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The Age Discrimination in Employment Act (ADEA): A Legal Overview

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The Age Discrimination in Employment Act (ADEA): A Legal Overview

Abstract
[Excerpt] This report provides an overview of the Age Discrimination in Employment Act (ADEA) and discusses current legal and legislative developments. The ADEA, which prohibits employment discrimination against persons over the age of 40, was enacted "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."

The ADEA, which applies to employers, labor organizations, and employment agencies, makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." The statute not only applies to hiring, discharge, and promotion, but also prohibits discrimination in employee benefit plans such as health coverage and pensions. The Equal Employment Opportunity Commission (EEOC) is responsible for enforcing the provisions of the ADEA.

The ADEA applies to employers who have "twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." A labor organization is covered by the ADEA if it "exists for the purpose ... of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment." An employment agency and its agents are subject to the ADEA if the agency "regularly undertakes with or without compensation" the procurement of employees for an employer, other than an agency of the United States. The ADEA also covers congressional and most federal employees.

In addition, the Supreme Court recently handed down a series of decisions involving the ADEA during its 2007-2008 term, including Sprint/United Management Co. v. Mendelsohn; Federal Express Corp. v. Holowecki; Gomez-Perez v. Potter; Kentucky Retirement Systems v. Equal Employment Opportunity Commission; and Meacham v. Knolls Atomic Power Laboratory. Each of these cases is discussed below.

Keywords
age discrimination, public policy, Age Discrimination in Employment Act, ADEA

Comments
Feder, J. (2008). *The Age Discrimination in Employment Act (ADEA): A legal overview* (RL34652). Washington, DC: Congressional Research Service. http://digitalcommons.ilr.cornell.edu/key_workplace/548/

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Order Code RL34652

CRS Report for Congress

The Age Discrimination in Employment Act (ADEA): A Legal Overview

September 5, 2008

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Prepared for Members and Committees of Congress

Congressional Research Service

The Age Discrimination in Employment Act (ADEA): A Legal Overview

Summary

This report provides an overview of the Age Discrimination in Employment Act (ADEA) and discusses current legal and legislative developments. The ADEA, which prohibits employment discrimination against persons over the age of 40, was enacted "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."

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In addition, the Supreme Court recently handed down a series of decisions involving the ADEA during its 2007-2008 term, including *Sprint/United Management Co. v. Mendelsohn*; *Federal Express Corp. v. Holowecki*; *Gomez-Perez v. Potter*; *Kentucky Retirement Systems v. Equal Employment Opportunity Commission*; and *Meacham v. Knolls Atomic Power Laboratory*. Each of these cases is discussed below.

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The Age Discrimination in Employment Act (ADEA): A Legal Overview

I. Introduction

The Age Discrimination in Employment Act (ADEA) of 1967,[1] as amended, seeks to address the longstanding problem of age discrimination in the workplace. The ADEA, which prohibits employment discrimination against persons over the age of 40, was enacted "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."[2] The ADEA makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[3] The statute not only applies to hiring, discharge, and promotion, but also prohibits discrimination in employee benefit plans such as health coverage and pensions. In addition to employers, the ADEA also applies to labor organizations and employment agencies.

After it was enacted, the ADEA went through a series of amendments to strengthen and expand its coverage of older employees. Originally, the ADEA only covered employees between the ages of 40 and 65. Eventually the upper age limit was extended to age 70, and then eliminated altogether. In 1978, enforcement authority of the ADEA was transferred from the Department of Labor to the Equal Employment Opportunity Commission (EEOC).[4]

II. Requirements Under the ADEA

Coverage

Employers.

The ADEA applies to employers who have " twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding

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[1] 29 U.S.C. §§ 621 et seq.

[2] Id. at § 621.

[3] Id. at § 623.

[4] Reorg. Plan No. 1 of 1978, 92 Stat. 3781 (1978). See also 29 U.S.C. § 626(a).

calendar year."[5] Companies that are incorporated in a foreign country but that are controlled by a U.S. employer are subject to the ADEA, and U.S. citizens employed by a U.S. employer to work in a foreign country are also covered, unless compliance with the ADEA would violate the laws of that country.[6] The determination regarding whether a company is under an American employer's control is based on the interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control between the employer and the corporation.[7]

Although the statutory definition of "employer" technically excludes the United States, a separate ADEA provision extends coverage to federal employees in certain military departments, executive agencies, the United States Postal Service, the Postal Rate Commission, certain District of Columbia agencies, federal legislative and judicial branch units with positions in the competitive service, the Smithsonian Institution, the Government Printing Office, the General Accounting Office, and the Library of Congress.[8] Congressional employees of the House and Senate are also covered by the ADEA pursuant to the Congressional Accountability Act of 1995.[9] In addition, the term "employer" includes state and local governments.[10]

Despite the fact that the ADEA applies to state governments, the United States Supreme Court in *Kimel v. Florida Board of Regents* held that state employees could not sue states for monetary damages under the ADEA.[11] The Court reasoned that states have sovereign immunity and are immune from suit unless the state consents or an exception applies. While, the *Kimel* decision effectively eliminated the ability of state employees to bring suit for monetary damages against states under the ADEA, the act may still be enforced against states by the EEOC, and state employees may still sue state officials for declaratory and injunctive relief.

In addition to employers, labor organizations and employment agencies are also subject to the ADEA. A labor organization is covered by the ADEA if it "exists for the purpose ... of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment."[12] The ADEA defines a labor organization as an entity that has a hiring hall or is a certified employee representative, or if not certified, holds itself out as the employee's

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[5] Id. at § 630(b).

[6] Id. at § 623(f)(1) and (h).

[7] Id. at § 623(h)(3).

[8] Id. at § 633a(a).

[9] 2 U.S.C. §§ 1301 et seq.

[10] 29 U.S.C. § 630. The Supreme Court in *EEOC v. Wyoming* declared constitutional the extension of the ADEA to state and local government employees as a valid use of Congress' authority under the Commerce Clause. 460 U.S. 226 (1983).

[11] 528 U.S. 62 (2000). See also, CRS Report RL30364, *Legal Issues Affecting the Right of State Employees to Bring Suit Under the Age Discrimination in Employment Act and Other Federal Labor Laws*, by Kimberly D. Jones.

[12] 29 U.S.C. § 630(d).

bargaining representative.[13] Meanwhile, an employment agency and its agents are subject to the ADEA if the agency "regularly undertakes with or without compensation" to provide employees for an employer.[14]

Employees.

In general, the ADEA covers employees who are forty years of age and older.[15] Because the statute prohibits discrimination against individuals regarding any terms or conditions of employment, the act's protections not only cover employees but also extend to both applicants for employment and discharged ex-employees. Both private and public employees are generally covered by the ADEA. For example, the ADEA applies to most federal employees, and the Congressional Accountability Act of 1995 extended the rights and protections of the ADEA to congressional employees.[16] State elected officials and their personal staff, appointees, and legal advisers are excluded from the definition of employee, although state employees covered by civil service laws are considered employees.

Despite the ADEA's exemption for the personal staff, appointees, and legal advisers of state officials, such individuals may nevertheless be able to file age discrimination claims under a separate law, the Government Employee Rights Act.[17] State officials remain exempt and therefore are not protected from age discrimination by either law.[18]

The ADEA contains several notable exceptions to the prohibition against age discrimination. For example, although mandatory retirement policies generally constitute a violation of the ADEA, the statute permits employers to establish compulsory retirement for a bona fide executive or high policymaker who has reached age 65 and is entitled to a pension benefit of at least $44,000.[19] Under certain circumstances, state and local governments may establish mandatory retirement requirements for their firefighters or law enforcement officers.[20] Also exempt are federal civil service employees who are air traffic controllers, firefighters, law

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[13] Id. at § 630(e).

[14] Id. at § 630.

[15] Id. at § 631(a).

[16] 2 U.S.C. §§ 1301 et seq.

[17] 42 U.S.C. § 2000e-16.

[18] Although state court judges who are elected are clearly not covered by the ADEA, the status of appointed state court judges was less clear until the Supreme Court ruled in *Gregory v. Ashcroft* that such judges fall within the exception to the ADEA regarding "appointee on the policymaking level." 501 U.S. 452, 467 (1991).

[19] 29 U.S.C. § 631(c)(1).

[20] Id. at § 623(j).

enforcement officers, nuclear materials couriers, and customs and border protection officers.[21]

Although the ADEA did at one point contain an exception for tenured faculty at institutions of higher education, that exception has expired. Currently, however, the ADEA does allow institutions of higher education to offer tenured employees who become eligible to retire "supplemental benefits" to encourage them to voluntarily retire. Supplemental benefits are those benefits above and beyond retirement or severance benefits generally offered to employees of the institution. If certain requirements are met, supplemental benefits may be reduced or eliminated on the basis of age without violating the ADEA. However, the ADEA continues to prohibit an institution from reducing or ceasing non-supplemental benefits on the basis of age.[22]

Prohibited Acts

As noted above, the ADEA applies to a broad range of employment practices, including discrimination because of age in hiring, placement, promotion, demotion, transfer, termination, and discipline. Because the statute prohibits age discrimination with respect to all terms and conditions of employment, discrimination regarding salary, leave, and other benefits may also violate the act. In addition, the statute prohibits discrimination in referrals by employment agencies, actions by unions, and retaliation against employees for filing or participating in an ADEA claim or for opposing an employer's discriminatory practices.[23]

Although the ADEA expressly prohibits retaliation in the private sector, the statute is less clear with regard to retaliation involving age discrimination in the federal sector. The Supreme Court, however, recently addressed this issue in *Gomez-Perez v. Potter*, holding that the ADEA does indeed prohibit retaliation in federal employment.[24] Relying on precedents established in cases involving other anti-discrimination statutes, the Court ruled that a prohibition against retaliation is encompassed within the general prohibition against age discrimination in the federal sector.

Because the statute covers individuals who are age forty or older, younger employees are not protected from age discrimination. Indeed, employers may engage in so-called reverse discrimination — favoring employees over the age of forty — without violating the statute. Furthermore, the Supreme Court has held that the ADEA does not prohibit employers from discriminating against employees who are

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[21] 5 U.S.C. § 8335.

[22] 29 U.S.C. at § 623(m).

[23] Id. at § 623(d). In *Robinson v. Shell Oil Co.*, a case involving Title VII of the Civil Rights Act, the Supreme Court held that ex-employees may sue for retaliation. 519 U.S. 337 (1997). Since the ADEA is closely modeled after Title VII, former employees appear to be protected from retaliation under the ADEA as well.

[24] 128 S. Ct. 1931 (2008).

protected under the statute in favor of older members of the protected class.[25] According to the Court, although the ADEA "forbids discriminatory preference for the young over the old," it does not prohibit favoring the old over the young, even when the younger and older employees are within the protected class, i.e., age forty or older.[26] In contrast, the Court has separately held that the ADEA does prohibit discrimination against older employees in favor of younger employees who are older than forty years old.[27]

Before entering an employment relationship with their workers, most employers advertise the job opening. As a result, such advertisements are subject to the ADEA, which prohibits advertisements that contain age preferences unless age is a bona fide occupational qualification for the position advertised.[28] According to the EEOC's regulations, advertisements that contain phrases such as, "age 25 to 35," "young," "college student," "recent college graduate," "boy," "girl," or similar terms are prohibited under the act, unless an exception applies. Even phrases that favor some members of the class, but discriminate against others is prohibited, such as "age 40 to 50," "age over 65," "retired person," or "supplement your pension."[29] On the other hand, the request for the age or date of birth of an applicant on an employment application or use of the phrase "state age" on a want ad is not automatically a violation because there may be legitimate reasons for requesting the age or date of birth of an applicant.[30] However, the EEOC will "closely [scrutinize the application] to assure that the request is for a permissible purpose and not for purposes proscribed by the Act."[31]

Defenses and Exceptions

The ADEA provides several defenses for employers. These available defenses attempt to strike a balance between the ability of employers to conduct their business and the interest of the government in eliminating age discrimination in employment.

Under one prominent exception, an employer will not be deemed to have violated the act when the action taken against an employee is due to a "bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of the particular business."[32] According to the Supreme Court, the BFOQ must be more than "convenient" or "reasonable," but must be "'reasonably necessary ... to the

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[25] Gen. Dynamics Land Sys. v. Cline, 540 U.S. 581 (2004).

[26] Id. at 584.

[27] O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308 (1996).

[28] 29 U.S.C. § 623(e).

[29] 29 C.F.R. § 1625.4(a).

[30] Id. at § 1625.4(b), 1625.5.

[31] Id. at § 1625.5.

[32] 29 U.S.C. § 623(f)(1).

particular business.'"[33] Under this narrow interpretation, an employer must justify an age-based employment requirement by demonstrating (1) that the requirement is reasonably necessary to the essence of its business, and (2) that an individualized approach would be pointless or impractical. The second prong of this test can be established in one of two ways. First the employer may show that it had a factual basis for believing that persons over a certain age would be unable to perform the job safely. In the alternative, the employer may show that "age was a legitimate proxy for the safety-related job qualifications by proving that it is 'impossible or highly impractical' to deal with the older employees on an individualized basis."[34] Although employers have attempted to use the BFOQ defense in a wide variety of occupations, job-related age requirements have tended to be more successful when the position in question, such as airline pilot or law enforcement officer, may affect public safety.

Another defense to a charge of age discrimination may apply if "the differentiation is based on reasonable factors other than age [RFOTA]."[35] Similarly, disciplining or discharging an employee for good cause also constitutes a defense to the act.[36] In both of these defenses, an employer asserts that its adverse action did not involve age discrimination but rather was based on some other factor. Such factors may include job performance, business cutbacks, or lack of qualifications, among others. In addition, the Court has held that employers may, without violating the ADEA, make employment decisions based on cost factors that are highly correlated with age, such as pensions or high salaries, as long as their actions are not actually based on age.[37] Indeed, in *Kentucky Retirement Systems v. Equal Employment Opportunity Commission*,[38] the Supreme Court recently upheld a state retirement plan that imputed additional years of service to employees who became disabled before becoming eligible for retirement at age 55, but did not, for purposes of calculating pensions, impute additional years of service to employees who became disabled after

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[33] W. Air Lines v. Criswell, 472 U.S. 400, 414 (1985).

[34] Id.

[35] 29 U.S.C. § 623(f)(1).

[36] Id. at § 623(f)(3). In *McKennon v. Nashville Banner Pub. Co.*, the Court considered whether after-acquired evidence of employee misconduct would bar an ADEA claim. The Court held that after-acquired evidence, which, if discovered, would have led to the employee's discharge, does not bar an ADEA claim, but may reduce the amount of damages. 513 U.S. 352 (1995).

[37] Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993). In *Biggins*, the plaintiff was fired weeks before he was scheduled to vest under his employer's pension plan, which allowed vesting after ten years of service. Although the Court held that firing an employee to prevent vesting is actionable under the Employees Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq., such firing "would not constitute discriminatory treatment on the basis of age," even though an employee's years of service may be highly correlated with age. Biggens, 507 U.S. at 612. However, the Court did not address the possibility of pension status being used as a proxy for age. If vesting were based on an employee's age, then firing an employee to avoid vesting could possibly result in liability under both the ADEA and ERISA. Id. at 613. Likewise, if an employer uses cost factors such as pension status or high salary as a proxy for age, then an ADEA violation may occur.

[38] 128 S. Ct. 2361 (2008).

they became eligible for retirement. The Court ultimately held that the retirement plan, which treated employees differently based on their pension status, was designed to provide pension benefits to disabled employees and was not "actually motivated" by age. Thus, the Court ruled that the retirement plan did not violate the ADEA.[39]

Under the ADEA, it is also permissible for an employer to take action pursuant to a bona fide seniority system or employee benefit plan, although neither the seniority system nor the benefit plan may require mandatory retirement of employees because of age.[40] However, the ADEA explicitly allows voluntary early retirement as an incentive of employee benefit plans. In addition, a bona fide employee benefit plan must satisfy the "equal cost equal benefit" principle that provides parity between the amount employers spend on benefits for older and younger workers.[41] If it costs more to provide the same benefit to the protected class, the employer has the option of paying the same amount for benefits of the protected class as it does for employees outside of the protected class. This is so, even if it results in workers in the protected class receiving fewer benefits. However, employers may not pay less for benefits of members of the protected class than they pay for younger employees.

Recently, there has been a debate over the extent to which the "equal benefits or equal costs" principle should be applied to retired employees. In order to cut costs, some employers have sought to provide one level of health benefits to retirees under age 65 to cover them until they are eligible for Medicare and then reduce or eliminate the benefit when the retiree becomes Medicare eligible. In *Erie County Retirees Ass'n v. County of Erie*,[42] the Court of Appeals for the Third Circuit ruled that the ADEA applies to retirees and held that the practice of providing different benefits to older and younger retirees based on their eligibility for Medicare constitutes age discrimination in violation of the act because Medicare eligibility is an "explicitly" age-related factor. Fearing that employers might reduce or eliminate benefits for all retirees rather than increase benefits for older, Medicare-eligible retirees, the EEOC, which exercised its statutory authority to approve reasonable exceptions to the ADEA,[43] promulgated a rule stating that it is not a violation of the act to alter, reduce,

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[39] Id. at 2369-70.

[40] 29 U.S.C. § 623(f)(2). See also, Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985). Bona fide is defined as a system or plan that is not being used to evade the purposes of the act.

[41] 29 U.S.C. § 623(f)(2)(B). In *Public Employees Retirement System of Ohio v. Betts*, the Court rejected the "equal benefits or equal costs" principle, holding that a bona fide employee benefit plan was permissible under the ADEA unless an employee could establish that adoption of the plan was a subterfuge for discrimination. 492 U.S. 158 (1989). The Older Workers Protection Act (P.L. 101-433), which amended the ADEA, restored the use of the "equal benefit or equal cost" principle after it had been invalidated by the Supreme Court in *Betts*.

[42] 220 F.3d 193 (3d Cir. 2000).

[43] 29 U.S.C. § 628.

or eliminate health benefits for retirees when the participant becomes eligible for Medicare or comparable state health benefits.[44]

Finally, as noted above, the ADEA permits employers to impose mandatory retirement with respect to certain categories of employees, such as executives and high policymakers, as well as firefighters and law enforcement officers.

Disparate Treatment vs. Disparate Impact

When bringing a civil case alleging employment discrimination, there are two types of claims that a plaintiff can make: disparate treatment and disparate impact. Disparate treatment occurs when an employer intentionally discriminates against an employee or enacts a policy with the intent to treat or affect the employee differently from others because of the employee's age. Such disparate treatment claims require proof that the employer intended to discriminate against the complaining party when it took the challenged employment action. Intent, the critical element of a disparate treatment claim, may be shown directly (e.g., by discriminatory statements or behavior of a supervisor towards a subordinate) or, perhaps more likely, by circumstantial evidence.

Meanwhile, disparate impact occurs when the employer's acts or policies are facially neutral, but have an adverse impact on a class of employees and are not otherwise reasonable. Unlike disparate treatment claims, disparate impact claims may be established without proof of discriminatory intent, relieving the victim of an often insurmountable burden. Although the ADEA clearly allows disparate treatment claims, it was, for many years, unclear whether an employee may recover under a disparate impact theory, which led to confusion for litigants and lower courts alike.[45] In 2005, however, the Supreme Court held in *Smith v. City of Jackson* that the ADEA does indeed authorize disparate impact claims.[46]

Over the years, the courts have developed a complicated set of rules and procedures that govern how disparate treatment and disparate impact claims are

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[44] 72 FR 72938. When proposed, the EEOC regulation was challenged in court, and a permanent injunction blocking its implementation remained in effect for several years while the courts considered the issue. In 2007, the Third Circuit ruled that the EEOC's promulgation of the proposed rule was a reasonable exercise of the agency's exemption authority and lifted the injunction, thus allowing the EEOC to publish the final rule. AARP v. EEOC, 489 F.3d 558 (3d Cir. 2007), cert. denied, 128 S. Ct. 1733 (2008). For more information, see CRS Report RS21845, *Final Equal Employment Opportunity Commission Rules on Retiree Health Plans and the Age Discrimination in Employment Act*, by Jody Feder.

[45] Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993). ("The disparate treatment theory is of course available under the ADEA, as the language of that statute makes clear. . . . By contrast, we have never decided whether a disparate impact theory of liability is available under the ADEA.") Id. at 609-610.

[46] 544 U.S. 228 (2005). For more information on this case, see CRS Report RS22170, *The Age Discrimination in Employment Act and Disparate Impact Claims: An Analysis of the Supreme Court's Ruling in Smith v. City of Jackson*, by Charles V. Dale and Jody Feder.

adjudicated. Many of the cases in which these rules have evolved are Title VII cases, but their reasoning typically applies in the ADEA context as well. These rules, which differ depending on the type of claim involved, are discussed below.

Proving a Disparate Treatment Claim.

In general, the courts evaluate individual disparate treatment claims under the ADEA in one of two ways.[47] When direct evidence of discrimination is lacking, plaintiffs are generally subject to the burden-shifting framework established by the Supreme Court in *McDonnell Douglas v. Green* and *Texas Dept. of Community Affairs v. Burdine*.[48] When the plaintiff has direct evidence of age discrimination, use of the *McDonnell Douglas* burden-shifting model is unnecessary,[49] and courts tend to rely instead on the "mixed motive" framework established by the Court in *Price Waterhouse v. Hopkins*.[50]

Under the *McDonnell Douglas* burden-shifting framework, a plaintiff must first establish a prima facie case, meaning that a plaintiff must allege facts that are adequate to support a legal claim. Once a plaintiff, by a preponderance of the evidence, establishes a prima facie case, then the burden of production shifts to the employer, "to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[51] If the employer successfully rebuts the employee's prima facie case by articulating such a reason, then the employee may still prevail if he can show that the employer's defense is merely a pretext and that the employer's behavior was actually motivated by discrimination.[52] While the burden of production shifts to the employer to rebut the employee's prima facie case, the burden of persuasion remains on the plaintiff at all times.[53]

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[47] Under the ADEA, plaintiffs may also bring a separate type of disparate treatment claim akin to Title VII "pattern or practice" suits, which involve habitual discriminatory actions on the part of the employer. Such class action claims carry a heavy evidentiary burden that follow different rules of proof. See, e.g., Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

[48] 411 U.S. 792 (1973); 450 U.S. 248 (1981).

[49] See, e.g., Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985).

[50] 490 U.S. 228 (1989).

[51] McDonnell Douglas, 411 U.S. 792, 802 (1973).

[52] St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). In *Hicks*, the Supreme Court revisited the burden of proof scheme established by *McDonnell Douglas* and *Burdine*, holding that it is not enough for the plaintiff to show that the employer's proffered reason was false. The plaintiff must show that the employer's proffered reason is both false and that the employer's actions were motivated by discrimination. In *Reeves v. Sanderson Plumbing Products, Inc.*, the Court emphasized that "a plaintiff's prima facie case of age discrimination, combined with sufficient evidence to find that the employer's asserted justification for its action was false, may permit the trier of fact to conclude that the employer unlawfully discriminated," and the plaintiff need not always introduce additional and independent evidence of discrimination. 530 U.S. 133, 148-49 (2000).

[53] Burdine, 450 U.S. 248, 255-256 (1981).

Because the *McDonnell Douglas* framework was originally established in a Title VII case involving failure to hire, there has been some confusion among the courts when applying this model to ADEA claims, particularly when it comes to defining what constitutes a prima facie case of age discrimination. Under the facts in the *McDonnell Douglas* case, a prima facie case would be established when the plaintiff showed: "(1) that he belongs to a racial minority; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite his qualifications, he was rejected; and (4) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."[54] As adapted to the ADEA context, therefore, a plaintiff generally must show that he or she is a member of the protected age group, that he or she was adversely affected by an employment action, and that such action was taken because of the employee's age in order to establish a prima facie case of age discrimination.[55] However, because the elements of a prima facie case may vary somewhat depending on the type of employment action that was taken (e.g., failure to hire, discharge, demotion, compensation, etc.), a plaintiff may have to make additional — or more specific — showings in order to establish a prima facie case.[56]

As noted above, if an employer rebuts the plaintiff's prima facie case by offering a legitimate nondiscriminatory reason for its employment action, then the plaintiff must establish that the employer's reason is a pretext for discrimination. A plaintiff may show pretext in a variety of ways, such as offering statistical evidence, proof of discriminatory statements by an employer, or evidence of harassment, although presentation of such evidence does not guarantee that the plaintiff will be successful. In addition, a plaintiff may, in some cases, demonstrate pretext by offering evidence of discrimination against other employees. Indeed, in *Sprint/United Management Company v. Mendelsohn*,[57] the plaintiff attempted to introduce testimony by several former employees who claimed they had suffered age discrimination at the hands of their supervisors, even though those supervisors worked in another part of the company and were not involved in any discriminatory action taken against the plaintiff. Noting that "[t]he question whether evidence of discrimination by other supervisors is relevant in an individual ADEA case is fact based and depends on many factors," the Supreme Court held that such evidence is neither per se admissible nor per se inadmissible and therefore the district court should determine the admissibility of such evidence on a case by case basis.[58] Because many lower

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[54] McDonnell Douglas, 411 U.S. at 802.

[55] The plaintiff must show that age was a motivating factor in the employer's decision, but does not have to show that it was the only factor. Kralman v. Illinois Dept. of Veteran's Affairs, 23 F.3d 150 (7th Cir. 1994), cert. denied, 513 U.S. 948 (1994).

[56] For example, in discharge cases, the Court has held that a prima facie case of age discrimination does not require a plaintiff to demonstrate that he or she was replaced by a person outside of the protected age class. Rather, replacement by someone who is substantially younger — even if that person is also a member of the protected class — may be sufficient for the plaintiff to demonstrate that he was replaced because of his age. O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308 (1996).

[57] 128 S. Ct. 1140 (2008).

[58] Id. at 1147.

courts had been excluding such evidence, the Court's decision is expected to benefit employees who want to introduce co-worker evidence in future cases.

In contrast to the *McDonnell Douglas* model, which is typically used in cases in which direct evidence of discrimination is lacking, courts may instead evaluate disparate treatment claims under the *Price Waterhouse* "mixed motive" framework. Mixed motive cases, which involve employment actions that are based on a mix of discriminatory and nondiscriminatory reasons, require a plaintiff to provide "direct evidence" demonstrating that age discrimination was a "substantial factor" in the employer's action. At that point, the burden shifts to the employer, who must prove that it would have made the same decision regardless of the discriminatory motive. If the employer fails to make this showing, it will be held liable.

The differences between a *McDonnell Douglas* pretext case and a *Price Waterhouse* mixed motives case are significant for several reasons. First, under the *McDonnell Douglas* framework, the burden of persuasion remains on the plaintiff at all times because the plaintiff bears the burden of demonstrating pretext in response to an employer's articulation of a nondiscriminatory reason for the employment action. Under the *Price Waterhouse* framework, however, the burden of persuasion ultimately lands on the employer, who must prove that it would have made the same employment decision even in the absence of the discriminatory motive. Second, the types of evidence that plaintiffs are required to produce differ somewhat. In a pretext case, an inference of discrimination may be made even though the plaintiff's evidence of age discrimination is not be very strong, while mixed motive cases require direct evidence of such discrimination.

Proving a Disparate Impact Claim.

As noted above, the Supreme Court has clarified that plaintiffs may bring disparate impact claims under the ADEA, reasoning that the ADEA is analogous to Title VII, under which disparate impact claims are authorized.[59] The process for bringing such claims, however, differs from the process for proving a disparate treatment claim. In addition, because of differences between the ADEA and Title VII, plaintiffs who decide to pursue disparate impact claims under the ADEA must comply with rules of proof that differ from the rules that govern disparate impact claims under Title VII.

In order to bring a disparate impact claim under the ADEA, a plaintiff must first establish a prima facie case of age discrimination by demonstrating that a given employment practice has a disparate impact on members of the protected class. At this stage, a plaintiff must identify the specific employment practice that is responsible for the disparate impact.[60] The employer may then rebut the prima facie case by showing that the adverse impact was attributable to a reasonable factor other than age, a requirement based on the statutory provision that exempts otherwise prohibited employment actions that are based on a reasonable factor other than age.

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[59] Smith v. City of Jackson, 544 U.S. 228 (2005).

[60] Id.

Until recently, there was confusion among the federal courts regarding the question of whether it is the employee or employer who bears the burden of demonstrating that the challenged employment practice is reasonable or unreasonable. In *Meacham v. Knolls Atomic Power Laboratory*, the Supreme Court ruled that the employer is responsible for proving that its action was in fact reasonable.[61] The Court's decision rested in part on its determination that the party who claims the benefits of a statutory exception must bear the burden of proving its actions were justified.[62] Ultimately, the result in the *Meacham* case appears to make it easier for plaintiffs to prevail in disparate impact cases.

Enforcement and Filing Procedures

The EEOC is responsible for enforcing the provisions of the ADEA.[63] In order to encourage informal resolution of age discrimination disputes, the statute requires aggrieved employees to file complaints with the EEOC before they are allowed to sue in federal court. The deadline for filing an ADEA charge varies depending on several factors.[64] Generally, a private sector employee must file a complaint with the EEOC within 180 days of the alleged discriminatory act. However, if the state where the alleged unlawful practice took place has an age discrimination law and a corresponding enforcement agency, then the time by which a claimant must file with the EEOC is extended to within 300 days of the alleged unlawful practice.[65]

After receiving a charge of unlawful discrimination, the EEOC conducts an investigation, and, if the claim is found to have merit, the agency may seek compliance with the statute through methods such as conciliation, conference, or persuasion.[66] Once 60 days have elapsed after the filing of a discrimination charge, then an ADEA plaintiff may file suit in federal court.[67] If the claimant decides to wait

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[61] 128 S. Ct. 2395 (2008).

[62] Id.

[63] 29 U.S.C. § 626(a). The Department of Labor was originally responsible for enforcement of the ADEA. The authority was transferred to the EEOC in 1978 pursuant to Reorg. Plan No. 1 of 1978, 92 Stat. 3781 (1978).

[64] The filing procedures for federal employees vary somewhat from the filing procedures for private sector employees. Most notably, federal employees are required to seek resolution with the equal employment opportunity office at their respective agency prior to filing a charge of discrimination with the EEOC. 29 C.F.R. § 1614.105.

[65] 29 U.S.C. § 626(d). Additional filing deadlines apply to suits that are filed in state court. In states with age discrimination laws and an agency to administer such laws, the statute requires ADEA claimants to file suit in state court. Id. at § 633(b). The Supreme Court, in *Oscar Mayer & Co. v. Evans*, held that this provision requires claimants to pursue state claims prior to suing in federal court. However, the Court also held that this provision is satisfied by filing with the applicable state agency, that such charges do not need to be filed within the state law filing period, and that exhaustion of state remedies is not required before filing a complaint with the EEOC. 441 U.S. 750 (1979).

[66] 29 U.S.C. § 626(b).

[67] Id. at § 626(d). The statute gives private sector employees the right to a jury trial, but this

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for a final determination from the EEOC, then he or she has 90 days to file suit in federal court once notified of the agency's final action.[68] It is important to note, however, that the EEOC has the authority to sue on behalf of an individual, in which case the individual's right to bring suit yields to the EEOC.[69]

Over the years, there has been some confusion over what constitutes a charge for purposes of triggering EEOC enforcement action. Under EEOC regulations, an ADEA complaint must, at a minimum: (1) be in writing, (2) name the prospective respondent, and (3) generally allege the discriminatory acts.[70] In addition to these regulatory requirements, EEOC policy states that a filing, in order to be deemed a charge, must contain a request for agency action to remedy the alleged age discrimination. The agency's position was recently validated by the Supreme Court in *Federal Express Corp. v. Holowecki*,[71] which held that a claimant's submission of an improper form was not fatal to her claim. According to the Court, "In addition to the information required by the regulations ... if a filing is to be deemed a charge it must be reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee."[72] Although this permissive standard may lead to a higher number of filings being deemed to be charges, the Court reasoned that giving inexperienced litigants the benefit of the doubt is more consistent with the remedial purpose of the ADEA.

Waiver and Arbitration.

An employee may waive his rights under the ADEA if such waiver was knowing and voluntary.[73] In order to be considered knowing and voluntary, a waiver must comply with detailed requirements set forth in the statute.[74] A waiver given in

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[67] (...continued)
right does not extend to federal employees. Lehman v. Nakshian, 453 U.S. 156 (1981).

[68] 29 U.S.C. § 626(e).

[69] Id. at § 626(c).

[70] 29 C.F.R. § 1626.6. The EEOC has a duty to accept charges that are submitted in person or over the telephone, and to put these charges in writing.

[71] 128 S. Ct. 1147.

[72] Id. at 1157-58.

[73] 29 U.S.C. § 626(f).

[74] Id. at § 626(f)(1). A waiver is knowing and voluntary if:
(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
(B) the waiver specifically refers to rights or claims arising under this chapter;
(C) the individual does not waive rights of claims that may arise after the date the waiver is executed;
(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;
(E) the individual is advised in writing to consult with an attorney prior to executing the
(continued...)

settlement of a charge filed with the EEOC or in a civil action is not considered knowing and voluntary unless the general requirements for a waiver are met and the individual has a reasonable opportunity to consider the settlement.[75] The person asserting validity of the waiver has the burden of proving that the waiver was knowing and voluntary. In addition, the waiver provision does not apply to the EEOC, nor may a waiver be used to interfere with an employee's right to file an age discrimination charge or participate in an EEOC investigation or proceeding.

On occasion, employers may, either deliberately or inadvertently, fail to comply with the ADEA's waiver requirements. In such cases, the courts must determine what effect the employee's acceptance of the statutorily deficient waiver has on the waiver's validity. In *Oubre v. Entergy Operations, Inc.*,[76] the employee received severance pay in return for waiving any claims against the employer, but the waiver did not fully comply with the ADEA's waiver requirements. The Supreme Court, reasoning that retention of severance benefits does not ratify a statutorily invalid waiver, held that the plaintiff did not have to return the money before bringing suit.[77]

A related issue is the effect of arbitration clauses on ADEA claims. The Court held in *Gilmer v. Interstate/Johnson Lane Corp.* that the ADEA does not preclude enforcement of a compulsory arbitration clause.[78] The plaintiff in *Gilmer* signed a registration application with the New York Stock Exchange (NYSE), as required by his employer. The application provided that the plaintiff would agree to arbitrate any claim or dispute that arose between him and Interstate. Gilmer filed an ADEA claim with the EEOC upon being fired at age 62. Interstate filed a motion to compel

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[74] (...continued)
agreement;
(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or
(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;
(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;
(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to —
(i) any class, unit, or group of individuals covered by such programs, any eligibility factors for such program, and any time limits applicable to such program; and
(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

[75] Id. at § 626(f)(2).

[76] 522 U.S. 422 (1998).

[77] Id. at 428. An employer, however, may be entitled to deduct the original settlement amount from any damages awarded in a subsequent lawsuit.

[78] 500 U.S. 20 (1990).

arbitration based on the application and the Federal Arbitration Act (FAA),[79] which was enacted to change the "longstanding judicial hostility to arbitration...."[80] Ultimately, the Court held that an ADEA claim may be subject to compulsory arbitration in accordance with an arbitration agreement contained in an employment contract.[81]

Remedies

The remedies available under the ADEA are patterned on the Fair Labor Standards Act,[82] and may include injunctions, compelled employment, reinstatement, promotion, and back pay.[83] In addition, a willful violation of the act gives rise to liquidated damages, which are generally computed by doubling the amount awarded to the plaintiff.[84] According to the Supreme Court in *Trans World Air Lines v. Thurston*, "a violation of the Act [is] 'willful' if the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA."[85] Upon proving a claim of age discrimination, a plaintiff is entitled to reasonable attorney's fees and costs.[86]

In addition, anyone who interferes with the EEOC's performance of its duties under the ADEA is subject to criminal penalties amounting to a fine or up to one year of prison, or both.[87]

III. Other Laws Prohibiting Age Discrimination

The ADEA is not the only legal remedy available to employees who have been subject to age discrimination. Other laws that may offer some degree of protection include the U.S. Constitution, federal statutes such as the Age Discrimination Act and the Congressional Accountability Act, and various state laws.

One alternative remedy to the ADEA is the U.S. Constitution. Although some employees seeking a remedy for age discrimination in employment may decide to file

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[79] 9 U.S.C. §§ 1 et seq.

[80] Gilmer, 500 U.S. at 24. Courts are less likely to honor arbitration agreements contained in a collective bargaining agreement. See, e.g., Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

[81] Gilmer, 500 U.S. at 23.

[82] 29 U.S.C. § 626(b).

[83] Id. at § 216(b).

[84] Id. at § 626(b). Compensatory and punitive damages are not available under the ADEA.

[85] 469 U.S. 111, 126 (1985).

[86] 29 U.S.C. § 216(b).

[87] Id. at § 629.

a constitutional challenge based on the Equal Protection Clause,[88] such claims are unlikely to be successful. Because the Equal Protection Clause applies only to governmental entities, a plaintiff must show state action in order to establish such a claim. Moreover, the courts generally review legislation involving age classifications under a deferential standard of review, meaning that such legislation is highly likely to survive judicial scrutiny. For example, in *Gregory v. Ashcroft*,[89] the Supreme Court considered an Equal Protection Clause challenge to a Missouri law that required state judges to retire at age 70. Noting that "age is not a suspect classification under the Equal Protection Claus" "and that the plaintiffs did not "have a fundamental interest in serving as judges,"[90] the Court reviewed the claim under the deferential rational basis standard. Ultimately, the Court held that the state had a legitimate and rational basis for requiring retirement of their state judges to ensure the competency and efficacy of their judiciary.

Other remedial alternatives to the ADEA may be found in other federal statutes.[91] For example, the Age Discrimination Act prohibits discrimination on the basis of age in federally funded programs or activities.[92] Although each federal agency is responsible for enforcing compliance with respect to its funding recipients, the statute states that agencies are not authorized to take action against recipients with respect to their employment practices. However, it is possible, though not certain, that individuals may bring employment-related suits on their own. Meanwhile, as noted above, the Congressional Accountability Act applies several existing civil rights, labor, and workplace laws — including the ADEA — to employees of the legislative branch of the federal government.[93]

Finally, in addition to federal laws, most states have laws that prohibit age discrimination in private employment. The ADEA does not preempt such state laws, even when those laws are more stringent than the ADEA.[94]

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[88] U.S. Const. amend. XIV, § 1. The Equal Protection Clause states in part, "[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws."

[89] 501 U.S. 452 (1991).

[90] Id. at 470.

[91] It is unclear whether plaintiffs may bring age discrimination in employment claims under certain provisions of the Reconstruction Statutes, namely 42 U.S.C. § 1983 or 42 U.S.C. § 1985.

[92] 42 U.S.C. §§ 6101 et seq.

[93] 2 U.S.C. §§ 1301 et seq.

[94] 29 U.S.C. § 633(a).