing a particular employee for layoff was unreasonable or quick does not necessarily establish a claim of age discrimination. Fisher, *supra*. See also Pitasi v. Gartner Group, Inc., 184 F.3d 709, 718 (7th Cir. 1999) (A poor business judgment by employer in choosing whom to discharge in reduction in force not sufficient to establish pretext; rather, plaintiff must show employer did not honestly believe the reasons it gave for terminating him/her). But see Losciale v. Port Auth. of NY, NJ, No. 97-CIV-0704, 1999 WL 587928 (S.D.N.Y. Aug. 4, 1999) (where decision to discharge employee was based on A purely subjective criteria, without any consideration of factors such as salary and seniority, and A unfettered discretion of managers who were aware plaintiff was substantially older than other employees, jury reasonably could have found age bias). By the same token, the Seventh Circuit ruled that evidence, admitted at trial, of a replacement employee's poor performance after a reduction in force was irrelevant and prejudicial and warranted a reversal of the judgment for the plaintiff employee and a new trial. Cullen v. Olin Corp., 195 F.3d 317, 324-25 (7th Cir. 1999).

Where statistics are utilized as evidence of age discrimination in the context of a reduction in force, courts have recognized that an important statistic is the difference in the percentage of older employees in the workforce before and after the reduction. See, e.g., EEOC v. McDonnell Douglas Corp., *supra*. However, a drop in the average age from 42 years old to 39 years old was held to be A negligible and A statistically insignificant. Scelza v. North Fork Bank, 33 F. Supp.2d 193, 202 (E.D.N.Y. 1999).

## VII. REMEDIES (Eugene Cavallucci)

An issue that has continued to concern practitioners is the taxability of settlement amounts. In 1999, the U.S. Tax Court held that the money received by an employee upon the termination of his employment from IBM was includable in his gross income under Section 104 of the Internal Revenue Code. Sherman v. Commissioner of Internal Revenue, No. 11665-97, 1999 Tax Ct. Memo LEXIS 236 (June 18, 1999). The court rejected the employee's assertion that the payment was made solely in settlement of his claim for physical and mental injury arising out of his possible claim against IBM for age discrimination.

In so holding, the court pointed to a number of facts concerning the language of the settlement agreement which it concluded were dispositive of the issue. First, it found that the settlement agreement did not allocate the \$207,000 payment to or among any claim or claims petitioner may have had against IBM.<sup>6</sup> Second, the settlement agreement failed to mention any specific injury to the employee and did not identify any amount he was to receive for any personal injury. Third, the settlement amount represented an amount equal to the employee's annual salary (\$107,000) plus \$100,000.

In the absence of express language specifying the nexus between the amount paid and the injury compensated, the court found the intent of the payor to be determinative. Since IBM did not link any portion of the payment to the employee's personal injury claim, the court concluded that IBM did not intend for any portion of the \$207,000 to be specifically carved out as a settlement of a tort or tort type claim on account of a personal injury or sickness.<sup>7</sup>

Citing with approval the Second and Seventh Circuit Courts of Appeals decisions in Taggi v. United States, 35 F.3d 93 (2d Cir. 1994) and Pipitone v. United States, 180 F.3d 859

(7th Cir. 1999) respectively, the court held that the \$207,000 settlement payment was not excludable from income under Section 104 (a)(2) of the Internal Revenue Code.