

ADEA
NEW AND RECURRING ISSUES

ABA National conference on Equal Employment Opportunity Law
April 2019

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I. Coverage of State Government Agencies

As originally enacted in 1967, the ADEA did not apply to governmental entities, because it imposed liability on employers and defined “employer” as “a person engaged in an industry affecting commerce” who had fifty or more employees, and specifically excluded government entities. 81 Stat. 605. In 1968, by operation of the original enactment, the number of required employees dropped to 25, and then in 1974 it was further reduced to 20. 88 Stat. 55, 74 (substituting 20 for 25). In the 1974 amendments to the ADEA, Congress added a new prong to the definition of employer, so that it read:

The term ‘employer’ means a person engaged in an industry affecting commerce who has twenty or more employees The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State

29 U.S.C. § 630(b).

The majority of federal courts of appeals to which the question was presented concluded that state and local governments are covered by the ADEA only if they have at least 20 employees. See *Kelly v. Wauconda Park Dist.*, 801 F.2d 269 (7th Cir. 1986); *EEOC v. Monclova*, 920 F.2d 360 (6th Cir. 1990); *Palmer v. Arkansas Council on Economic Educ.*, 154 F.3d 892 (8th Cir. 1998); *Cink v. Grant County*, 635 Fed. Appx. 470 (10th Cir. 2015). The Ninth Circuit bucked this trend in *Guido v. Mount Lemmon Fire Dist.*, 859 F.3d 1168 (9th Cir. 2017), holding that state and local governments are covered by the ADEA regardless of their number of employees.

The Supreme Court granted review of the Ninth Circuit decision, and on November 6, 2018, in an opinion authored by Justice Ginsburg, unanimously held (without J. Kavanaugh’s participation) that the ADEA applies to States and political subdivisions regardless of size. *Mount Lemmon Fire Dist. v. Guido*, 586 U.S. ___, 139 S. Ct. 22 (2018).

Mount Lemmon is a small special district and political subdivision of Arizona that provides fire protection services to an area near Tucson. After a budget cut, Mount Lemmon fired the two oldest of its eleven employees, who were 46 and 54. The EEOC found cause on their age discrimination charge; the district court dismissed their suit, holding Mount Lemmon was not a covered employer; and the Ninth Circuit reversed.

The Supreme Court analyzed the plain language of the statute and concluded that the introductory language--“also means”--indicated that the definition’s expansion to include States created a separate category of “employer” not restricted by the 20-employee limit applied to private employers. *Id.* at 26. Acknowledging that this gives the ADEA a broader reach than Title VII in this respect, the Court emphasized that this is a consequence of the different language Congress chose to employ. The Court also noted that the more appropriate comparison

for these purposes is with the FLSA, which ranks States and political subdivisions as employers regardless of the number of employees they have. *Id.*

II. Special Problems in Disparate Treatment Cases

A. Age-Based Mandatory Retirement

Age-based mandatory retirement policies applicable to employees are relatively rare and with rare exception violate the ADEA. *See EEOC v. Metallic Products Corp.* (mandatory retirement at age 70 unlawful; case settled for injunctive and monetary relief *see* <https://www.eeoc.gov/eeoc/newsroom/release/11-21-11b.cfm>.) Such policies are frequently imposed on jobs involving public safety and public employment arenas, and courts strictly construe the requirements of the bona fide occupational requirement (BFOQ) defense. *See, e.g., Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 124 (1985) (no BFOQ where employer permitted captains disqualified for reasons other than age to bump flight engineers, but denied that option to captains precluded from flying under FAA age-60 rule; but the age-60 rule for pilots was a BFOQ). The contours of acceptable mandatory retirement policies for police and firefighters are well established and there has been little litigation challenging such policies in recent years. *See* 29 U.S.C. § 623(j).

Medical providers and law firms frequently have mandatory age-based retirement policies that apply to partners or shareholders, and these raise the question whether the affected individuals are employees or owners of the entities for which they work. The Supreme Court considered this question in *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003), a case involving a medical clinic, and adopted the EEOC's longstanding view that there are six factors relevant to the inquiry whether a shareholder-director of a clinic is an employee: (1) whether the organization can hire or fire the individual or set the rules governing his or her work; (2) whether and, if so, to what extent the organization supervises the individual's work; (3) whether the individual reports to someone higher up; (4) whether the individual can influence the organization and to what extent; (5) whether the parties intended that the individual be an employee; and (6) whether the individual shares in the profits, losses, and liabilities of the organization. *Id.* at 449-450 (quoting EEOC Compliance Manual § 605:0009).

In post-*Clackamas* decisions, courts have applied these factors to medical practices and concluded that shareholder partners are owners, not employees, and thus cannot challenge adverse actions under the discrimination statutes. *See, e.g., Bluestein v. Cent. Wisconsin Anesthesiology, S.C.*, 769 F.3d 944 (7th Cir. 2014) (affirming summary judgment in a Title VII and ADA termination case and holding that a shareholder-board member of a medical professional corporation was an owner because she could vote on governing rules and regulations; had an equal vote on hiring and firing decisions, including the power to vote against her own termination; no one had the right to control or supervise her work; she had a vote on all matters coming before the board); *Rodal v. Anesthesia Group of Central New York*, 2006 WL 208835 (N.D. N.Y. 2006) (dismissing ADA claim after applying *Clackamas* factors to anesthesia

group and concluding that shareholder/directors manage, control, and run their firm; are compensated based on profits; shared responsibility for expenses and liabilities; participated in management decisions and set policy; and being denominated employees did not outweigh these other indicia of ownership and management); *Wells v. Clackamas Gastroenterology*, No. 99-0406 (D. Or. 2005) (the plaintiff conceded on her employer's renewed motion for summary judgment after remand that the shareholder directors were owners, and since Clackamas did not have 15 employees, her ADA claim was dismissed with prejudice); *Schmidt v. Ottawa Med. Ctr., P.C.*, 322 F.3d 461, 467-68 (7th Cir.2003) (a shareholder in a professional corporation who possesses the right to vote on matters put before the board and the opportunity to share in profits is an employer for the purposes of the anti-discrimination laws).

In cases involving law firms pre- and post-*Clackamas*, the outcome of the employee coverage question is often linked to the size and governance structure of the firm. See *EEOC v. Kelley Drye & Warren*, No. 10-0655 (S.D. N.Y. 2010) (EEOC challenged policy that required partners in 200 member firm to give up equity in the firm at age 70 and receive only discretionary bonuses if they continued to practice; case settled in 2012 and Kelley Drye changed its policy and paid damages to the attorney who filed a charge challenging the practice; see <https://www.eeoc.gov/eeoc/newsroom/release/4-11-12a.cfm>). Courts sometimes hold that the concentration of management decisions and power in the hands of a small executive board in a large firm supports the conclusion that partners who are not on the board are actually employees. See *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696 (7th Cir. 2002) (holding in an ADEA subpoena enforcement action that EEOC was entitled to gather information to determine whether equity partners demoted because of their age were actually employees, and noting that they had very limited voting rights and no voice in hiring or firing decisions because the firm was “controlled by a self-perpetuating executive committee”; this case subsequently settled). The outcome of the analysis is different in smaller firms. See *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, 2010 WL 2780927 (3d Cir. 2010) (female shareholder-director of law firm challenged sex discrimination in pay and Third Circuit affirmed district court's grant of summary judgment based on *Clackamas* factors, holding that her ability to participate in firm's governance, right not to be terminated without three-quarters vote of firm's board of directors for cause, and entitlement to percentage of firm's profits, losses, and liabilities, supported conclusion she was not an employee); *Solon v. Kaplan*, 398 F.3d 629 (7th Cir. 2005) (general partner not an employee where firm had only four partners, partnership agreement allowed for his involuntary termination only by two-thirds vote of general partners, and partner served as managing partner, held equity interest in firm, shared in its profits, attended partnership meetings, had access to private financial information, and possessed unilateral veto power over new admissions).

B. What Constitutes “Direct Evidence” of Age Discrimination?

Outside of explicit age-based policies, it is rare for plaintiffs to adduce sufficient “direct” evidence of age discrimination to satisfy the but-for causation standard and get to trial on that evidence alone. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 178-79 (2009) (but-for standard applies). There are occasional instances in recorded cases in which decision-makers involved in

the decision in question make a statement at the time that reflects age-based animus. *See King v. United States*, 553 F.3d 1156 (8th Cir. 2009) (King challenged her non-selection for a promotion and evidence that department chief discussed his philosophy of hiring younger, educated people shortly after the selection committee’s decision constituted direct evidence); *Sanders v. Southwestern Bell Tel., LP*, 544 F.3d 1101, 1105 (10th Cir. 2008) (manager on team who ranked a work group for “surplus” purposes told plaintiff she was being “surplussed” because of her age, not her job performance).

A review of 64 appellate decisions from 2017 to the present identified only two in which plaintiffs proffered evidence they considered direct evidence of age discrimination, and the court of appeals agreed that it met that standard. *See Steele v. Mattis*, 899 F.3d 943, 945, 950-951 (D.C. Cir. 2018) (reversing summary judgment against employee on ADEA age discrimination claim and holding that a supervisor involved in the termination process making repeated discriminatory remarks constituted direct evidence; direct evidence included supervisor telling employee that older employees are “stubborn,” “difficult to work with,” and “cantankerous,” and pointing to a particular older person as a case study in why it’s not good to have lots of older employees, as contrasted to his statements that “young people are such a breath of fresh air,” “eager to please,” “work hard,” and are “enthusiastic,” and stating that the workplace was “much better” because “all these younger people” were hired; court noted that the supervisor “gave voice to the very type of ‘arbitrary’ stereotypes and prejudices about older workers’ abilities that Congress enacted the ADEA to halt”); *Howley v. Fed. Express Corp.*, 682 Fed. App’x 439 (6th Cir. 2017) (reversing summary judgment against employee on his age claim under the Michigan Elliot-Larsen Civil Rights Act – the state analogue to the ADEA – and holding that plaintiff’s evidence of multiple statements from his supervisor expressing age-based discriminatory animus, taken together, constituted direct evidence; direct evidence included supervisor inquiring about plaintiff’s salary and expressing surprise at plaintiff’s length of employment, supervisor asking employees about their retirement plans and “why they were still working,” and supervisor expressing concern that employees were “old and not keeping up with technology” and “should have retired”).

There may be few reported cases involving direct evidence because such cases settle without extensive litigation. *See, e.g., Taaffe v. Drake*, No. 2:15-cv-2870 (S.D. Ohio Apr. 29, 2016) (denying motion for judgment on the pleadings; plaintiffs were 62 and 66-year-old teachers of English as a second language at Ohio State University; the director of the ESL program derided older teachers as “millstones” and “dead wood:” when the plaintiffs complained about their treatment, their positions were eliminated, and they were forced into retirement). The plaintiffs were reinstated and the case settled for significant monetary relief in June 2018.

<https://www.aarp.org/work/working-at-50-plus/info-2018/ohio-state-age-discrimination-lawsuit.html> Note that the plaintiffs sued five university officials, not the university, which the Supreme Court held in *Kimmel v. Florida Board of Regents*, 528 U.S. 62 (2000), is immune to suit for monetary damages under the ADEA.

In contrast to the few cases in which courts have considered age-based remarks to be direct evidence, courts frequently find that evidence of age animus is not reflective of age bias or not sufficiently connected to the challenged employment decision to be probative. *See, e.g., Simmons v. SAIA Motor Freight Line, LLC*, 751 Fed. Appx. 541 (5th Cir. 2018) (various managers asked the 61-year-old plaintiff if he doesn't think it's time to retire, and told him that SAIA wants "young, productive drivers" and is "getting rid of all you old Bucks," and that he should retire before SAIA replaces him with a younger driver; the court of appeals affirmed summary judgment for SAIA, holding that these comments were stray remarks); *Alberty v. Columbus Township*, 730 Fed. Appx. 352 (6th Cir. 2018) (74-year old assistant assessor replaced by a woman 44 years younger argued that decision-maker's statement--that he was satisfied with the plaintiff's performance and that they hired "this young lady" who they assumed was qualified based on a reference--was direct evidence; the court held it was just an "innocuous description" not evidence that age entered into the decision); *Aulick v. Skybridge Americas Inc.*, 860 F.3d 613 (8th Cir. 2017) (a senior IT director age 61 was denied a promotion and told repeatedly by the CEO that the company wanted "a New Face"; the court of appeals affirmed summary judgment for Skybridge and held that this comment was "facially and contextually neutral" and no reasonable fact finder could hold otherwise); *Jones v. Price*, 695 Fed. Appx. 374 (10th Cir. 2017) (64-year old applicant for seven openings at the Centers for Disease Control and Prevention argued that the selecting official's statement that CDC considered World Health Organization's (WHO) mandatory retirement age when considering job applicants for overseas jobs was direct evidence or age bias; the court of appeals affirmed summary judgment for CDC and held that this did not constitute evidence that job applicant was not hired for domestic positions because of his age).

C. Application of "But-For" Causation in Disparate Treatment Cases on Summary Judgment.

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000), the Supreme Court held that a plaintiff's prima facie case plus the falsity of the employer's proffered reason suffice for a case to reach the jury unless "the record conclusively reveal[s] some other, nondiscriminatory reason" or there "[is] abundant and uncontroverted independent evidence that no discrimination had occurred." When lower courts combine this rule with the requirement that plaintiffs must prove discrimination was the "but-for" cause of the adverse decision, the *Reeves* rule loses force. For example, in *Alberty v. Columbus Township*, 730 Fed. Appx. 352 (6th Cir. 2018), after rejecting the plaintiff's argument that the preference for "this young lady" constituted direct evidence (see discussion above in paragraph B), the Sixth Circuit concluded that the plaintiff did not have sufficient circumstantial evidence to reach a jury either. The court emphasized that under *Gross* a plaintiff must show that age was the but-for cause of the adverse action and the prima facie case coupled with evidence of pretext is not always enough. It was not enough here because the city said it relied on "budgetary concerns." Although the record showed that rationale arose after the lawsuit was filed, was factually unsupported, and did not actually motivate the decision, the majority concluded that plaintiff's evidence did not establish it was a pretext for age discrimination, or if it did, the evidence was weak and nothing else

suggested that age was the but-for cause of the decision rather than the desire to hire the young relative of the outgoing assessor. The majority noted that no one involved in the decision had indicated that Alberty's age was a problem or made any age-based comments or jokes. In dissent, Judge Clay emphasized that the disputed facts about the city's budget and finances and the absence of any evidence suggesting a legitimate reason for Alberty's termination should have created a triable issue; but the majority's view of Alberty's circumstantial evidence as weak because no one mentioned age in the discussions of her termination meant that she could not get to trial without direct evidence. *Id.* at 364-68 (Clay. J. dissenting).

D. Availability of Pattern or Practice Theory.

After the Supreme Court's decision in *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 178-79 (2009), that the burden of proof never shifts the defendant in an ADEA disparate treatment case, defendants have argued that pattern-or-practice claims invoking the *Teamsters* burden shifting methodology, *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), are no longer cognizable. These arguments have been squarely rejected. See *Thompson v. Weyerhaeuser Co.*, 582 F.3d 1125 (10th Cir. 2009) (holding that *Gross* had no relevance to the pattern-or-practice proof scheme; *Gross* was an individual disparate treatment case and the Supreme Court's analysis of differing causation language in Title VII and the ADEA is unavailing in this case because there is no analogous difference in the statutory language of Title VII and the ADEA pertaining to a pattern-or-practice claims, whose analytical proof structure was developed by the courts and applied the same in ADEA cases as Title VII cases); *EEOC v. Darden Restaurants, Inc.*, 143 F.Supp.3d 1274 (S.D. Fla. 2015) (same) (the case settled in May 2018, <https://www.eeoc.gov/eeoc/newsroom/release/5-3-18a.cfm>) *Rupert v. PPG Industries, Inc.*, 2009 WL 3602021 (W.D. Pa. 2009) (refusing to dismiss pattern-or-practice claim based on the causation argument derived from the *Gross* analysis) (the case settled for monetary relief for 61 plaintiffs a month later).

III. Disparate Impact Theory Under 29 U.S.C. § 623(a)(2)

A. Can Job Applicants Bring Disparate Impact Claims?

The Supreme Court first recognized a disparate impact theory of discrimination under Title VII in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), in which the plaintiffs challenged education and test requirements for employment in particular jobs where the standards were not significantly related to successful job performance and disproportionately screened out African Americans. For over twenty years, as the Supreme Court later observed, lower courts "uniformly interpreted the ADEA as authorizing recovery on a 'disparate-impact' theory in appropriate cases." *Smith v. City of Jackson*, 544 U.S. 228, 236-37 (2005).

In *Hazen Paper Company v. Biggins*, 507 U.S. 604, 610 (1993), a disparate treatment case, the Court generated confusion about whether disparate impact claims are cognizable under the

ADEA by stating that “disparate treatment captures the essence of what Congress sought to prohibit in the ADEA” and noting that it had never decided whether disparate impact claims were cognizable under the ADEA. During the next decade, a number of lower courts concluded that the disparate impact theory was not available to ADEA plaintiffs. *See* B. Lindemann & D. Kadue, *Age Discrimination in Employment Law* 417-418, n.23 (collecting cases).

The Supreme Court answered the question it had generated when it held in *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005), that the ADEA “authorize[s] recovery on a disparate-impact theory[.]” The *Smith* plaintiffs were incumbent police and public safety officers who challenged a salary plan implemented by the City of Jackson that had a disparate impact on older employees. The Supreme Court made no distinction between applicants and employees, and relied heavily on its reasoning in *Griggs* which had addressed job requirements applicable to employees seeking job transfers and (at least arguably) to new applicants. Nevertheless, the *Smith* decision did not address whether job applicants can state disparate impact claims.

There is a split in the lower courts on that question. Recent court of appeals decisions have determined that such claims are not cognizable based on their reading of the plain language of the ADEA. *See Kleber v. CareFusion*, 914 F.3d 480 (7th Cir. 2019) (attorney applied for in-house position but was denied consideration because the company sought only applicants with three to seven years of experience) *en banc*; *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958 (11th Cir. 2016) (applicant for managerial position screened out by guidelines stating a preference for candidates 2-3 years out of college) *en banc*. District courts in other circuits have rejected that interpretation of the statutory language. *See Champlin v. Manpower Inc.* 2018 WL 572997 (S.D. Tex. 1/24/18) (applicant for software engineer position told that “culturally 1-5 years’ experience is the best fit”); *Rabin v. PricewaterhouseCooper*, 236 F.Supp.3d 1126 (N.D. 2017) (class claim alleges that campus-focused recruitment and other practices deter older applicants and have a disparate impact).

This question is significant because individuals who are denied jobs very seldom have the type of evidence that would support a disparate treatment claim. People are rarely told why they are not hired and they usually have no way of knowing who got the specific job for which they applied, so they have no basis to suspect or charge age discrimination in hiring. Conversely, job applicants are often very aware of seemingly neutral standards and practices that have the effect of screening them out of potential job opportunities. Such practices include announcing that only applicants with less than seven years of experience will be considered, or that the employer is seeking recent college graduates. Denying the use of the disparate impact theory to such job applicants deprives them of an effective tool to challenge these practices.

The relevant language of the ADEA says:

It shall be unlawful for an employer:

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[.]

Section 4(a)(2), 29 U.S.C. § 623(a)(2).

In *Villarreal*, an 8-3 *en banc* decision, the Eleventh Circuit majority held that the plain text and statutory context of section 4(a)(2) covers discrimination against employees and not applicants for employment. The majority gave weight to the key phrase “or otherwise” used to join the verbs, and decided that construction meant “Congress made ‘depriv[ing] or tend[ing] to deprive any individual of employment opportunities’ a subset of ‘adversely affect[ing] [the individual’s] status as an employee’ or in other words, Congress made clear that section 4(a)(2) ‘protects an individual only if he has a ‘status as an employee.’” 839 F.3d at 963. The majority rejected the dissenting judges’ emphasis on the phrase “deprive any individual” and insisted that the only individuals intended to have protection in this section are employees. *Id.* at 965. The majority found the use of the word applicants in other sections of the ADEA to be further proof that its exclusion from section 4(a)(2) was intentional. *Id.* at 966. The majority rejected arguments that the *Griggs* Court had interpreted identical language in Title VII to provide protection to applicants, pointing out that the case involved transfers of existing employees to higher paying jobs and thus said nothing about rights of applicants. *Id.* at 968-69. Finally, the majority rejected arguments based on the legislative history of the 1972 post-*Griggs* amendments to Title VII, and the purpose of the ADEA, because history and purpose are irrelevant when the text is clear. *Id.* at 969-70. The 1972 amendment added the word “applicants” to the parallel provision of Title VII, and the legislative history stated that the intent of Congress was to “merely be declaratory of present law.” S. Rep. 92-415 at 43 (Oct. 28, 1971). The court dismissed arguments about the purpose of the ADEA of preventing hiring discrimination and emphasized that job applicants could sue under section 4(a)(1) for disparate treatment. *Id.* at 970.

The Eleventh Circuit judges who dissented on the meaning of the statutory language thought the majority’s reading ignored the language “deprive any individual” and would have held that *Griggs* and *Smith* compel the conclusion that the ADEA permits impact claims by applicants for employment. *Id.* at 982-989 (Martin, J. dissenting). The dissenters noted that eleven judges in this case “read the statute to mean at least three different things” which surely suggests ambiguity and a reason to defer to the EEOC’s interpretation, which for over 50 years has consistently stated that applicants are protected by the disparate impact provision of the ADEA. *Id.* at 989 (noting that DOL first stated this in a regulation in 1968, and EEOC adopted this same view in 1981).

In *Kleber*, an 8-4 *en banc* decision, the Seventh Circuit majority also focused on the statutory language and parsed it much as the Eleventh Circuit majority had in *Villareal*, concluding that the proscribed impact “must befall an individual with ‘status as an employee.’” 914 F.3d at 482. The majority also found the use of the word applicants in other sections of the ADEA to be

compelling evidence that Congress authorized only employees to bring disparate impact claims. *Id.* at 484-85. Like the *Villareal* majority, the *Kleber* majority discounted the Supreme Court’s reading of the identical language in Title VII in *Griggs*, and insisted that *Griggs* involved only employees and thus its holding could not extend to applicants despite the Supreme Court’s broader references to barriers to employment of minorities. *Id.* at *485. Although the dissenting judges pointed out that *Griggs* was a class action and the certified class included future applicants, and the district court’s order on remand from the Supreme Court directed remedies for all future employees of Duke Power, *id.* at 496-500, the majority was not persuaded. The Seventh Circuit majority emphasized that if it was clear that *Griggs* applied to applicants under the ADEA, it would not have taken the Supreme Court 34 years to decide that the ADEA permits any type of disparate impact claim, and it would not have been necessary for Congress to amend Title VII to add the word applicants. *Id.* at 485. The majority also eschewed arguments based on the statutory purpose of the ADEA and emphasized that it was bound to interpret the language as written. *Id.* at 487-88.

The dissenting judges in *Kleber* (Wood, J., Easterbrook, J., Rovner, J., and Hamilton, J.) laid out the counter-interpretation of the statutory language, the reason other sections of the ADEA mentioned applicants while section 4(a)(2) did not, the facts of *Griggs*, the purpose of the amendment of Title VII, and the statutory purpose of the ADEA in exhaustive detail. *Id.* at 489-508.

Not all courts agree with the analysis of the language of section 4(a)(2) adopted by the Seventh and Eleventh Circuits. The district court in *Champlin v. Manpower Inc.*, 2018 WL 572997 (S.D. Tex. Jan. 24, 2018), held that in the absence of binding authority, it would not dismiss a disparate impact claim brought by a job applicant. The court noted that the Supreme Court in *Smith*, 544 U.S. at 239-40, 243, had concluded that section 4(a)(2) permits disparate impact claims, deferring in part to the EEOC’s interpretation. 2018 WL 572997 at *7. The district court also noted that the *Rabin* court had relied on the fact that the EEOC has long interpreted the ADEA to permit disparate impact claims by job-seekers, and that the Supreme Court in *Smith* had only said that the scope of disparate-impact liability under the ADEA is narrower than under Title VII, but said nothing about applicant claims.

The district court in *Rabin v. PricewaterhouseCoopers LLP*, 236 F.Supp.3d 1126, 1133 (N.D. Cal. 2017), concluded more squarely based on its own “textual analysis of section 4(a)(2), the Supreme Court’s precedent in *Griggs* and *Smith*, the EEOC’s interpretation of the ADEA, and the Act’s legislative history” that “all confirm that job applicants like Plaintiffs may bring disparate impact claims.” The plaintiffs in *Rabin* challenged PwC’s focusing its recruiting efforts on college campuses, and its use of a recruitment tool that can only be accessed by those with a current college affiliation, which they alleged was part of the company’s plan to hire predominantly millennial age workers for its assurance and tax business lines and to peg all older workers as a “bad fit.” (The plaintiff’s subsequent motion for conditional certification of their proposed collective action was denied without prejudice on the ground that the named plaintiffs were not “substantially similar either to unqualified applicants or to deterred applicants” which

were part of the larger collective class they sought to certify. *Rabin v. PricewaterhouseCoopers LLP*, 2018 WL 3585143 (N.D. Cal. July 26, 2018). Plaintiffs filed an amended motion on August 27, 2018, which is pending in the district court.)

Because the availability of disparate impact liability in hiring cases is an open question in most circuits, the decisions of all the judges in these decisions should be studied to appreciate the strength of the opposing interpretations of the language at issue.

B. Can Sub-Classes Bring Disparate Impact Claims?

The Third Circuit recently disagreed with three other circuit courts when it held that the plain text of the ADEA permits disparate impact claims to be brought by a “subgroup” (here employees 50 and older) who alleged they were disfavored during a reduction in force (RIF) relative to younger employees. *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 66 (3d Cir. 2017). The Third Circuit found the Supreme Court’s decision in *O’Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), to be compelling authority for the proposition that the ADEA proscribes age discrimination, not 40-and-over discrimination. *Karlo*, 849 F.3d at 70-71. Although *O’Connor* was a disparate treatment case, the language it construed is identical in the disparate impact section, and thus the Supreme Court’s reasoning “ineluctably leads” to the conclusion that “evidence that a policy disfavors employees older than fifty is probative of the relevant statutory question: whether the policy creates a disparate impact ‘because of such individual[s]’ age.” *Id.* at 71. The Third Circuit also found *Connecticut v. Teal*, 457 U.S. 440 (1982), a Title VII disparate impact case, to be supportive of its conclusion that the statutes are “designed to protect the rights of individual employees, not the rights of a class.” *Karlo*, 849 F.3d at 72. The Third Circuit also relied on the ADEA’s remedial purposes in concluding that sub-group claims are cognizable. *Id.* at 74-75.

The Third Circuit acknowledged that its decision is at odds with those of three other circuits but rejected those courts’ conclusions as based on policy arguments rather than the text of the statute, and in at least two of the cases, as pre-dating the Supreme Court’s decision in *O’Connor*. *See id.* at 75-80 (critiquing reasoning in *Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364 (2d Cir. 1989); *Smith v. Tennessee Valley Authority*, 924 F.2d 1059 (6th Cir. 1991) *table, unpub.*; *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948 (8th Cir. 1999)).

The Seventh Circuit recently agreed with the Third Circuit that the Supreme Court’s reasoning in *O’Connor* that the ADEA bans discrimination because of age, not because an employee is over 40, applies with equal force to disparate impact claims and thus age discrimination against a subgroup of older employees is actionable. *O’Brien v. Caterpillar Inc.*, 900 F.3d 923, 929-30 (7th Cir. 2018).

C. The RFOA Defense.

Although job applicants face uncertainty about whether they can bring disparate impact challenges to practices that screen out older individuals, incumbent employees continue to challenge terminations and other changes in benefits that impact older employees more harshly than younger employees. If a plaintiff class can establish the impact of the employer's practice, the employer can defend it by showing that the basis for the action was a reasonable factor other than age (RFOA). The Supreme Court affirmed dismissal of the plaintiffs' claims in *Smith v. City of Jackson*, 544 U.S. 228 (2005), holding that the city's rationale for offering lower raises to older workers was a RFOA because it derived from a policy of using pay as a recruitment incentive for new officers. In *Meacham v. Knolls Atomic Power Laboratory*, 554 U.S. 84 (2008), the Court held that the defendant has the burden of proving its rationale for a challenged employment practice with a disparate impact is reasonable and that the RFOA is an affirmative defense. The EEOC issued a final rule on the RFOA defense in 2012, and it is codified at 29 C.F.R. § 1625.7(e). <https://www.eeoc.gov/eeoc/newsroom/release/3-29-12.cfm>

In *Bryan v. Government of Virgin Islands*, 916 F.3d 242 (3d Cir. 2019), the Third Circuit upheld a requirement that territorial employees with 30 years of credited service make additional 3% contributions to the Government Employees Retirement System unless they agreed to retire. Explaining that it had previously held that the reasonableness burden is "relatively light," *id.* at 248 (citing *Karlo*, 849 F.3d at 70), the court held that the retirement inducement was reasonably related to the government's interest in reducing payroll and increasing the System's solvency. The court noted that the action reasonably targeted long-tenured employees with higher salaries to encourage them to retire and/or pay more into the pension system.

In *Dayton v. Oakton Community College*, 907 F.3d 460 (7th Cir. 2018), the Seventh Circuit considered application of the RFOA defense to a community college's decision to terminate the employment of 84 adjunct and part-time employees who were receiving annuities from the retirement system for state university employees. The employees alleged the college violated the ADEA among other claims. The college made this change to its hiring policy when the Illinois legislature amended the state retirement system's return-to-work provisions to impose a penalty on employers that employ "affected annuitants." Although not all the college's employed annuitants met the definition under the amendment, the college incurred penalties for mistakenly employing one who did, and decided the better course was to refuse to rehire any annuitants. The district court assumed the aggrieved annuitants stated a prima facie case of disparate impact but granted summary judgment for the college because it had demonstrated its decision was based on an RFOA. The plaintiffs argued on appeal that the district court did not properly consider the defense in light of EEOC's RFOA regulations. The regulation defining a reasonable factor other than age says: "[An RFOA] is a nonage factor that is objectively reasonable when viewed from the position of a prudent employer mindful of its responsibilities under the ADEA under like circumstances." 29 C.F.R. § 1625.7(e)(1). The regulation further states all facts and circumstances should be considered and provides a non-exhaustive list of potentially relevant considerations:

- (i) The extent to which the factor is related to the employer's stated business purpose;
- (ii) The extent to which the employer defined the factor accurately and applied the factor fairly and accurately, including the extent to which managers and supervisors were given guidance or training about how to apply the factor and avoid discrimination;
- (iii) The extent to which the employer limited supervisors' discretion to assess employees subjectively, particularly where the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes;
- (iv) The extent to which the employer assessed the adverse impact of its employment practice on older workers; and
- (v) The degree of the harm to individuals within the protected age group, in terms of both the extent of injury and the numbers of persons adversely affected, and the extent to which the employer took steps to reduce the harm, in light of the burden of undertaking such steps.

29 C.F.R. § 1625.7(e)(2).

The Seventh Circuit concluded that the district court had performed a fact-intensive inquiry even though it did not mention all the relevant factors, and found that the college adopted the policy to prevent the mistaken employment of an affected annuitant and the resulting penalty.

In *O'Brien v. Caterpillar Inc.*, 900 F.3d 923 (7th Cir. 2018), the Seventh Circuit considered the plaintiffs' challenge to a distribution of benefits that disadvantaged older employees, but found it justified by an RFOA. Caterpillar liquidated its supplemental unemployment benefit trust fund and distributed the funds in pro rata shares to plan participants who were retirement eligible and agreed to retire. Those who were ineligible to retire received the same pro rata share of the fund with no strings attached. Retirement-eligible employees who refused to retire brought suit alleging that the liquidation plan violated the ADEA. The district court granted summary judgment for Caterpillar and the Seventh Circuit affirmed. The court of appeals agreed with the plaintiffs that the liquidation plan had a disparate impact on older workers but found it justified by several "reasonable factors other than age." 29 U.S.C. § 623(f)(1). Specifically, the plan achieved a long-standing financial objective of eliminating costly unemployment benefits and saved money by incentivizing early retirement. It reduced administrative expenses and contributed to labor peace between Caterpillar and the union. 900 F.3d at 926. The Seventh Circuit stressed that the RFOA inquiry does not require consideration of "whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class." *Id.* at 932 (quoting *Smith*, 544 U.S. at 243).

IV. Enforceability of Waivers in Group Layoff Situations.

Through amendments added by the Older Workers Benefits Protection Act (OWBPA) in 1990, the ADEA enumerates specific requirements for knowing and voluntary waivers of rights in

connection with individual terminations, 29 U.S.C. § 626(f)(2)(A)-(G), and group layoffs, 29 U.S.C. § 626(f)(2)(H). In group layoffs, the statute requires that employees be notified of the “class, unit, or group” covered by the program, “eligibility factors for such program” and the job titles and ages of all individuals “eligible or selected for the program” and the titles and ages of all individuals in the “same job classification or organizational unit who are not eligible or selected for the program.” *Id.* EEOC regulations provide further explanations and examples to clarify these notice requirements for group layoffs. 29 C.F.R. § 1625.22. Courts have found the language to be ambiguous and have struggled with questions about what information should be provided to explain “eligibility factors” for the severance programs and how employers should define the decisional unit.

An example in the EEOC regulations describes eligibility as: “All persons in the Construction Division are eligible for the program. All persons who are being terminated in our November RIF are selected for the program.” 29 C.F.R. § 1625.22(f)(4)(vii)(B). Some courts, however, interpret the term “eligibility factors” to mean the criteria, such as job performance, experience, or seniority, an employer relied on in deciding who to terminate. That was the district court’s initial conclusion in *Pagliolo v. Guidant Corp.*, 483 F.Supp.2d 847 (D. Minn. 2007), where it held that a release did not comport with the OWBPA requirements because it did not identify the general criteria by which employees were selected for termination. The court in *Pagilio, id.* at 861, relied in part on *Commonwealth of Massachusetts v. Bull HN Information Systems, Inc.*, 143 F.Supp.2d 134, 147 & n.29 (D. Mass. 2001), which held that a waiver was unenforceable where information in a severance pay plan did not explain “eligibility factors” which the court held “must refer to the factors used to determine who is subject to a termination program, not the factors used to determine who is eligible for severance pay after termination.” The *Pagilio* court agreed with the *Bull* court that eligibility factors refers to factors used to select individuals for the RIF, and indicated that this could be done with a brief statement that, for example “job criticality and performance were the eligibility factors” the employer used to select people. The persuasiveness of the *Pagliolo* decision was thrown into doubt by the court’s subsequent decision to certify the waiver issues for interlocutory review under 28 U.S.C. § 1292(b). *Pagliolo*, 2007 WL 1567617 (D. Minn. May 29, 2007). On December 24, 2008, the court entered an order dismissing all claims by all parties.

The Tenth Circuit has also grappled with the informational requirements in group layoff situations. In *Kruchowski v. Weyerhaeuser Co.*, 423 F.3d 1139, 1143-44 (10th Cir. 2005), the court invalidated a release of claims because it failed to identify selection criteria as “eligibility factors.” The court noted that in responses to interrogatories the defendant stated that the factors it used were the leadership, abilities, technical skills, and behavior of each employee and whether each employee’s skills matched its business needs, but it did not provide this information to the plaintiffs. *Id.* at 1144. However, in a later revised opinion the court invalidated the release only on the ground that the employer failed to identify the decisional unit, and declined to comment on the other issues plaintiffs had raised, emphasizing that a waiver is unenforceable if it fails to meet even one of the OWBPA requirements. 446 F.3d 1090, 1094-96 (10th Cir. 2006).

Courts have also reached varying results in analyzing whether employers have properly identified the decisional unit in providing information in group layoff situations. In *Kruchowski*, the defendant notified plaintiffs that the decisional unit was all salaried employees at the Mill, but later indicated in response to interrogatories that the actual decisional unit was only the salaried employees reporting to the Mill manager. The court noted that there were fifteen employees, or ten percent of the total employees at the Mill who were not part of the decisional unit although the notice erroneously indicated they were included. 446 F.3d at 1094. Similarly, in *Pagliolo*, the court found that Guidant did not properly disclose its decisional unit where it listed “nearly all United States-based employees” and gave no explanation to employees that they should discover which Guidant subsidiaries are incorporated US corporations or are owned 80% or more by Guidant to ascertain who was eligible for the RIF. 483 F.Supp.2d at 858. In *Burlison v. McDonald’s Corp.*, 455 F.3d 1242 (11th Cir. 2006), the court of appeals reversed summary judgment for the employees, who had persuaded the district court that the regional information they were provided did not comport with OWBPA’s requirements because McDonalds had conducted a nationwide RIF. The Eleventh Circuit analyzed the statutory and regulatory requirements and on the critical question of identifying the correct decisional unit, held that McDonalds had provided the appropriate data to enable the employees to conduct meaningful statistical analyses.

IV. Available Remedies for Age Discrimination.

A. Facial Discrimination in Pension Plan

In the long-running EEOC challenge to Baltimore County’s facially discriminatory retirement benefit plan that required older employees to pay a greater percentage of their salaries based on their ages at the time they enrolled in the plan, the Fourth Circuit recently held that a retroactive monetary award of back pay is a mandatory legal remedy upon a finding of liability under the ADEA. *EEOC v. Baltimore County*, 904 F.3d 330 (4th Cir. 2018). The court rejected the district court’s view and the County’s argument that a court has discretion to determine what relief it will order, and held instead that the language of the ADEA, and the Fair Labor Standards Act (FLSA) from which the ADEA enforcement standards are derived, make clear that back pay awards are mandatory if liability is found. *Id.* at 334-35. The County had relied on several Title VII cases in which the Supreme Court had held that retroactive monetary awards are discretionary under Title VII, and had refused to award retroactive relief based on the unique burdens such awards place on pension plans. *Id.* at 335 (citing *City of L.A., Dep’t of Water & Power v. Manhart*, 435 U.S. 702 (1978); *Ariz. Governing Comm. For Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073 (1983); *Florida v. Long*, 487 U.S. 223 (1988)). The Fourth Circuit stressed that back pay is a discretionary equitable remedy under Title VII while back pay is mandatory under the ADEA/FLSA. *Id.* Baltimore County petitioned for Supreme Court review and although the EEOC waived its right to respond, the Court has asked the EEOC to respond. The Court granted the Government’s request for an extension to April 8, 2019, to file a response.

B. Retaliation Claims

The majority of federal courts of appeals have held that compensatory and punitive damages are not available under the ADEA, despite language authorizing “such legal . . . relief as may be appropriate,” 29 U.S.C. § 626(b). *See, e.g., Bruno v. Western Elec. Co.*, 829 F.2d 957, 966 (10th Cir. 1987) (finding punitive damages not allowed under the ADEA and citing cases from numerous circuits); *Perrell v. FinanceAmerica Corp.*, 726 F.2d 654, 657 (10th Cir. 1984) (compensatory damages for mental suffering are not allowed under the ADEA; citing eight other circuits reaching the same conclusion). Courts have likewise held that the FLSA does not permit a plaintiff to recover mental distress or punitive damages. *See, e.g., Goldstein v. Manhattan Indus., Inc.*, 758 F.2d 1435, 1446 (11th Cir. 1985). The Supreme Court noted the unanimity of the lower courts on this point in *Comm. Of Internal Revenue v. Schleier*, 515 U.S. 323, 336-37 (1995), in which it held that an ADEA award was taxable because it did not constitute compensation for the types of harms associated with personal injury.

Against this general rule, only the Seventh Circuit has concluded that compensatory and punitive damages are available in ADEA **retaliation** claims. *Moskowitz v. Trustees of Purdue University*, 5 F.3d 279, 283-84 (7th Cir. 1993). The *Moskowitz* Court based this conclusion on its earlier decision in *Travis v. Gary Comm. Mental Health Center*, 921 F.2d 108 (7th Cir. 1990). In *Travis* the court held that a 1977 amendment to the FLSA added language authorizing “appropriate legal relief” for retaliation claims, and thus changed the FLSA to permit a plaintiff to recover punitive damages and compensation for emotional distress. *Id.* at 112. This rationale and conclusion were roundly criticized by the district court in *Goico v. Boeing Co.*, 347 F.Supp.2d 986, 996 (D. Kan. 2004), which emphasized that the FLSA amendment added language virtually identical to the language already in the ADEA, which courts had uniformly construed as authorizing only back pay, and not compensatory or punitive damages. Recently, the Fifth Circuit also affirmed its prior view that compensatory and punitive damages are not available in ADEA cases of any kind. *Vaughan v. Anderson Regional Medical Center*, 849 F.3d 588, 591-92 (5th Cir. 2017) (rejecting argument that the 1977 amendment to the FLSA enlarged remedies available for ADEA retaliation claims). Somewhat confusingly, the Fifth Circuit also held that plaintiffs pursuing retaliation claims under the FLSA can recover compensatory and punitive damages even though ADEA retaliation plaintiffs cannot because of the different purposes of the statutes. *Pineda v. JTCH Apartments, LLC*, 843 F.3d 1062 (5th Cir. 2016). The EEOC agrees with the Seventh Circuit that damages are available in ADEA retaliation cases. *See* EEOC Directive No. 915.004, *EEOC Enforcement Guidance on Retaliation and Related Issues*, at n. 186 (Aug. 25, 2016) (“The FLSA, as amended in 1977, 29 U.S.C. § 216(b), authorizes compensatory and punitive damages for retaliation claims under ... the ADEA.”), available at https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm#_ftnref186

In *Burlington Northern v. White*, 548 U.S. 53 (2006), the Supreme Court held that a materially adverse action for retaliation purposes is one that would be likely to dissuade a reasonable worker from making or supporting a charge of discrimination. This has expanded the universe of actionable retaliation beyond terminations to include other significant changes in terms and

conditions of employment, including, for example, harassment, transfers to less desirable positions, and removal of responsibilities. Assuming that the Supreme Court's definition of an adverse action for retaliation purposes under Title VII applies to the ADEA, it is difficult to imagine ADEA retaliation complaints predicated on any action short of a discharge, since the only available monetary remedy is back pay. Of course, victims of age-based harassment may be entitled to injunctive relief, and may have claims under state law that permit compensatory or punitive damages.