

**1999 ANNUAL REPORT
OF THE
AGE DISCRIMINATION IN
EMPLOYMENT ACT SUBCOMMITTEE**

FEDERAL LABOR STANDARDS LEGISLATION COMMITTEE

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I. JURISDICTION (Howard Flaxman and Joanna Han)

A. Respondents Subject To Prohibitions

1. Those Covered by the Definition of “Employer”

a. Foreign companies

The Age Discrimination in Employment Act (“ADEA” or the “Act”) defines an employer as a “person engaged in industry affecting commerce . . . [including] any agent of such person” or “a state or political sub-division of a state” 29 U.S.C. § 630(b). Section 4(h)(2) of the Act provides that “[t]he prohibitions of [the ADEA] shall not apply where the employer is a foreign person not controlled by an American employer.” A literal interpretation of this section suggests that the ADEA does not apply to the domestic operations of foreign employers.

Past decisions, such as Robins v. Max Mara, U.S.A., Inc., 914 F. Supp. 1006 (S.D.N.Y. 1996), have applied the literal meaning and held that only those employees of the enterprise who work in the United States can be counted in determining ADEA coverage. In the past year, however, the Second Circuit, in Morelli v. Cedel, 141 F.3d 39 (2d Cir. 1998), abrogated the Robins decision. The court held that, while the ADEA generally protects branch employees of a foreign employer located in the United States, the ADEA counts a foreign corporation’s foreign employees toward the twenty employee coverage threshold. Id. at 43. The court questioned the rationale of decisions such as Robins, remarking that “[i]t is not apparent why the domestic operations of foreign companies should be subject to Title VII and the ADA, but not to the ADEA.” Id. The Morelli court found that foreign comity does not require the exemption of the domestic operations of foreign employers, and such an exemption would undermine the purpose of the ADEA.

b. Requisite number of employees

A foreign company is not subject to the ADEA by virtue of its American operations unless it is an “employer” under the ADEA. See 29 U.S.C. § 630(b) (a business must have at least twenty employees to be an employer). The Second Circuit in Morelli identified several reasons for the minimum employee requirement: the burdens of compliance and potential litigation costs, the protection of personal relations in a small business, the potential effects on competition, and the constitutionality under the commerce clause. See Morelli, 141 F.3d at 45. None of these reasons, the court determined, indicates that a foreign employer is subject to the ADEA based on its size in America alone. See id. While it was undisputed that the defendant is a foreign employer with fewer than twenty employees in its sole American branch, see id. at 42, “[defendant] would not appear to be any more a boutique operation in the United States than would a business with ten employees each in offices in, say, Alaska and Florida, which would be subject to the ADEA.” See id.

The statutory definition of employer also requires that a “person engaged in an industry affecting commerce [have] twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.” 29 U.S.C. § 630(b). The court in Burnett v. Intercon Security Ltd., No. 97C 3385, 1998 WL 142395, at *2 (N.D. Ill. Mar. 24, 1998), noted that the term “calendar year” means the period between January and December, rather than any period of twelve consecutive months. The “current year” is the year of the violation and the applicable period does not cease on the date of the violation, but at the end of the calendar year. See id.

Burnett also examined the foreign employer's contention that its employees located outside the United States do not count towards the statutory minimum of twenty employees. See id. at *3. The court suggested that the attempt of the foreign employer, a huge Canadian corporation with a small Chicago branch office, to put itself on par with small businesses that the ADEA presumably sought to exempt was disingenuous. The court then proceeded to follow the Seventh Circuit's single employer doctrine analysis to determine whether a foreign parent and its American subsidiary are a single employer for ADEA purposes: interrelation of operations; common management; centralized control of labor relations; and common ownership. See id. at **6-7. The decision emphasized, however, that the Northern District of Illinois follows the strong presumption that a parent company is not the employer of its subsidiary's employees. See id. at *10.

Under the ADEA, an "employer" can include (1) any agent of such a person who has twenty or more employees, and (2) a State or political subdivision of a State and any agency or instrumentality. See 29 U.S.C. § 630(b). The Eighth Circuit distinguished between the concept of an "agency" and "instrumentality" in Palmer v. Arkansas Council on Economic Education, 154 F.3d 892 (8th Cir. 1998). Observing that "[a]lthough other circuits have not distinguished between the terms 'agency' and 'instrumentality,' we believe that the distinction is significant." Id. at 895 (citation omitted). Apparently the difference is that, although the twenty-employee requirement applies to both agencies and instrumentalities, an instrumentality's employees should not be aggregated with those of the State or political subdivision of the State for meeting the ADEA's definition of employer. See id. at 896.

According to Palmer, a defendant institution is an agency if the State or political subdivision had some supervisory control over the plaintiff. See id. at 896. An agency of a political subdivision that employs fewer than twenty employees may be an “employer” within the ADEA definition if the number of agency employees exceeds twenty when added to the number of employees of the affiliated political subdivision. See id. On the other hand, the court refused to include employees of an instrumentality with those of a State or political subdivision, because the State or a political subdivision does not exercise control over an instrumentality. See id. at 897. The court reasoned that control over employees is necessary in the consideration of calculating the number of employees, as legislative history of the ADEA presupposed that control permits an employer to use its array of employment positions to effectively place older workers. See id. Assuming that “instrumentality” is subject to a broader definition that does not require control over the employment relationship, adding the instrumentality’s employees to those of the State or political subdivisions is inconsistent with congressional assumption of employer control.

2. Individual Liability Under the ADEA

Individuals who do not independently meet the ADEA definition of employer cannot be held liable under the ADEA. See 29 U.S.C. § 630(b). The ADEA defines employer as, inter alia, “any agent” of an employer. See id. Title VII has a similar definition. See 42 U.S.C. § 2000e(b). Despite this reference to an employer’s agent, the Second Circuit has refused a literal interpretation of Title VII and held that Congress intended to limit liability to employer-entities. See Bernhardt v. Interbank of New York, 18 F. Supp.2d 218 (E.D.N.Y. 1998). The Bernhardt court acknowledged that, although the Second Circuit has not yet addressed specifically the issue

of individual liability under the ADEA, courts within the circuit have uniformly concluded that the ADEA generally does not permit individual liability.

On the other hand, the court in Worman v. Farmers Cooperative Association, 4 F. Supp.2d 1052, 1053 (D. Wyo. 1998), determined that, although it logically follows from the tandem analysis of Title VII and ADEA cases that individual liability suits would be disallowed under the ADEA, the Tenth Circuit has insinuated that at least in some cases the potential for individual liability under the ADEA may exist. See, e.g., Brownlee v. Lear Siegler Management Servs. Corp., 15 F.3d 976, 978 (10th Cir.) (“[A] principal’s status as an employer can be attributed to its agent to make the agent statutorily liable for his own age-discriminatory conduct . . .”), cert. denied, 512 U.S. 1237 (1994). The Worman court rejected the Brownlee analysis, however, as general dictum that has been disavowed in subsequent decisions, and held that the clear intention of the Tenth Circuit precludes individual liability. See id. at 1053-54.

In Klein v. London Star Ltd., 26 F. Supp.2d 689, 693 (S.D.N.Y. 1998), a district court examined the difficulties involved in granting supplemental jurisdiction to state causes of action in ADEA claims that involve individual liability. The court recognized not only that the defendants correctly asserted that there is no individual liability under the ADEA, but also that the presence of individual defendants not liable under federal law but who could be liable under state law would create practical difficulties at trial. See id. at 693-94. The court noted, however, that the potential for jury confusion is no greater than that in an action involving damages issues in a joint Title VII-ADEA claim. See id. The court reasoned that the jury confusion arising out of the differing proofs necessary and remedies available under the various statutes at issue may be ameliorated with proper jury instructions and special verdict forms. See id. In addition, as federal

courts have exclusive jurisdiction over ADEA claims, the dismissal of any state claims would force the plaintiff to proceed in two forums. See id. at *694. On balance, the court found, the duplication and waste from two separate proceedings outweighed the possibility of jury confusion and predominance of state issues. See id.

3. Who Is an Employee?

A claimant under the ADEA must establish that he or she is as an “employee.” See 29 U.S.C. § 623(a). The ADEA defines the term “employee” as “any individual employed by an employer.” See id. § 630(f). The Ninth Circuit, in Barnhart v. New York Life Insurance Co., 141 F.3d 1310 (9th Cir. 1998), found that the adoption of the common-law agency test for an employee under ERISA applies to the ADEA as well. The test, outlined in a Supreme Court case, Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318, 323-24 (1992), balances several equally weighted factors in the determination of who qualifies as an employee for ERISA:

(1) the skill required; (2) the source of the instrumentalities and tools; (3) location of the work; (4) duration of the relationship between parties; (5) whether the hiring party has the right to assign additional projects to the hired party; (6) the extent of the hired party’s discretion over when and how long to work; (7) the method of payment; (8) the hired party’s role in hiring and paying assistants; (9) whether the work is part of the regular business of the hiring party; (10) whether the hiring party is in business; (11) the provision of employee benefits; and (12) the tax treatment of the hired party.

See Barnhart, 141 F.3d at 1312-13.

The issue in Barnhart was whether the ADEA provides protection for a person whose position is a hybrid between that of an independent contractor and an employee. See id. at 1313. The court concluded that the law “provides an all or nothing approach. Either Barnhart is an employee and thus entitled to the protection of . . . the ADEA, or he is not.” Id.

II. PROCEDURE (Michael J. Ossip and Jennifer L. Levy)

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. Much litigation has been devoted to defining when the statutory period has commenced. For example, in American Airlines, Inc. v. Cardoza-Rodriguez, 133 F.3d 111 (1st Cir. 1998), the court affirmed summary judgment for the airline because the plaintiffs failed to file ADEA charges with the EEOC within 300 days of the alleged discrimination. The plaintiffs alleged that they had been misled into signing a release as part of a voluntary early retirement program because management told them their jobs were being eliminated; instead of the jobs being eliminated, the former employees claimed that younger people were hired to replace them. They asserted that the triggering discriminatory act was their termination of employment. The court held that the triggering event

for the running of the statute of limitations was the employees' election to participate in the employer's voluntary early retirement program and that their claims arose when the employees made their choice to sign the invalid waiver that was part of the program. Thus, the plaintiffs did not file their ADEA charges within the required 300 days.

Another case, which could potentially expand the notion of accrual, was filed under New York's Human Rights Act. In that case, the court found that the time for filing a suit did not begin to run until a reasonable person could have inferred that the adverse employment action the plaintiff suffered was the result of age discrimination. Cohen v. Stephen Wise Free Synagogue, No. 95 Civ. 1659 (PKL), 1998 WL 799162, at *3 (S.D.N.Y. Nov. 13, 1998). As the court stated, "otherwise mere notice of termination, without more, would set the limitations clock ticking, requiring that an employee quickly commence a discrimination suit when no reason for doing so has presented itself, so as to protect any potentially viable, meritorious cause of action that might eventually crystallize." Id.

In addition, courts continue to recognize a "continuing violation theory" to avoid the statute of limitations issue in the appropriate circumstances. The theory of continuing violation "extends the limitations period for all claims of discriminatory acts committed under [an ongoing policy of discrimination] even if those acts, standing alone, would have been barred by the statute of limitations." Annis v. County of Westchester, 136 F.3d 239, 245 (2d Cir. 1998) (citing Lightfoot v. Union Carbide Corp., 110 F.3d 898, 907 (2d Cir. 1997)). The Tenth Circuit has created a test to determine whether there is a continuing violation or whether incidents are discrete and unrelated; the court focuses on the "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 his rights and whether the consequences of the act would continue even in the absence of a continuing intent to discriminate." Veale v. Sprint Corp., No. Civ. A 95-2379-GTV, 1997 WL 49114, at *6 (D. Kan. Feb. 3, 1997).

For example, in Causey v. Balog, 929 F. Supp. 900 (D. Md. 1996), aff'd, 162 F.3d 795 (4th Cir. 1998), the plaintiff asserted that his charge was timely under a continuing violation theory. Because the plaintiff alleged no discriminatory acts within the 300 days preceding the filing, the plaintiff's claim was found untimely even if there were a pattern of discrimination.

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

For a plaintiff to bring an ADEA suit, that plaintiff must wait until sixty 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, the plaintiff has ninety days within which to file suit after receiving notice from the EEOC.

In Rasmussen v. Sigma Corp. of America, 27 F. Supp.2d 388 (E.D.N.Y. 1998), the court held that the ninety-day period to file a civil suit after receiving an EEOC right-to-sue letter started when the EEOC's letter was actually delivered to the plaintiff's residence, rather than the date on which the plaintiff actually received the letter. In this case, the right-to-sue letter had been intercepted by the plaintiff's teenage daughter while the plaintiff was on vacation, preventing the plaintiff from viewing it for seventeen days. Rejecting an argument that the result was too harsh, the court held that "procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular

litigants.” Id. at 393. In addition, the court noted that there had been no showing by the plaintiff that the remaining seventy-three days of the statute of limitations period were not sufficient time within which to file a complaint. Id.

In a narrow holding, in Hodge v. New York College of Podiatric Medicine, 157 F.3d 164 (2d Cir. 1998), the Second Circuit reinstated a plaintiff’s age discrimination complaint, holding it was timely filed. The plaintiff was employed by the college as a professor from 1973 to 1995. Two years prior to his dismissal, an assistant dean of the college told the plaintiff that the college wanted to cut his salary and duties in half because his current salary was excessive. The assistant dean also stated that the plaintiff’s contract, ending June 30, 1994, would not be renewed for more than one additional year. After refusing the college’s offer for reduced wages and duties plus a one-year contract renewal, the plaintiff appealed to the faculty hearing committee alleging age discrimination and contract violations. On September 1, 1993, the plaintiff also filed charges of age discrimination with the EEOC.

One month later, the faculty hearing committee found that the college had acted improperly with respect to the plaintiff. Subsequent to the committee’s finding, agents of the college met with the plaintiff. They offered the plaintiff a one-year non-renewable contract and told him that if he did not accept, the “situation would get nasty’ and the college would find’ cause to terminate him.” Id. at 166. On April 1, 1994, the plaintiff agreed to the proposed arrangement and withdrew his EEOC charge. However, his agreement violated the release requirements of the OWBPA. The plaintiff’s employment was terminated June 30, 1995, and on August 25, 1995, Hodge filed a civil suit under the ADEA. In response to the college’s argument that his suit was untimely, the court held that the plaintiff should not lose any litigation rights,

including ADEA rights, because of the withdrawal of an EEOC charge based on the plaintiff's reliance on a settlement agreement that violated OWBPA. In addition, the court held that there was no need for the plaintiff to file another EEOC charge or seek to reopen the prior proceeding. Because the EEOC charge had been filed on September 1, 1993, and was not withdrawn until April 8, 1994, the minimum sixty-day period that an ADEA plaintiff must allow the EEOC to investigate or conciliate before filing a civil suit was satisfied; the court saw no statutory purpose to be served by imposing another sixty-day waiting period.

In Fabregas v. I.T.T. Intermedia, Inc., 954 F. Supp. 32 (D.P.R. 1997), the court addressed whether the ninety-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 ninety-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 recently held that the EEOC is not bound by the ninety-day statute of limitations for filing claims under the ADEA. EEOC v. AT&T, No. C2-97-167 (7/17/98) (as reported in 147 Daily Lab. Report (BNA) A-2 (July 31, 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 ninety-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. 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.

3. Arguments for Tolling Filing Deadlines

The timely filing of a charge of discrimination under the ADEA with the EEOC is treated like a statute of limitations, subject to waiver, tolling or estoppel. Eye v. Fluor Corp., 952 F. Supp. 635, 642 (E.D. Mo. 1997). 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, or allowing the plaintiff to avoid the bar of the limitations period, is appropriate when the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his claim. Cada v. Baxter Healthcare Corp., 920 F.2d 446, 451 (7th Cir. 1990), cert. denied, 501 U.S. 1261 (1991).

Under the doctrine of equitable tolling, 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., No. Civ. 97-1698, 1999 WL 16776, at *4 (3d Cir. Jan 15, 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 Washington v. Washington Metropolitan Area Transit Authority, 160 F.3d 750 (D.C. Cir. 1998), the plaintiff did not file a charge with the EEOC until more than one year after the

alleged discrimination. Prior to filing those charges, the plaintiff had relied solely on the defendant's internal procedures. The plaintiff claimed that even though he did not satisfy the EEOC filing requirement, his claim should be equitably tolled because the defendant "lulled [him] ... into presuming that he had met the requirements of the law" by stating that its internal procedure was the appropriate forum within which to resolve discrimination complaints. *Id.* at 752. Although the plaintiff's claim would be more appropriately characterized as one for equitable estoppel because the plaintiff was relying upon the defendant's conduct as a basis for asserting the timeliness of his charge, the court held that the plaintiff was not entitled to relief because he did not demonstrate any affirmative misconduct on the part of the defendant.

In Jones v. Long Island R.R., No. 96 CV-4033, 1998 WL 221365 (E.D.N.Y. May 1, 1998), the court discussed the basic standards of equitable tolling and equitable estoppel. In this case, the plaintiff had been employed by the defendant for fourteen years before entering the conductor training program. In order to qualify for the position of conductor, it was necessary for the plaintiff to pass an examination. Upon failing this examination in May 1991, the plaintiff was fired pursuant to his union's bargaining agreement which allowed each member a specified period of time to become a conductor or else face termination. Jones was rehired by the defendant three months later but was not given credit for his past seniority and was only paid an entry-level salary. The plaintiff then filed a charge of age discrimination with the EEOC.

The court held his ADEA claim untimely because the plaintiff did not file an administrative charge with the EEOC within 300 days of the alleged discriminatory act. The plaintiff argued that he should qualify for tolling because he did not learn, until 1995, of the two younger employees who were rehired with their seniority after being similarly terminated. The court did not agree,

stating that “[t]he requirement of diligent inquiry imposes an affirmative duty on the potential plaintiff to proceed with a reasonable investigation in response to an adverse event.” Jones, 1998 WL 221365, at *4 (citing Pacheco v. Rice, 966 F.2d 904, 907 (5th Cir. 1992)). In addition, there was no evidence on record demonstrating that the defendant actively misled the plaintiff. Similarly, the court found no reason to estop the defendant from raising the untimeliness defense because there existed no evidence that the defendant misrepresented any facts to the plaintiff or that the plaintiff relied on any such misrepresentations.

In Anderson v. Board of Regents of the University of Wisconsin System, 140 F.3d 704 (7th Cir. 1998), an ADEA plaintiff’s suit was dismissed because the plaintiff did not file a discrimination charge with the EEOC within 300 days of his firing. Instead, the plaintiff thought that the requirement was satisfied by filing with the relevant state agency, the Wisconsin Personnel Commission, on the 300th day from the date of his termination. The state agency did forward a copy of this complaint to the EEOC, but the EEOC did not receive the complaint until after the 300th day had passed. The plaintiff argued that he should qualify for tolling because the state agency had led him to believe that there was a worksharing agreement between the Wisconsin Personnel Commission and the EEOC, and thus filing with one agency was the equivalent of filing concurrently with the other agency. The court held that equitable tolling was not available to the plaintiff in this case because, although the state agency’s reference to a worksharing agreement was misleading, the plaintiff did not exercise due diligence in ascertaining the relevant terms of that agreement. Id. at 706.

The Eleventh Circuit Court of Appeals ruled this past year that age discrimination claimants who had been excluded from a collective action were barred from filing individual

claims after waiting in excess of ninety days before filing. Armstrong v. Martin Marietta Corp., 138 F.3d 1374 (11th Cir.), cert. denied, 119 S. Ct. 545 (1998). In Armstrong, there were thirty-one employees who had lost their jobs with the defendant between 1992 and 1993. Twenty-eight of those employees filed timely charges of age discrimination with the EEOC and opted into an age discrimination class that was already proceeding in the Middle District of Florida. On April 7, 1994, the district court held that the plaintiffs were not similarly situated to the other class plaintiffs and they were not certified as class members. More than ninety days later, the plaintiffs then filed suit.

The defendant filed a motion for partial summary judgment arguing that the individual plaintiffs did not file claims within ninety days after being denied class certification. The district court granted the defendant's motion and the appeals court affirmed, declining to hold that the ninety-day statute of limitations remained tolled until the denial of class certification had been appealed. The court held that the statute of limitations, which is tolled for members of a class that has not yet been certified, begins to run again when a district court issues an interlocutory order denying class certification.

In Basch v. Ground Round, Inc., 139 F.3d 6 (1st Cir.), cert. denied, 119 S. Ct. 165 (1998), the First Circuit held that potential plaintiffs could not rely on earlier class actions against the same defendant to extend the filing deadline, despite the fact that they were members of the class. In this case, the plaintiffs were former restaurant managers filing an ADEA claim against the defendant; the First Circuit upheld summary judgment for the defendant after finding that the employees failed to sue within ninety days after receiving their right-to-sue letter. The former employees agreed that their suit was untimely, but argued that the prior class actions tolled the

running of the ninety-day period. The First Circuit disagreed, reasoning that “[p]ermitting such tactics would allow lawyers to file successive putative class actions with the hope of attracting more potential plaintiffs and perpetually tolling the statute of limitations as to all such potential litigants, regardless of how many times a court declines to certify the class.” Basch, 139 F.3d at 11.

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. Efirid 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 recently enforced a subpoena under circumstances indicating that the ADEA gives the EEOC broader powers than those accorded by Title VII. EEOC v. Dillard Dep’t 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. EEOC v. Efirid Mills, Inc., 964 F.2d 300, 304 (4th Cir. 1992). In Dillard Department Stores, the EEOC brought charges against the defendant alleging that Dillard denied both applicants and employees over the age of forty 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

In Baber v. Runyon, No. 97 Civ. 4798 (DLC), 1998 WL 912065 (S.D.N.Y. Dec. 30, 1998), the court reiterated that a federal employee does not have to exhaust administrative remedies before filing a claim of discrimination in federal court. However, once a federal employee initiates administrative proceedings on an ADEA claim, that employee must then exhaust those administrative procedures before filing a claim in federal court.

For privately employed plaintiffs under the ADEA, a charge of discrimination must first be filed with the EEOC before jurisdiction lies in a civil court. Davis v. Sodexo, Cumberland College Cafeteria, 157 F.3d 460, 463 (6th Cir. 1998). In Davis, the plaintiff had been employed by the defendant in various capacities for twenty-seven years. Her hours also varied, from full-time during the school year to part-time over the summer. Usually, near to the end of each summer either the plaintiff would contact the defendant or the defendant would notify the plaintiff about returning to a full-time schedule. In 1996, however, the plaintiff did not contact the defendant; the defendant had tried to contact the plaintiff but her phone was disconnected. The plaintiff was removed from the defendant's payroll after failing to return to her employment with the defendant. In November 1996, the plaintiff filed a complaint with the EEOC alleging race discrimination and retaliation. After receiving a right-to-sue notice from the EEOC, the plaintiff filed age discrimination and retaliation claims in district court. The defendant's motion for

summary judgment as to the age claim was granted because the plaintiff failed to exhaust her administrative remedies by failing to include the charge of age discrimination in her EEOC complaint.

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. Jones v. Long Island R.R., No. 96 CV-0433 (FB), 1998 WL 221365 (E.D.N.Y. May 1, 1998). In Jones, the plaintiff filed a charge with the EEOC claiming that he was not given an opportunity to compete for a conductor position. The court ruled that such a claim was “plainly distinct” from his later claim in court in which he alleged that he was deprived of his seniority after he was rehired. Thus, the court held that this second claim was outside the scope of the EEOC charge and was dismissed. Jones, 1998 WL 221365, at *2.

The ADEA does not require a private plaintiff to obtain a right-to-sue letter from the EEOC prior to filing a civil claim. McNaboe v. NVF Co., No. 97-558-SLR, 1998 WL 661455 (D. Del. July 30, 1998). Instead, the plaintiff is required to commence a civil claim within the following period: beginning sixty days after filing a charge with a state agency and the EEOC and ending ninety days after either the receipt of a right-to-sue letter from the EEOC or a notice of termination of the charge by the EEOC. McNaboe, 1998 WL 661455, at *3. The court held, however, the requirement of timely filing with the EEOC was not a jurisdictional prerequisite, but instead acted as a statutory precondition to suit, much like a statute of limitations, making it subject to tolling, waiver or estoppel. Id. Without explanation, the court in McNaboe permitted

an ADEA claim to go forward despite the fact that the EEOC charge was not filed until after the civil suit had already commenced.

III. BURDEN OF PROOF (Tim J. Emert)

A. Liability For Age Discrimination

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, the plaintiff would not have been subjected to an adverse action. 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. Owen v. Thermatool Corp., 155 F.3d 137 (2d Cir. 1998); Zaben v. Air Prods. & Chems., Inc., 129 F.3d 1453 (11th Cir. 1997); Chiaromonte v. Fashion Bed Group, Inc., 129 F.3d 391 (7th Cir. 1997), cert. denied, 118 S. Ct. 1795 (1998); Miller v. CIGNA Corp., 47 F.3d 586, 598-99 (3d Cir. 1995) (granting new trial because jury was improperly instructed that plaintiff must prove age was "sole cause" of decision); Jones v. Unisys Corp., 54 F.3d 624 (10th Cir. 1995); Cooley v. Carmike Cinemas, Inc., 25 F.3d 1325, 1333 (6th Cir. 1994) (approving jury instruction stating "the age factor made a difference in determining whether or not he was to be employed" and it was not necessary to state "but for" discrimination).

A plaintiff can meet this burden of proof by direct evidence of discrimination or by establishing the inference of discrimination. Fairchild v. Forma Scientific, Inc., 147 F.3d 567 (7th Cir. 1998). Direct evidence can take the form of age-related comments, actions, or documents. Hoffman v. MCA, Inc., 144 F.3d 1117 (7th Cir. 1998). The plaintiff must establish a nexus between the remarks and the adverse action. Cordova v. State Farm Ins. Cos., 124 F.3d 1145 (9th Cir. 1997); Woodhouse v. Magnolia, 92 F.3d 248, 254 (5th Cir. 1996) (supervisor's

statement "they're gonna lay off those old people" found to be to be evidence of age discrimination). Normally, the plaintiff must also show that the decisionmaker actually uttered the discriminatory remarks. Hoffman, 144 F.3d at 1122 (if the plaintiff can show that the attitudes of the person who made the remarks "tainted" the decision of the decisionmaker, the discriminatory remarks may be relevant evidence of discrimination).

Stray remarks will not suffice to establish discrimination. Marshall v. Kelly Servs., Inc., 134 F.3d 378, 1998 WL 10753 (9th Cir. 1998) (text in Westlaw); Brown v. McDonnell Douglas Corp., 113 F.3d 139, 142 (8th Cir. 1997) (supervisor's statement that he "could have hired a young college graduate" at half the employee's salary is not direct evidence of age discrimination); Kneibert v. Thompson Newspapers, Michigan Inc., 129 F.3d 444 (8th Cir. 1997); Hill v. St. Louis Univ., 923 F. Supp. 1199, 1215 (E.D. Mo. 1996) (supervisor's statement that the division needed "fresh or new blood" was too vague to show age bias), aff'd, 123 F.3d 1114 (8th Cir. 1997); Smith v. Ciba-Geigy Corp., No. Civ. A. H-94-2381, 1996 WL 437458 (S.D. Tex. May 23, 1996) (supervisor's alleged derogatory remarks about older people constituted stray remarks as they were not close in time to discharge nor related to the discharge decision), aff'd mem., 114 F.3d 1181 (5th Cir.), cert. denied, 118 S. Ct. 301 (1997).

It is less likely that a plaintiff will be able 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 Williams v. Vitro Servs. Corp., 144 F.3d 1438 (11th Cir. 1998) (although the court held that the plaintiff made out a prima facie case, the court held that because plaintiff was hired, promoted and fired while a member of the protected age group by the same actor, there is a "permissible inference" of no discrimination); Hennessey v. Good Earth Tools, Inc., 126 F.3d 1107, 1109 (8th

Cir. 1997) (where plaintiff was hired at age fifty-five, 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 (5th Cir. 1996) (no evidence of age bias where employee was hired at age fifty-four and terminated at age fifty-eight and both decisions were made by company's president).

The courts continue to grapple with "same actor" cases where the same decisionmaker made both the hiring and firing decisions. The Eleventh Circuit held this year that "a permissible inference" arises that discriminatory motive does not exist. Williams v. Vitro Servs. Corp., 144 F.3d 1438 (5th Cir. 1998). See also Bradley v. Harcourt Brace & Co., 104 F.3d 267, 270-71 (9th Cir. 1996); Kelleher v. Aerospace Community Credit Union, No. 4:95CV632 JCH, 1996 WL 498107 (E.D. Mo. July 2, 1996) (where employee was hired at age forty-six, promoted at age fifty-two, and discharged at age fifty-four, and where company's president made all three decisions, employee cannot establish age bias), aff'd, 114 F.3d 745 (8th Cir. 1997), cert. denied, 118 S. Ct. 1392 (1998); Dingman v. Delta Health Group, Inc., 26 F. Supp.2d 1349, 1355 (S.D. Fla. 1998) ("it is highly unlikely that [the plaintiff's supervisor], eight months after hiring the 63 year old [plaintiff], suddenly developed an aversion to older people"). But see Schindler v. Bierwirth Chrysler/Plymouth, Inc., 15 F. Supp.2d 1054 (D. Kan. 1998) (court refused to apply inference of no discrimination when hiring was done by one person, and although that person was also involved in the decision to fire the employee, the ultimate termination decision was a group effort). Additionally, courts may be reluctant to find discriminatory animus when the decisionmaker responsible for terminating a protected-age employee is actually older than that employee. Fairchild v. Forma Scientific, Inc., 147 F.3d 567 (7th Cir. 1998).

1. The McDonnell Douglas Analysis

In cases where direct evidence is not available to prove discrimination, 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. Norton v. Sam's Club, 145 F.3d 114 (2d Cir.), cert. denied, 119 S. Ct. 511 (1998); Debs v. Northeastern Illinois Univ., 153 F.3d 390 (7th Cir. 1998); Fisher v. Wayne Dalton Corp., 139 F.3d 1137 (7th Cir. 1998). However, at least one jurisdiction has refused to employ the McDonnell Douglas analysis for large-scale workplace restructuring cases. Hartley v. Wisconsin Bell, Inc., 124 F.3d 887 (7th Cir. 1997) (holding that the McDonnell Douglas approach to burden shifting is inefficient in large scale workplace restructuring cases, the court chose to recast the case as a hiring issue). To establish a prima facie case for age discrimination under the McDonnell Douglas analysis, a plaintiff must show: 1) that the plaintiff is over age forty at the relevant time; 2) was qualified for the position; 3) suffered an adverse employment action; and 4) that similarly situated individuals who are younger were treated more favorably.

The prima facie case requires the plaintiff to establish that she was treated differently from a similarly situated younger individual or group of individuals. Fisher v. Wayne Dalton Corp., 139 F.3d 1137 (7th Cir. 1998) (plaintiff was not similarly situated to a younger employee who was retained even though their job responsibilities were similar where younger employee had computer related experience); Janiuk v. TCG/Trump Co., 157 F.3d 504 (7th Cir. 1998) (where younger manager either took over the entire position as sales manager or a significant portion of the former sales manager's responsibilities, the two are similarly situated for ADEA purposes); Eskra v. Provident Life & Accident Ins. Co., 125 F.3d 1406 (11th Cir. 1998) (holding that branch manager was replaced by younger person where the employer closed down the plaintiff's branch,

but hired a forty-four year-old person to manage the office near the plaintiff's old branch and began contacting the plaintiff's former clients); Hopper v. Hallmark Cards, Inc., 87 F.3d 983 (8th Cir. 1996) (statistical evidence that all managerial-level employees discharged within eighteen-month period were over forty does not raise inference of age bias where statistics do not show that retained employees were "similarly situated"); Newbury v. National Press Club, Inc., No. Civ. A. 96-449 AER, 1997 WL 664589 (D.D.C. Aug. 26, 1997) (fact that no one replaced discharged employee precludes him from making out prima facie case).

The plaintiff must show that he was at least as qualified as the younger employee who received better treatment. Coco v. Elmwood Care, Inc., 128 F.3d 1177 (7th Cir. 1997) (discharged employee replaced by much younger person cannot proceed to pretext stage without first establishing that he was meeting employer's legitimate expectations); Nichols v. Lorai Vought Sys. Corp., 81 F.3d 38 (5th Cir. 1996) (experience and tenure alone are not proof of superior qualifications over younger co-workers); Miller v. Butcher Distributors, 89 F.3d 265 (5th Cir. 1996) (judgment notwithstanding the verdict where plaintiff claimed she possessed necessary computer skills but was unable to answer basic questions on cross-examination about computer operations). The plaintiff need only show that she possessed qualifications equal to the comparable individual and does not need to show that the plaintiff was better qualified. EEOC v. Manville Sales Corp., 27 F.3d 1089 (5th Cir. 1994) (jury instruction was incorrect to require plaintiff to show he was clearly better qualified than younger employee), cert. denied, 513 U.S. 1190 (1995); but see Turlington v. Atlanta Gas Light Co., 135 F.3d 1428 (10th Cir.) (plaintiff seeking to establish a prima facie case 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), cert. denied,

119 S. Ct. 405 (1998) . The plaintiff is not required to establish damages to make out a prima facie case. Gerzog v. London Fog Corp., 907 F. Supp. 590 (E.D.N.Y. 1995). Moreover, the plaintiff need not show an "exact correlation" to the younger replacement, so long as they are similarly situated. 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 (1996), the U.S. Supreme Court held that a plaintiff can establish a prima facie case by showing that a younger person was treated better, even if that "younger" person is also in the protected age group. In this case, the plaintiff was age fifty-six when he was fired and replaced by a forty-year-old employee. The Court of Appeals for the Fourth Circuit affirmed summary judgment in favor of the employer, holding that O'Connor had failed to show that he was replaced by someone outside the protected class. 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. The Court held that where the replacement employee was significantly younger than the claimant, that was a more reliable indicator of bias than the fact the plaintiff was replaced by someone outside the protected class.

On the heels of Consolidated Coin, courts have examined the age gap between candidates, rather than a simple assessment of whether candidates were in or out of the protected class, in an effort to determine when the age gap will support an inference of bias. Richter v. Hook-SupeRx, Inc., 142 F.3d 1024 (7th Cir. 1998) (fifty-four year-old replaced by a forty-five year-old does not make out a prima facie ADEA case because not replaced by someone substantially younger); Isenbergh v. Knight-Ridder Newspaper Sales, Inc., 97 F.3d 436 (11th Cir. 1996) (prima facie case

established when plaintiff, age sixty, was not selected for a new job and the candidate selected was sixteen years younger), cert. denied, 117 S. Ct. 2511 (1997); McNulty v. New York City Dep't of Fin., 941 F. Supp. 452 (S.D.N.Y. 1996) (fact that sixty-seven year-old was replaced by a forty-seven year-old person does not preclude a prima facie ADEA claim); Mania v. Alper Holdings USA, Inc., No. 95 Civ. 1846 (DC), 1996 WL 438162 (S.D.N.Y. Aug. 6, 1996) (nine-year age difference between employee, forty-five, and his thirty-six year-old replacement is insufficient to raise fact issue).

If the plaintiff can establish a prima facie case, the burden then shifts to the defendant to articulate a legitimate, non-discriminatory reason for the adverse personnel action. This is not a burden of proof but a burden of producing some evidence which, if believed by the trier of fact, would support a finding that unlawful discrimination did not motivate the actions. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Norton v. Sam's Club, 145 F.3d 114 (2d Cir.), cert. denied, 119 S. Ct. 511 (1998); Debs v. Northeastern Illinois Univ., 153 F.3d 390 (7th Cir. 1998).

If the employer articulates a legitimate reason, the burden of proof then shifts back to the plaintiff to show that the reason proffered by the defendant was a pretext for age discrimination. A plaintiff has an affirmative burden to produce evidence of discrimination to escape summary judgment and cannot rely on an absence of knowledge. Woods v. Friction Materials, Inc., 30 F.3d 255 (1st Cir. 1994) (no knowledge of qualifications of those hired cannot show reason was a pretext); Campbell v. Fasco Indus., Inc., 861 F. Supp. 1385 (N.D. Ill. 1994) (evidence that most of the employees terminated in a three-year period were over age forty did not raise an issue of

fact where plaintiff did not know why those individuals left), aff'd mem., 67 F.3d 301 (7th Cir. 1995).

It is unlikely that a plaintiff will meet his burden of showing pretext by questioning the employer's exercise of business judgment. See Bennett v. Total Minatome Corp., 138 F.3d 1053 (5th Cir. 1998) (French subsidiary who wanted employees who could speak French and replaced plaintiff who could not speak French presented a non-discriminatory reason); Vanasco v. National-Louis Univ., 137 F.3d 962 (7th Cir. 1998) (university met its burden of showing non-discriminatory reason for denying plaintiff tenure where it relied on two unanimous decisions by committee reviewing plaintiff's work); see also Thornley v. Penton Publ'g, Inc., 104 F.3d 26, 30 (2d Cir. 1997) (whether job performance was satisfactory depends on employer's criteria and not on whether criteria was "reasonable," absent showing of bad faith by employer); Brocklehurst v. PPG Indus., Inc., 123 F.3d 890, 898 (6th Cir. 1997) (jury instruction that it could consider "fairness" of employer's decision when assessing credibility of business justification was erroneous, as it allowed jury to question employer's business judgment on issue of pretext); Furr v. Seagate Tech., Inc., 82 F.3d 974 (10th Cir. 1996) (evidence presented by RIF'd employee tending to show employer's financial health and profitability is not evidence of pretext), cert. denied, 117 S. Ct. 684 (1997); Ellis v. United Airlines, Inc., 73 F.3d 999 (10th Cir.) (evidence showing the employer's exercise of erroneous or illogical business judgment does not itself constitute pretext), cert. denied, 517 U.S. 1245 (1996); but see Boehms v. Cromwell, 139 F.3d 452 (5th Cir. 1998) (pretext may be shown where the negative evaluations of plaintiff's work, which were the employer's proffered reason for plaintiff's termination, were determined to be overblown), cert. denied, 67 U.S.L.W. 3188, 3244, 3452, 3457 (1999).

In Kelley v. Airborne Freight Corp., 140 F.3d 335 (1st Cir. 1998), the First Circuit Court of Appeals held that it was not reversible error for the district court to decline to give a “business judgment” instruction, based on instructions that did not permit or suggest that the jury could predicate a finding of age discrimination on its disagreement with the defendant’s business judgment. A plaintiff 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 reduction in force (“RIF”) which resulted in his discharge. Brocklehurst v. PPG Indus., 123 F.3d 890 (6th Cir. 1997); Kelly v. Drexel Univ., 94 F.3d 102 (3d Cir. 1996) (no inference of bias in employee’s assertion that employer actually had no economic necessity for reducing the work force and eliminating employee’s position; bias statutes not intended to force employers to maintain status quo, and courts should not second-guess business decision for a RIF). Employer use of such factors as grade level and salary in making employment decisions is not direct evidence of age discrimination, even though these factors are correlated with age. Achor v. Riverside Golf Club, 117 F.3d 339 (7th Cir. 1997); Brown v. McDonnell Douglas Corp., 113 F.3d 139 (8th Cir. 1997); see also Dilla v. West, 4 F. Supp.2d 1130 (M.D. Ala. 1998) (Army’s concern that a large percentage of its air traffic controllers would soon be eligible for retirement and the need to hire controllers who could be expected to remain on the job for some years is a non-discriminatory reason for hiring a young applicant over protected-age applicants), amended, No. Civ. A. 97-T-1003-N, 1999 WL 13341 (M.D. Ala. Jan. 11, 1999). Discharging an employee solely because of his status as a higher-paid employee does not alone permit an inference of age discrimination. Cramer v. McDonnell Douglas Corp., 120 F.3d 874 (8th Cir. 1997); Marks v. Loral Corp., 57 Cal. App.4th 30, 33 (1997) (state court of appeal approved jury instruction that “an employer is

entitled to choose employees with lower salaries, even though this may result in choosing younger employees"; also held that disparate impact analysis is inapplicable to age discrimination claims based on salary differentials.)

The Supreme Court has made it clear that the plaintiff always retains the ultimate burden of proof and cannot simply rely on showing that the defendant's reasons are false. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993). The plaintiff must show both that the reasons offered by the employer are false and that actual discrimination motivated the decision. In Hicks, the Supreme Court held that if the defendant has carried its burden of production and articulated a legitimate reason for the action, the McDonnell Douglas framework is no longer relevant. The rejection of the employer's reasons does not compel a finding of discrimination. The plaintiff always has the ultimate burden of proof, not just to show that the articulated reasons are false but also to show that the real reason for the adverse action was prohibited discrimination.

In addition to requiring that plaintiffs (1) prove their prima facie case and (2) present evidence that the employer's proffered justification for the adverse employment action was false (pretextual), some courts require the plaintiff to provide evidence that the adverse employment action was motivated by discriminatory intent ("pretext plus"). See, e.g., Vaughan v. MetraHealth Cos., 145 F.3d 197, 204 (4th Cir. 1998) (plaintiff must show "not just a pretext, but a pretext for age discrimination"); Tidwell v. Carter Prods., 135 F.3d 1422 (11th Cir. 1998) (inconsistencies in employer's proffered reason for termination are not enough to make out a pretext - the inconsistencies must show age bias); Kline v. TVA, 128 F.3d 337 (6th Cir. 1997); Krenik v. County of Le Sueur, 47 F.3d 953 (8th Cir. 1995) (plaintiff must demonstrate some additional

facts to support a finding that proffered reason is pretext and that real reason was intentional discrimination).

Other circuit courts do not require the plaintiff to prove employer pretext "plus" additional evidence of discriminatory intent. Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 994 (5th Cir. 1996) ("In tandem with a prima facie case, the evidence allowing rejection of the employer's proffered reasons will often, perhaps usually, permit a finding of discrimination without additional evidence."); Waldron v. SL Indus., Inc., 56 F.3d 491 (3d Cir. 1995) (summary judgment may be defeated by court's disbelief of employer's proffered non-discriminatory reasons plus plaintiff's prima facie case); Jones v. Unisys Corp., 54 F.3d 624 (10th Cir. 1995) (after defendant offers evidence of non-discrimination, plaintiff must present evidence that defendant's rationale was pretext or evidence of discrimination in order to avoid summary judgment).

This split in the Courts of Appeal is highlighted in Aka v. Washington Hospital Center, 156 F.3d 1284 (D.C. Cir. 1998) (en banc), where the majority adopted a presumption that discrediting an employer's reason will suffice to escape summary judgment, indicating that "a lie is evidence of consciousness of guilt" and a "jury can conclude that an employer who fabricates a false explanation has something to hide." Id. at 1293. The dissenting opinion pointed out that the false reason could be intended to mask an embarrassing but legal reason or simply to protect the feelings of the employee and does not establish discriminatory intent. The split in the courts makes this issue ripe for review by the Supreme Court.

In Smith v. Borough of Wilkinsburg, 147 F.3d 272 (3d Cir. 1998), the Third Circuit reviewed the conflicting post-Hicks decisions and held that in all discrimination cases, jurors must be instructed:

they are entitled to infer, but need not, that the plaintiff's ultimate burden of demonstrating intentional discrimination by a preponderance of the evidence can be met if they find that the facts needed to make up the prima facie case have been established and they disbelieve the employer's explanation for its decision.

147 F.3d at 280 (footnote omitted). Failure to give this instruction is reversible error, ruled the Court.

2. Disparate Impact

Disparate impact analysis continues to split the circuits. While the Supreme Court did not directly address the issue in Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993), there is a split among the circuits regarding whether to recognize disparate impact claims under the ADEA. See Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042 (6th Cir. 1998) (court stated that there is considerable doubt as to whether an age discrimination claim may exist under a disparate impact theory); Furr v. Seagate Tech. Inc., 82 F.2d 980 (10th Cir. 1996) (disparate impact claims not cognizable under ADEA), cert. denied, 117 S. Ct. 684 (1997); 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); but see Maier v. Lucent Techs., Inc., 120 F.3d 730, 734 (7th Cir. 1997) ("Clearly, the policies of AT&T have had disparate impact upon those in the protected class. This impact is sufficient enough to make out and prove a prima facie case for age discrimination."); Babcock v. CAE-Link Corp., 878 F. Supp. 377 (N.D.N.Y. 1995) (employer's motion for summary judgment denied as to pretext where evidence existed of age-biased atmosphere and layoff had disparate impact on older employees).

3. Use of Statistics

Statistics may be used to establish a prima facie case. Stratton v. Department for the Aging, 132 F.3d 869 (2d Cir. 1997); Bevan v. Honeywell, Inc., 118 F.3d 603 (8th Cir. 1997); Roemer v. Public Serv. Co. of Colorado, 911 F. Supp. 464 (D. Colo. 1996). Statistics may also be used to show pretext. Brown v. McDonnell Douglas Corp., 113 F.3d 139 (8th Cir. 1997); Nitschke v. McDonnell Douglas Corp., 68 F. 3d 249 (8th Cir. 1995); Rea v. Martin Marietta Corp., 29 F.3d 1450 (10th Cir. 1994); see also Beaird v. Seagate Tech., Inc., 145 F.3d 1159 (8th Cir.) (statistical evidence cannot defeat the plaintiff's pretext claim where the plaintiff's case rests on non-statistical evidence), cert. denied, 119 S. Ct. 617 (1998).

Statistics based upon employee birth dates alone are not evidence of age bias. Sheehan v. Daily Racing Form, Inc., 104 F.3d 940 (7th Cir. 1997). Statistical evidence demonstrating a pattern of age discrimination, but failing to incorporate employee performance ratings, is not probative where employer claimed discharge was result of performance ratings. Schultz v. McDonnell Douglas Corp., 105 F.3d 1258 (8th Cir.), cert. denied, 118 S. Ct. 56 (1997).

B. Liability For Willful Damages

A violation of ADEA is not willful if the employer neither knew the action was illegal nor showed reckless disregard for its legality. Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993). The circuit courts have applied this standard with varying emphasis on what constitutes knowledge or reckless disregard. Kolstad v. American Dental Ass'n, 139 F.3d 958 (D.C. Cir.) (distinguishing between need for showing of egregious conduct for Title VII punitive damages and rejection of need for such showing for ADEA liquidated damages), cert. granted, 119 S. Ct. 401, cert. denied, 119 S. Ct. 408 (1998); Woodhouse v. Magnolia Hosp., 92 F.3d 248 (5th Cir. 1996) (liquidated damages not recoverable for intentional violation of ADEA with employer's

good-faith, albeit mistaken, belief that Act allowed decision); Padilla v. Metro-North Commuter R.R., 92 F.3d 117 (2d Cir. 1996) (jury entitled to find willful violation even though decisionmaker consulted with employer's legal department), cert. denied, 117 S. Ct. 2453 (1997); Shaw v. HCA Health Servs. of Midwest, Inc., 79 F.3d 99 (8th Cir. 1996) (termination willful where hospital personnel manager altered notes made by employee's supervisor).

IV. AFFIRMATIVE DEFENSES (Tim J. Emert)

A. After-Acquired Evidence

In McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995), the Supreme Court resolved a split in the circuit courts over whether after-acquired evidence acts as a bar to recovery on an ADEA claim when the employer later discovers some wrongful conduct that would have led to discharge if it had been discovered earlier. The Supreme Court held that after-acquired evidence cannot serve to preclude the entire action but could be a basis to limit the plaintiff's damages. Remedies available to plaintiffs are limited to backpay measured from the date of the injury to the date of the discovery of the employee wrongdoing. 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." Id. at 362. The Court did not directly address the issue of a plaintiff's right to double the damages awarded if the trier of fact finds that the employer's violation of the ADEA was willful. 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.

Following the Supreme Court's holding in McKennon, the circuit courts have held that after-acquired evidence cannot preclude a plaintiff's claim entirely, but may cut off the accrual of

backpay from the date the employer discovered the plaintiff's wrongdoing. 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); Mardell v. Harleysville Life Ins. Co., 65 F.3d 1072 (3d Cir. 1995) (if employer proves that it would have terminated plaintiff upon discovery of wrongdoing, backpay would run only from time of termination until discovery). Misconduct by an employee following discharge, however, is irrelevant and will not trigger application of the acquired-evidence doctrine. Ryder v. Westinghouse Elec. Corp., 879 F. Supp. 534 (W.D. Pa. 1995).

B. Other Defenses

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. 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.

The doctrine of judicial estoppel was 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, Simon v. Safelite Glass

Corp., 128 F.3d 68 (2d Cir. 1997), and workers' compensation temporary total disability benefits, Rissetto v. Plumbers & Steamfitters, Local 343, 71 94 F.3d 597 (9th Cir. 1996).

The ADEA provides that the employer can defend against claims of age discrimination by offering evidence that reasonable factors other than age motivated the decision. EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529 (2d Cir. 1996), cert. denied, 118 S. Ct. 47 (1997); Bedwell v. Jefferson Smurfit Corp., 947 F. Supp. 1322 (E.D. Mo. 1996) (despite evidence of age-biased remark by supervisor, employer proved that it would have demoted employee regardless of any age bias because he caused production problems, refused to attend training, and was the subject of complaints about his supervision); Smith v. City of Des Moines, 99 F.3d 1466, 1471 (8th Cir. 1996) (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).

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 Express Corp., 121 F.3d 1022 (6th Cir. 1997), cert. denied, 118 S. Ct. 1300 (1998).

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 (DAB), 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 sixty-five); Morrissey v. Boston Five Cents Sav. Bank, 54 F.3d 27 (1st Cir. 1995) (former executive vice

president of bank was exempt from ADEA protection as high policymaker where he reported directly to bank CEO, attended weekly meetings of senior officers, chose bank's outside legal counsel, and was responsible for sale of bank's deposit in a branch office). The ADEA also excludes from protection any elected public officers and any person appointed to such officer's personal staff. Gunaca v. State of Texas, 65 F.3d 467 (5th Cir. 1995) (special investigator appointed by county district attorney was excluded from ADEA protection).

V. REMEDIES (Eugene Cavallucci)

A. Attorneys' Fees

The United States Court of Appeals for the Second Circuit in Kirsch v. Fleet Street, Ltd., 148 F. 3d 149 (2d Cir. 1998), affirmed the district court's award of \$89,475 in attorneys' fees in an ADEA lawsuit, despite the plaintiff's request for \$329,431.30. The court upheld all of the district court judge's reductions to the amount requested. First, the court agreed with the trial judge's determination that \$325/hour was excessive and that \$250/hour was a more reasonable rate, given the plaintiff's counsel's rate in a comparable case pending from 1979 to 1987.

Second, the court determined that the number of hours claimed was excessive, principally because the records submitted by the plaintiff did not "indicate clearly the amount of time spent on each claim." Id. at 172. It therefore reduced the number of hours by 50%. Third, the court further reduced the hours claimed by another 20% because of vague and ambiguous entries, i.e., "letter to court," "staff conference," as well as redundancies and inconsistencies in many of the entries. Id. "Applications for fee awards should generally be documented by contemporaneously created time records that specify, for each attorney, the date, the hours expended, and the nature of the work done." Id. at 173 (citations omitted).

Finally, the court declined to award fees for work done in the second trial on damages concluding that the plaintiff had failed to “make additional fee submissions relating to the latest damages trial.” 148 F.3d at 172. The court also determined that the trial judge had sufficient discretion to determine that the plaintiff should not be awarded fees for pursuing a judgment some “\$40,000 less than the judgment he could have received without any additional work.” *Id.* at 173-74.

B. Recovery Of Front Pay, Punitive And Liquidated Damages

Holding that the award of front pay and liquidated damages are not necessarily mutually exclusive remedies, the court in Hipp v. Liberty National Life Insurance Co., No. 95-1332-CIV-17A, 1998 WL 892694 (M.D. Fla. Nov. 20, 1998), awarded the plaintiffs liquidated damages and permitted them to present evidence of entitlement to front pay. In so holding, the court rejected the defendant’s assertion that reinstatement, not front pay, was the preferred remedy under the facts of this case, finding that reinstatement was impractical given that the “admiration and esteem that Plaintiffs once held for Defendant has long been extinguished by Defendant’s acts.” *Id.* at *3. However, the court did agree with the defendant’s argument that an award of liquidated damages under the ADEA and punitive damages under the Florida Civil Rights Act would amount to double recovery. Consequently, the court upheld the “mandatory award of liquidated damages under the ADEA” and struck completely the jury’s award of punitive damages. *Id.* at *5.

C. Settlement Amounts As Taxable Income

In Pipitone v. United States, 17 F. Supp.2d 793 (N.D. Ill. 1998), the United States District Court for the Northern District of Illinois granted summary judgment in favor of the United States

and held that \$95,000 received by the plaintiff under a “General Release in Full and Settlement Agreement” was taxable income under Section 104 of the Internal Revenue Code. Relying on the Supreme Court’s decision in Commissioner v. Schleier, 515 U.S. 323 (1995), the court held that the payments received by the plaintiff were in the nature of severance payments and were not paid to him for personal injuries arising from age discrimination under the Illinois Human Rights Act. 17 F. Supp.2d at 796-97. The court found the settlement agreement to be ambiguous and therefore placed considerable reliance on affidavits signed by management employees of the plaintiff’s former employer, which stated that the \$95,000 was intended to be severance payments. Id. at 799. The plaintiff’s “self-serving” affidavit and his failure to submit any documentary evidence or testimony were also viewed by the court to be fatal to his position. Id. Compare Greer v. United States, Civ. A. No. 96-117, 1998 U.S. Dist. Lexis 16734 (E.D. Ky. Sept. 22, 1998) (holding that payments made to plaintiff in settlement of a disputed employment claim constituted an “excludable personal injury tort settlement” and were therefore non-taxable under Section 104). The case is distinguishable from Pipitone because no express release of any specific federal or state discrimination statute was spelled out in the settlement agreement and the plaintiff was paid amounts well in excess of any severance pay to which he was entitled.

VI. BENEFITS (Michael I. Bernstein and David M. Safon)

A. Ratification Of Releases: Tender Back

In Oubre v. Entergy Operations, Inc., 522 U.S. 422, 118 S. Ct. 838 (Jan. 26, 1998), the United States Supreme Court resolved a split in the circuit courts over whether a release that failed to comply with OWBPA nonetheless could bar an ADEA claim where the plaintiff declined

to tender back the benefits s/he received in exchange for the release. Reversing the Fifth Circuit's grant of summary judgment to the employer, the Court ruled such tender back was not required. According to the Court, "An employee 'may not waive' an ADEA claim unless the employer complies with the statute. Courts cannot with ease presume ratification of that which Congress forbids." 118 S. Ct. at 841. The Court, however, specifically refrained from addressing whether the waiver or release was effective with regard to non-ADEA claims. *Id.* at 842. Moreover, it did not foreclose the possibility the employer could assert a claim for restitution, recoupment or setoff against the employee, although it acknowledged the complexity of such a determination where a release is effective as to at least some of the claims. *Id.*

The Second Circuit followed *Oubre* in *Tung v. Texaco Inc.*, 150 F.3d 206, 209 (2d Cir. 1998). A New York district court, faced with a release that failed to comply with OWBPA, took the doctrine a step further. In *Butcher v. Gerber Products Co.*, 8 F. Supp.2d 307 (S.D.N.Y. 1998), the release was deemed ineffective as to the ADEA claims, but effective as to the remaining claims. At issue was not merely the tender back of benefits already made, but whether the employer could suspend future severance payments that had been agreed upon in exchange for the release. In the court's view, inasmuch as the release effectively barred these other claims, it still benefited the employer and, accordingly, the suspension of future severance payments was held unlawful; "a great windfall will not result to the discharged employees if [the company] is required to continue making severance payments to which they are contractually obligated." *Id.* at 318. The court further explained:

According to [the company], . . . the discharged employees who signed the Release and who have joined in this lawsuit are receiving benefits they would not otherwise be entitled to absent the Release. While this is true with respect to the ADEA claims, given the policy

behind the OWBPA and the Supreme Court's directive in Oubre, the inclination is toward penalizing the employer for its "mistake" of not complying with the statutory requirements set forth in the OWBPA, rather than depriving the employee of the protection afforded him or her under the statute.

Id.

In Rangel v. El Paso Natural Gas Co., 996 F. Supp. 1093 (D.N.M. 1998), the court applied the "no tender back" rule to prevent dismissal of a Title VII claim. The plaintiff contended he had signed a release under false pretenses, but failed to return the benefits he had received in exchange for the release. Adopting the reasoning of the Supreme Court in Oubre, the court concluded that a rule precluding suit, absent tender back, "might tempt employers to risk noncompliance with . . . waiver provisions, knowing it will be difficult [for the discharged employee] to repay the monies and relying on ratification." Id. at 1096 (quoting Oubre, 118 S. Ct. at 842). Unlike OWBPA, Title VII does not specifically address waivers or releases but, the court held, the goals of the two statutes – "to expand employment opportunities and to combat workplace discrimination" – are the same. Id.

The "no tender back" rule has been applied, as well, in connection with a claim under the Family and Medical Leave Act, 29 U.S.C. § 2601 et seq. In Riddell v. Medical Inter-Insurance Exchange, 18 F. Supp.2d 468 (D.N.J. 1998), the plaintiff was not required to tender back the severance benefits she had received in order to challenge the release of her FMLA claims. Given the particular wording of OWBPA, the court expressly declined to rely on Oubre. Nonetheless, it found the parallel clear: "[the] FMLA is also a federal remedial statute and . . . imposing a tender back requirement would similarly compromise the underlying purposes of the statute." Id. at 476. A "tender back" rule, the court stated, "would deter meritorious challenges to releases of FMLA

claims and thus undermine Congress's goal of encouraging job security for . . . employees" with serious health problems. Id.

B. Final Regulations – OWBPA

The Equal Employment Opportunity Commission promulgated its final regulations on ADEA waivers, effective July 6, 1998. 29 C.F.R. Part 1625. The regulations are essentially unchanged from the proposal adopted by the Commission in March 1997 and clarify OWBPA requirements regarding valid waivers. These regulations provide:

! In determining whether the waiver is "knowing and voluntary," as required in ADEA Section 7(f)(1) and (2), a relevant consideration is whether the employer made a material mistake, omission or misstatement in the information it furnished the employee in connection with the waiver. 29 U.S.C. § 626(f). It must not mislead, misinform or fail to inform affected individuals, exaggerate benefits or minimize limitations.

! The waiver rules apply to both private and public sector employment, including employment by the United States Government.

! The entire waiver agreement must be in writing, drafted in "plain language geared to the level of understanding of the individual party to the agreement or individuals eligible to participate." Id. The level of comprehension and education of "typical participants" should be considered. Id.

! The waiver must refer to the Age Discrimination in Employment Act by name.

! The individual must be advised, in writing, to consult with an attorney before executing the agreement.

! The agreement cannot include a waiver of future rights or claims. However, the ADEA does not bar the enforcement of agreements to perform future employment-related actions, such as the employee's agreement to retire or otherwise terminate employment at a future date.

! The consideration of value must be additional to that to which the individual is already entitled in the absence of a waiver. Moreover, if the consideration previously had been eliminated in violation of law or contract, express or implied, its subsequent offer in connection with the waiver will not suffice.

! A person in the protected age class need not be given a greater amount of consideration than that given a person under age forty.

! The twenty-one-day period during which an employee may consider the offer – or, in the case of an “exit incentive or other employment termination program,” the forty-five-day period – runs from the date of the employer's final offer. 29 U.S.C. § 626(f)(1)(F). Only material changes to that offer will restart the running of the period. The parties may agree, however, that all changes, material or immaterial, do not restart the running of the period.

! The seven-day revocation period cannot be shortened by the parties, even by agreement.

! It is permissible for an employee to sign a release prior to the end of the twenty-one- or forty-five-day period, thereby commencing the revocation period, as long as the employee's decision to do so was knowing and voluntary and was not induced by the employer through fraud, misrepresentation, a threat to withdraw or alter the offer before the end of the

twenty-one- or forty-five-day period, or by the offer of different terms to employees who signed the release before the end of the period.

! Whether there exists an “exit incentive program” or “other employment termination program” that would trigger the forty-five-day requirement and, with it, the employer’s obligation to provide data to the individual regarding the characteristics of the individuals covered by the program, is a fact-based inquiry. 29 U.S.C. § 626(f)(1)(H). A “program” exists when a waiver is sought from two or more employees. In both an “exit incentive program” and an “other employment termination program,” the terms generally are not subject to negotiation. Moreover, the “program” need not constitute an “employee benefit plan” for purposes of the Employee Retirement Income Security Act of 1974.

! The information regarding the “class, unit or group” of individuals covered by the “program” must be given to each person in the “decisional unit” asked to sign a waiver. The regulation describes several examples designed to assist employers in defining the “decisional unit.” It is “that portion of the employer’s organizational structure from which the employer chose the persons who would be offered consideration for the signing of a waiver and those who would not.” 29 C.F.R. § 1625.22(f)(3)(i).

! The information furnished by the employer must be in writing and written so as to be understood “by the average individual eligible to participate.” 29 U.S.C. § 626(f)(1)(H).

! In listing the ages of each person eligible or selected for the program and each person not eligible or selected, the use of age bands broader than one year (e.g., “age 20-30”) is unacceptable. 29 C.F.R. § 1625.22(f)(4)(ii).

! The information furnished should be broken down by grade level or other subcategory, where such levels and categories exist.

! In providing the information, the employer must distinguish, where applicable, between voluntary and involuntary terminations.

! Where an involuntary termination program takes place in successive increments over a period of time, the information provided to employees must be cumulative, so that later terminated employees are provided the data both for all persons in the decisional unit at the beginning of the program and for all persons terminated to date. There is no duty, however, to supplement the information given to employees terminated earlier in the period.

! An employer seeking a waiver in settlement of either a charge filed with the EEOC or an action filed in court need not provide a twenty-one- or forty-five-day period for consideration of the agreement, but must give the individual “a reasonable period of time within which to consider the settlement agreement.” 29 U.S.C. § 626(f)(2). The twenty-one- and forty-five-day periods, however, will be considered “reasonable.”

C. Age-Based Distinctions

Distinctions in benefits on the basis of age are unlawful unless justified on the basis of cost. In McGinty v. State of New York, 14 F. Supp.2d 241, 245 (N.D.N.Y. 1998), the court, quoting 29 U.S.C. Section 623(f)(2)(B), observed that a bona fide benefit plan that discriminates on the basis of age may be lawful if ““for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker.”” Here, the state’s retirement system reduced the death benefit for members who joined at age fifty-two or older and for members who died at age sixty-one or

older. These reductions, the court held, could not be justified and, accordingly, were unlawful.

Id.

It has been held, however, that the “equal benefit or equal cost” rule “has no application in the retirement incentive plan context.” Auerbach v. Board of Educ., 136 F.3d 104, 112 (2d Cir. 1998). According to the Second Circuit, an employer need not provide identical early retirement incentives for employees of different ages or incur the same costs for all employees; the plan “need only be voluntary and consistent with the ADEA’s relevant purpose(s)” – and most importantly, “the protection of employees from arbitrary age discrimination.” Id. The court stated, however, that an early retirement incentive plan violates the ADEA where, in order to encourage “premature departure from employment by older workers,” it “withholds [from] or reduces benefits” to older retiree plan participants, but continues to make the benefits available to younger participants. Id. at 114. On the other hand, the plan at issue there was not unlawful, as it offered the same incentives to all plan participants who reached age fifty-five, regardless of the actual age at which they retired. Id.

In Schoolman v. UARCO, Inc., No. 94 C 5598, 1998 WL 774680 (N.D. Ill. Oct. 23, 1998), the retirement plan permitted lump sum payments for participants who were ineligible for retirement (i.e., under age fifty-five) or had fewer than ten years of service at the time of termination, but did not provide the same option for participants who, when terminated, were eligible for retirement. This, the court held, was “a pension plan that treats older employees differently [and, therefore,] violates the ADEA.” Id. at *4.

A somewhat different situation was present in Castellano v. City of New York, 142 F.3d 58, 72 (2d Cir.), cert. denied, 119 S. Ct. 276, and cert. denied, 119 S. Ct. 60 (1998). There,

previous retirees had received lesser benefits than those offered to current retirees, but the employer was not required to offer the past retirees the improved benefits retroactively.

An age-based distinction was deemed lawful in Kaplan v. California Public Employees' Retirement Systems, No. C 98-1246 CRB, 1998 WL 575095 (N.D. Cal. Sept. 3, 1998), where the state's industrial disability retirement allowance formula factored in the number of potential years of service the employee would have had if the employee had worked until age fifty-five. While the employee's age necessarily was a relevant factor to the extent it related to potential years of service, it was not the controlling factor. Id. at *4.

In a similar vein, it has been held that a "positive correlation between active pay status and age" is not necessarily unlawful. Bramble v. American Postal Workers Union, 135 F.3d 21, 26 (1st Cir. 1998). There, a United States Postal Service labor union's compensation plan set the union president's salary as the sum of the pay s/he would receive in accordance with his/her active status with the Postal Service plus \$3,000. Thus, a president who had retired from the Postal Service would be paid only the \$3,000 while a president who had yet to retire would receive an amount equivalent to his/her Postal Service salary in addition to the \$3,000. Although age was a factor, under these circumstances it was not regarded as sufficient to establish a claim of age discrimination. Id.

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

A. Prima Facie Case

The circuit courts continue to struggle with the articulation of a prima facie case for age discrimination in a reduction in force. See, e.g., Brennan v. GTE Gov't Sys. Corp., 150 F.3d 21,

26 (1st Cir. 1998) (plaintiff was at least forty years old, met employer's legitimate job performance expectations, experienced adverse employment action and employer did not treat age neutrally or younger individuals were retained in same position); Scott v. Goodyear Tire & Rubber Co., 160 F.3d 1121, 1126 (6th Cir. 1998) (plaintiff was between forty-five and sixty-five years old, qualified for position, subjected to adverse employment action, and presented “additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled [him] out for discharge for impermissible reasons”) (quoting Barnes v. GenCORP, Inc., 896 F.2d 1457, 1465 (6th Cir.), cert. denied, 498 U.S. 878 (1990)); Janiuk v. TCG/Trump Co., 157 F.3d 504, 507 (7th Cir. 1998) (plaintiff was in protected age group, performed to employer's legitimate expectations, was discharged despite performance, and substantially younger employees, similarly situated, were treated more favorably); Beaird v. Seagate Tech., Inc., 145 F.3d 1159, 1165 (10th Cir.) (plaintiff was within protected age group, doing satisfactory work, discharged despite adequacy of work, and presented evidence employer intended to discriminate against her in reaching its reduction in force decision), cert. denied, 119 S. Ct. 617 (1998); Williams v. Vitro Servs. Corp., 144 F.3d 1438, 1441 (11th Cir. 1998) (plaintiff was in protected age group, adversely affected by employment decision, qualified for current position or to assume another position at time of discharge, and presented evidence from which a factfinder reasonably could conclude employer intended to discriminate on basis of age in reaching decision).

B. Evidence

It has been held that evidence of employer concern about high-salaried employees, even if salary may have had some correlation with age, was not necessarily indicative of age

discrimination in the implementation of a reduction in force. See, e.g., EEOC v. McDonnell Douglas Corp., 17 F. Supp.2d 1048, 1054 (E.D. Mo. 1998); Wado v. Xerox Corp., 991 F. Supp. 174, 192 (W.D.N.Y. 1998). Nor, in the latter case, was it age discrimination where the evidence indicated a preference for younger employees more proficient in using computers, rather than an older employee “set in his ways.” Wado, 991 F. Supp. at 194. Similarly, in that same case, a supervisor’s alleged post-reduction statement, “Now that we have let go of all of the dead wood, we’re in a good position,” was found unrelated to the plaintiff’s age. Id. at 202. As the court there stated, “‘Dead wood’ implies employees who are unproductive or superfluous, and could just as easily include younger employees as older employees.” Id. Moreover, statements by non-decisionmakers, or actions unrelated to the decisionmaking process, cannot be used to demonstrate pretext. Id. at 212.

Where statistical evidence is at issue in a reduction in force context, it has been held that the “most significant statistic is the difference in the percentage of older employees before and after the RIF.” EEOC v. McDonnell Douglas Corp., 17 F. Supp.2d at 1053-54 (drop in percentage of older employees from 14.7% to 13.6% is insignificant). Moreover, as the court there also held, age discrimination is not established where an employer predicates its reduction in force decisions based upon its employees’ pension rights, whether the employer’s motivation was to “interfere” with those rights or to “minimize the adverse [e]ffect a layoff might have on an employee.” Id. at 1054. Such motivations, the court concluded, are not indicative of “the kind of inaccurate and stigmatizing age-based stereotypes prohibited by the ADEA.” Id.

Where an element of the plaintiff’s prima facie case is evidence that “similarly situated and substantially younger employees were treated more favorably,” the term “substantially

younger” has been interpreted to mean at least a ten-year age difference. Fisher v. Wayne Dalton Corp., 139 F.3d 1137, 1141 (7th Cir. 1998) (“any age disparity less than ten years is ‘presumptively insubstantial’”) (quoting Kariotis v. Navistar Int’l Transp. Corp., 131 F.3d 672, 676 n.1 (7th Cir. 1997)). Where the disparity is less than ten years, the plaintiff still may present a triable claim “if she directs the court to evidence that her employer considered her age to be significant.” Fisher, 139 F.3d at 1141 (quoting Hartley v. Wisconsin Bell, Inc., 124 F.3d 887, 893 (7th Cir. 1997)).

Evidence that an employee’s tasks were either assigned to others to perform along with their other job duties or redistributed among co-workers already performing related work did not establish that the employee had been “replaced.” Godfredson v. Hess & Clark, Inc., 996 F. Supp. 730, 736 (N.D. Ohio 1998). Nor, the court held, was the employer under any obligation to transfer the employee to another position within the company when the reduction in force was for economic reasons. Id. at 738.

Evidence that many others in the workforce have been adversely affected, although a factor, in itself was held insufficient to provide the ground for summary judgment, in favor of the employer. Danzer v. Norden Sys., Inc., 151 F.3d 50, 56 (2d Cir. 1998). Nor were the employer’s efforts to relocate the plaintiff, rather than terminate him (“commendable” as they were), sufficient to “serve as an absolute shield from an ADEA suit.” Id. at 56 n.4.

On the other hand, in Allard v. Indiana Bell Telephone Co., 1 F. Supp.2d 898 (S.D. Ind. 1998), evidence that employees voluntarily decided to take positions with reduced pay and benefits, rather than remain on an at-risk list of those who might be terminated during a reduction in force, precluded a finding of an “adverse employment action” that could provide the basis for

a claim of age discrimination. As the court explained, the plaintiffs “understood that only a small percentage of the hundreds of employees on the at-risk list would be selected for termination.”

Id. at 934-35.