Chapter 12

Age Discrimination

Learning Objectives

When you finish studying this chapter, you should be able to:

LO1 Distinguish the perception of older workers from the reality of their impact in the workplace.

LO2 Describe the history of the protection of older workers in the United States.

LO3 Distinguish the ADEA and state-based age discrimination laws.

LO4 Identify the legal options available to an employee who believes that he or she is a victim of age discrimination.

LO5 Explain the *prima facie* case of discrimination based on age.

LO6 Describe the *bona fide occupational qualification* defenses available to employers under the ADEA.

LO7 Distinguish circumstances where disparate impact and disparate treatment apply in connection with age discrimination.

LO8 Analyze factual circumstances when employer economic concerns may justify adverse action against particular groups of workers.

LO9 Recognize necessary elements to establish pretext under the ADEA.

LO10 Define the parameters of a valid waiver of ADEA rights.

Opening Scenarios

SCENARIO 1

1 Scenario

In an effort to reduce costs across the board, Pilchard wishes to hire recent graduates of MBA programs who have little experience. His firm would be paying them above competitive salaries even if it offered them one-half the salaries of its present staff members who are over age 40. Should Pilchard terminate the older employees in favor of the younger, less-expensive workers? What if one or more of the older employees were willing to accept a 50-percent pay cut? Can Pilchard make the 50-percent pay cut a condition on older employees for remaining employed?

SCENARIO 2

2 Scenario

Beth, an employer, wants to hire someone for a strenuous job that requires a great deal of training, which will take place over the course of several years. The applicant who appears most qualified is 58 years old; however, Beth is concerned that the applicant will not be able to handle the physical demands of the position in the long run. Further, she is concerned that the applicant will only continue working for several more years before she retires. Does Beth hire the applicant anyway? What advice would you give Beth?

SCENARIO 3

3 Scenario

Mary had worked as an accountant for Andrew Arthurson, a once prestigious accounting firm, for over 20 years before she was laid off after the firm suffered a great loss of clients due to a scandal. Fifty-year-old Mary applies for a position as an accountant at Knott Hower Phault, an accounting firm with 25 employees in Chicago, Illinois. Thirty-eight-year-old senior partner Dan Knott is impressed by Mary's credentials and understands that Mary had no involvement in the Arthurson scandal. Still, he fears that Mary's years of experience make her overqualified for the accountant position at his firm. Dan thinks that a professional at Mary's stage would not care to take direction from him or his partners, who are either Dan's age or younger. What advice would you give Dan?

Statutory Basis

The statutory basis is presented in Exhibit 12.1, "Age Discrimination in Employment Act."

Oldie . . . but Goldie?

America is a culture in which youth is valued. It must be very strange indeed to those of other cultures, like the Japanese, who revere age and believe that with it comes wisdom and insight unobtainable by the young. In our culture, the general perception is that with youth comes energy, imagination, and innovation. With age comes decreasing interest, lack of innovation and imagination, and a lessening of the quality of the person. Television networks, studios, and talent agencies have been accused of stereotyping "older" television writers as not having the energy and ability to write for the younger demographic group they want to attract.[1] In 2010, to prove the point, 17 major networks and production studios paid $70 million to settle an age discrimination suit brought by 165 writers, who had alleged that they were tossed aside in Hollywood's pursuit of younger audiences.[2]

LO1

The scenarios at the beginning of this chapter are mere generalizations, or perhaps even stereotypes, but they are omnipresent in the workplace. While statistics show that older workers are more reliable, harder working, and more committed

Exhibit 12.1 *Age Discrimination in Employment Act*

Sec. 4 (a) It shall be unlawful for an employer—

(1) 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 privilege of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

Source: 20 U.S.C. § 623.

1 Scenario

and have less absenteeism than younger workers—all characteristics that employers say they value—the general perception of them as employees is exactly the opposite. A Government Accountability Office report to Congress[3] evidences a continuing bias against older workers. When asked how their organizations view older workers, 42 percent of respondents answered that older workers were an "issue to be dealt with." Less than one-fourth viewed older workers as a leveraging opportunity. This attitude adversely affects employees who may not be treated as well because they are perceived as less-desirable employees.

This perception is not limited to the United States, of course. Until 2007, lawyers were not permitted to be admitted to practice for the first time in the Indian state of Delhi if they were over the age of 45. This prohibition was based on the general understanding that "lawyers above 45 just get into the profession [to pass time]. They don't contribute anything, engage in malpractice and crowd in."[4] The constraint was recently lifted.

Contrary to those perceptions, older workers are actually now more likely to remain on the job than their counterparts earlier in this century. Between 1999 and 2009, the share of the workforce that was 55 and older grew from 12 percent to 19 percent, marking the largest proportion ever recorded in that age bracket.[5] If the same pace continues, this age group will constitute 25 percent of the workforce in 2019. In addition, a study by Pew Research found that more than 75 percent of workers today *expect* to continue to work for pay after they retire.[6] In contrast, the number of workers between the ages of 35 and 44 is expected to increase between 2010 and 2030, but at a much slower pace than the rate for older workers.[7] This eventuality presents a workforce challenge since more than 50 percent of companies do not actively recruit or work to retain older workers[8] and since a large proportion of the workforce will be eligible to retire within five years.[9] As a result, for many employers, the number one concern is how to attract and retain new talent.

Many employers feel that older employees may be more expensive to retain because they have greater experience and seniority. They may receive a raise each year until their salary becomes a burden on the firm. Management realizes that it could reduce costs by terminating older employees, who have more experience

than may be necessary to perform the requirements of the position, and by hiring younger, less-experienced employees. However, the economic bias against older workers is not well founded in fact. (See Exhibit 12.2, "Realities about Older Workers and Age Discrimination.") A report issued by the American Association of Retired People (AARP) demonstrates that, contrary to popular beliefs that older workers impose higher costs on employers than younger workers, any additional costs are minimal, at best. With regard to retention, offsetting costs are actually related to turnover. In other words, the costs are based on the value that older workers have brought to the workplace through their "deep institutional knowledge and job-related know-how."[10] In connection with hiring, age-based compensation cost differences are exceptionally low. The same report found that older workers are more motivated to exceed expectations on the job than are younger counterparts.

While there certainly is an argument that *some* younger workers might be better qualified than older workers for certain types of positions at the moment the younger workers enter the workforce, employers might instead choose to rely on generalizations about groups of workers when they make hiring decisions. They may opts only to choose employees from those groups that they perceive as

Exhibit 12.2 *Realities about Older Workers and Age Discrimination*

1. In a reduction in force caused by economic reasons, employers should be aware of the impact of terminations based on salary since older workers may be higher paid than others on average, due to job seniority.
2. Just because most people in a certain age group might have a common weakness, it cannot be generalized that *all* in that group have the weakness; so age may not be used as a job qualification.
3. Employees have no claim under the Age Discrimination in Employment Act for discrimination on the basis of their youth, only on the basis of age 40 and older.
4. Under most circumstances, employees are not required to retire at age 65 in the United States.
5. As workers, the following are **mere myths about older employees: They:**
    - Are not hard workers.
    - Will get tired more easily than younger workers.
    - Are less able to perform than younger workers.
    - Do not understand technology.
    - Do not want to travel too much and are generally more stubborn and uninterested in learning.
    - Make too much money since it often is based on seniority and not performance.
    - Are just marking time before they can retire.
6. The following are **mere myths about younger employees: They**
    - Have it easy; they never suffer discrimination.
    - Always win the job when competing against older workers.
    - Have a lower unemployment rate than older workers.
    - Can easily find jobs since older workers are retiring all the time.

more likely to be successful as opposed to making a time-consuming individualized determination of the abilities of each applicant. While some of these generalizations may be grounded in their past experiences, it is the act of generalizing, rather than the individualized conclusions, that constitutes the wrongful discrimination. In this chapter, we will discuss older employees, their legal rights under the laws that protect them, and the most effective way for employers to end up with the most qualified workforces while respecting those laws.

Regulation: Age Discrimination in Employment Act

Age Discrimination in Employment Act
Prohibits discrimination in employment on the basis of age; applies to individuals who are at least 40 years old. Individuals who are not yet 40 years old are not protected by the act and *may* be discriminated against on the basis of their age.

Baseless discrimination against older workers occurs with such consistency that Congress was compelled to enact legislation to protect older workers from discrimination to prevent increased unemployment for those over 40. In 1967, Congress enacted the **Age Discrimination in Employment Act (ADEA)** for the express purpose of "promot[ing the] employment of older people based on their ability rather than age [and prohibiting] arbitrary age discrimination in employment." The act applies to employment by public and private employers and by unions and employment agencies, as well as by foreign companies, with more than 20 workers located in the United States. Age discrimination complaints filed with the EEOC rose dramatically in recent years. Between 1999 and 2008, age-based complaints increased by almost 74 percent, to 24,582.[11] The percentage of all EEOC complaints based on age also grew substantially, by 7.5 percent, to 25.8 percent of all complaints filed. In 2009, however, the number of age-based complaints actually dropped 7 percent, to 22,778, surprising many analysts.[12] Among the reasons offered were (1) a prolonged economic downturn in which fewer age discrimination-eligible workers were still employed, (2) greater reliance on state age discrimination laws, which sometimes allow a wider range of damages than the federal law, (3) greater reliance on arbitration, and (4) a recent U.S. Supreme Court decision that tightened the screws on certain types of age discrimination suits (more on that later in this chapter).

On its effective date, the act covered employees between the ages of 40 and 65. The upper limit was extended to 70 in 1978 and later removed completely. There is no longer an upper age limit, in recognition that an 80-plus-year-old may be just as qualified for a position as a 30-year-old and should have the opportunity to prove her or his qualifications and to obtain or retain employment based on them. With few exceptions, mandatory retirement has now become a dinosaur (discussed below). It is also important to recognize that the act will become all the more critical as health care advances allow people to live more vital lives to longer ages. Many people today feel healthy enough to work long beyond the age at which most people used to retire.

LO2

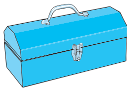
Courts and Congress have recognized there is a trade-off for the required employment of qualified older workers. In *Graefenhain v. Pabst Brewing Co.,*[13] the court said:

> Although the ADEA does not hand federal courts a roving commission to review business judgments, the ADEA *does* create a cause of action against business

> decisions that merge with age discrimination. Congress enacted the ADEA precisely because many employers or younger business executives act as if they believe that there are good business reasons for discriminating against older employees. Retention of senior employees who can be replaced by younger lower-paid people frequently competes with other values, such as profits or conceptions of economic efficiency. The ADEA represents a choice among these values. It stands for the propositions that this is a better country for its willingness to pay the costs for treating older employees fairly.

Distinctions between ADEA and Title VII

You may wonder why age was not merely included as an amendment to Title VII since the laws have several similarities. Both are enforced by the EEOC, as well as through private actions. However, discrimination based on age is substantively different from discrimination based on factors covered by Title VII in three important ways. First, the ADEA is more lenient than Title VII regarding the latitude afforded employers' reasons for adverse employment decisions. The ADEA allows an employer to rebut a *prima facie* case of age discrimination by identifying any "reasonable factor other than age" that motivated the decision. (For a more general discussion of a *prima facie* case, please see Chapter 3.)



Second, an employee is not barred from pursuing a claim simply because the employer treated another older worker better. In other words, a 62-year-old is not barred from a claim when terminated simply because her replacement was 55 (that is, also in the protected class).

Third, the act only protects employees over 40 from discrimination. Unlike Title VII, there is no protection from "reverse" discrimination. In other words, an individual under 40 cannot file a claim under the act based on the claim that she was discriminated against because of her youth. Moreover, in a 2004 decision, the Supreme Court held that the ADEA does not protect workers over 40 who were discriminated against (in this case) in favor of workers over 50 with regard to benefits. As Justice Souter noted in *General Dynamics Land Systems, Inc. v. Cline,* "The law does not mean to stop an employer from favoring an older employee over a younger one. . . The enemy of 40 is 30, not 50."[14]

LO3

Note, however, that certain state laws or precedents allow for what might be considered a youth's "reverse-discrimination" claim under state age discrimination statutes. One New Jersey man who claimed he was fired from a bank vice president position because of his young age (25) was allowed to proceed in court in that state. In direct response to the *Cline* case, the EEOC modified its regulations to remove language that prohibited discrimination against younger workers, opening the doors to what some consider affirmative action in favor of an older generation.

It is interesting to note that, in recent years, there has been somewhat of an upward trend in seeking to hire and retain older workers. (See Exhibit 12.3, "The Times, They Are a' Changin', or Not?" for an alternate perspective.) AARP reports that some businesses, particularly in health care and retail, are increasingly focusing on hiring and retaining older workers as the nation's 78 million

Exhibit 12.3 *The Times, They Are a' Changin', or Not?*

Age discrimination became illegal in Britain as of October 2006. Perhaps you thought it might have occurred earlier?

As a *Financial Times* article pointed out, "[M]ost people instinctively know that [age discrimination] is nonsense," but, as you will see throughout cases and examples in this chapter, perhaps that conclusion is not so universally accepted. As the language in the article suggests, perhaps gender discrimination persists as well; "[w]omen in lap-dancing clubs will still be young, men in boardrooms old. Employers can still make workers retire at age 65, at least for the moment."[1]. [*Note: See below for U.S. differences in the law.*]

Examples are not difficult to find, though perhaps they are difficult to prove. In a 2007 case involving global law firm Akin Gump, Donald Gross filed an age discrimination claim alleging he was terminated less than two years after being hired as senior counsel for its practice in Korea. He contends that he was told that it was not due to performance but instead because he was too senior due to his age and therefore "not a good fit." The firm denies the claims entirely.[2]. The court ultimately granted Akin Gump's motion for summary judgment on the ground that, though Gross was able to meet the requirements of a *prima facie* case of age discrimination, the law firm was able to establish a legitimate nondiscriminatory reason for firing name (poor performance).

[1]J. Kay, "A Subtler Approach Is Needed Than Laws Against Ageism," *Financial Times,* October 3, 2006, p. 13.

[2]E. Schwartz, "Former Akin Gump Attorney Accuses Firm of Age Discrimination," *Legal Times,* March 6, 2007.

baby boomers age. CNBC adds, "With the prospect of shortfalls in funding for Social Security and the potential for a real labor shortage when the economy expands, employment forecasters say the country can't afford to lose older workers in the years ahead."[15]

Another restriction on the ADEA's protection came from the U.S. Supreme Court's 2000 decision in *Kimel v. Florida Board of Regents.*[16] In *Kimel,* state employees alleged that their state employers had discriminated against them on the basis of age in violation of the ADEA. Under the U.S. Constitution's Eleventh Amendment, states cannot be sued by citizens of another state. Federal courts have interpreted the Eleventh Amendment to extend immunity to states not consenting to being sued by their citizens. The U.S. Supreme Court determined that while Congress intended to allow state employees to sue their state employers under the ADEA, this attempt exceeded congressional authority. Therefore, in almost half the states, specifically those that have not waived sovereign immunity, state employees are not able to sue their state employers under the ADEA.

To ensure that appropriate and adequate information exists as to hiring practices in connection with age, the act has specific record-keeping provisions for employers. Employers are required to maintain the following information for *three years* for each employee and applicant, where applicable:

- Name.
- Address.
- Date of birth.

- Occupation.
- Rate of pay.
- Compensation earned each week.

Employers are required to maintain the following information for *one year* for each employee and for both regular and temporary workers:

- Job applications, résumés, or other employment inquiries in answer to ads or notices, plus records about failure or refusal to hire.
- Records on promotion, demotion, transfer, selection for training, layoff, recall, or discharge of any employee.
- Job orders given to agencies or unions for recruiting personnel for job openings.
- Test papers.
- Results of physical exams that are considered in connection with any personnel action.
- Ads or notices relating to job openings, promotions, training programs, or opportunities for overtime.

The ADEA also addresses discrimination in the provision of benefits. Specifically, employers are held to an equal-benefit/equal-cost rule. Under the rule, employers can comply with the ADEA by either providing equal benefits to workers of all ages or spending an equal amount to purchase the benefits. In recognizing that it may cost more to provide equivalent benefits to older workers, Congress was striving to encourage the hiring of older workers.

State Law Claims

Most states, and some municipalities, have laws that protect older workers and, in some cases, provide protections greater than those provided by the ADEA. These state laws vary widely. Some states, principally in the South, have no age discrimination laws, which means that employees in those states are limited to the remedies provided by the ADEA. A few other states have age discrimination laws that track the ADEA. A large third group, however, has laws that provide greater protections than those afforded by the ADEA (because federal law applies to all states, of course, no state can have protections less protective than the ADEA).

Employees who live in states with state age discrimination protections greater than those provided by the ADEA can choose to file a state law claim rather than a federal law claim. Laws in those states that are provide greater protections typically may provide for the following:

1. State age discrimination laws apply to a wider range of employers. The ADEA applies to employers with 20 or more employees. Some state laws, however, apply to all employers in the state, while others apply to employers with 2, 5, 10, or 15 employees. Thus, employees who may be prevented from filing an ADEA claim because the law does not apply to their employee might still have a remedy under state law.

2. State age discrimination laws sometimes allow a wider range of damages. For example, an employee can recover back wages and attorney's fees under the ADEA. However, under some state laws, an employee can also recover damages for emotional distress, as well as punitive damages, both of which are not permitted under the ADEA. Punitive damages are those designed to punish the employer for its actions. Thus, an employee who believes that the employer's actions were particularly horrible might want to file a state law claim to try to collect punitive and/or emotional distress damages.
3. States often provide longer filing periods. In an age discrimination case, two filing deadlines are important. The first is the 180 days after the discrimination occurs that the employee has to file a complaint with the EEOC. Where state or local age discrimination laws exist, the deadline can be pushed back to 300 days. The second deadline is the amount of time to file a suit once the regulatory body evaluates the claims and gives the go-ahead to filing suit, which is 90 days in complaints involving the EEOC. Many state laws give employees a longer time to file suit after getting the go-ahead. Thus, an employee who has waited too long to file a claim under the ADEA might still be able to file a state law claim.

Some also contend that a fourth benefit is that state law claims are processed more quickly than federal law claims, but that cannot be verified. Most likely, some are and some are not. One final point to note about state law claims: as you know, age discrimination only applies to those 40 and older. No state is permitted to extend the protection to someone younger than 40.

Employee's Options

LO4

An employee who believes that his or her employer has engaged in age discrimination has several options to try to correct the wrong. The option most often used is to file a complaint with the employer, using the employer's internal grievance procedures. Some companies have extensive internal grievance procedures, which may involve arbitration or some other type of mediation, though some employers do not have these procedures.

If filing a grievance does not bring satisfaction, the employee has several legal options: file a complaint with the federal Equal Employment Opportunity Commission, file a complaint with the state equivalent of the EEOC (if one exists), file a lawsuit in federal court under the ADEA, or file a lawsuit in state court under state age discrimination laws. These legal options are not exclusive—pursuing one option does not prevent the employee from later pursuing one or more of the other options.

As previously mentioned, the deadline for filing a complaint with the EEOC is 180 days from when the discrimination occurred, which is extended to 300 days if the state has age discrimination laws and an administrative agency to oversee age discrimination complaints. Note, however, that using the employer's internal grievance procedure does not affect the EEOC timing. Thus, if the grievance

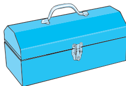
procedure drags out, the employee might be forced to file within the 180 days even if the employer's grievance procedure has not run its course. So, the employee could file an internal grievance, then file a complaint with the state agency (within however many days the state allows), then file an EEOC complaint within 300 days. Or the employee could have skipped the complaint process entirely and filed suit right away; employees are not required to go through the grievance process before filing suit.

Upon receiving the complaint, the EEOC has several possible responses (state procedures are generally similar). It could dismiss the complaint if it believes that the charges have no merit, or it could investigate the charges. If it investigates the charges, the EEOC can either bring suit on the employee's behalf if it believes that the charges have merit or give the employee what is called a right-to-sue letter, if it believes that the charges lack the merit needed to file suit. Once the employee receives the right-to-sue letter, she or he has 90 days to file suit against the employer in her or his own name.

Employee's *Prima Facie* Case: Disparate Treatment

LO5

Suppose that an employee believes that she or he has suffered age discrimination based on an adverse employer action (a pay cut, bad performance review, demotion or otherwise). For our purposes, let us assume that the employee has gone through the complaint process and has decided to file a federal lawsuit under the ADEA. Two types of discrimination exist under the ADEA: disparate treatment and disparate impact. As is discussed in greater detail in Chapter 3, disparate treatment occurs when the discrimination is directed at the employee, to the exclusion of other employees. The employee is treated differently from other employees because of age. The employee does not have to be the only one affected; but the action must be directed at that employee. Choosing not to hire the employee because of her or his age is one example. Disparate treatment, on the other hand (discussed in more detail later in this chapter), involves actions that are not directed at the employee because of her or his age but that have an unfair impact on older workers.



The employee filing an action against the employer under the ADEA based on disparate treatment must prove age discrimination by utilizing the method of proof for Title VII cases originally set forth in *McDonnell Douglas Corp. v. Green* and later adapted to age discrimination claims under the ADEA. Under this approach, an employee must establish the following four elements to persuade the court that she or he even has a claim for age discrimination:

1. The employee is in the protected class.
2. She or he suffered an **adverse employment action** (was terminated or demoted).
3. The employee was doing her or his job well enough to meet her or his employer's legitimate expectations.
4. Others not in the protected class were treated more favorably.

adverse employment action
Any action or omission that takes away a benefit, opportunity, or privilege of employment from an employee.

Member of the Protected Class

To satisfy the first requirement of the *prima facie* case, the employee must merely show that she or he is 40 years old or older.

Adverse Employment Action

The second requirement is proof that the employer made an employment decision that adversely affected the employee. This may include a decision not to hire the applicant or to terminate the employee.

Qualified for the Position

qualified for the position
Able to meet the employer's legitimate job requirements.

With the third requirement, the applicant must prove that he or she was **qualified for the position**. If the applicant is not qualified, then the employer's decision would be justified and the applicant's claim fails. The position requirements, however, must be legitimate requirements and not merely devised for the purpose of terminating or refusing to hire older workers. Courts have allowed this requirement to be met by the employee simply by showing that the employee was never told that performance was unacceptable. The qualifications requirement is not a difficult one. Courts have even held that the fact that the employee was hired initially indicates that he or she has the basic qualifications.

Dissimilar Treatment

In connection with the fourth requirement for a *prima facie* case of age discrimination, which is almost always the most difficult element to prove, the employee or applicant must show that he was treated differently from other employees who are not in the protected class. This might require an employer to explain its actions if it terminates (or refuses to hire) an older qualified employee, while simultaneously hiring younger employees. For instance, where an employer terminates a 57-year-old worker and hires, in her place, a 34-year-old employee, and the 57-year-old employee can show that she remains qualified for her position, the employer must defend its decision.

The courts have struggled to develop consistent rules that can be applied in these situations. What if an 80-year-old is fired and replaced by a 78-year-old? Is this discriminatory action? The basic ADEA case is filed where an employee is replaced by or not hired in favor of an employee who is not a member of the protected class. However, the Supreme Court has held, in *O'Connor v. Consolidated Coin Caterers,*[17] that a plaintiff can state a claim as long as she or he is replaced by someone younger, even if the replacement is 40 years old or older. Of interest is a 2008 Supreme Court case, *Sprint/United Management Co. v. Mendelsohn,* which held that evidence of other older workers terminated from the same company should be evaluated on a case-by-case basis. Called "me, too" evidence., The court explained that, "[t]he question whether evidence of discrimination by other supervisors is relevant . . . is fact-based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances."[18]

One other provision of the ADEA merits special attention: section 4(e) makes it unlawful to "print or publish or cause to be printed or published, any notice or

Exhibit 12.4 *EEOC Guidance*

The EEOC Interpretive Rules offer the following guidance:

> When help wanted notices or advertisements contain terms and phrases such as "age 25 to 35," "young," "boy," "girl," "college student," "recent college graduate," or others of a similar nature, such a term or phrase discriminates against the employment of older people, and will be considered in violation of the act. Such specifications as "age 40 to 50," "age over 50," or "age over 65" are also considered to be prohibited. Where such specifications as "retired person" or "supplement your pension" are intended and applied so as to discriminate against others within the protected group, they, too, are regarded as prohibited unless one of the exceptions applies.

advertisement . . . indicating any preference, limitation, specification, or discrimination, based on age." The court in *Hodgson v. Approved Personnel Serv., Inc.*[19] found that, in determining whether an advertisement had a discriminatory effect on older individuals, "the discriminatory effect of an advertisement is determined not by 'trigger words' but rather by its context." That is, the ad is not considered discriminatory because of a word or words but rather because of the intent of the ad to discriminate against older individuals.

The use of certain trigger words like "girl" or "young" may establish an ADEA violation under most circumstances so the context of the statement is important to determine its discriminatory effect. For instance, the use of "recent college graduate" is not discriminatory if a personnel agency merely intended to identify those *services* that it offered to that specific class of individuals. (See Exhibit 12.4, "EEOC Guidance.") The EEOC specifically explains as follows:

> The ADEA generally makes it unlawful to include age preferences, limitations, or specifications in job notices or advertisements. A job notice or advertisement may specify an age limit only in the rare circumstances where age is shown to be a "bona fide occupational qualification" (BFOQ) reasonably necessary to the normal operation of the business.[20]

Burden Shifting No More

Prior to the summer of 2009, once the employee presented evidence of the employer's wrongful actions, the burden of proof shifted to the employer to present a legitimate nondiscriminatory reason (LNDR) for its actions. The motivations behind employment actions, such as a dismissal, are often difficult to determine. Discrimination cases involving more than one potential motivation for the employment action are referred to as mixed-motives cases. Because the employee only has to prove that age discrimination was a *motivating factor* (one of many, perhaps), the employer in a mixed-motives case has always been given the opportunity to prove that it would have come to the same decision even if there were no discrimination present because of some nondiscriminatory motivation, such as poor performance or a legitimate business necessity, the LNDR.

However, in *Gross v. FBL Financial Servs. Inc.,* No. 08-441, June 18, 2009, included at the end of this chapter, the court ruled that age discrimination cases under the ADEA require proof that age was the "but for" cause of the adverse employment action. Critical to the court's decision was the fact that Title VII had been amended in 1991 to include "motivating factor" language but that the ADEA had not.

As a result, the court said, no burden shifting occurs in ADEA cases. In fact, the decision means that mixed-motives age discrimination claims do not exist under the ADEA for disparate treatment claims, although burden shifting still applies to Title VII cases. Henceforth, the employee could recover ***only if the employment action would not have taken place but for age discrimination.***

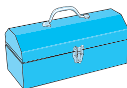
The decision caused quite a stir, with commentators interpreting the ruling to mean that disparate treatment age discrimination claims would be more difficult to prove. Whether that comes to pass remains to be seen, but efforts were launched in the aftermath of *Gross* to undo the decision. Jack Gross was called to testify before Congress, and bills have been introduced in both the House and Senate to legislatively overturn the decision. To date, however, *Gross* remains the law of the land on ADEA-base age discrimination claims alleging disparate treatment.

Meanwhile, as the legislative process continued, the lower courts were left to implement *Gross* and to answer related questions not raised in the case. Generally speaking, subsequent lower court answers to open questions have softened the impact. For example, does *Gross* require that age discrimination be the *only* factor? The 10th Circuit has said no; *Gross* can be interpreted to mean that other factors can be present as long as age is the factor that made the difference.[21] Does the *McDonnell Douglas* burden-shifting approach still have any relevance in ADEA disparate treatment cases? Surprisingly, perhaps, eight circuits—the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, and 10th—have all said yes. According to the 10th Circuit,[22] summarizing the opinions of the other seven circuits, *Gross* held only that the burden of *persuasion* never shifts. *McDonnell Douglas*, on the other hand, shifts only the burden of *production*. Under those appellate court opinions, at some point after the employee has met the "but for" requirement, the burden shifts to the employer to produce evidence of a nondiscriminatory justification for the action. The burden of persuading the judge or jury that the employer is guilty of age discrimination, however, always rests with the employee. The distinction between burden of proof and burden of production can be difficult to draw. We will have to wait to see if the Supreme Court agrees with those lower court interpretations.

LO6

Employer's Defenses

Bona Fide Occupational Qualification



2 Scenario

If an employer is sued for age discrimination, the defense of BFOQ is available. (See Chapter 2 for a more general discussion of BFOQs.) In fact, age is one of the most consistently applied BFOQs. The employer's proof of a bona fide occupational qualification under the ADEA is slightly different and less exacting than under Title VII. Title VII requires that the employer demonstrate that the essence of the business requires the exclusion of the members of a

protected class and all or substantially all of the members of that class are unable to perform adequately in the position in question. The EEOC follows the requirements of Title VII in connection with the ADEA but adds one further possibility for the employer's proof, included as no. 3, below. The EEOC identifies what the employer must prove in an age discrimination case brought under the ADEA as

1. The age limit is reasonably necessary to the essence of the employer's business; and either
2. All or substantially all of the individuals over that age are unable to perform the job's requirements adequately; or
3. Some of the individuals over that age possess a disqualifying trait that cannot be ascertained except by reference to age.

The third element of the proof allows an employer to exclude an older worker from a position that may be unsafe to *some* older workers. This defense would only be accepted by a court where there is no way to individually assess the safety potential of a given applicant or employee.

For example, assume there existed a medical disorder that was prevalent among those over 80 and was not discoverable under standard medical investigation. Assume also that this medical condition caused its sufferers to lose consciousness without warning. An employer who refused to place those over 80 in the position of a school bus driver would satisfy the proof of a BFOQ. Note that it is not enough for an employer to simply think there is a condition related to age that supports a BFOQ. The decision must be based on competent expert evidence of a connection between age and the component of the job affected (see Exhibit 12.5).

mandatory retirement
Employee must retire upon reaching a specified age. Deemed illegal by the 1986 amendments to the ADEA, with few exceptions.

When Congress passed the 1986 amendments to the ADEA prohibiting **mandatory retirement** on the basis of age for most workers, it included several temporary exemptions, notably one for tenured faculty in higher education. That exemption expired December 31, 1993. Mandatory retirement has been limited to two circumstances. First, a small number of high-level employees with substantial executive authority can be subjected to compulsory retirement

Exhibit 12.5 *Employer's Defenses*

The employer may defend its actions in one of several ways. The act states:

> It shall not be unlawful for an employer
>
> (1) to take any action otherwise prohibited where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age.
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan.
>
> (3) to discharge or otherwise discipline an individual for good cause.

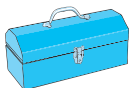
at age 65 or beyond if the individual will receive a company pension of $44,000 or more. This exception is a very narrow one and does not allow for compulsory retirement policies for midlevel managers. Perhaps this exception is narrowly confined to those with decision-making authority based on stereotypes that the majority of powerful executives tend to be over 40, with wealth and opportunity that make a mandatory retirement policy less burdensome. Second, persons in two specific occupations, police officers and firefighters, have been subject to mandatory retirement. However, age is not necessarily a BFOQ in these occupations. Voluntary retirement plans are, however, permitted and are discussed later in this chapter.

The employer cannot simply base employment decisions on age-related stereotypes; the employer must base such decisions on credible evidence. As demonstrated in *Western Airlines, Inc. v. Criswell,* provided at the end of the chapter, an airline attempted to defend its mandatory retirement policy for flight engineers over the age of 60 as a BFOQ. This defense ultimately failed because individual determinations of health could help achieve the airline's goal of safe transportation of passengers in a less restrictive manner.

The policy was apparently based on the Federal Aviation Administration's original "Age 60 Rule," which prohibited people at or over the age of 60 from acting as pilots or co-pilots.[23] Interestingly, while the FAA requires individual pilot medical certifications and a semiannual exam of pilots, it maintained the Age 60 Rule until 2007, when then-President Bush signed a bill raising the mandatory retirement age to 65, bringing the United States into alignment with international rules. At the time of its passage, the legislation was praised for keeping more experienced pilots in the cockpit longer, for easing the challenge brought on by a pilot shortage but also for its requirement that pilots over 60 be accompanied by a younger copilot on international flights.

LO7

Employee's *Prima Facie* Case: Circumstances Involving Claims of Disparate Impact



We now turn to disparate impact. Disparate treatment, as discussed in Chapter 2, occurs where an employee is treated differently from other employees because she or he is a member of a protected class. Disparate impact, on the other hand, exists where a policy or rule of an employer, though not discriminatory on its face, has an effect on one group different from that on another. For example, a rule that required all bus drivers to have 20/20 vision may have the effect of limiting the number of older workers who can be bus drivers. Now, this rule is indeed discriminatory in that it distinguishes between those who have good vision and those who do not. The question is whether the rule is discriminatory. In the example, perhaps it is justified by business reasons, and thus perfectly acceptable. Because of the close connection between the *prima facie* cases and the employer defenses, we will discuss the case of disparate impact at this juncture and then return to the employee's burden of evidencing pretext shortly; but let us review where we are in the case process for navigational purposes (see Exhibit 12.6, "Proving a Case of Age Discrimination").

Exhibit 12.6 *Proving a Case of Age Discrimination*

DISPARATE TREATMENT

Step One: Employee's *prima facie* case.

1. The employee is in the protected class.
2. She or he was terminated or demoted.
3. The employee was doing her or his job well enough to meet her employer's legitimate expectations.
4. Others not in the protected class were treated more favorably.

Step Two: Employer defenses.

1. Bona fide occupational qualification.

Step Three: Employee may evidence pretext for employer actions.

DISPARATE IMPACT

Step One: Employee's *prima facie* case

1. A facially neutral policy or rule is imposed by an employer,
2. Which has a different effect on an older group of workers.
3. No intent to discriminate is necessary.

Step Two: Employer defenses

1. Reasonable factor other than age (RFOA)
   a. Economic concerns.
   b. Seniority.

In mid-2005, the Supreme Court reached a decision in *Smith v. City of Jackson*[24] that resolved this issue—one that had caused a distinct split in the circuit courts. In that case, police and public safety officers employed by the city of Jackson, Mississippi, argued that the city had given senior officers lower salary increases than those offered to younger officers. The city had adopted this salary plan "to attract and retain qualified people, provide incentive for performance, maintain competitiveness with other public sector agencies and ensure equitable compensation to all employees regardless of age, sex, race and/or disability." The appellate court held that disparate-impact claims are categorically unavailable under the ADEA.

reasonable factor other than age (RFOA)
May include any requirement that does not have an adverse impact on older workers, as well as those factors that do adversely affect this protected class but are shown to be job-related. For example, if an employee is not performing satisfactorily and is terminated, her failure to meet reasonable performance standards would constitute a reasonable factor other than age.

While holding that disparate impact claims are actionable under the ADEA, the Supreme Court ended up finding against the officers because the city based its decision on **reasonable factors other than age (RFOA)**. "The RFOA provision provides that it shall not be unlawful for an employer 'to take any action otherwise prohibited under [the Act] . . . where the differentiation is based on reasonable factors other than age discrimination. . . . ' In most disparate-treatment cases, if an employer in fact acted on a factor other than age, the action would not be prohibited under [the Act] in the first place." One of the important elements of the decision is that the Court found that the disparate impact provision is to be interpreted much more *narrowly* for disparate impact claims under the ADEA compared to Title VII. First, there is no RFOA defense in Title VII; under Title VII, the employer can justify a practice that has been shown to have a disparate impact by evidencing that it is job-related and consistent with business necessity.

In evaluating the city's salary plan, the Supreme Court concluded that reliance on seniority and rank is unquestionably reasonable given the city's goal of raising employees' salaries to match those in surrounding communities. The court explained again that the analysis in this ADEA case was different from an analysis under Title VII: "While there may have been other reasonable ways for the City to achieve its goals, the one selected was not unreasonable. Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement." The court therefore decided that the city's decision was based on a "reasonable factor other than age" that responded to the city's legitimate goal of retaining police officers.

2 Scenario

In opening scenario 2, the applicant's age appears to be of some concern; however, the real issue is whether the applicant can do the strenuous job. If it can be shown that the applicant can perform all the necessary job functions, he should be hired because he is the most qualified. In the future, if he becomes unable to meet the demands of the job, his termination would be a result of his lack of ability, not his age. Furthermore, regarding the concerns about the applicant leaving after a few years, *any* employee can leave an employer at any time unless there is a contract. This is not a concern with older individuals only.

LO8

Economic Concerns

1 Scenario

Would a company's desire to cut payroll costs constitute a reasonable factor other than age? Given the above decision, cases that arise based on economic justifications may spell some bad news for older workers who were relying on the decision to strengthen their footing with regard to facially neutral termination plans. Often, a reduction in force may adversely impact older workers since their seniority may reward them with higher salaries. To reduce costs, a firm may opt to reduce its workforce based in part on salary amounts in order to have the greatest impact. Based on *City of Jackson,* above, it is crucial that the discharges be made on the basis of an objective standard so that the RFOA defense remains available to the employer.

This issue is unique to ADEA discrimination claims because it is not more costly, for instance, to hire an Asian employee than a Caucasian employee. However, in many cases, it is more expensive to hire or to retain older workers since, among other reasons, they have more experience and thereby command a higher wage. Courts disfavor this justification for the termination of older workers. As stated by the Illinois district court in *Vilcins v. City of Chicago,* "[n]othing in the ADEA prohibits elimination of a protected employee's position for budgetary reasons. In fact, the case law establishes that economic or budgetary factors may provide valid reasons for discharging a protected employee. A termination allegedly based on economic factors may constitute impermissible discrimination, however, *when the economic reasons proffered serve merely to obscure the fact that age was the true determinant.*"[25]

With regard to reductions in force, courts generally absolve the employer from liability where the employer follows a specified procedure for the terminations,

where objective criteria are used to determine the individuals to be discharged, and where the entire position is eliminated. In one example of a pre–*City of Jackson* case, the Second Circuit did find that the ADEA allowed disparate impact claims during a reduction in force. Its dicta are relevant as the case offers some insight into the ways in which a court may evaluate such claims in the future. In the Supreme Court's 2008 decision, *Meacham v. Knolls Atomic Power Laboratory*, it further clarified that the burden of proving the RFOA is on the employer in these cases since it is an affirmative defense. In other words, the employer must prove that age was *not* a factor in the decision.

This brings to mind one of the most interesting case opinions in this area: *Metz v. Transit Mix, Inc.*[26] In that case, the appellate court noted that salary is often a direct function of seniority. Individual salary increases may occur yearly with no regard to the financial condition of the employer; consequently, those who have been employed for the longest times, and have accrued the most seniority, are also the highest-paid employees. In disallowing the termination of older workers for financial reasons, the court then cited Willie Loman, the salesman who was fired after working for his boss for 34 years (in Arthur Miller's *Death of a Salesman*): "You can't eat the orange and throw the peel away—a man is not a piece of fruit." Courts have emphatically rejected business practices in which the "plain intent and effect was to eliminate older workers who had built up, through years of satisfactory service, higher salaries than their younger counterparts."

The court stated that where salary is tied directly to seniority (and therefore age), seniority then serves as a "proxy" for age, supporting a claim of age discrimination. The court of appeals noted that one possible solution to the high-pay quandary for the continued employment of older workers is to offer the older worker the option of accepting a pay cut in lieu of termination. The pay cut, of course, must be warranted by business necessity such as economic difficulties, but at least the older worker would be retained and not replaced by a younger worker who would be willing to accept the lower salary offered. Such an offer to the older worker would be evidence of the intent to reduce costs, as opposed to the intent to relieve the firm of its older workforce. In addition, terminations pursuant to bona fide reductions in force, bankruptcy, or other legitimate business reasons are generally legal, even if the economic considerations that have necessitated the reduction in force require the termination of more older workers than younger employees. Of course, if the true reason for the pay cut is economic, it would be an unfortunate result if an older worker is fired and a younger worker is hired, only to avoid a discrimination suit by not offering the older worker a lower salary instead. If the employer actually wanted to get rid of the older worker (i.e., had discriminatory intent), it would not make this offer in the first place. (See discussion, below, on this option.)

In 2004, that court upheld a lower court's decision in *Meacham v. Knolls Atomic Power Laboratory,*[27] finding that a reduction in force (RIF) program had a disparate impact on older workers, even though the employer did not intend to discriminate. To state a cause of action, the Second Circuit explained that the employee would need to identify the actual, specific policy that resulted in harm (such as

particular selection criteria). Next, the employee would need to show that this policy resulted in a disparity in the retention rates of younger and older employees "sufficiently substantial to raise an inference of causation" (using statistical data, discussed below). The employer is then given the opportunity to explain the business necessity of the challenged employment practice. The burden then shifts back to the employee, who may prevail "only if they can show that the employer's explanation was merely a pretext for discrimination." The court suggests that the employee could point to another practice that would achieve the same result at comparable cost without causing a disparate impact on older workers.

In *Meacham,* the Second Circuit found that the employee had satisfied this burden by showing that the selection procedures were extremely imprecise, allowing for excessive subjectivity to impact the results. If an employer seeks to use subjective criteria to make decisions such as these, and if adequate alternative methods exist by which to make the same determination, the court warns that these criteria will need to be validated or audited to ensure that a disparate impact does not result. Employers may instead opt for more effective, job-related, objective criteria when reaching these decisions.

In *Schuster v. Lucent Technologies, Inc.*, provided for your review, the Seventh Circuit revisits the issue of age discrimination in the face of economic duress and, under the facts of this case, finds the employer's arguments persuasive. In *Hazen Paper Co. v. Biggins*, included at the end of the chapter, the employee claimed that he was fired in order to prevent his pension from vesting, rather than for a bona fide reason. The Supreme Court was asked to determine whether a firing decision based on number of years served is "age-based." The case is an important one in this area since the Court holds that there is no disparate treatment under the ADEA when the factor motivating the employer is some feature "*other than the employee's age*" (emphasis added).

Interestingly, one challenge to stating a claim for discrimination based on a reduction in force is the fourth prong of the traditional *prima facie* case—where a RIF occurs, no one replaces the employee so there is no one similarly situated. Therefore, in the event of a RIF, age discrimination may be proven where

- The employer refuses to allow the discharged (or demoted) employee to bump others with less seniority, and
- The employer hires younger workers when the jobs become available after the employee was discharged (or demoted) at the prior salary of the older worker.

The question mentioned at the end of the *Metz* discussion, above, then arises: in an effort not to terminate the employee but to continue to cut costs, can an employer unilaterally reduce the salary of a protected employee to respond to its economic challenges? While this may seem a creative option, section 4(a)(3) of the ADEA specifically states that it is "unlawful for any employer . . . to reduce the wage rate of any employee in order to comply with this Act." Strangely, though striving to be clear, in light of *City of Jackson,* this prohibition remains vague since an employer may argue that it was not reducing the wage rate to comply with the ADEA but instead for some RFOA such as reducing costs.

What if an employee told he is to be laid off for economic reasons voluntarily offers to reduce his salary? The law is unsettled; but, the Second Circuit reversed a lower court decision and held instead that rejecting such an offer might indeed constitute age discrimination. In *Carras v. MGS 728 Lex*,[28] a chief financial officer was told that he was being terminated for financial reasons. He then offered to take a severe pay cut, to $60,000. The company rejected his offer, laid him off, replaced him with a younger person, and paid the new person more than $60,000. The former CFO convinced the appellate court that rejection of his offer might be an indication that economic reasons were not the real motivation.

There is no consensus in the federal courts on the question of whether there is a "high correlation" between compensation and age in any generic manner that would imply that compensation-based decisions would have a disparate impact on older workers as a general rule. An employer's decision based on salary that disproportionately affected older workers because of the high correlation between age and salary would be actionable age discrimination under a number of federal circuit court decisions.[29] On the other hand, federal courts that have examined the issue more recently, particularly in the wake of *Hazen Paper Co. v. Biggins,* have tended to hold that economic decisions do not give rise to liability for age discrimination, despite the disparate impact of such decisions on older workers.[30]

The split among courts on whether economic factors can be considered when terminating older workers can be traced to two fundamentally differing views about the goal of the age discrimination statutes. If the goal of the age discrimination statutes is to preclude decisions based on generalities about older workers that may have no basis as to individuals, then they certainly do not extend to decisions based on relative compensation rates between individual workers. In this view, age discrimination statutes were enacted to prevent employers from assuming that just because an individual attained a certain age, he or she no longer could do the job, or do it as well. This view was best articulated by the dissent in *Metz v. Transit Mix, Inc.,* which stated, "The Act prohibits adverse personnel actions based on myths, stereotypes, and group averages, as well as lackadaisical decisions in which employers use age as a proxy for something that matters (such as gumption) without troubling to decide employee-by-employee who can still do the work and who can't."

The other view is that age discrimination statutes were enacted to protect older workers because of their status as older workers, since older workers, generally speaking, face unique obstacles late in their careers. Age discrimination law is thus seen as a kind of protective legislation designed to improve the lot of people who are vulnerable as a class. If this view is correct, then holding that decisions based solely on salary may contravene laws precluding discrimination based on age makes sense.

Defenses Based on Benefit Plans and Seniority Systems

The ADEA specifically excludes bona fide retirement plans that distinguish based on age but are "not a subterfuge to evade the purpose of [the] Act." "Subterfuge" in this definition denotes those plans that are mere schemes for the purpose of

evading the ADEA or the Older Workers' Benefit Protection Act (discussed below). The effect of the 1978 and 1986 amendments to the ADEA was to completely prohibit involuntary retirement plans when they are imposed on the sole basis of an employee's age.

To qualify as a bona fide voluntary retirement plan allowed by the act, the plan must be truly voluntary. Some employees have contended that there is no voluntary decision when they are given only a short time in which to reach a decision about whether to accept the retirement option. But a short time period in which to reach a decision does not necessarily render the decision involuntary. The determination of what qualifies as a bona fide plan must be made on a case-by-case basis.

It has been held that early retirement plans offered by employers are not bona fide pursuant to the act if a reasonable person would have felt compelled to resign under similar circumstances. However, even after several court decisions relating to the issues of voluntariness, and whether a plan was a subterfuge, employers are left without much direction in terms of the formulation of early retirement programs and other means of providing benefits.

"Same Actor" Defense

A number of appellate courts, including the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits, have adopted a defense called the "same actor" defense to age discrimination claims. The circuit courts have applied various weights of strength or value of the defense when the hirer and firer are the same actor. These courts have held that when the same "actor" both hires and fires a worker protected by the ADEA, there is a permissible inference that the employee's age was not a motivating factor in the decision. After all, if someone held discriminatory beliefs about older workers, why would that person have hired the worker in the first place? The Fourth Circuit reasoned that "claims that the employer animus exists in termination but not in hiring seem irrational. From the standpoint for the putative discriminator, it hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job."[31]

Retaliation

The ADEA prohibits retaliation,[32] which usually occurs when an employer takes an employment action against an employee, such as a dismissal, a denial of a promotion, a demotion, or a suspension, in response to an age discrimination complaint filed by that employee. The protection is quite broad and protects not only the person filing the complaint but also includes any other employee who might have participated in the claim. As a result, the ADEA protects an employee who, for example, is a witness in support of the employee's position. If the employer retaliates against that employee, the employer violates the ADEA.

While, originally, some legal analysts thought that the ADEA might not protect federal employees from retaliation because the public sector language in the ADEA was different from the private sector language,[33] the Supreme Court

dispelled any confusion on that issue in *Gomez-Perez v. Potter*.[34] In that case, the U.S. Supreme Court ruled that federal and private sector employees have the same protection from retaliation under the ADEA, reversing the First Circuit, which had previously found no similar rights.

Interestingly, punitive damages, which are generally unavailable in ADEA-based claims, are available for retaliation claims.[35] **Punitive damages** are those designed to punish the employer (rather than compensating the employee), and often significantly higher in amount. The ADEA requires that the employer's conduct be willful,[36] which the U.S. Supreme Court has said means "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute."[37]

punitive damages
Punitive damages are designed to punish the party being sued rather than compensate the injured party. Punitive damages can be quite high, especially if the actions are especially offensive, the defendant is a large company, and the jury is angry. They are paid to the injured party, which some have criticized as an unearned windfall.

Punitive damages, which are generally unavailable in ADEA-based claims, are available for retaliation claims.[38] In order to be successful in a plea for punitive damages, the ADEA requires a showing that the employer's conduct is willful,[39] which the U.S. Supreme Court has said means that "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute."[40]

Employee's Response: Proof of Pretext

LO9

Let us return to the standard *prima facie* case of discrimination. Assume that the employee has demonstrated the required four elements of that case and that the employer has demonstrated a bona fide occupational qualification (BFOQ). The next step in proving a case of discrimination is for the employee to show that that reason or defense is *pretextual*. When a claim is pretextual, it means that it is not the true reason for the action, that there is some underlying motivation to which the employer has not admitted. To prove that the offered reason is pretext for an actual case of age discrimination, the employee need not show that age was the *only* factor motivating the employment decision, but only that age was a determining factor.

Where there is direct evidence of discrimination, proof of pretext is not required. This may occur where the employer admits to having based the employment decision on the employee's age, or when a representative of the employer says that it would be cheaper to hire younger applicants. You would not think that an employer would actually admit something so directly; but in *Mauer v. Deloitte & Touche, LLP,* a supervisor gave a speech where he explained that the firm would get rid of poor performers just like you prune a blueberry bush. He explained that you cut off "older branches to make room for younger ones." The court held that the supervisor's statement was direct evidence of age discrimination.[41]

The question of what constitutes direct evidence is not always clear. Despite the similarity between statements made by employers, however, statements regarding an applicant's or employee's race are taken more seriously than those about age. For instance, most courts would rule in the employee's favor if it were determined that she was not hired pursuant to the manager's statement, "I don't want any more blacks in my unit." But it is questionable whether this same employer would be

held guilty if the manager states, "We need some new ideas in this unit. Let's hire younger analysts." The statement may be viewed as merely descriptive.

An employee also can show pretext by proving that the offered reasons for the adverse employment action have no basis in fact, the offered reasons did not actually motivate the adverse employment action, or the offered reasons are insufficient to motivate the adverse action taken. In addition, in a 2004 case, the First Circuit held that an adverse action taken by a nonbiased decision maker, but based on information from another worker who has a discriminatory motive, still satisfies a *prima facie* case. In other words, if someone takes an adverse action against an employee based on what appears to be a reasonable factor, the employer will be liable if the basis of that decision is actually grounded in bias and a discriminatory motive.[42] The employee also may show that pretext exists where the employer presents conflicting rationales for the adverse employment action.[43]

In its 2000 decision in *Reeves v. Sanderson Plumbing Products,*[44] the U.S. Supreme Court held that a jury may infer discriminatory intent behind an adverse employment action based on the falsity of the employer's explanation. In October 1995, 57-year-old Reeves, who had worked for Sanderson Plumbing for 40 years, was terminated. As a supervisor, Reeves was responsible for keeping attendance records of his employees. After the department reportedly suffered a downturn in productivity due to tardiness and absenteeism, the records were audited. The audit revealed that Reeves and two other managers had made numerous errors in timekeeping. One other manager was discharged along with Reeves. Reeves brought a claim under the ADEA against his former employer, claiming that he had kept accurate attendance records. Further, Reeves argued that the employer's reasons for firing him were merely a pretext for age discrimination that was demonstrated through age-related comments made to him by his supervisor. The U.S. Supreme Court stated in its opinion that once the employer's rationalization has been eliminated, discrimination may well be the most likely alternative explanation for the adverse employment action.[45]

The *Reeves* decision, therefore, rejected what has become known as the "pretext plus" standard. Courts cannot require employees both to show pretext and to produce additional evidence of discrimination. No additional evidence is necessary to show discrimination because, once the pretext has been shown, an inference can be made that the action was done for discriminatory reasons.[46]

Employee's *Prima Facie* Case: Hostile Environment Based on Age

The Sixth Circuit recognizes a cause of action under the ADEA based on hostile environment age harassment. In *Crawford v. Medina General Hosp.,*[47] Crawford claimed hostile environment based on ageist remarks consistently made by her supervisor such as "old people should be seen and not heard" and "I don't think women over 55 should be working." Crawford also alleged that, in addition to the disparaging remarks, the older women are "not included in anything," such as parties, as well as information about minor changes in office procedures, and that the supervisor would customarily call the young people into her office to question

them about what the older people were doing "and then she encourages them to go out and confront those people."[48]

The Sixth Circuit found that it was a "relatively uncontroversial proposition that such a theory is viable under the ADEA"[49] and, since that time, the Eighth and Eleventh Circuits and some district courts have applied the same theory.[50] The court then articulated the *prima facie* case for hostile environment under the act:

1. The employee is 40 years old or older.
2. The employee was subjected to harassment, either through words or actions, based on age.
3. The harassment had the effect of unreasonably interfering with the employee's work performance and creating an objectively intimidating, hostile, or offensive work environment.
4. There exists some basis for liability on the part of the employer.[51]

Though it denied the claim based on the facts of that case, the Northern District of Illinois also upheld a cause of action under the ADEA for hostile environment age harassment.[52] The claim will most likely be recognized as well by the Seventh Circuit, which stated one year prior "[plaintiff] asserts that he was subjected to a hostile work environment because of his age. This circuit has assumed, without deciding, that plaintiffs may bring hostile environment claims under the ADEA. See *Halloway v. Milwaukee County,* 180 F.3d 820, 827 (7th Cir. 1999). We will do likewise here because we conclude that, even if such a hostile work environment claim could be brought under the ADEA, Bennington could not prevail."[53] While several other circuits and districts also have so allowed,[54] the remaining courts have refused to expand the ADEA to include a hostile environment claim without express statutory language to the contrary.

Note that, if a hostile environment age harassment claim becomes more universally recognized, the impact may go significantly further than a solely age discrimination claim. Consider the impact on constructive discharge. A worker subject to age harassment may be reasonable in quitting, based on the intolerable working condition, which could then give rise to a claim of constructive discharge based on age harassment.

Waivers under the Older Workers' Benefit Protection Act of 1990

In 1990, Congress enacted the Older Workers' Benefit Protection Act (OWBPA), amending section 4(f) of the ADEA. The OWBPA concerns the legality and enforceability of early retirement incentive programs (called "exit incentive programs" in the act) and of waivers of rights under the ADEA, and it prohibits age discrimination in the provision of employee benefits. What this act really involves are those situations where employees are offered amounts of money through retirement plans as incentives for leaving a company. In that way, the company is

not terminating an older worker and, thereby, cannot in theory be held liable under the ADEA.

LO10

Many companies also request that older workers sign a waiver whereby they relinquish the right to later question the plan by filing an age discrimination action. Once the waiver is signed and the worker accepts the benefits under the plan, the company would like to believe it is safe from all possible claims of discrimination. Where a waiver is valid under the ADEA/OWBPA, the employer can use it as an affirmative defense to an ADEA claim. The burden, however, is on the employer to prove validity. This is not necessarily always the case, as will be discussed.

The OWBPA codifies the EEOC's "equal cost principal," requiring firms to provide benefits to older workers that are at least equal to those provided to younger workers, unless the cost of their provision to older workers *greatly* exceeds the cost of provision to younger workers. Therefore, a firm may only offer different benefits to older and younger workers if it costs a significant amount more to provide those benefits to older workers. This section amends section 4 of the ADEA, which provides that adverse employment actions taken in observance of the terms of a bona fide employee benefit plan are partially exempt from question.

waiver
The intentional relinquishment of a known right.

In connection with employee waivers of their rights to file discrimination actions under the ADEA, the OWBPA requires that every **waiver** must be "knowing and voluntary" to be valid. In order to satisfy this requirement, the waiver must meet all of the following requirements:

1. The waiver must be written in a manner calculated to be understood by an average employee.
2. The waiver must specifically refer to ADEA rights or claims (but may refer to additional acts, such as Title VII or applicable state acts).
3. The waiver only affects those claims or rights that have arisen prior to the date of the waiver (i.e., the employee is not waiving any rights that will be acquired after signing the waiver).
4. The waiver of rights to claims may only be offered in exchange for some consideration in addition to anything to which the individual is already entitled (this usually involves inclusion in an early retirement program).
5. The employee must be advised in writing to consult with an attorney prior to execution of the waiver (this does not mean that the employee must consult with an attorney, but must merely be advised of the suggestion).
6. The employee must be given a period of 21 days in which to consider signing a waiver, and an additional 7 days in which to revoke the signature. Note that where a waiver is offered in exchange for an early retirement plan, as opposed to some other consideration, the individual must have 45 days in which to consider signing the agreement.
7. If the waiver is executed in connection with an exit incentive (early retirement) or other employment termination program, the employer must inform the

employee in writing of the exact terms and inclusions of the program. This information must be sufficient for the employee to test the impact of the selection decision made; in other words, does the decision about inclusion in the program have any discriminatory impact?[55]

The waiver may not bar the employee from filing a claim with the EEOC or participating in investigations by the EEOC. Therefore, the employee may testify on another's behalf if requested. The purpose of these provisions is basically to ensure that the employee entered into the agreement that waived her or his rights knowingly and voluntarily based on the "totality of the circumstances." Courts are serious about enforcing these provisions in order to protect stridently the rights of workers, which was the original intent of the act. In one case, *Ruehl v. Viacom, Inc.,*[56] the court held that an ADEA waiver was completely invalid based on the fact that the employer did not give adequate and written notice to the employee of the relevant information, or how to obtain it. In another, the court tossed out waivers where the employer simply misstated the number of workers terminated in the RIF (154 instead of 152) and did not properly disclose job titles.[57]

Based on the court's decision in *Oubre v. Entergy Operations, Inc.,* if an employee signs a defective waiver, the employee is *not* required to give back any benefits received under the defective waiver. In addition, if the employer offers to individually negotiate the waiver (as opposed to offering a standard form to the employee on a take-it-or-leave-it basis), this may be able to serve as proof to the court that the employee knew what he was doing when he signed the document. Because the court's explanation of this holding is so critical, it has been included at the end of the chapter.

Employers may use general waivers as an attempt to avoid all employment-related liability in contexts other than layoffs. For example, Allstate Insurance decided to transform its 15,200-member sales force from regular employees to independent contractors. To remain as contractors, the agents were required to sign a release stating that they would not sue Allstate. Those agents who refused to sign the waivers were dismissed. Ninety percent of these agents were over the age of 40. In December 2001, the EEOC filed a suit against Allstate alleging it engaged in age discrimination against its agents.[58] However, employers must beware of asking employees to sign waivers that are considered *too general,* such as a document that contains a general release and a covenant not to sue, since courts may find that they are so ambiguous that they do not constitute a knowing and voluntary waiver of the employee's right to sue under the ADEA.[59] In *Thomforde v. International Business Machines Corp.,* the court found the agreement unclear because it failed to explain how the release and the covenant not to sue were related because it used the terms interchangeably, and because it failed to explain the agreement sufficiently to the employee.

After the Supreme Court decision in *Oubre,* the EEOC issued a notice of proposed rule making to address the issues raised in that case. After receiving comments, the EEOC published its final regulation setting forth its interpretation of the waiver provisions of OWBPA. This regulation became effective on January 10, 2001.[60] The regulation makes clear that employees cannot be required to

"tender back" the consideration received under an ADEA waiver agreement before being permitted to challenge the waiver in court. Further, the contract principle of ratification does not apply to ADEA waivers. The EEOC also recognized that covenants not to sue operate as waivers in the ADEA context. Therefore, OWBPA's requirements and these rules apply to such agreements as well.[61]

A firm must be cautious because individual negotiations may lead to slightly different agreements with various employees, and varying benefits among similar employees may constitute a violation of the Employee Retirement Income Security Act (ERISA).

The OWBPA also contains the following provisions in connection with early retirement plans, 29 U.S.C. § 623:

1. Employers may set a minimum age as a condition of eligibility for normal or early retirement benefits.
2. A benefit plan may provide a subsidized benefit for early retirement.
3. A benefit plan may provide for Social Security supplements in order to cover the time period between the time when the employee leaves the firm and the time when the employee is eligible for Social Security benefits.
4. While severance pay cannot vary based on the employee's age, the employer may offset the payments made by the value of any retiree health benefits received by an individual eligible for immediate pension.

Thus, while an employer may not actually discriminate in the amount of the payments offered by the retirement plan on the basis of age, these provisions actually seem to allow for inconsistent payments to older and younger workers, under certain circumstances.

Note that no provision of the OWBPA prohibits an employer from revoking a retirement offer *while* the employee is considering it. So, for example, a firm could offer an employee a retirement package in a separation agreement; then, while the employee considers it, the firm could revoke it and offer a less attractive package. This could be abused, of course, if it is interpreted as a threat to encourage the worker to decide earlier than the 21-day limit.

The Use of Statistical Evidence

Courts allow the use of statistical evidence to prove discrimination on the basis of age, though it is generally more useful in disparate impact cases than it is in disparate treatment cases. However, the court in *Heward v. Western Electric Co.* explained the similarities in the application of statistics in disparate impact cases as compared to disparate treatment cases:

> The significance of companywide statistics is heightened in disparate *impact* cases because plaintiffs need only demonstrate statistically that particular companywide practices in actuality operate or have the effect of excluding members of the protected class. However, even in a disparate *treatment* class action or "pattern and practice" suit, only gross statistical disparities make out a *prima facie* case of discrimination.

In either case, statistical evidence is meticulously examined to ensure that the statistics shed some light on the case. There is a great deal of skepticism relating to statistical evidence in age discrimination cases precisely because of the fact that older workers are likely to be replaced by younger workers, merely as a result of attrition of the workforce. This is not true in cases brought under Title VII based on race or gender discrimination; therefore, statistics may be slightly more relevant to a determination under Title VII because they may represent pure discrimination.

Where statistics are used to prove discriminatory effect, the Supreme Court has offered some guidance about their use. The Supreme Court has considered percentage comparisons and standard deviation analyses of those comparisons: "As a general rule, . . . if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the [selection process] was random would be suspect." In addition, the Court cautioned that the usefulness or weight of statistical evidence depends on all of the surrounding facts and circumstances, and, specifically, "when special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value."

Remedies

equitable relief
Relief that is not in the form of money damages, such as injunctions, reinstatement, and promotion. Equitable relief is based on concepts of justice and fairness.

liquidated damages
Liquidated damages limit awards to a predetermined amount. As used in the ADEA, liquidated damages are equal to the unpaid wage and are available in cases involving "willful violations" of the statute.

The court may award a variety of remedies to a successful employee/plaintiff in an age discrimination action. However, where money damages such as back pay (what the employee would have received but for the violation) or front pay (which includes a reasonable and expected amount of compensation for work that the employee would have performed until the time of her expected retirement) are ascertainable and adequately compensate the employee for damages incurred, the court may *not* grant other **equitable relief**. Compensation for pain and suffering or emotional distress is not available under the ADEA.[62] Forms of equitable relief include reinstatement, promotions, and injunctions.

If an employee-plaintiff proves that the employer-defendant "willfully violated" the ADEA, then the court is also allowed to award **liquidated damages** in an amount equal to unpaid wage liability.[63] Suffice it to say that, by contrast, violations of the ADEA need not, therefore, be otherwise willful. As one has often heard, "ignorance of the law is no excuse," and the same holds true here. In fact, it has been tested in court. The employer's defense that its hiring managers had not been trained concerning bias and admitted their ignorance on the issues was no defense to an ADEA action in *Mathis v. Phillips Chevrolet, Inc.*[64]

Employee Retirement Income Security Act

In 1974, Congress passed the Employee Retirement Income Security Act, which regulates private employee benefit plans. While ERISA specifically governs the operation of retirement plan provisions and other benefits and is therefore relevant

to the issue of age discrimination, a complete discussion of its implications is found in Chapter 19.

In short, ERISA's purpose is to protect employees from wrongful denial of all types of benefits, including retirement or pension benefits. Prior to ERISA's enactment, employers were able to discriminate against certain employees in their determination of eligibility for pension benefits and the amount of time one must work for the employer to be eligible for benefits. In addition, many employees suffered from the loss of their benefits when companies underwent management reorganizations, or when the company decided to terminate the plan only a short time before the employees' benefits were to vest. Other employees lost their benefits when they became sick and were forced to quit their job prior to the time at which their pension rights vested.

ERISA prevents these problems by regulating the determination of who must be covered by pension plans, vesting requirements, and the amount that the employer must invest for the benefit of its employees. In an effort to encourage compliance with this provision, ERISA also requires complete disclosure of the administration of the plan. Further, ERISA stipulates that an employee may not be excluded from a plan on account of age, as long as she or he is at least 21 years of age and is a full-time employee with at least one year of service.

ERISA does have some negative side effects. It has made the provision of benefit plans more costly for employers. In addition, no federal law requires that employers offer retirement plans.

Distinctions among Benefit Plans

Can an employer simply decide to lower the amounts of benefits it offers its employees? Yes, as long as it is in line with requirements of ERISA. However, those reductions must be made across the board; the OWBPA limits the distinctions that an employer may make on the basis of age to only those that are justified by "age-based cost differences."

Many firms also have seniority systems that award benefits on the basis of seniority. Because experience seniority is often balanced in favor of older workers, not as many problems arise as a result of these systems. Those not themselves based in age discrimination are valid. In other words, those systems that disadvantage employees as they age are not protected by the ADEA.

Management Considerations

Generalizations such as "older people have poorer vision" or "workers over 50 are less motivated than younger workers" may appear to be grounded in fact, based on the experiences of many firms. But adherence to these prejudiced principles during recruitment or retention of employees may cause more problems for the company than it prevents. As with other areas of protection against wrongful discrimination, managers are not precluded by the ADEA from hiring or retaining the most qualified individual; the act specifically requires that the employer do just that.

The employer may be losing a valuable and completely qualified employee simply because it incorrectly believes that all individuals over a certain age are not qualified for the available position. Instead of relying on vague generalizations concerning all individuals of advanced years, employers would do better to reevaluate the true requirements of the position then test for those characteristics.

For instance, if an employee must have 20/20 vision to safely drive a taxicab, the taxi company will hire the most qualified individuals if it chooses the most competent and experienced from the pool of applicants and subjects these individuals to a vision test. In that way, the employer is sure to locate those workers who are, actually, the most *qualified* for the position, while not excluding an older worker based on a preconceived idea about failing vision. Or, if a position on an assembly line requires great dexterity and speed of movement, the employer should choose the most qualified applicants and allow them to perform the functions required of the position. If the older worker performs adequately, that applicant should be evaluated with no regard to age.

In addition, employers may inadvertently discriminate against older workers and, in doing so, hurt themselves and their firm by failing to train and develop their older workers. Often older workers are not considered for continuous learning or other development because "they're on their way out, anyway." Managers should pay attention to the basis for decision making and selection in connection with training and development opportunities.

In addition, several problems are unique to the employer's defense of a claim of discrimination as a result of a RIF. These problems arise as a result of the difficulty of complete documentation of employee performance.

First, employers generally do not retain intricate written analyses of performance. Consequently, when asked what are the particular problems associated with the employment of this individual, the employer must rely on the subjective oral reports of its supervisors or managers. The jury is then not only faced with the question of whether the adverse action was justified but also with whether the recollection of the managers is correct or merely fabricated for purposes of the litigation. In addition, the employer should ensure that the performance appraisals that *are* recorded reflect an objective evaluation of the employee's performance at that time. The evaluator must exercise caution in the area of the employee's future potential because this is an area that may be related to age and comments may be suspect.

Second, managers and supervisors will likely evaluate an employee as compared to other employees. Therefore, a rating of "good" may be the worst rating given in a department. When the RIF later requires that certain employees be discharged, the employer is left with the obligation to justify the termination of an individual who, in fact, never received a poor evaluation. This is not a sympathetic position.

Finally, the employer may make a decision based on some factor other than performance, such as the fact that a retained employee's wife is in the hospital or that the discharged worker had the opportunity to participate in an early retirement program,

Management Tips

- Any job requirement on the basis of age must be subject to your highest scrutiny. There are extremely few BFOQs allowed on the basis of age alone. Instead, consider what you are actually concerned about and test for that characteristic. For instance, if you are concerned about the eyesight of your applicants or workers, conduct vision tests rather than follow a presumption that older workers will always be disqualified because of their eyesight.
- Reductions in force are prone to problems in connection with age discrimination as a result of higher salaries paid to older and more experienced workers. Review all termination decisions carefully in order to ensure fair and balanced procedures.
- Prior to implementing an RIF, study and document the forces that led to the decision and consider using an employee committee to help plan for the RIF.
- Terminating an older worker and replacing her or him with another worker who is over 40 does not protect you from a charge of age discrimination.
- Even though "accommodation" is most often associated with disability discrimination, it can apply to age discrimination claims. Managers should be trained to understand that failing to consider possible accommodations to age could be evidence of age discrimination.
- Review all recruiting literature to remove all age-based classifications like "looking for young upstarts to help build growing business."
- You may not terminate an older worker on the basis of age; if you must terminate a worker who is 40 or over, ensuring that you have appropriate documentation to justify dismissal creates a safe harbor.
- In drafting a waiver of discrimination claims for older workers to sign upon termination, review the form to ensure compliance with the OWBPA.
- Employers should neither permit nor encourage age-based remarks, comments, or jokes to avoid liability under the ADEA for age-related harassment. Antiharassment policies and procedures should encompass age and all prohibited factors.
- Employers should be sensitive about the inclination in the past to single out workers over 40 for medical exams.
- Beware the situation where an older worker laid off for economic reasons offers to take a pay cut, especially if the offered pay cut is less than what would be paid to a younger replacement. The law is unsettled as to whether these circumstances constitute age discrimination.
- Remember that retaliation for filing a claim of age discrimination is forbidden, not just against the employee filing the claim, but against anyone who supported the claim, such as by testifying.
- The chances of retaliation occurring can be reduced by proper management training and by making sure that all employee handbooks adequately address the issue.

while the retained worker could not. Superior care should be exercised in reaching a conclusion regarding terminations where these issues serve as the bases for retention and discharge because many determining factors could be viewed as age based.

It is in both the employer's and the employee's interest to ensure that the employee periodically receives an objective, detailed performance appraisal. In this way, the employer protects against later claims that the employee was not informed of the employer's dissatisfaction with her or his work, and the employee can guarantee that the employer may only use valid justifications for its discharge decisions.

Chapter Summary

- Employees are protected against discrimination on the basis of their age under the ADEA, unless age is a bona fide occupational qualification.
- Employees who believe that they are victims of age discrimination have available to them a wide array of choices under both state and federal law.
- To prove a case of age discrimination, the employees must show that:

  1. They are 40 years of age or older.
  2. They suffered an adverse employment decision.
  3. They are qualified for the position (either that they meet the employer's requirements or that the requirements are not legitimate).
  4. They were replaced by someone younger.

- Once the employee has presented this information, the employer may defend its decision by showing that

  1. Age requirement of a job is a bona fide occupational qualification. This can be done by showing:
     a. The age limit is reasonably necessary to the employer's business and
     b. All or a substantial number of people over that age are unable to perform the requirements of the job adequately; or
     c. Some of the people over that age possess a trait that disqualifies them for the position and it cannot be ascertained except by reference to age.
  2. The decision was made based on some reasonable factor other than age.
  3. The employee was not qualified for the position.
  4. The decision to leave was because of a voluntary retirement plan.
  5. The "same actor" defense may be used in some courts. The presumption is that when the same person hires and fires a worker protected by ADEA, there is a permissible inference that the employee's age was not a motivating factor in the decision to terminate.

- Once the employer presents its defense, the employee will have the opportunity to prove that this defense is mere pretext for the actual discrimination that exists.

- The *Gross* decision seemingly altered the burden-shifting requirement, but subsequent lower court rulings have suggested that the shifting does still apply in age discrimination cases.
- The ADEA prohibits retaliation, both against the employee who alleges age discrimination and any other employee who assists the employee in her or his claim.
- Federal courts are split as to whether an employer can terminate an older employee due to economic considerations.
- Benefit plans and seniority systems cannot be created for the purpose of evading the ADEA or the OWBPA.
- The OWBPA amended section 4(f) of the ADEA and places restrictions where employers offer employees amounts of money through retirement plans as incentives for leaving the company.
- The Employee Retirement Income Security Act (ERISA) regulates private employee benefit plans. It governs the operation of welfare and retirement plan provisions. (See Chapter 19 for a further discussion of ERISA.)
- A variety of remedies are available to those discriminated against due to their age.
- A reduction in force (RIF) occurs when a company is forced to downscale its operations to address rising costs or the effects of a recession. When an individual is terminated pursuant to a bona fide RIF, the employer's actions are protected. In the event of a RIF, age discrimination may be proven when

    1. The employer refuses to allow a discharged or demoted employee to bump others with less seniority.
    2. The employer hires younger workers when jobs become available.

Chapter-End Questions

1. Calder, aged 60, worked as an account executive for TCI Cable, selling advertising time. Calder believed that she had a number of negative experiences at TCI because of her age. She bases this contention on several facts, including several discriminatory comments made by management at TCI. During one of Calder's individual meetings with an executive, he told her that she should walk faster, comparing her to a younger account executive. Another manager told her that he did not understand why, "at this time in [her] life," she did not want free time to travel. Another referred to a job applicant as "grandma" and hired a younger candidate. Is this evidence of discrimination sufficient to support a claim? [*Calder v. TCI Cablevision of Missouri, Inc.,* 298 F.3d 723 (8th Cir. 2002).]
2. Eugene Kilpatrick, who worked for Tyson Foods for 27 years, was terminated at age 68 and replaced by a much younger employee. His only evidence of age discrimination is an e-mail from the manager stating that he understood how long Kilpatrick had worked for Tyson, but that Kilpatrick was not effectively doing his job. Is this enough to establish age discrimination? [*Kilpatrick v. Tyson Foods, Inc.,* 268 Fed. Appx. 860 (11th Cir. 2008).]

3. John Van Voorhis, a pilot over 50 years of age, applied to the county for a job as a helicopter pilot. Although Van Voorhis was clearly the most qualified applicant, the county chose not to interview anyone because, as the supervisor explained, they did not want to hire "an old pilot." The position was later reopened, with reduced minimum requirements, but the previous applicants were not notified. The county hired a younger woman who had previously applied but who had not been considered because she did not meet the earlier minimum standards. Has Van Voorhis presented sufficient direct evidence to establish age discrimination? [*Van Voorhis v. Hillsborough County Board of County Commissioners,* No. 07-12672 (11th Cir. 2008).]
4. Allstate Insurance established a corporate restructuring plan in which it fired employee-agents, then rehired them either one year after they were fired or at the end of the severance they received, whichever was longer. Statistical evidence showed that, of the 6,000 employees affected by the policy, 90 percent were older than 40 and that the over-40 group constituted only 23 percent of Allstate's total workforce. Does the policy have a disparate impact in violation of the ADEA because older employees generally received severance for longer than younger employees? [EEOC v. Allstate Ins. Co., 528 F.3d 1042 (8th Cir. 2008).]
5. Richard Hopkins, a 61-year-old employee of the city of Independence, Missouri, was diagnosed with a heart condition that prevented him from driving for six months. Driving was an essential function of his job, so it was impossible for him to work for six months. Under the city's "Leave Donation Program," employees of the city were permitted to donate up to 40 hours of vacation, personal-business, and sick leave to other employees. When his co-workers learned of Hopkins's condition, they began to donate leave time to him under the Leave Donation Program. Shortly after the donations began, however, the city's Human Resources Administrator told Hopkins that he was ineligible for the program because he was over 60, also saying, "I didn't know you were that old." Among several other requirements, the Leave Donation Program stipulated that, in order to be eligible, the recipient employee must "not be eligible for regular retirement." Eligibility for retirement is defined in the city's Personnel Policies and Procedures manual as "age sixty (60)" and "vested" in the city's pension plan (requiring five years of service). Does the city's Leave Donation Program violate the ADEA? [*United States Equal Employment Opportunity Commission (EEOC) v. City of Independence, Missouri,* 471 F.3d 891 (8th Cir. 2006).]
6. Can an employer be liable under any anti-discrimination statute for refusing to hire someone whom the employer thinks is overqualified? [*Taggart v. Time, Inc.,* 924 F.2d 43 (2d Cir. 1991).]
7. The oldest or nearly oldest in each department happened to be the employee chosen by each unit supervisor to be laid off in a cutback. An employee filed suit and the employer claimed that (1) it had the right to terminate the oldest employees because they cost the most to the company and (2) there was no discrimination or intent to do so because each unit supervisor made her or his own decisions, so there was no concerted effort or decision to get rid of older employees. Are you persuaded by this defense?
8. Tommy Morgan was a 20-year employee of New York Life Insurance Company. At age 52, his career at New York Life included a promotion, high marks for job performance, and a good reputation among his colleagues. One co-worker described Morgan as the best managing partner he had seen in 40 years. In September 2005, the company sent out an e-mail announcing a "new generation of managers." Within three weeks of that e-mail, Morgan was fired. He sued New York Life for age

discrimination. Does he have any basis for a legitimate claim? Why or why not? [*Morgan v. New York Life Ins. Co.,* 101 FEP Cases 657 (N.D. Ohio 2007).] Would the situation be different if the employer simply said that Morgan was no longer "compatible" with the company's corporate culture? [*Brian Reid v. Google,* 155 Cal. App. 4th 1342, 66 Cal. Rptr. 3d 744 (2007).]

9. Fifty-five-year-old Merriweather had worked for 14 years as a benefits coordinator before he was laid off by his employer. The employer contended that it eliminated Merriweather's job for economic reasons. To support its strategic goals, the employer had decided to hire new workers instead of training Merriweather to handle projected additional tasks. The employer chose not to retain an employee who is seven months older than Merriweather as the only full-time benefits coordinator. Two new workers, ages 42 and 50, were hired to divide their time between benefits coordination and the added tasks. Merriweather claimed that he was qualified to handle the added responsibilities, but he did not offer evidence to support this claim. You be the judge. Do the employer's actions violate the ADEA? Explain. [*Merriweather v. Philadelphia Federation of Teachers Health & Welfare Fund,* 2001 U.S. Dist. LEXIS 18511 (E.D. Pa. 2001).]

End Notes

1. See Erin Carroll, "Television Writers' Age-Bias Case Moves to State Court," *Los Angeles Daily Journal,* February 27, 2002, p. 3.
2. Richard Verrier, "Hollywood writers' age-discrimination case settled," *Los Angeles Times* website, Jan. 23, 2010, articles.latimes.com/2010/jan/23/business/la-fi-ct-writers23-2010jan23.
3. U.S. Government Accountability Office, "Older Workers: Labor Can Help Employers and Employees Plan Better for the Future," GAO-06-80, December 2005, p. 12.
4. R. Ambrogi, "Delhi Abolishes Lawyer Age Cap," Legal Blog Watch, November 19, 2007, http://legalblogwatch.typepad.com/legal_blog_watch/2007/11/delhi-abolishes.html; "Age Bar on Bar Enrolment Goes," *The Hindu,* November 13, 2007, http://www.hindu.com/2007/11/13/stories/2007111366890400.htm.
5. Richard W. Johnson, "Older Workers: Opportunities and Challenges," Urban Institute, July 2010, www.urban.org/uploadedpdf/412166-older-workers.pdf.
6. Pew Research, "Working after Retirement: The Gap Between Expectations and Reality," September 21, 2006, http://pewresearch.org/pubs/320/working-after-retirement-the-gap-between-expectations-and-reality.
7. Ibid., p. 8.
8. J. Collison, *Older Workers Survey.* Alexandria, VA: Society for Human Research Management (SHRM/NOWCC/CED), 2003.
9. Ernst & Young, *The Aging of the U.S. Workforce.*
10. AARP, "The Business Case for Workers Age 50+: Planning for Tomorrow's Talent Needs in Today's Competitive Environment," December 2005, http://www.aarp.org/research/work/employment/workers_fifty_plus.html.
11. See the EEOC charge statistics at www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.
12. See, for example, a Nov. 12, 2009, blog post on the Workplace Prof Blog (lawprofessors.typepad.com/laborprof_blog/2009/11/new-eeoc-statistics-show-age-discrimination-complaints-are-down.html).

13. 827 F.2d 13, n.8 (7th Cir. 1987), overruled on other grounds, 860 F.2d 834 (7th Cir. 1988).
14. *General Dynamics Land Systems, Inc. v. Cline,* 540 U.S. 581, 124 S. Ct. 1236 (2004).
15. Bertha Coombs, "Demand Grows for Older Workers: Firms Focus on Hiring and Retaining Baby Boomers," CNBC TV, May 7, 2004.
16. 528 U.S. 62 (2000).
17. 517 U.S. 308, 116 S. Ct. 1307 (1996).
18. *Sprint/United Management Co. v. Mendelsohn,* 552 U.S.___, 128 S. Ct. 1140 (2008), http://www.law.cornell.edu/supct/html/06-1221.ZS.html.
19. 529 F.2d 760 (4th Cir. 1975).
20. http://www.eeoc.gov/types/age.html.
21. *Jones v. Oklahoma City Public Schools,* No. 09-6108 (10th Cir. 2010).
22. *Ibid.,* at p. 10, "[T]he rule articulated in *Gross* has no logical effect on the application of *McDonnell Douglas* to age discrimination cases."
23. See 14 C.F.R. § 121.383(c).
24. 351 F.3d 183 (2005), *affirmed, Smith v. City of Jackson,* 544 U.S. 228 (2005).
25. 1991 WL 74610 (N.D. Ill. 1991) (emphasis added).
26. 828 F.2d 1202 (7th Cir. 1987).
27. 381 F.3d 56 (2d Cir. 2004).
28. No 07-4480 (2d Cir. 2008).
29. See *Caron v. Scott Paper Co.,* 834 F. Supp. 33 (D. Me. 1993); *Camacho v. Sears, Roebuck de Puerto Rico,* 939 F. Supp. 113 (D.P.R. 1996).
30. See *Ellis v. United Airlines, Inc.,* 73 F.3d 999, 1009 (10th Cir. 1996): "Of those courts that have considered the issue since *Hazen,* there is a clear trend toward concluding that the ADEA does not support a disparate impact claim."
31. *Proud v. Stone,* 945 F.2d 796 (4th Cir. 1991).
32. Section 623(d) of the ADEA says, "It shall be unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation."
33. Section 633(a) says only that personnel "shall be made free from any discrimination based on age." No mention is made of individuals who participate in an investigation, as there is in section 623(d).
34. No. 06-1321 553 U.S. ___, 128 S.Ct. 1931 (May 27, 2008).
35. See, for example, "Punitive Damages in Employment Discrimination Law," by Louis Malone (www.bna.com/bnabooks/ababna/annual/2000/malone.pdf.) in which he says, "No punitive damages are permitted under the ADEA, except for retaliation claims."
36. See section 7(b).
37. See *Hazen Paper Company v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701 (1993).
38. See, for example, "Punitive Damages in Employment Discrimination Law," by Louis Malone (www.bna.com/bnabooks/ababna/annual/2000/malone.pdf.) in which he says, "No punitive damages are permitted under the ADEA, except for retaliation claims."
39. See section 7(b).
40. See *Hazen Paper Company v. Biggins,* 507 U.S. 604, 113 S. Ct. 1701 (1993).

41. Kline, Susan and John Gaidoo, "Labor & Employment-Recent Federal Court Decisions Highlight ADEA Pitfalls" (Nov. 8, 2010), http://www.bakerdaniels.com/newsandevents/articlesalerts/detail.aspx?id=EEB7BB948D184A6D968E01706733C482.
42. *Cariglia v. Hertz Equipment Rental Corporation,* 363 F.3d 77 (1st Cir. 2004).
43. *Christensen v. Titan Distribution, Inc.,* 481 F.3d 1085 (8th Cir. 2007).
44. 530 U.S. 133 (2000).
45. See "Have Discrimination Cases Gotten More Difficult?" *Texas Lawyer,* September 27, 2000.
46. See, for example, *Jones,* the 2010 10th Circuit decision, supra, at pp. 13–14.
47. 96 F.3d 830 (6th Cir. 1996).
48. Ibid. at 833.
49. Ibid. at 834.
50. *Smith v. Kmart Corporation,* 1996 WL 780490 (E.D. Wash. 1996); *Lewis v. Federal Prison Industries, Inc.,* 786 F.2d 1537 (11th Cir. 1986); *Kelewae v. Jim Meagher Chevrolet, Inc.,* 952 F.2d 1052 (8th Cir. 1992); *City of Billings v. State Human Rights Commission,* 209 Mont. 251 (1984).
51. *Crawford,* 96 F.3d at 834–35.
52. *Alexander v. CIT Technology Financing Services,* 217 F. Supp. 2d 867 (N.D. Ill. 2002).
53. *Bennington v. Caterpillar Inc.,* 275 F.3d 654 (7th Cir. 2001).
54. *Jones v. SmithKline Beecham Corp.,* 309 F. Supp. 2d 343 (N.D.N.Y. 2004); *Lacher v. West,* 147 F. Supp. 2d 538 (N.D. Tex. 2001); *Jackson v. R.I. Williams & Associates, Inc.,* Civ. A. No. 98-1741, 1998 WL 316090 (E.D. Pa. 1998); *Tumolo v. Triangle Pacific Corp.,* 46 F. Supp. 2d 410, 412 (E.D. Pa. 1999); *Burns v. AAF-McQuay, Inc.,* 166 F.3d 292, 294 (4th Cir. 1999); *Ricci v. Applebee's Northeast, Inc.,* 301 F. Supp. 81 (D. Me. 2004); and *Lacher v. Principi,* 2002 WL 1033089 (W.D. Tex. 2002). In addition, while the Tenth Circuit has not expressly recognized a cause of action for hostile work environment under the ADEA, it has decided a case where the plaintiff raised the issue before the district court. See *McKnight v. Kimberly Clark Corp.,* 149 F.3d 1125, 1129 (10th Cir. 1998) (deciding a hostile work environment claim under the ADEA, but not addressing the apparent lack of authority for raising such a theory). In light of the *McKnight* case, the court in *Ellison v. Sandia National Laboratories,* 192 F. Supp. 2d 1240 (D.N.M. 2002), assumed without deciding that employee may assert a hostile work environment claim under the ADEA.
55. *Burlison v. McDonald's Corp.,* 455 F.3d 1242 (11th Cir. 2006).
56. 500 F.3d 375 (3d Cir. 2007).
57. *Peterson v. Seagate US LLC,* 534 F.Supp. 2d 996 (D.MN 2008).
58. See "U.S. Sues Allstate over Age Discrimination," Reuters, http://news.findlaw.com/legalnews/s/20011228/n28194796.html, December 28, 2001.
59. *Thomforde v. International Business Machines Corp.,* 406 F.3d 500 (8th Cir. 2005).
60. 29 C.F.R. § 1625.
61. See Kiren Dosanjh, "Old Rules Need Not Apply: The Prohibition of Ratification and 'Tender Back' in Employees' Challenges to ADEA Waivers," *Journal of Legal Advocacy and Practice* 3, no. 5 (2001).
62. *Commissioner of Internal Revenue v. Schleier,* 515 U.S. 323, 115 S. Ct. 2159 (1995).
63. 29 U.S.C. § 626(b).
64. 269 F.3d 771. (7th Cir. 2001).

Cases

Case 1 *Western Air Lines, Inc. v. Criswell* •••
Case 2 *Gross v. FBL Financial Services, Inc.* •••
Case 3 *Hazen Paper Co. v. Biggins* •••
Case 4 *Oubre v. Entergy Operations, Inc.* •••

Western Air Lines, Inc. v. Criswell *472 U.S. 400 (1985)*

Western Air Lines requires that its flight engineers, who are members of the cockpit crew but do not operate flight controls unless both the pilot and the co-pilot become incapacitated, retire at age 60. The Federal Aviation Administration prohibits anyone from acting as a pilot or co-pilot after they have reached the age of 60. The respondents in this case include both pilots who were denied reassignment to the position of flight engineers at age 60 and flight engineers who were forced to retire at that age. The airline argued that the age 60 retirement requirement is a BFOQ reasonably necessary to the safe operation of the business. The lower court instructed the jury as follows: The airline could establish age as a BFOQ only if "it was highly impractical for [petitioner] to deal with each [flight engineer] over age 60 on an individualized basis to determine his particular ability to perform his job safely" and that some flight engineers "over 60 possess traits of a physiological, psychological or other nature which preclude safe and efficient job performance that cannot be ascertained by means other than knowing their age." The Supreme Court evaluated whether this instruction was appropriate and determined that it correctly stated the law.

Stevens, J.

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The evidence at trial established that the flight engineer's "normal duties are less critical to the safety of flight than those of a pilot." The flight engineer, however, does have critical functions in emergency situations and, of course, might cause considerable disruption in the event of his own medical emergency.

The actual capabilities of persons over age 60, and the ability to detect diseases or a precipitous decline in their faculties, were the subject of conflicting medical testimony. Western's expert witness, a former FAA [Federal Aviation Administration] deputy federal air surgeon, was especially concerned about the possibility of a "cardiovascular event," such as a heart attack. He testified that "with advancing age the likelihood of onset of disease increases and that in persons over age 60 it could not be predicted whether and when such diseases would occur."

The plaintiff's experts, on the other hand, testified that physiological deterioration is caused by disease, not aging, and that "it was feasible to determine on the basis of individual medical examinations whether flight deck crew members, including those over age 60, were physically qualified to continue to fly." Moreover, several large commercial airlines have flight engineers over age 60 "flying the line" without any reduction in their safety record.

Throughout the legislative history of the ADEA, one empirical fact is repeatedly emphasized: the process of psychological and physiological degeneration caused by aging varies with each individual. "The basic research in the field of aging has established that there is a wide range of individual physical ability regardless of age." As a result, many older workers perform at levels equal or superior to their younger colleagues.

In 1965, the secretary of labor reported to Congress that despite these well-established medical facts, "there is persistent and widespread use of age limits in hiring that in a great many cases can be attributed only to arbitrary discrimination against older workers on the basis of age and regardless of ability." Two years later, the president recommended that Congress enact legislation to abolish arbitrary age limits on hiring. Such limits, the

president declared, have a devastating effect on the dignity of the individual and result in a staggering loss of human resources vital to the national economy.

The legislative history of the 1978 amendments to the ADEA makes quite clear that the policies and substantive provisions of the act apply with especial force in the case of mandatory retirement provisions. The House Committee on Education and Labor reported: "Increasingly, it is being recognized that mandatory retirement based solely upon age is arbitrary and that chronological age alone is a poor indicator of ability to perform a job."

In *Usery v. Tamiami Trail Tours, Inc.,* the court of appeals for the Fifth Circuit was called upon to evaluate the merits of a BFOQ defense to a claim of age discrimination. Tamiami Trail Tours had a policy of refusing to hire persons over age 40 as intercity bus drivers. At trial, the bus company introduced testimony supporting its theory that the hiring policy was a BFOQ based upon safety considerations—the need to employ persons who have a low risk of accidents. The court concluded that "the job qualifications which the employer invokes to justify his discrimination must be *reasonably necessary* to the essence of his business—here, the safe transportation of bus passengers from one point to another. The greater the safety factor, measured by the likelihood of harm and the probable severity of that harm in case of an accident, the more stringent may be the job qualifications designed to insure safe driving."

In the absence of persuasive evidence supporting its position, Western nevertheless argues that the jury should have been instructed to defer to "Western's selection of job qualifications for the position of flight engineer that are reasonable in light of safety risks." This proposal is plainly at odds with Congress's decision, in adopting the ADEA, to subject management decisions to a test of objective justification in a court of law. The BFOQ standard adopted in the statute is one of "reasonable necessity," not reasonableness.

In adopting that standard, Congress did not ignore the public interest in safety. That interest is adequately reflected in instructions that track the language of the statute. When an employer establishes that a job qualification has been carefully formulated to respond to documented concerns for public safety, it will not be overly burdensome to persuade a trier of fact that the qualification is "reasonably necessary" to safe operation of the business. The uncertainty implicit in the concept of managing safety risks always makes it "reasonably necessary" to err on the side of caution in a close case. . . . Since the instructions in this case would not have prevented the airline from raising this contention to the jury in closing argument, we are satisfied that the verdict is a consequence of a defect in Western's proof, rather than a defect in the trial court's instructions.

Case Questions

1. What is the basis for the determination that an employer should or should not be required to test applicants on an individual basis?
2. Should an employer have available as a defense that the cost of the tests would impose a great burden on the employer? Why or why not?
3. What is the distinction the Criswell opinion makes between "reasonable necessity" and "reasonableness"?

Gross v. FBL Financial Services, Inc. *No. 08-441 (S.Ct. 2009)*

Gross began working for FBL in 1971. In 2003, when Gross was 54, he was reassigned from his position as claims administration director to the position of claims project coordinator. His previous position was renamed to claims administration manager and was given to a younger employee whom Gross had previously supervised. Although his pay remained the same, Gross considered the change a demotion and sued FBL for age discrimination. Gross introduced evidence at trial that the decision was at least partly based on age. FBL's defense was that the move was part of a restructuring and that the new position was a better fit for Gross's skills. The trial court gave the jury an instruction that it should find for Gross if it

found that "age was a motivating factor." It also instructed the jury that it should find for FBL if it found, by a preponderance of the evidence, that FBL would have demoted him regardless of age. The jury found in Gross's favor and FBL appealed. The 8th Circuit reversed the decision and sent the case back for trial. The U.S. Supreme Court reviews the 8th Circuit's ruling.

Thomas, J.

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The parties have asked us to decide whether a plaintiff must "present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case." . . . Before reaching this question, however, we must first determine whether the burden of persuasion ever shifts to the party defending an alleged mixed-motives discrimination claim brought under the ADEA. We hold that it does not. Petitioner relies on this Court's decisions construing Title VII for his interpretation of the ADEA. Because Title VII is materially different with respect to the relevant burden of persuasion, however, these decisions do not control our construction of the ADEA.

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In *Price Waterhouse* . . . the Court . . . determined that once 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 only 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." . . . But as we explained in *Desert Palace, Inc. v. Costa,* 539 U. S. 90, 94–95 (2003), Congress has since amended Title VII by explicitly authorizing discrimination claims in which an improper consideration was "a motivating factor" for an adverse employment decision.

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This Court has never held that this burden-shifting framework applies to ADEA claims. And, we decline to do so now. When conducting statutory interpretation, we "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination."

***

We cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA . . . As a result, the Court's interpretation of the ADEA is not governed by Title VII decisions such as *Desert Palace* and *Price Waterhouse*.

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Our inquiry therefore must focus on the text of the ADEA to decide whether it authorizes a mixed-motives age discrimination claim. It does not . . . The words "because of" mean "by reason of: on account of." . . . Thus, the ordinary meaning of the ADEA's requirement that an employer took adverse action "because of" age is that age was the "reason" that the employer decided to act. . . . It follows, then, that under §623(a)(1), the plaintiff retains the burden of persuasion to establish that age was the "but-for" cause of the employer's adverse action.

***

We hold that 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. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.

Justice Stevens, with whom Justice Souter, Justice Ginsberg, and Justice Breyer join, dissenting

The "but-for" causation standard endorsed by the Court today was advanced in Justice Kennedy's dissenting opinion in Price Waterhouse v. Hopkins, 490 U. S. 228, 279 (1989), a case construing identical language in Title VII of the Civil Rights Act of 1964 . . . Not only did the Court reject the but-for standard in that case, but so too did Congress when it amended Title VII in 1991. Given this unambiguous history, it is particularly inappropriate for the Court, on its own initiative, to adopt an interpretation of the causation requirement in the ADEA that differs from the established reading of Title VII. I disagree not only with the Court's interpretation of the statute, but also with its decision to engage in unnecessary lawmaking. I would simply answer the question presented by the certiorari petition and hold that a plaintiff need not present direct evidence of age discrimination to obtain a mixed-motives instruction.

The Court asks whether a mixed-motives instruction is ever appropriate in an ADEA case. As it

acknowledges, this was not the question we granted certiorari to decide.

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Unfortunately, the majority's inattention to prudential Court practices is matched by its utter disregard of our precedent and Congress' intent.

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We recognized [in *Price Waterhouse*] that the employer had an affirmative defense: It could avoid a finding of liability by proving that it would have made the same decision even if it had not taken the plaintiff's sex into account. . . . But this affirmative defense did not alter the meaning of "because of." As we made clear, when "an employer considers both gender and legitimate factors at the time of making a decision, that decision was 'because of' sex.". . . We readily rejected the dissent's contrary assertion. "To construe the words 'because of' as colloquial shorthand for 'but-for' causation," we said, "is to misunderstand them." . . . Today, however, the Court interprets the words "because of" in the ADEA "as colloquial shorthand for 'but-for' causation."

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The Court's resurrection of the but-for causation standard is unwarranted. Price Waterhouse repudiated that standard 20 years ago, and Congress' response to our decision further militates against the crabbed interpretation the Court adopts today. The answer to the question the Court has elected to take up—whether a mixed-motives jury instruction is ever proper in an ADEA case—is plainly yes.

***

The Court's endorsement of a different construction of the same critical language in the ADEA and Title VII is both unwise and inconsistent with settled law. The but-for standard the Court adopts was rejected by this Court in Price Waterhouse and by Congress in the Civil Rights Act of 1991. Yet today the Court resurrects the standard in an unabashed display of judicial lawmaking. I respectfully dissent.

Case Questions

1. Do you agree with the Dissent that the majority opinion in *Gross* completely alters the burden-shifting framework adopted in *Price Waterhouse?*
2. Is the *Gross* opinion likely to make recovery by employees more difficult in age discrimination cases, as many commentators have suggested?
3. Appellate court decisions subsequent to *Gross* have drawn a distinction between a burden of proof, which does not shift, and a burden of production, which does. In your opinion, what is the difference and how is it relevant to the employee's age discrimination case?

Hazen Paper Co. v. Biggins *507 U.S. 604 (1993)*

The Hazens hired Walter Biggins in 1977 and fired him in 1986 when he was 62 years old. Biggins sued, alleging a violation of the ADEA. The Hazens claimed instead that they terminated him because he did business with their competitors. A jury decided in favor of Biggins and the appellate court agreed, relying on evidence that the Hazens really fired him in order to prevent his pension benefits from vesting (which would have happened in the few weeks following his termination). In this case, the Supreme Court determines whether a firing decision based on number of years served is "age-based."

O'Connor, J.

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The Courts of Appeals repeatedly have faced the question whether an employer violates the ADEA by acting on the basis of a factor, such as an employee's pension status or seniority, that is empirically correlated with age . . . . We now clarify that there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age.

***

In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision. The employer may have relied upon a formal, facially discriminatory policy requiring adverse treatment of employees with that trait. Or the employer may have been motivated by the protected trait on an ad hoc, informal basis. Whatever the employer's decision-making process, a disparate

treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome.

Disparate treatment, thus defined, captures the essence of what Congress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age.

"Although age discrimination rarely was based on the sort of animus motivating some other forms of discrimination, it was based in large part on stereotypes unsupported by objective fact. . . . Moreover, the available empirical evidence demonstrated that arbitrary age lines were in fact generally unfounded and that, as an overall matter, the performance of older workers was at least as good as that of younger workers."

Thus the ADEA commands that "employers are to evaluate [older] employees . . . on their merits and not their age." The employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly.

When the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is. Pension plans typically provide that an employee's accrued benefits will become nonforfeitable, or "vested," once the employee completes a certain number of years of service with the employer. On average, an older employee has had more years in the workforce than a younger employee, and thus may well have accumulated more years of service with a particular employer. Yet an employee's age is analytically distinct from his years of service. An employee who is younger than 40, and therefore outside the class of older workers as defined by the ADEA, may have worked for a particular employer his entire career, while an older worker may have been newly hired. Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily "age based."

The instant case is illustrative. Under the Hazen Paper pension plan, as construed by the Court of Appeals, an employee's pension benefits vest after the employee completes 10 years of service with the company. Perhaps it is true that older employees of Hazen Paper are more likely to be "close to vesting" than younger employees. Yet a decision by the company to fire an older employee solely because he has nine-plus years of service and therefore is "close to vesting" would not constitute discriminatory treatment on the basis of age. The prohibited stereotype ("Older employees are likely to be—") would not have figured in this decision, and the attendant stigma would not ensue. The decision would not be the result of an inaccurate and denigrating generalization about age, but would rather represent an accurate judgment about the employee—that he indeed is "close to vesting."

We do not mean to suggest that an employer lawfully could fire an employee in order to prevent his pension benefits from vesting. Such conduct is actionable under § 510 of ERISA. But it would not, without more, violate the ADEA. That law requires the employer to ignore an employee's age (absent a statutory exemption or defense); it does not specify further characteristics that an employer must also ignore. . . .

We do not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination. . . . Finally, we do not consider the special case where an employee is about to vest in pension benefits as a result of his age, rather than years of service, and the employer fires the employee in order to prevent vesting. That case is not presented here. Our holding is simply that an employer does not violate the ADEA just by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service.

Case Questions

1. Do you agree with the court that age and years of service are sufficiently distinct to allow for terminations based on years of service and to find no violation of the ADEA where the terminations result in a greater proportion of older workers being fired?
2. Aren't workers close to vesting more likely to be older workers? And, if so, then do you believe that an employer can use the category "close to vesting" to avoid liability under the ADEA?
3. If an employer did terminate a group of individuals on the basis of their being close to vesting with the intention of getting rid of older workers, what type of evidence would the employees/plaintiffs be able to use to prove the unlawful intent?

Oubre v. Entergy Operations, Inc. *522 U.S. 422, 118 S. Ct. 838 (1998)*

Dolores Oubre worked as a scheduler at a power plant in Louisiana run by Entergy Operations, Inc. In 1994, she received a poor performance rating. Oubre's supervisor met with her on January 17, 1995, and gave her the option of either improving her performance during the coming year or accepting a voluntary arrangement for her severance. She received a packet of information about the severance agreement and had 14 days to consider her options, during which time she consulted with attorneys. On January 31, Oubre decided to accept. She signed a release, in which she "agree[d] to waive, settle, release, and discharge any and all claims, demands, damages, actions, or causes of action . . . that I may have against Entergy. . . . " In exchange, she received six installment payments over the next four months, totaling $6,258.

Kennedy, J.

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Oubre filed this suit against Entergy alleging constructive discharge on the basis of her age in violation of the ADEA and state law. She has not offered or tried to return the $6,258 to the employer, nor is it clear she has the means to do so. The lower court agreed with the employer that Oubre had ratified the defective release by failing to return or offer to return the monies she had received. The Court of Appeals affirmed judgment for the employer and the Supreme Court reverses.

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The statutory command [of the OWBPA] is clear: An employee "may not waive" an ADEA claim unless the waiver or release satisfies the OWBPA's requirements. The policy of the Older Workers' Benefit Protection Act is likewise clear from its title: It is designed to protect the rights and benefits of older workers. The OWBPA implements Congress' policy via a strict, unqualified statutory stricture on waivers, and we are bound to take Congress at its word. Congress imposed specific duties on employers who seek releases of certain claims created by statute. Congress delineated these duties with precision and without qualification: An employee "may not waive" an ADEA claim unless the employer complies with the statute. Courts cannot with ease presume ratification of that which Congress forbids.

. . . The statute creates a series of prerequisites for knowing and voluntary waivers and imposes affirmative duties of disclosure and waiting periods. The OWBPA governs the effect under federal law of waivers or releases on ADEA claims and incorporates no exceptions or qualifications. The text of the OWBPA forecloses the employer's defense, notwithstanding how general contract principles would apply to non-ADEA claims.

The rule proposed by the employer (that the employee must first give back monies received before avoiding the release) would frustrate the statute's practical operation as well as its formal command. In many instances a discharged employee likely will have spent the monies received and will lack the means to tender their return. These realities might tempt employers to risk noncompliance with the OWBPA's waiver provisions, knowing it will be difficult to repay the monies and relying on ratification. We ought not to open the door to an evasion of the statute by this device.

Oubre's cause of action arises under the ADEA, and the release can have no effect on her ADEA claim unless it complies with the OWBPA. In this case, both sides concede the release the employee signed did not comply with the requirements of the OWBPA. Since Oubre's release did not comply with the OWBPA's stringent safeguards, it is unenforceable against her insofar as it purports to waive or release her ADEA claim. As a statutory matter, the release cannot bar her ADEA suit, irrespective of the validity of the contract as to other claims.

In further proceedings in this or other cases, courts may need to inquire whether the employer has claims for restitution, recoupment, or setoff against the employee, and these questions may be complex where a

release is effective as to some claims but not as to ADEA claims. We need not decide those issues here, however. It suffices to hold that the release cannot bar the ADEA claim because it does not conform to the statute. Nor did the employee's mere retention of monies amount to a ratification equivalent to a valid release of her ADEA claims, since the retention did not comply with the OWBPA any more than the original release did. The statute governs the effect of the release on ADEA claims, and the employer cannot invoke the employee's failure to tender back as a way of excusing its own failure to comply. REVERSED and REMANDED.

Case Questions

1. Do you think the fact that an attorney was consulted before the acceptance of the offer is relevant in this case to determine whether the waiver was knowing and voluntary?
2. As an employer, what should you do to ensure the waiver an individual will be signing is valid?
3. Why do you think an employer must follow such strict guidelines when creating a waiver? Do you think the guidelines are correct? How would you change them?