Chapter Fifteen

AGE DISCRIMINATION
# The Age Discrimination in Employment Act (ADEA), Generally

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I. THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA), GENERALLY

The ADEA, 29 U.S.C. §§ 621-634 (1967), makes it illegal for an employer to discriminate in employment decisions because a person is age 40 or older.

A. Coverage. The ADEA applies to private employers with 20 or more employees, 29 U.S.C. § 630(b). Whether and under what circumstances the ADEA applies to state and local governments has been the subject of some dispute. By the statute’s literal terms, it does. 29 U.S.C. § 630(b)(2). But due to constitutional limitations on federal control of states, it has been held that individual state employees may not seek monetary damages (as opposed to injunctive relief) from their state employers – and, by extension, from individual agents of state employers – in federal court for age discrimination under the ADEA unless the state specifically abrogates its sovereign immunity. Instead, such persons must look to state law remedies for relief. See Kimel v. Florida Bd. of Regents, 528 U.S. 62, 91-92 (2000) (5-4 decision); Latham v. Office of Atty. Gen. of State of Ohio, 395 F.3d 261, 270 (6th Cir. 2005) (the plaintiff “simply cannot sue a State under the ADEA without the State’s consent”). This does not, however, bar ADEA suits by employees of local governments, i.e., municipal corporations or other governmental entities that are not arms of the state. Williams v. Dallas Area Rapid Transi, 242 F.3d 315, 322 (5th Cir. 2001) (the lower court erred in finding the defendant immune from suit because it was not an arm of the state under the factors the court analyzed).

Also, some courts have interpreted Kimel narrowly to allow the ADEA to be applied against state governmental entities in some situations. See, e.g., State Police for Automatic Retirement Ass’n v. DiFava, 317 F.3d 6, 12 (1st Cir. 2003) (“even though private individuals are precluded by the Eleventh Amendment from suing the Commonwealth for money damages for violations of the ADEA, the provisions of the ADEA remain fully applicable and may be enforced against the Commonwealth in the manner described. Kimel has not so altered the legal landscape as to invalidate the permanent injunction issued in Gately.”).

Moreover, the Kimel ban applies only to private parties; it does not prevent the federal government from recovering damages from a state in an ADEA case. State Police, supra.

The ADEA applies only to employees employed in the U.S. and to U.S. citizens working abroad for a U.S. employer or for an employer controlled by a U.S. employer. U.S. citizens working abroad for companies not controlled by a U.S. company are not covered. See Denty v. SmithKline Beecham Corp., 109 F.3d 147, 151 (3d Cir. 1997).

1. Reverse Discrimination Claims under the ADEA. The ADEA does not prohibit employers from favoring older workers over younger ones, even if the younger workers are in the ADEA’s protected age group. See General Dynamics Land Systems, Inc. v. Cline, 540 U.S. 581 (2004).

2. Whether ADEA Precludes Age Discrimination Claim Under § 1983. Most federal appeals courts addressing the issue of whether the ADEA precludes an employee from bringing a claim for age discrimination under 42 U.S.C. § 1983 have held that such claims are precluded. See

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1 Although the United States is expressly excluded from the ADEA's definition of employer, 29 U.S.C. § 633a prohibits age discrimination in personnel actions “affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress.”
Hildebrand v. Allegheny Cnty., 757 F.3d 99, 108 (3d Cir. 2014) ("Fitzgerald [v. Barnstable School Committee, 555 U.S. 246 (2008)] reaffirmed the principle that, where a statute imposes procedural requirements or provides for administrative remedies, permitting a plaintiff to proceed directly to court via § 1983 would be 'inconsistent with Congress' carefully tailored scheme.'"), cert. denied, 135 S. Ct. 1398 (2015). Compare Levin v. Madigan, 692 F.3d 607, 622 (2012) (the ADEA does not purport to provide a remedy for violations of constitutional rights but instead provides a mechanism for enforcing the rights established by the ADEA itself, thus "the ADEA is not the exclusive remedy for age discrimination in employment claims"). See also Hildebrand, 757 F.3d at 107 (collecting cases).

B. Hiring Concerns. Under the ADEA, employers cannot refuse to hire a person because that person is over 40.

1. Advertising. In "help wanted" notices or advertisements, employers should not use terms such as: "employee age 25 to 35 desired," "young," "college student," "recent college graduate," "boy," or "girl" unless the employer can prove a bona fide occupational qualification (see below for discussion of reliance upon a bona fide occupational qualification as a basis for considering age). The Equal Employment Opportunity Commission (EEOC) considers the use of such terms in advertisements to be direct evidence of age discrimination.

2. Employment Applications. Employers should not require applicants to state their age or birth dates on application forms. Requesting a person's age or birth date is not per se unlawful but can be used as evidence of the employer's intent to discriminate.

3. Child Labor. Employers may ask questions designed to ensure compliance with federal or state child labor restrictions, such as, 'Are you 18 years of age or older? ___ yes ___ no.'

II. RETIREMENT PROGRAMS

A. Involuntary Retirement. The ADEA prohibits mandatory retirement based on age.

Exception: Bona Fide Executives. The ADEA permits the involuntary retirement of employees who are at least 65 years old and who for the two-year period immediately before retirement were employed in a bona fide executive or a high policy-making position, and are entitled to an immediate nonforfeitable annual retirement benefit. The retirement income level that triggers this executive exemption is $44,000. 29 C.F.R. § 1625.12(a). This exemption "does not apply to middle-management employees, no matter how great their retirement income, but only to a very few top level employees who exercise substantial executive authority over a significant number of employees and a large volume of business." Id.

B. Employee Attacks on "Voluntary" Retirement. Voluntary retirement plans may be attacked by employees who argue they are not given a true choice between retiring and remaining employed. In Henn v. National Geographic Society, 819 F.2d 824, 828-829 (7th Cir. 1987), the plaintiffs argued that their retirement was involuntary because they felt pressured by the employer to retire and felt the alternative was unacceptable. The Henn court rejected the plaintiffs' age discrimination claims, and listed some factors to be considered in analyzing such claims: (1) whether the employee received information about what would happen in response to the choice; (2) whether the choice was free from fraud or other misconduct; (3) the length of time the employee was given to consider the option; and (4) whether the employee had time to consult others about the offer. Id. at 828-29. See also Aliotta v. Bair, 614 F.3d 556 (D.C. Cir. 2010) (employees considering whether to accept a buyout offer "faced a difficult decision: they could either leave the Agency early and receive an incentive payment and benefits, or they could choose to stay and face the risk of termination in the RIF. But, senior employees were not faced with 'an impermissible take-it-or-leave-it choice between retirement or discharge' ... nor were they otherwise compelled to accept the buyout"); Morgan v. A.G. Edwards & Sons, Inc., 486 F.3d 1034, 1041 (8th Cir. 2007) (although the memorandum containing...
III. THE OLDER WORKERS BENEFIT PROTECTION ACT (OWBPA)

A. Coverage. The OWBPA amended the ADEA to prohibit age discrimination in employee benefits and to establish minimum requirements for valid waivers of claims under the ADEA. The OWBPA applies to all employee benefit plans established or modified on or after the date of its enactment, and to all waivers of any right or claim under the ADEA. A number of courts have held that the OWBPA’s requirements for waivers set out only the terms of an effective waiver and do not create an independent cause of action. See, e.g., Whitehead v. Oklahoma Gas & Elec. Co., 187 F.3d 1184, 1191 (10th Cir. 1999) (the OWBPA’s waiver provisions do not create a cause of action for affirmative relief). But see Commonwealth of Massachusetts v. Bull HN Info. Sys., 16 F. Supp. 2d 90, 108 (D. Mass. 1998) (denying summary judgment on plaintiff’s allegations that the employer violated the ADEA by requiring older workers to “waive ADEA rights in exchange for severance pay when younger workers, who are not covered by the ADEA, received the same severance without waiving these rights”). In denying summary judgment, the court held that even if the OWBPA did not permit a civil enforcement action, these allegations stated a claim under the ADEA and could not be dismissed.

B. OWBPA Impact on Employee Benefit Plans. Under the OWBPA, employers cannot deny or reduce benefits to older workers based on age-related stereotypes. For example, excluding older workers from an early retirement incentive plan based on stereotypical assumptions that “older workers would be retiring anyway” would violate the OWBPA. The OWBPA requires employers to provide older workers with benefits at least equal to those provided to younger employees, unless the employer can prove that the cost of providing an equal benefit is greater for an older worker than for a younger one, in which case the employer may comply by providing older workers with benefits the cost of which is at least equal to the cost incurred to provide benefits to younger workers.


Disparate Treatment Based on Pension Status. The ADEA’s general rule permitting age to be used as a factor in determining pension eligibility can lead to situations where a policy that considers pension eligibility when conferring a benefit results in more favorable treatment of younger workers. For example, in Kentucky Retirement, above, under the state’s retirement plan for workers in hazardous positions, if an employee became disabled before reaching the age when retirement benefits were available, years of service were imputed to the employee so that he or she would qualify for retirement benefits, while no years of service would be imputed for an employee who had already reached retirement eligibility at the time of disability. Because the level of retirement benefits was tied to years of service, if a younger and an older employee with equal years of service both became disabled, the younger employee would receive an increased level of benefits while the older eligible employee would not. In Kentucky Retirement, the Supreme Court held that this plan did not constitute disparate treatment discrimination under the ADEA, because the differential treatment was not motivated by age, but rather by pension status. Kentucky Retirement, 554 U.S. at 148. However, in EEOC v. Baltimore County, 747 F.3d 267 (4th Cir. 2014), cert. denied, 135 S. Ct. 436 (2014), the Fourth Circuit held that the employer violated the ADEA by requiring older employees to contribute more to a retirement plan than younger employees. The employer argued that the different contribution rates were based on the “time value of money” since the older employees would be contributing for fewer years than the younger employees. Thus, the employer
argued, the different contribution rates were permissible under the U.S. Supreme Court's analysis in Kentucky Retirement. The employer also argued that the ADEA's “safe harbor” provision relating to early retirement benefit plans, 29 U.S.C. § 623(l)(1)(A)(ii)(I), authorized the employer's subsidies to the plan and shielded the employer from liability. The Fourth Circuit rejected both arguments. The court distinguished the U.S. Supreme Court's decision in Kentucky Retirement because in that case the Court had to determine whether “pension status” unlawfully constituted a “proxy for age,” while in Baltimore County the Court was required to determine whether the different contribution rates based on age could be justified on any permissible basis. Id. at 274. The court rejected the employer’s argument that the different contribution rates were justified by the “time value of money” because the employer did not change the contribution rates after it modified the retirement plan to permit employees to retire based solely on years of service. “Therefore, the number of years until an employee reached retirement age could not have served as the basis for the disparate rates. Because those disparate rates were not motivated by either the ‘time value of money’ or other funding considerations,” the court concluded that the plan treated older employees at the time of enrollment less favorably than younger employees because of their age. Id. The court also held that the ADEA's safe harbor provision did not protect the employer because that provision does not address employee contribution rates and does not employers to impose contribution rates that increase with the employee's age at the time of plan enrollment. Id. at 275.

D. Specific Rules Regarding Voluntary Early Retirement Plans. The OWBPA specifically authorizes voluntary early retirement incentive plans, but only so long as those programs are truly voluntary and consistent with the ADEA's purpose. Although the equal benefit provision does not apply to voluntary early retirement incentive plans, such plans must be consistent with the purposes of the ADEA. See Gutchen v. Bd. of Governors of the Univ. of R.I., 148 F. Supp. 2d 151, 157 (D.R.I. 2001).

The OWBPA contains specific rules governing such plans, including:

• An employer has the burden of proving that its conduct with respect to a benefit plan is lawful if the plan is challenged in court.

• An employer may set a minimum age as a condition of eligibility for normal or early retirement benefits.

• An employer may provide pension subsidies that supplement pension benefits and it may make Social Security “bridge” payments until the affected employees reach the age at which they are eligible for Social Security benefits.

• An employer cannot discriminate with respect to severance pay on the basis of age or deny severance pay to employees who choose to retire during a reduction in force. An employer may, however, offset severance payments by the value of any retirement health benefits received by an individual who is eligible for an immediate pension, as well as the value of any additional pension benefits provided to employees who are eligible for not less than an immediate and unreduced pension. If the benefits are actually reduced, the amount of the offset is to be reduced by the same percentage. (The OWBPA provides rules for determining the value of retirement health benefits to be deducted.)

• An employer may reduce long-term disability benefits by either the amount of pension benefits that an employee elects to receive or the amount for which she or he is eligible after attaining the later of age 62 or normal retirement age.

In Abrahamson v. Bd. of Educ. of the Wappingers Falls Ctr. Sch. Dist., 374 F.3d 66 (2d Cir. 2004), the court held that a collective bargaining agreement that allowed tenured teachers who met certain age and service requirements to elect between retiring early and receiving a lump sum payment, or continuing to work at an increased salary, violated the ADEA because the eligibility trigger was age, not years of service. The court also held that the provision was not protected by the ADEA's safe harbor for voluntary early retirement incentive plans because it failed to provide teachers with an incentive to retire but in fact made continuing to work more attractive because those who did so received an additional $7,000 per year. Id. at 74. See also EEOC v. Minn. Dep’t of Corr., 648 F.3d
910 (8th Cir. 2010), where the court found unlawful the employer’s early retirement incentive, which provided for continuation of contributions to health and dental insurance premiums for those who retired prior to age 55, but not for those who retired after age 55.

E. EEOC Final Rule on Coordination of Retiree Benefits with Eligibility for Medicare. The EEOC has published a rule permitting employers to coordinate retiree health benefits with eligibility for Medicare or comparable state health benefits programs. See 29 C.F.R. Parts 1625 and 1627. The rule creates a narrow exemption from the ADEA for such plans but does not otherwise affect an employer’s ability to offer health or other employment benefits to retirees, consistent with the law. The rule was published in response to a Third Circuit decision finding that “carve-out” plans violate the ADEA.

The EEOC rule states, “[s]ome employee benefit plans provide health benefits for retired participants that are altered, reduced or eliminated when the participant is eligible for Medicare health benefits or for health benefits under a comparable State health benefit plan, whether or not the participant actually enrolls in the other benefit program.” The rule further provides, “[i]t is hereby found necessary and proper in the public interest to exempt from all prohibitions of the Act such coordination of retiree health benefits with Medicare or a comparable State health benefit plan.”

The EEOC has provided a question and answer section with the rule. Some key factors of the rule can be derived from the rule’s language, the EEOC’s comments to the rule, and the question and answer section:

- The rule is to be narrowly construed;
- No other aspects of ADEA coverage or employee benefits are affected by the exemption;
- The rule applies only to coordination with Medicare and comparable state plans, not other types of governmental programs, such as Medicaid;
- The rule only applies to health benefit plans, not other types of benefit plans such as life insurance or disability benefits; and
- The rule applies only to retirees, not current employees.

F. OWBPA Impact on Reductions in Force (RIFs). The OWBPA permits employers to offset severance payments by the value of certain retirement benefits if the severance payments are made available to an employee because of an event unrelated to age and the employee is entitled to an immediate and unreduced pension. In Stokes v. Westinghouse Savannah River Co., 206 F.3d 420 (4th Cir. 2000), the Fourth Circuit Court of Appeals held that the employer did not violate the OWBPA by requiring an employee who was laid off during a reduction in force to choose between receiving a lump sum severance payment or a special retirement benefit. The employee claimed the choice was discriminatory because only those employees over the age of 50 (who were the only employees eligible for the special retirement benefit) had to make a choice. The court held that this arrangement, in which “the special pension benefit was, in effect, set off against the severance benefit, is permitted by the ADEA, so long as (1) the triggering event for both is an event unrelated to age; and (2) the pension is provided on an unreduced basis.” Id. at 427.

IV. WAIVERS AND RELEASES UNDER THE ADEA/OWBPA

A. Waiver Standards. The ADEA, as amended by the OWBPA, provides that an individual may not waive any right or claim under that statute unless the waiver is “knowing and voluntary.” 29 U.S.C. § 626(f). The employer must, “at a minimum,” comply with the following standards under the ADEA for a waiver to be considered “knowing and voluntary”:

- The waiver must be part of an agreement between the employee and the employer and must be written in plain language;
• The waiver must refer specifically to rights or claims arising under the ADEA;
• The waiver cannot cover rights or claims that may arise after the date the waiver is executed;
• The waiver must be given in exchange for consideration, and that consideration must be in addition to anything of value that the employee is already entitled to receive;
• The employee must be advised in writing to consult with an attorney before signing the agreement;
• The employee must be given a sufficient amount of time (see below) to decide whether to sign the waiver; and
• In most cases, the agreement must provide that the employee has at least seven days following the execution of the agreement in which to revoke it and that the agreement shall not become effective or enforceable until the revocation period has expired.

These requirements are mandatory. Releases that do not comply with them are not enforceable. See Oubre v. Entergy Operations, Inc., 522 U.S. 422 (1998). See also Ferruggia v. Sharp Elecs. Corp., 2009 WL 1704262 (D.N.J. June 18, 2009) (waiver unenforceable because it did not comply with the OWBPA’s requirements). In Ferruggia, the court permitted the plaintiff to proceed with his ADEA claims even though he discussed the severance and release with an attorney before signing it and received $98,000 in exchange for the release, which he was permitted to retain.

If a dispute arises concerning the waiver, the person asserting the validity of the waiver (usually the employer) must prove that the employee made a knowing and voluntary waiver. The OWBPA also states that no waiver agreement may affect the EEOC’s rights and responsibilities to enforce the ADEA, and no waiver may be used to justify interfering with an employee’s right to file a charge or to participate in an EEOC action or proceeding.

Time for Considering Agreement. The time requirements for consideration of the waiver vary depending on the circumstances. Generally, the employee must be given at least 21 days to consider the agreement containing the waiver. 29 U.S.C. § 626(f)(1)(F)(i). If the waiver is requested in connection with “an exit incentive or other employment termination program offered to a group or class of employees,” then the employee must be given at least 45 days to consider the agreement. 29 U.S.C. § 626(f)(1)(F)(ii). The time for considering the release may be waived if the employee voluntarily signs the release early, without coercion. 29 C.F.R. § 1625.22(e)(6). However, if the waiver is given in settlement of a charge filed with the EEOC or an action in court alleging age discrimination, then the employee must be given a “reasonable” period of time. 29 U.S.C. § 626(f)(2)(B). See also Powell v. Omnicom, 497 F.3d 124, 132 (2d Cir. 2007) (the plaintiff could not rely on the timing requirements in § 626(f)(1) to set aside a settlement agreement because “under § 626(f)(2), they do not apply to actions such as [the plaintiff’s] that are filed in court and allege age discrimination under 29 U.S.C. § 623”). The court in Powell noted that § 626(f)(2) requires instead that the individual be given “a reasonable period of time within which to consider the settlement agreement.” Id. The court further noted that the EEOC has interpreted this to mean “reasonable under all the circumstances including whether the individual is represented by counsel or has the assistance of counsel.” Id. (quoting 29 C.F.R. § 1625.22(g)(4)). The court found that the plaintiff in this case had a reasonable period of time to consider the terms of the settlement agreement and, accordingly, it was enforceable notwithstanding the OWBPA.

B. Revocation Period. The parties cannot shorten the seven-day revocation period. 29 C.F.R. § 1625.22(e)(5). However, the revocation period is not required for a release given in settlement of a charge filed with the EEOC or an action in court alleging age discrimination. 29 U.S.C. § 626(f)(2). See also 29 C.F.R. § 1625.22(g)(5) (“While the time periods under section 7(f)(1) of the ADEA do not apply to subsection 7(f)(2) of the ADEA, a waiver agreement under this subsection that provides an employee the time periods specified in section 7(f)(1) of the ADEA will be considered ‘reasonable’ for purposes of section 7(f)(2)(B) of the ADEA.”); Pompeo v. Exelon Corp., 2014 WL 642756, at *3 (N.D. Ill. Feb. 19, 2014) (the “EEOC has also determined that the time periods under Section
626(f)(1), such as the seven-day revocation period pursuant to Section 626(f)(1)(G), do not apply to settlement agreements under Section 626(f)(2) ... Accordingly, the seven-day revocation period at issue in the written agreement is irrelevant to the Court's analysis.

C. Exit Incentive Information. Additional requirements must be met for exit incentives or other "employment termination programs offered to a group or class of employees." In those situations, the employee must be informed in writing, in a manner calculated to be understood by the average individual eligible to participate, as to any class, unit, or group of employees covered by the program, and any applicable time limitations. The employee must also be given 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. 29 U.S.C. § 626(f)(1)(H). Regulations implementing the OWBPA refer to the "class, unit or group" in which the termination decisions are made as the "decisional unit." See 29 C.F.R. § 1625.22(f)(3)(i)(B) ("A 'decisional unit' 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 be offered consideration for the signing of a waiver. The term 'decisional unit' has been developed to reflect the process by which an employer chose certain employees for a program and ruled out others from that program.") In Ribble v. Kimberly-Clark Corp., 2012 WL 589252 (E.D. Wis. Feb. 22, 2012), the court held that the "decisional unit need not include an entire department or division within the organization." The court also noted, however, that when the decisional unit is less than the entire department or organizational unit, the criteria used to narrow the unit must be reasonably objective. Id. at *12.

D. Validity of Releases. The U.S. Supreme Court has held that if a release does not fully comply with the OWBPA, the employee who signed the release may keep the money given to him or her as consideration for the release and still sue the former employer for age discrimination. Oubre v. Entergy Operations, Inc., 522 U.S. 422 (1998). See also Hodge v. New York College of Podiatric Med., 157 F.3d 164, 167 (2d Cir. 1998) (an employee's continued employment and acceptance of benefits under a release that did not comply with the OWBPA did not ratify the agreement).

The EEOC has issued regulations prohibiting any provision in a settlement agreement that limits the individual's right to challenge a waiver of ADEA rights. The regulations restate the U.S. Supreme Court's holding in Oubre and also state that provisions in a settlement agreement requiring an individual to tender back the consideration received in exchange for waiving ADEA rights are invalid. The regulations further provide that an employer cannot include any provision in a settlement agreement that limits an individual's right to challenge the agreement. Prohibited provisions include tender back provisions and requirements that the individual pay damages or the employer's attorney's fees incurred in defending any suit the individual files challenging the agreement.

If an employer includes in an agreement waiving ADEA claims a fee shifting clause or a liquidated damages provision (i.e., a provision stating that the employee must pay specified damages if he or she violates the agreement), the agreement should clearly state that those provisions do not apply to ADEA or OWBPA claims. Compare Thomforde v. Int'l Bus. Machines Corp., 406 F.3d 500 (8th Cir. 2005) (clumsily worded attempt to exclude ADEA claims from provision that employer would be entitled to recover attorneys' fees if employee breached covenant not to sue created confusion about whether ADEA claims were also excluded from general release, therefore, the release was invalid because not written in a manner calculated to be understood by the person signing the release); and Syverson v. Int'l Bus. Machines Corp., 472 F.3d 1072 (9th Cir. 2007) (same); with Ridinger v. Dow Jones & Co., 651 F.3d 309, 315 (2d Cir. 2011) (affirming summary judgment for employer, distinguishing Thomforde and Syverson, because agreement did not use or combine the terms "waiver," "release," and "covenant not to sue" "in the manner found to be confusing" in those cases).

In light of these decisions and the EEOC's regulations, employers may want to consult with experienced labor and employment counsel in preparing settlement agreements involving waivers of ADEA or OWBPA rights. The EEOC has issued a guidance directed at helping employees under-
stand waivers of discrimination claims included in employee severance agreements. The guidance provides answers, and illustrative case law examples, to frequently asked questions regarding the content, validity, and limitations of severance agreement waivers. The guidance also states the EEOC’s view that “provisions in severance agreements that attempt to prevent employees from filing a charge with the EEOC or participating in an EEOC investigation, hearing, or proceeding are unenforceable.” The EEOC guidance can be found at: http://www.eeoc.gov/policy/docs/qanda_severance-agreements.html.

V. PROVING AND DEFENDING ADEA CLAIMS

A. ADEA Enforcement Mechanisms. Congress has established two primary enforcement mechanisms within the ADEA. The EEOC may sue on behalf of an aggrieved individual for injunctive and monetary relief. 29 U.S.C. § 626(b). The ADEA also authorizes any aggrieved individual to bring a civil action for “such legal or equitable relief as will effectuate the purposes of the [ADEA].” 29 U.S.C. § 626(c)(1). An individual must file a charge with the EEOC before filing suit and must indicate in the charge that she or he is suing for age discrimination. Davis v. Sodexho, 157 F.3d 460 (6th Cir.1998); 29 U.S.C. § 626(d). The ADEA also provides for collective actions brought by one or more individuals on behalf of others similarly situated. Collective actions alleging ADEA violations are discussed in the Class and Collective Actions Chapter of the SourceBook.

B. Time for Filing Suit. An individual filing a charge with the EEOC must do so within 180 days after the alleged unlawful act, except in a state that has its own law prohibiting age discrimination in employment. In those states, the EEOC charge must be filed within 300 days from the alleged unlawful act or 30 days from receipt of notice of termination of proceedings under state law, whichever is earlier. 29 U.S.C. § 626(d). The time for filing lawsuits under the ADEA is any time after 60 days from the time the EEOC charge is filed and before 90 days from the date the EEOC terminates the charge. 29 U.S.C. § 626(d) and (e). In Federal Express Corp. v. Holowecki, 552 U.S. 389 (2008), the U.S. Supreme Court held that a former employee who filed an intake questionnaire supported by a detailed affidavit had filed a charge that entitled her to file an ADEA suit. The U.S. Supreme Court decided that a document filed with the EEOC that requests action to protect the employee’s rights or to settle a dispute with the employer constitutes a discrimination charge under the ADEA.

C. Proving Age Discrimination.

1. Factually Dependent Test. The proof needed to sustain an ADEA finding depends on the nature of the claim (i.e., disparate treatment or disparate impact) and the type of evidence available (i.e., circumstantial or direct evidence). The burden of proof in ADEA cases is similar, but not identical, to the burden of proof in Title VII cases.

2. Disparate Treatment. Most age discrimination cases are brought under the disparate treatment theory. Under the disparate treatment theory, the plaintiff must prove intentional discrimination, and that “but for” his or her age, he or she would not have been treated less favorably. Gross v. FBL Fin. Servs., 557 U.S. 167 (2009). This differs from Title VII, where the plaintiff need only prove that his or her protected class status was “a motivating factor.”

Just as in Title VII cases, the complaining party can establish an employer’s discriminatory motive either by direct or circumstantial evidence.


(1) Direct Evidence. Direct evidence is evidence that proves, without the need to make inferences, that someone was discharged for an illegal reason. See, e.g., East v. Clayton County, 436 F. App’x 904, 909-910 (11th Cir. Aug. 1, 2011) (“Direct evidence is evidence that establishes the existence of discriminatory intent behind the employment decision without any inference or presumption” and “consists of [o]nly the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age.”) (citations
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omitted); Scheick v. Tecumseh Pub. Sch., 766 F.3d 523, 531 (6th Cir. 2014) (evidence, if believed, that a decision-maker stated “they just want someone younger,” in response to plaintiff’s questions regarding his options after his contract was not renewed, could be direct evidence of age discrimination); Sharp v. Aker Plant Serv. Group, 726 F.3d 789, 798 (6th Cir. 2013) (statement by supervisor “who significantly influence[d]” termination decision that “I had an opportunity to bring the next generation[ ] in, so that’s what we decided to do” was direct evidence of discrimination) (applying ADEA analysis to age discrimination claim under Kentucky state law); EEOC v. City of Independence, 471 F.3d 891, 894 (8th Cir. 2006) (where employer had leave donation policy that permitted employees to donate leave time to other employees who had exhausted their own leave, statement to older worker that he could not participate in the leave donation program because of his age was direct evidence of discrimination). Compare Roberts v. IBM, 733 F.3d 1306 (10th Cir. 2013) (instant message referring to plaintiff’s “shelf life” was not direct evidence of age discrimination because it referred to his level of billable work, not his age), cert. denied, 134 S. Ct. 2867 (2014); Bhatnagar v. Sunrise Senior Living, Inc., 935 F. Supp. 2d 1, 6 (D.D.C. 2013) (comments that the plaintiff should resign or retire were not direct evidence of age discrimination). In Bhatnagar, the court also held that a statement that the plaintiff was getting old was not direct or circumstantial evidence of discrimination “[w]ithout evidence that the speaker participated in the decision to terminate plaintiff.” Id.

(2) Circumstantial Evidence. Because direct evidence is rarely available in discrimination cases, courts have developed a framework a plaintiff can use to prove discrimination using circumstantial evidence. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). This framework requires the plaintiff to present a prima facie case of discrimination, which shifts to the employer the burden of articulating a legitimate, nondiscriminatory business reason for the adverse action. If the employer offers a legitimate reason for the action, the burden shifts back to the plaintiff to prove that the reason proffered by the employer is a “pretext” for discrimination. Reeves v. Sanderson Plumbing Prods., Inc., 550 U.S. 133 (2000). The specific proof required at each stage depends to some extent on the circumstances of the case, and courts are somewhat flexible in permitting variations in the method of proving discrimination. Courts continue to apply the McDonnell Douglas framework even after the U.S. Supreme Court’s decision in Gross, above. See, e.g., Scheick, 766 F.3d at 529 (“as this and every other circuit has held, application of the McDonnell Douglas evidentiary framework to prove ADEA claims based on circumstantial evidence remains consistent with Gross”) (citations omitted); Sims v. MVM, Inc., 704 F.3d 1327, 1332 (11th Cir. 2013) (“Following Gross, we have continued to evaluate ADEA claims based on circumstantial evidence under the McDonnell Douglas framework.”); Shelley v. Geren, 666 F.3d 599, 607 (9th Cir. 2012) (since the decision in Gross, several federal appellate courts have continued to utilize the McDonnell Douglas framework to decide motions for summary judgment in ADEA cases). In Shelley, the court joined those courts, holding “nothing in Gross overruled our cases utilizing this framework to decide summary judgment motions in ADEA cases.”

(a) Prima Facie Case. A plaintiff establishes a prima facie case by presenting evidence which, if unrebutted, is sufficient to raise an inference of unlawful discrimination. One way a plaintiff may establish a prima facie case of unlawful age discrimination is to show that: (1) s/he is a member of the protected class; (2) s/he was qualified for the job and met the employer’s legitimate expectations; (3) s/he was discharged despite his or her qualifications and performance; and (4) following the discharge, s/he was replaced by a substantially younger individual with comparable qualifications. See Warch v. Ohio Casualty Ins. Co., 435 F.3d 510, 513 (4th Cir. 2006) (citing O’Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 312-13 (1996), and Causey v. Balog, 162 F.3d 795, 802 & n. 3 (4th Cir. 1998)). In Warch,
the court affirmed summary judgment in favor of the employer, where the plaintiff was discharged after being counseled several times for his poor performance. The court rejected the plaintiff’s argument that requiring him to show he was meeting his employer’s legitimate expectations improperly combined his burden with the employer’s obligation to show that it had a legitimate, nondiscriminatory reason for discharging him.

As with Title VII, actions other than discharge may constitute adverse actions sufficient to satisfy the third prong of the prima facie case. See, e.g., Summers v. Winter, 303 F. App’x 716 (11th Cir. Dec. 16, 2008) (“An adverse employment action is ‘a serious and material change in the terms, conditions, or privileges of employment.’”) (citations omitted); Guillen-Gonzalez v. JC Penney Corp., 731 F. Supp. 2d 219, 228 (D.P.R. 2010) (“Although demotions and failures to promote may be considered adverse actions in employment discrimination cases … [d]etermining whether an action is materially adverse necessarily requires a case-by-case inquiry.”) (citations omitted); Diaz v. AIG Mktg., 396 F. App’x 664, 666 (11th Cir. Sept. 22, 2010) (the plaintiff failed to establish a prima facie case because neither reassignment to another location, which increased the plaintiff’s commute, nor increasing his workload was an adverse employment action; “it is not our role to second-guess AIG’s business decisions, and changes to an employee’s work assignments are rarely sufficiently ‘adverse’ to warrant scrutiny under the anti-discrimination laws”) (citations omitted).

The fourth prong may be satisfied by evidence sufficient to raise an inference of discrimination; replacement is not required in all cases. See, e.g., O’Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 311 (1996) (plaintiff may establish fourth element of prima facie case by proving that after his rejection the position remained open and the employer continued to look for applicants with plaintiff’s qualifications); Smith v. Integrated Cmty. Oncology Network, LLC, 428 F. App’x 886, 887 (11th Cir. 2011) (“[W]here the plaintiff’s position was eliminated, he can prove a prima facie case (1) by demonstrating that he was in a protected age group and was discharged, (2) by showing that he was qualified for another position at the time of discharge, and (3) by producing circumstantial or direct evidence by which a factfinder might reasonably conclude that the employer intended to discriminate on the basis of age in reaching the decision not to place him in that other position.”).

A plaintiff attempting to establish the fourth prong of a prima facie case by proving replacement with a younger employee is not required to prove she or he was replaced by someone outside the protected age group. O’Connor, 517 U.S. at 312. “[T]he fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class.” Id. See also Whittington v. Nordam Gp. Inc., 429 F.3d 986 (10th Cir. 2005) (five-year age difference between plaintiff and comparable employee who was not terminated was a factor to be considered by the jury in determining whether age discrimination occurred, refusing to adopt a bright-line test that a five-year age difference is always insignificant); Grosjean v. First Energy Corp., 349 F.3d 332 (6th Cir. 2003) (affirming summary judgment in favor of employer, because while the plaintiff is not required to show that his replacement is outside of the protected class (40 and older), he must show that he was replaced by someone significantly younger than himself, and six-year age difference was insufficient in absence of other evidence of discrimination); Del Valle-Santana v. Servicios Legales De Puerto Rico, Inc., 2015 WL 6143389, at *3 (1st Cir. Oct. 20, 2015) (the plaintiff failed to establish a prima facie case of discrimination where she did not provide the actual ages of allegedly younger directors who were retained when she
was discharged, “nor is there anything in the record that would otherwise indicate that these other ‘younger’ directors were significantly younger than [the plaintiff] so as to permit an inference of age discrimination”). In *Woodman v. WWOR-TV Inc.*, 411 F.3d 69 (2d Cir. 2005), the Second Circuit held a plaintiff must show that the employer was aware of the age discrepancy between the discharged employee and her replacement for the discrepancy to support an inference of discriminatory intent.

**b) Pretext for Discrimination.** A plaintiff may prove pretext by showing: “(1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate [the adverse action], or (3) that they were insufficient to motivate [the action].” *Rutherford v. Brithaven, Inc.*, 452 F. App’x 667, 671 (6th Cir. Dec. 21, 2011).

In *Reeves*, the U.S. Supreme Court addressed whether, in responding to an employer’s stated reason, it is sufficient for the plaintiff to show that the employer’s reason for the employment decision was false (“pretext only”), or whether the plaintiff must present additional evidence of discrimination (“pretext plus”). The Court held that the plaintiff must prove both that the employer’s reason is false and that discrimination was the real reason for the adverse action, but also that proof of falsity is evidence of intentional discrimination and, by itself, may be sufficient to establish pretext in some cases. The Court further stated that once the employer’s reason for the action has been proven false “discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.”

The Court also held, however, that proof the employer gave a false reason for the employment action will not always be sufficient. Justice O’Connor, writing for the Court, pointed out that it is possible a plaintiff will present a “weak issue of fact as to whether the employer’s reason was untrue” while the employer presents “abundant and uncontroverted evidence that no discrimination had occurred.” Such cases should not get to a jury.

To establish pretext where the employer proffers multiple reasons, the plaintiff must rebut each of the proffered reasons. See *Crawford v. Fairburn*, 482 F.3d 1305, 1308 (11th Cir. 2007); *Kautz v. Met-Pro Corp.*, 412 F.3d 463, 467 (3d Cir. 2005) (*Reeves* “does not change our standard for proving pretext” and requiring the plaintiff to put forth evidence that would allow a reasonable fact finder to decide that each of the employer’s proffered nondiscriminatory reasons was either a post-hoc fabrication or otherwise did not actually motivate the employment action).

That the employer may have been mistaken is insufficient to demonstrate pretext. See *Miller v. Metro Ford Auto. Sales, Inc.*, 519 F. App’x 850, 853 (5th Cir. 2013); *Lindamood v. Florida Dep’t of Bus. and Prof’l Reg.*, 2015 WL 6516405 (11th Cir. Oct. 27, 2015) (supervisor was entitled to terminate plaintiff’s employment based on his honest belief (even if mistaken or unfair) that her performance was unsatisfactory, and the fact that the plaintiff considered herself a good employee “has no bearing on our analysis of pretext”). See also *Delaney v. Bank of Am. Corp.*, 766 F.3d 163, 169 (2d Cir. 2014) (“While we must ensure that employers do not act in a discriminatory fashion, we do ‘not sit as a super-personnel department that reexamines an entity’s business decisions.’”); *Ripoll v. Dobard*, 2015 WL 4257450 at *4 (5th Cir. July 15, 2015) (the plaintiff’s evidence that she had previously received above-average performance scores and had received an overall positive evaluation a few months before her termination did not establish pretext because it did not contradict or draw into question the employer’s reasons for discharging her (insufficient student progress at her school, failure to meet her stated performance goals and failure to
properly evaluate her staff); noting “[e]ach of these remains a logical and legitimate 
reason for dismissing [the plaintiff] as a principal”).

After the U.S. Supreme Court’s decision in Reeves, some courts have required a 
jury instruction on pretext, while others have held that a specific instruction on pre-
text is not required. See, e.g., Conroy v. Abraham Chevrolet-Tampa, Inc., 375 F.3d 
1228 (11th Cir. 2004) (although the plaintiff’s proposed jury instruction on pretext 
correctly stated the law, the failure to give a specific instruction on pretext was not 
reversible error, noting that Reeves did not change the law in the Eleventh Circuit 
on this issue) (citing cases).

(c) “Stray Comments.” Generally, comments made by non-decision-makers or com-
ments by decision-makers not related to the decisional process do not create an 
inference of discrimination. See Beshears v. Asbill, 930 F.2d 1348, 1354 (8th Cir. 
1991); Mauter v. Hardy Corp., 825 F.2d 1554, 1558 (11th Cir. 1987) (statement by 
non-decision-maker that the company “was going to weed out the old ones” did not 
rise a genuine issue of material fact regarding discriminatory intent). However, in 
Reeves the Court found that “stray comments” made by decision-makers may help 
to prove discrimination when combined with other evidence. In Reeves, the Court 
held that the decision-maker’s comments that the plaintiff was “too damn old to do 
his job” and was “so old [he] must have come over on the Mayflower,” even though 
not made in the context of the termination decision, were sufficient, along with his 
prima facie case and evidence that the reason given for firing him was false, to 
support a jury finding of discrimination. See also Goudeau v. Nat’l Oilwell Varco, 
L.P., 793 F.3d 470, 477 (5th Cir. 2015) (reversing summary judgment in favor of 
defendant, finding that the doubts the plaintiff raised about disciplinary warnings 
he received, combined with his supervisor’s ageist comments, which were “poten-
tially corroborated” by the termination of the plaintiff and another over-40 employee, 
could allow a jury to conclude that age was the reason for his termination).

In Stone v. Landis Constr. Corp., 442 F. App’x 568 (D.C. Cir. Dec. 7, 2011), the 
court held that the CEO’s expression, following a job interview, of concerns about 
whether the applicant could perform physical labor because he was “old” was direct 
evidence of discrimination. Because the plaintiff had presented direct evidence of 
discrimination, the appellate court found that the district court had erred in applying 
the McDonnell Douglas framework. Compare Arroyo-Auditred v Verizon Wireless, 
Inc., 527 F.3d 215 (1st Cir. 2008), where the court held that the fact that the person 
interviewing the plaintiff yawned during the interview was not evidence of age 
discrimination. Rejecting the plaintiff’s argument that the yawn meant that the plaintiff’s 
comments during the interview did not matter because the interviewer had already 
decided to hire a younger employee, the court noted that it is only required to draw 
reasonable inferences in the plaintiff’s favor. “Imputing an ulterior motive to a yawn 
is not such a reasonable inference.” Id. at 220.

(d) Evidence of Treatment of Other Employees. The U.S. Supreme Court has held 
that testimony by nonparties to a lawsuit claiming they were subject to discrimina-
tion by individuals other than those accused in the lawsuit is neither per se admis-
sible nor per se inadmissible. See Sprint/United Management Co. v Mendelsohn, 
552 U.S. 379 (2008). In Sprint, the Court held that the relevance and prejudice of 
this evidence must be weighed in the context of the facts and arguments in a par-
ticular case, thus a per se rule is improper. “The question [of] whether evidence of 
discrimination by other supervisors is relevant in an individual ADEA case is fact 
based and depends on many factors, including how closely related the evidence is to the plaintiff’s circumstances and theory of the case.” Similarly, determining
whether evidence is unfairly prejudicial also requires a fact-intensive, context-specific inquiry.

On remand the trial court held that the testimony of employees from different departments was not admissible because it was irrelevant to the plaintiff's allegations that her department's supervisors used age to select her for layoff. The trial court also held that the danger that the employer would be prejudiced from the admission of this testimony outweighed its possible value in proving the plaintiff's claim. The Tenth Circuit affirmed the trial court's ruling but emphasized that the trial court's holding and its affirmation of that holding are narrow in scope. See Mendelsohn v. Sprint/United Mgmt. Co., 402 F. App'x 337 (10th Cir. Nov. 12, 2010). Because Mendelsohn had not challenged the RIF itself as inherently discriminatory, but instead claimed that the decisions about which employees would be terminated in the RIF were made on a departmental level, she needed to show that her supervisors intentionally discriminated against her. Id. at 341. The Tenth Circuit held that the trial court did not abuse its discretion in requiring evidence regarding other employees to be "logically or reasonably" tied to the adverse employment action against plaintiff. Id. at 341-42. See also Lawson v. Graphic Packaging Int'l Inc., 549 F. App'x 253 (5th Cir. Dec. 13, 2013) (unpublished decision) (affirming decision of trial court to exclude detailed examples of prior discriminatory conduct by the plaintiff's supervisor in a pattern and practice case, where the trial judge struck a balance between permitting the jury to hear pattern and practice evidence and avoiding cumulative evidence); Delaney v. Bank of Am., Corp., 766 F.3d 163, 170 (2d Cir. 2014) (assuming the plaintiff could present evidence of another employee's EEOC charge in admissible form at trial, the evidence would not call into doubt the employer's nondiscriminatory reason for discharging the plaintiff, because "[c]omments about another employee's age, removed from any context suggesting that they influenced decisions regarding [plaintiff's] own employment, do not suffice to create a genuine issue of fact as to whether age was the but-for cause of [plaintiff's] termination").

(e) Mixed Motive Cases. In Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), the U.S. Supreme Court held that even if a "plaintiff in a Title VII case proves that [the plaintiff's membership in a protected class] played a motivating part in an employment decision, the defendant may avoid a finding of liability ... by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken [that factor] into account." 490 U.S. at 258. In 1991, Congress responded by amending Title VII to expressly provide that a plaintiff may prevail by proving that membership in a protected class was "a motivating factor" for an adverse employment decision, but that only limited forms of relief are available where the employer proves it would have made the same decision even in the absence of the impermissible consideration. See 42 U.S.C. § 2000e-2(m). Congress did not, however, amend the ADEA when it amended Title VII to authorize these "mixed motive" claims. Because of this, and based upon the language of the ADEA, which prohibits discrimination "because of" an individual's age, the U.S. Supreme Court in Gross declined to adopt the mixed motive burden-shifting framework for ADEA cases. Accordingly, the Court held, "a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action." Gross, 557 U.S. at 180. Proof that age was a motivating factor but not the "but for" cause does not entitle the plaintiff to any damages, and the burden of persuasion never shifts to the employer. Id. See also Delaney, 766 F.3d at 169 ("The condition that a plaintiff's age must be the 'but for' cause of the adverse employment action is not equivalent to a requirement that age was the employer's only consideration, but rather that the adverse employment action [ ] would not have occurred without it.' Fagan v. U.S.
Carpet Installation, Inc., 770 F. Supp. 2d 490, 496 (E.D.N.Y.2011) (citing Gross, 557 U.S. at 175–77, 129 S. Ct. 2343) (emphasis added); Markovich v. City of New York, 588 F. App’x 76, 77 (2d Cir. 2015) (because ADEA plaintiff “failed to put forth evidence that would ‘permit a jury to find that age was the but-for cause of the challenged adverse employment action,’” the court did not address his other arguments (citing Delaney, 766 F.3d at 168)). Legislation (the Protecting Older Workers Against Discrimination Act) has been proposed in Congress that would overturn the Court’s decision in Gross; however, as of the date of publication of this edition of the SourceBook, it had not been enacted.

b. “Cat’s Paw” or Subordinate Bias Liability. The Eleventh Circuit has held that the Supreme Court’s analysis of subordinate bias liability in Staub v. Proctor Hosp., 562 U.S. 411 (2011) does not apply in ADEA cases. See Sims v. MVM, Inc., 704 F.3d 1327 (11th Cir. 2013). In Staub, a Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) case, the Court defined the circumstances under which an employer could be liable when the decision-maker has no discriminatory animus but is influenced by a subordinate supervisor’s action that is the product of discriminatory animus. The Court held that the employer could be liable only if the subordinate supervisor (1) performs an act motivated by anti-military animus that is intended to cause an adverse employment action, and (2) that act is a proximate cause of the ultimate employment action. Staub, 131 S. Ct. at 1194. The court in Sims refused to apply the Staub analysis in an ADEA case, holding "[b]ecause the ADEA requires a “but-for” link between the discriminatory animus and the adverse employment action as opposed to showing that the animus was a ‘motivating factor’ in the adverse employment decision [as required in a USERRA claim], we hold that Staub’s ‘proximate causation’ standard does not apply to cat’s paw cases involving age discrimination.” 704 F.3d at 1336. Instead, the plaintiff was required to present sufficient evidence from which a jury could conclude that the subordinate supervisor’s discriminatory animus was a ‘but for’ cause of, or a determinative influence on, the decision-maker’s ultimate decision. Id. at 1337. But see Woods v. City of Berwyn, 2015 WL 6077602, at *4 (7th Cir. Oct. 15, 2015) (applying the “cat’s paw” theory in an ADEA case and noting that under Staub, “[i]f the ultimate decision-maker does determine whether the adverse action is entirely justified apart from the supervisor’s recommendation, then the subordinate’s purported bias might not subject the employer to liability”). In Woods, the court held that the employer’s formal and adversarial proceedings and the evidence it relied on to support its decision to terminate the plaintiff “broke the chain of causation” linked to the subordinate’s alleged bias. Id.

3. Disparate Impact. Under the disparate impact theory, the plaintiff claims that an employer’s facially neutral policy operated in a way that had a disparately negative impact on employees because of their age. A plaintiff is not required to prove intentional discrimination to prevail on a disparate impact claim. Disparate impact claims are available to ADEA plaintiffs. See Smith v. City of Jackson, 544 U.S. 228 (2005) (the scope of a disparate impact claim under the ADEA is narrower than such a claim under Title VII because the ADEA (unlike Title VII) permits actions that are based on reasonable factors other than age (RFOA) and because Congress did not amend the language of the ADEA when it amended Title VII in 1991 to expand the coverage of a Title VII disparate impact claim). See also Reminder v. Roadway Express, Inc., 215 F. App’x 481, 485 (6th Cir. Feb. 7, 2007) (unpublished decision) (allegation in complaint that “[a] disparate proportion of those employees terminated from the marketing and sales departments on or about September 26 and 29, 2003 … were over 40 years of age compared to those retained” did not plead a claim for disparate impact; plaintiffs did not allege that the defendant’s reduction in force was a neutral practice that merely resulted in a disproportional number of older employees being terminated); Coleman v. Robinson Bros. Envtl., Inc., 2007 WL 5576554 at *6 (W.D. Wis. July 9, 2007) (dismissing plaintiffs’ disparate impact claims alleging that defendant’s hiring practice gave preferential treatment to less experienced employees and, because age and experience
are often linked, the hiring practice had a disparate impact based on age, finding the allegation nothing more than speculation).

4. Hostile Environment. Hostile environment harassment claims may be pursued under the ADEA, at least in some jurisdictions. See Dediod v. Best Chevrolet, Inc., 655 F.3d 435, 441 (5th Cir. 2011) (recognizing hostile environment claim under ADEA); Crawford v. Medina Gen. Hosp., 96 F.3d 830, 834 (6th Cir. 1996) (“While, as far as we can discern, no circuit has as yet applied the hostile-environment doctrine in an ADEA action ... we find it a relatively uncontroversial proposition that such a theory is viable under the ADEA.”) In Crawford, the court permitted the plaintiff to proceed with her hostile environment age claim, but found that she failed to present evidence that she was harassed based on her age. Compare Burns v. AAF-McQuay, 166 F.3d 292 (4th Cir. 1999) (declining to decide whether hostile environment age discrimination claims are viable in the 4th Circuit, because, even if claim was available, evidence would not support it); Weiss v. Alere Med., Inc., 2013 WL 2450598 at *9 (D. Nev. June 4, 2013) (it “is not clear whether a hostile work environment claim properly lies under either the ADA or the ADEA in this Circuit,” and noting that even if such a claim is recognized, the plaintiff failed to show she was subjected to a hostile work environment based on either her disability or age).

5. Pattern or Practice. To prove that an employer engaged in an unlawful pattern or practice of discrimination, the plaintiff must show that the employer “regularly and purposefully” treated members of the protected group less favorably and that unlawful discrimination was the employer’s “regular procedure or policy” EEOC v. McDonnell Douglas Corp., 191 F.3d 948, 951 (8th Cir. 1999) (citing International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335, 360 (1977)). In a pattern or practice claim, the plaintiff must prove discrimination was the employer’s “standard operating procedure – the regular rather than the unusual practice.” Id.

Plaintiffs often use statistics to bolster pattern or practice claims. Statistical evidence is not probative of discrimination if based on a “small or incomplete data set.” See generally Watson v. Ft. Worth Bank & Trust, 487 U.S. 977, 996-97 (1988) (in disparate impact case), superseded, in other respects, by statute as stated in Phillips v. Cohen, 400 F.3d 388, 398 (6th Cir. 2005). See also Pace v. Southern Ry. Sys., 701 F.2d 1383, 1388-89 (11th Cir. 1983) (statistical evidence is not probative if taken out of context or sample provided is too small); EEOC v. McDonnell Douglas Corp., 191 F.3d at 951 (holding, in RIF case, comparison of number of discharged employees over 40 with those under 40 insufficient to prove discrimination and stating that court should also look at the percentage of employees over 40 in the workforce before the RIF); Simpson v. Midland-Ross Corp., 823 F.2d 937, 943 n.7 (6th Cir. 1987) (“small statistical samples provide little or no probative value to show discrimination”); Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 511 (4th Cir. 1994) (sample size of four has no probative value); cf. Aliotta v. Bair, 614 F.3d 556 (D.D.C. 2010) (discrimination claims failed because plaintiffs could not include in their statistical analysis, in disparate impact case, a group of employees who, because they voluntarily accepted a buyout, suffered no adverse employment action).

6. RIF. Age discrimination claims frequently arise from RIFs. Employers should be aware that hiring or retaining younger workers while discharging older ones might create an inference of age discrimination. See Beaver v. Rayonier, Inc., 200 F.3d 723, 729-30 (11th Cir. 1999) (a jury could infer discrimination where plaintiff, when his position was eliminated in a RIF, offered to take any available position, and presented evidence that he was more qualified than younger employees selected for vacant positions); Jameson v. Arrow Co., 75 F.3d 1528 (11th Cir. 1996) (while the ADEA does not require an employer to establish an interdepartmental transfer program during a RIF, the employer’s rejection of the plaintiff for positions available at time of the RIF coupled with the hiring of younger workers was sufficient to establish a prima facie case, but not to ensure that claim would ultimately be successful). See also Cullen v. Olin Corp., 195 F.3d 317 (7th Cir. 1999) (evidence that: plaintiff’s job duties were taken over by younger employees; she had superior job performance ratings; and a top official made age-related comments was sufficient to get the claim to a jury). But see Schoonmaker v. Spartan Graphics Leasing LLC, 595
F.3d 261 (6th Cir. 2010) (affirming summary judgment for employer in RIF case where plaintiff could show nothing more than an age differential between herself and the retained employee, which was insufficient). In Schoonmaker, the court held that the plaintiff had to show that she possessed superior qualities to establish a prima facie case in the RIF context. That the two oldest employees in the department were let go was not sufficient evidence of discrimination because of the small statistical base. See also Delaney v. Bank of Am. Corp., 766 F.3d 163, 168 (2d Cir. 2014) (affirming summary judgment in RIF case, noting, “[w]e have previously held that a RIF constitutes a legitimate, nondiscriminatory reason for termination of employment”). In Delaney, the court held that the employer demonstrated that the plaintiff was selected for the RIF based on his poor performance, showing that he had poor performance reviews, was ranked 136th among all sales associates, and his performance was the worst in his group.

7. Statistical Evidence. In a RIF case, a plaintiff may make a prima facie case of age discrimination by establishing: (a) she is within the protected age group; (b) she met the applicable job qualifications; (c) she suffered an adverse employment action; and (d) there is some additional evidence that age was a factor in the employer’s action. See Ward v. Int'l Paper Co., 509 F.3d 457, 461 (8th Cir. 2007) (holding that the fourth element continues to be a part of the prima facie case in RIF cases after the Supreme Court's decision in Reeves because Reeves was not a RIF case, noting that in a RIF case, the fact that “a younger employee assumed some of plaintiff’s duties does not establish a prima facie case because often at least one younger worker receives some of plaintiff’s duties”); Stidham v. Minnesota Min. and Mfg., Inc., 399 F.3d 935, 938 (8th Cir. 2005), (a plaintiff may satisfy the fourth element of the prima facie case “by presenting either statistical evidence (such as a pattern of forced early retirement or failure to promote older employees) or 'circumstantial' evidence (such as comments and practices that suggest a preference for younger employees”), abrogated in part on other grounds by Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011). In Stidham, the court noted that, as in other cases where a plaintiff relies on statistical evidence, a disparity does not have evidentiary value unless it is statistically significant. Id. (holding that the fact that 15 out of 16 employees terminated in the RIF were over the age of 40 was not statistically significant and insufficient to satisfy fourth prong of prima facie case, where before the reduction in force 72 percent of the salaried employees in the department were over age 40, after the reduction 68 percent were over the age of 40, and the average age of employees declined by only half of a year). See also Ward, 509 F.3d at 461 (holding that evidence that 71 percent of the positions eliminated in the RIF were held by individuals over the age of 50 was “meaningless without some analysis of the age of the entire workforce at [IP] before and after the reduction in force”) (citations omitted).

D. Affirmative Defenses to ADEA Claims. The ADEA provides specific statutory defenses. In other words, under specific circumstances, employers lawfully can make employment decisions based on age. The ADEA provides the following defenses:


To assert the BFOQ defense, an employer must demonstrate: (a) the BFOQ is reasonably necessary to the essence of its business; and (b) it has reasonable cause to believe all or substantially all persons within a class would be unable to safely and efficiently perform the duties of the job involved, or that it is impossible or impractical to make that determination on an individualized basis. See EEOC v. Exxon Mobil Corp., 560 F. App’x 282 (5th Cir. Mar. 25, 2014) (affirming summary judgment in favor of employer whose corporate policy imposed the same mandatory retirement age for pilots as imposed by FAA regulations on commercial pilot). In Exxon, the court found that the EEOC failed to present evidence “to challenge the underlying safety rationale of the rule or its continuing validity – namely, that the risk of sudden incapacitation increases with age and this cannot be accurately tested or predicted on an individualized basis.”
**EEOC Requirements.** The EEOC requires an employer asserting a BFOQ defense to prove that: (a) the age limit is reasonably necessary to the essence of the business; and (b) either (i) all or substantially all individuals excluded by the age limit from the job involved are, in fact, disqualified, or (ii) some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. Furthermore, if the employer’s objective is public safety, the employer must prove that the challenged practice does indeed effectuate public safety, and that there is no acceptable alternative that would better advance it or equally advance it with less discriminatory impact.

2. **Bona Fide Seniority Systems.** It is not unlawful age discrimination for an employer to observe the terms of a “bona fide seniority system” that is not intended to evade the purposes of the ADEA. 29 U.S.C. § 623(f)(2)(A). Additionally, it is not unlawful age discrimination for an employer to “observe the terms of a bona fide employee benefit plan” within certain parameters. 29 U.S.C. § 623(f)(2)(B).

3. **RFOA.** An employer may take actions otherwise prohibited by the ADEA where “differentiation is based on reasonable factors other than age” (RFOA). 29 U.S.C. § 623(f)(1). For example, an employer does not violate the ADEA by taking an adverse action based on pension status, even if pension status tends to correlate with age (although such an action might violate the Employment Retirement Income Security Act of 1974 (ERISA)). *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993). The ADEA does not prohibit an employer from making employment-related decisions based on wages and similar financial considerations – even when there is a correlation between higher wages and age – as long as each employee is treated individually on the merits of the established criteria and no unjustified impact on older workers occurs. *Bay v. Times Mirror Magazines, Inc.*, 936 F.2d 112 (2d Cir. 1991). To qualify for this affirmative defense, the employment practice must be age-neutral. See, e.g., *EEOC v. Johnson & Higgins*, 887 F. Supp. 682 (S.D.N.Y. 1995), *aff’d and remanded*, 91 F.3d 1529 (2d Cir. 1996); *EEOC v. McDonnell Douglas*, 191 F.3d 948, 952 (8th Cir. 1999) (“We have held that employment decisions motivated by factors other than age (such as retirement eligibility, salary, or seniority) even when such factors correlate with age, do not constitute age discrimination.

The U.S. Supreme Court has held that an employer defending a disparate impact ADEA claim bears the burden of production and persuasion on the RFOA affirmative defense. See *Meacham v. Knolls Atomic Power Laboratory*, 554 U.S. 84 (2008).

E. **Entitlement to a Jury Trial Under the ADEA.** A party is entitled to a jury trial under the ADEA. 29 U.S.C. § 626(c)(2).

### VI. ADEA REMEDIES

The ADEA is similar in many ways to Title VII. ADEA remedial standards, however, follow the Fair Labor Standards Act (FLSA). Thus, punitive damages are not available, although a successful plaintiff may be awarded liquidated damages in an amount equal to the back pay she or he would have earned, if the violation is determined to be willful. 29 U.S.C. § 216(b).

A. **Equitable Relief.**

1. **Injunctions.** Injunctive relief is available under the ADEA. See *EEOC v. Cosmair, Inc.*, 821 F.2d 1085 (5th Cir. 1987) (enjoining employer from engaging in conduct that violated ADEA).

2. **Reinstatement.** A plaintiff who prevails in a wrongful termination case is generally entitled to reinstatement. Reinstatement is the preferred remedy in ADEA cases because it helps make victims whole by restoring them to positions they would have held had the illegal discrimination never occurred. However, the trial court has discretion to determine whether reinstatement is an appropriate remedy, and “[i]n cases in which reinstatement is not viable because of continuing hostility between the plaintiff and the employer or its workers, or because of psychological inju-

Reinstatement is a forward-looking remedy that should not be awarded where the plaintiff’s eligibility for relief under the ADEA has terminated before judgment. See Geller v. Markham, 635 F.2d 1027, 1036 (2d Cir. 1980) (reinstatement unwarranted where jury found that the plaintiff had been hired only for a one-year term and that term had expired). The district court must weigh the multiple factors involved and determine whether reinstatement is appropriate on a case-by-case basis.

Failure to accept an unconditional offer of reinstatement generally bars recovery of damages that could have been avoided by acceptance of the offer. Ford Motor Co. v. EEOC, 458 U.S. 219 (1982), superseded by statute as stated in McCoy v. Oscar Mayer Foods, 108 F.3d 1379 (7th Cir. 1997) (table), 1997 WL 107762 (7th Cir. 1997). See also EEOC v. Yardley Chrysler Plymouth, Inc., 117 F.3d 1244 (11th Cir. 1997) (holding that plaintiff should have been awarded back pay from the date she was constructively discharged until the date she rejected the company's first unconditional offer of reinstatement). However, in various circumstances courts have refused to limit recovery of damages because it was reasonable for the former employee to refuse the offer of reinstatement. See Ortiz v. Bank of Am. Nat'l Trust and Savs. Assoc., 852 F.2d 383 (9th Cir. 1987), and cases cited therein. Compare Giandonato v. Sybron Corp., 804 F.2d 120 (10th Cir. 1986) (spouse's terminal illness and a desire not to work for an allegedly discriminatory boss are not valid reasons for refusing an unconditional offer of reinstatement).

3. Front Pay. Where reinstatement is not a viable alternative, front pay must be used to make the plaintiff whole for future expected losses. See Lewis v. Fed. Prison Indus., Inc., 953 F.2d 1277 (11th Cir. 1992); Lander v. Lujan, 888 F.2d 153 (D.C. Cir. 1989). “[F]ront pay is simply money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement.” Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 846 (2001). Because the purpose of front pay is to make the plaintiff whole, “front pay is calculated to terminate on the date a victim of discrimination attains an opportunity to move to his ‘rightful place.’” Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1529 (11th Cir. 1991), superseded by statute on other grounds. Because the duty to mitigate damages applies to front pay damages, a court awarding front pay damages should estimate the financial impact of future mitigation. See United Paper Workers Int'l Union, AFL-CIO, Local 274 v. Champion Int'l Corp., 81 F.3d 798, 805 (8th Cir. 1996). Therefore, courts generally limit front pay awards on the basis that the plaintiff should be able to mitigate damages by returning to the workforce within some reasonable period of time. See, e.g., Hybert v. Hearst Corp., 900 F.2d 1050, 1056-57 (7th Cir. 1990) (trial court's award of five years' front pay was too speculative); Goss v. Exxon Office Sys., Co., 747 F.2d 885, 890 (3d Cir. 1984) (affirming award of four months' front pay because longer period would be speculative); Snow v. Pillsbury Co., 650 F. Supp. 299, 300 (D. Minn. 1986) (nine-year front pay award reduced to three years).

B. Back Pay. An award of back pay is to provide the compensation the plaintiff would have received but for the employer's violation. It may include lost wages, pension benefits, insurance benefits, profit sharing benefits, accrued vacation time, and accrued sick leave. Post-termination economic benefits received by the plaintiff, such as severance pay, should be deducted from a back pay award. See Rhodes v. Guiberson Oil Tools, 82 F.3d 615, 620 (5th Cir. 1996). The relevant time period for calculating an award of back pay begins with the wrongful termination and ends at the time of trial. See, e.g., Kirsch v. Fleet Street, Ltd., 148 F.3d 149, 168 (2d Cir. 1998).

Mitigation of Damages. A plaintiff has a duty to make reasonable efforts to mitigate damages, and therefore is not entitled to back pay to the extent that he or she fails to remain in the labor market or otherwise fails to make reasonable efforts to minimize damages. See Kirsch, 148 F.3d at 168; Cook v. City of Chicago, 192 F.3d 693, 687 (7th Cir. 1999) (doctrine of mitigation of damages is flexible, requiring plaintiff to “take reasonable efforts” to minimize damages).
In *Barton v. Zimmer, Inc.*, 662 F.3d 448, 454 (7th Cir. 2011), the court held that an award of back pay was not available since the employee was not discharged and his compensation was not reduced. *See also Franzoni v. Hartmarx Corp.*, 300 F.3d 767, 773 (7th Cir. 2002) (holding that plaintiff’s ADEA claim based on job elimination was not actionable because the plaintiff was transferred to another job with no decrease in salary or benefits due to the elimination of his job).

**C. Liquidated Damages.** Liquidated damages under the ADEA are different in kind from those available under the FLSA. ADEA liquidated damage awards are punitive in nature and are meant to deter violators, while FLSA liquidated damages merely compensate for damages that would be difficult to calculate.

“Willfulness” Standard. In *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985), the Court rejected decisions finding willfulness simply because the employer knew that the ADEA was “in the picture” or was “potentially applicable.” The Court stated that this “broad standard … would result in an award of double damages in almost every case.” This would be true, the Court noted, even if the “employer acted reasonably and in complete good faith” and that “Congress hardly intended such a result.” The standard adopted in *Thurston* permits a finding of willfulness if “the employer … knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.” *Id.* In *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), the U.S. Supreme Court reaffirmed the *Thurston* standard and rejected any requirement of direct evidence of discrimination, outrageous conduct by the employer, or proof that age was the predominant rather than a determinative factor in the employment decision when finding willfulness necessary to award liquidated damages.

**D. Compensatory Damages.** The majority of courts do not permit compensatory damages under the ADEA. However, at least one court has held that compensatory damages are available in an ADEA retaliation case. *See Eggleston v. South Bend Community Sch. Corp.*, 858 F. Supp. 841 (N.D. Ind. 1994) (reasoning that compensatory damages are available in an ADEA retaliation case because the ADEA adopted the FLSA’s remedial provisions, and compensatory damages are available in FLSA retaliation cases).

**E. Recovery of Expert Fees Disallowed.** In *Gray v. Phillips Petroleum Co.*, 971 F.2d 591, 594-95 (10th Cir. 1992), the Tenth Circuit ruled that expert witness fees are not available under the ADEA. The court found that the ADEA does not authorize the award of witness fees other than the $40 per day plus expenses provided by the general federal court costs statute. The court observed that the fee-shifting provision of the FLSA, which is incorporated by reference into the ADEA, does not provide “explicit statutory authority” to award witness fees. That provision, the court observed, provides solely for the shifting of a “reasonable attorneys’ fee … and costs of the action.” The court continued that a “reasonable attorneys' fee” does not include witness fees and the “costs of the action” are defined in the general costs statute.

**F. Fee-Shifting and the Equal Access to Justice Act (EAJA).** By adopting the FLSA’s remedial provisions, the ADEA adopted the provision that prevailing plaintiffs may be awarded their attorney’s fees. 29 U.S.C. § 216(b). However, there is no parallel provision for recovery of attorney’s fees by a prevailing defendant.

The EAJA provides that in any civil action, if the U.S. is a party and loses, “the other party gets attorneys’ fees unless some other statute specifically says otherwise.” *EEOC v. Clay Printing Co.*, 13 F.3d 813 (4th Cir. 1994). In *Clay Printing*, the EEOC argued that this fee-shifting provision does not apply to age discrimination cases, because the ADEA contains no express provision for recovery of attorney’s fees by prevailing defendants. The Fourth Circuit rejected this argument and affirmed a district court’s award of almost $200,000 in attorneys’ fees against the EEOC for bringing a “simply implausible” age discrimination suit against an employer.
VII. STATE AND LOCAL AGE DISCRIMINATION LAWS

Most states and many local governments have their own statutes, regulations or ordinances prohibiting age discrimination. For the most part, those laws prohibit the same types of conduct that are prohibited by the ADEA. Many of those laws cover employers smaller than those covered by the ADEA. Several local age discrimination ordinances apply to employers with as few as five employees, and a few apply to even smaller employers. The burdens and standards of proof, and damages available, under these various laws differ in important respects from the ADEA; in some cases, burdens and standards of proof are more similar to Title VII standards than to ADEA standards.

Because of the substantial difference in these laws from state to state and from local government to local government, please contact your local FordHarrison office if you have questions about state or local age discrimination laws in your particular jurisdiction.