AGE DISCRIMINATION IN FOCUS
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Panel Presentation

Age Discrimination in Focus

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The two write-ups and summaries of my firms Andrews v. Lawrence Livermore National Security case will form the foundation of the talk regarding the litigation and trial of this case and how age discrimination came into play. The first attachment details the situation surrounding the layoff in the Lawrence Livermore National Laboratory in 2008. It describes the difficulties faced by the workers there, especially the older workers, and the events that unfolded after the Laboratory was taken over by a private corporation, up to and including the mass layoff. The second attachment details our firm's role in the case, our lengthy battle with the Laboratory and the cases eventual conclusion.

I will also discuss the advantage of having multiple plaintiffs in these cases. The third attachment, "Effectively Handling Multiple Plaintiff Employment Law Cases" will be discussed.

In May 2008, Lawrence Livermore National Security in California fired hundreds of loyal, experienced employees – 430 nuclear weapons scientists, researchers, assistants, and others with long years of dedicated service and most of them over the age of 40.

In May 2013, an Alameda County Superior Court jury awarded five of them $2.7 million for wrongful termination. Another 125 have sued LLNS and await their day in court.

The jury has said LLNS should pay for at least some of the suffering it brought upon men and women who had been so faithful to the lab and its vital work.

But that's just the tip of the iceberg.

Not only has LLNS put the livelihood and well-being of 430 hardworking men and women and their families at risk, the layoffs have also set off alarms about how LLNS is spending U.S. taxpayer dollars and what the loss of so many talented and experienced professionals bodes for our national security and readiness.

It will take more than the courts to fix that.

THERE HAD BEEN NO LAYOFFS AT LAWRENCE LIVERMORE LAB IN 30 YEARS. THEN, BECHTEL CAME ALONG.

When Lawrence Livermore Lab was privatized in 2007 – for $40 million a year MORE than what American taxpayers had been paying in management fees – Bechtel National, the construction and engineering giant, and its partners immediately began planning to get rid of employees in order to secure their profit margin. The enterprise was re-named "Lawrence Livermore National Security" (LLNS).

On May 22, 2008, 430 career employees were told they no longer had jobs (in the midst of a gnawing recession), were told to collect their belongings under the suspicious eye of corporate agents, and were escorted off the grounds by armed guards. This insult in addition to injury was LLNS' benediction to hundreds of people who had devoted their talents and longevity to the Lab and its mission. Many lost their homes or were forced into bankruptcy. Many others are still looking for work.

LLNS IS TAKING THE AMERICAN TAXPAYER FOR A RIDE

Rather than acknowledge its wrongdoing and cut its losses in light of the recent jury verdict, LLNS has doubled down on its intransigence, refusing to engage in settlement talks or mediation over remaining claims for the unwarranted and unconscionable layoffs. It is also trying to pass the damages off to the U.S. Department of Energy, allowing the Bechtel group to carry on with its profits untouched despite its liability.

LLNS' rationale for and handling of the layoffs, the ensuing litigation, and its budgetary requests cry out for serious scrutiny from the government it purports to serve.

These past five years, for me, have not been easy at all. To begin, I never thought I would ever be in the situation I am in now. I've applied for jobs that I knew wouldn't pay nearly what I was making at the lab. Out of all of that, I only got three interviews. Right now I am collecting my UC retirement, which helps a little, and I also am getting a little money from family, which gets me through from one month to another.

~Brian M, laid off in 2008

THE LAYOFFS WERE GOOD ONLY FOR BECHTEL'S PROFITS

Expert: LLNS 'WASHINGTON MONUMENTED' ITS BUDGET

According to Dr. Robert L. Civiak, a physicist and former national security analyst at the Office of Management and Budget, LLNS manufactured a budgeting crisis to justify the 2008 layoffs. In a sworn declaration filed with the Court, Dr. Civiak stated that "...the parameters of the 2008 budget were known well before LLNS assumed management of LLNL, in October 2007. **Any suggestion that a surprise budget shortfall led LLNS to invoke involuntary layoffs of career employees is false** [emphasis added]."

He added: "In my ten years of experience working on budget requests from DOE and its contractors, those organizations routinely exaggerate their funding needs and threaten dire consequences if their needs are not met. At OMB we called this tactic "Washington Monumenting" their budget problems, in analogy to Interior Department threats to close the Washington Monument when their budget is tight.

"In my opinion, LLNS Washington Monumented its FY08 budget problem. LLNS' claim of a $280 M budget shortfall was likely made in an attempt to get increased funding from the Administration and the Congress [emphasis added]. Only, LLNS took it another step. They used this phony budget shortfall as an excuse to lay off hundreds of workers for reasons not related to the budget."

"LLNS," said Dr. Civiak, "had sufficient funds to avoid involuntary layoffs."

GOOD IDEA ON PAPER: PRIVATIZATION GONE BAD

One of America's premier nuclear weapons facilities, LLNS is run by a public-private partnership led by the University of California Board of Regents and Bechtel. For half a century, the Lawrence Livermore National Laboratory was managed essentially as a public service by the University of California, which founded the Lab in 1952. But then, President George W. Bush's administration—in its frenzy to turn over key government functions to private industry—decided to fully privatize the nation's nuclear warhead complex, with Bechtel at the helm.

In 2007, the U.S. Department of Energy awarded the management contract of Livermore to LLNS. A Bechtel consortium also received contracts to operate Los Alamos National Laboratory, Savannah River National Laboratory, the Hanford Waste Treatment Plant in Washington, Y-12 nuclear weapons plant at Oak Ridge, and the Pantex warhead assembly plant in Texas. In exchange for multi-millions in management fees, Bechtel promised DOE it would improve efficiency and security. Instead, in its drive to maximize profits, it has been widely criticized by numerous government, congressional, and watchdog investigations for its cost overruns, its unfair employment practices, its security violations, its pattern of retaliation against whistleblowers, and massive reductions in its work force through voluntary and involuntary layoffs.

Union members and scientists argue that the profit motive in the nuclear weapons complex is bad public policy, setting a dangerous precedent that fosters a "brain drain" of the nation's best scientists and endangers the safety of the American public.

Meanwhile, it's all been very profitable for Bechtel — one of the country's largest privately held corporations — which recently revealed its 2012 earnings at $37.9 billion.

The Private For-Profit Nuclear Weapons Partnership at LLNS Has Produced:

- Illegal Layoffs
- Excessive Management Fees
- The Loss of Experienced Scientists, Researchers and Professionals in an Exceedingly Sensitive Field Affecting the National Readiness and Homeland Security
- Unjustifiable Budget Demands on the American Taxpayers

The 130 Plaintiffs in the ongoing LLNS Litigation (*Andrews, et al. v. LLNS, LLC*) are represented by the Oakland Law Firm of Gwilliam, Ivary, Chiosso, Cavalli & Brewer.

To read some of the media coverage, trial transcripts and other documents related to the litigation, visit www.giccb.com

$37.25M SETTLEMENT IN LAWSUIT OVER 2008 LAYOFF AT LAWRENCE LIVERMORE LAB

SUBMITTING PARTY:

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CASE INFORMATION

Case Name	*Andrews, et al v. Lawrence Livermore National Security, LLC*
Case Number	RG09453596
Case Type	Settlement after two trials
Verdict for	$2,728,327.00 in Phase One trial on May 10, 2013, plus prejudgment interest
Amount	$37,245,343.77 settlement on September 30, 2015
Topic	Employment Law
Court	Alameda County Superior Court
Department	20 – Judge Robert Freedman
Filing Date	May 21, 2009
Result Date	September 30, 2015
Trial Length	Phase One trial – 60 days; Phase Two trial – 60 days
Deliberation	

Trial Notes

The court selected five "test" plaintiffs. Their claims were tried in the Phase One and Phase Two trials. Defendant filed 29 motions *in limine* prior to the Phase One trial and 22 motions *in limine* prior to the Phase Two trial. Virtually all were denied.

In the Phase One trial, the plaintiffs' prevailed on their claims for breach of contract and breach of the implied covenant of good faith and dealing, with the jury finding that LLNS did not have "reasonable cause" to terminate their employment and/or that LLNS acted in bad faith. The plaintiffs were awarded $2,728,327.00 in damages. In the Phase Two trial, the jury returned a defense verdict on the plaintiffs' disparate impact age discrimination claims.

Expert Testimony	Plaintiffs: (1) Phil Allman, Ph.D. – economist; (2) Paul Berg, Ph.D. – emotional distress; (3) Jay Finkelman, Ph.D. – human resources; and (4) William Lepowsky – statistics. Defendant: (1) G. Edward "Ted" Anderson, Ph.D. – economist; (2) John Zeitz, M.D. – emotional distress; (3) Rhoma Young – human resources; (4) Ali Saad, Ph.D. – statistics.
Mediation Notes	Jeffrey Ross, David Rotman The case was mediated five times: (1) in June 2011, with Jeffrey Ross; (2) in February 2012, with David Rotman; (3) in April 2015, with Mr. Rotman; (4) in May 2015, with Mr. Ross; and (5) in August 2015, with Mr. Ross. In addition, Mr. Ross participated in four months of post-mediation negotiations during the summer of 2015.
Post Trial Motions	Both sides filed motions for new trial, which were denied. In addition, Plaintiffs filed a motion for prejudgment interest, which was granted, and a motion for attorneys' fees, which was denied.

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CASE FACTS

This was a consolidated action – not a class action – with 130 plaintiffs, all of whom worked at Lawrence Livermore National Laboratory ("the Lab"), a U.S. Department of Energy national security laboratory in Livermore, California. The plaintiffs were laid off in May 2008, only months after the Lab was privatized by defendant Lawrence Livermore National Security, LLC ("LLNS"), which is led by Bechtel Corporation and the University of California ("UC"). All of the plaintiffs had claims for age discrimination and breach of contract, along with other individual claims (retaliation, disability discrimination, etc.).

The plaintiffs contended that the layoff resulted from a corporate takeover of the Lab led by Bechtel. Indeed, the new LLNS contract to manage the Lab was over $40 million more than the not-for-profit UC had previously charged. Moreover, LLNS added approximately 40 new employees in executive and management positions, primarily from Bechtel, significantly increasing the overhead costs.

At the same time, LLNS promised the federal government that it would save $50 million annually by "improving operations and efficiency." To accomplish this, LLNS targeted its oldest and most experienced employees for layoff, in violation of its layoff policies, under which the majority of employees were to be laid off in inverse order of seniority. The average age of the 130 plaintiffs was 54 years, with an average of nearly 20 years of seniority.

The case was heavily litigated for more than 7 years. Approximately 300,000 pages of documents were produced. More than 100 individuals were deposed. There were two 60-day jury trials, and both sides filed appeals. Attorneys' fees and costs are estimated at $10-15 million for each side.

Throughout the case, LLNS's strategy was to delay the proceedings at all costs. LLNS twice removed the case to federal court. The court found that LLNS "lacked any objective basis" for the second removal, noting that it was "not a close call." The court awarded the plaintiffs $39,624 in attorneys' fees for the "improper removal," approving Gary Gwilliam's hourly rate of $750, Randy Strauss's hourly rate of $585, and Rob Schwartz's hourly rate of $300.

Likewise, after the court selected five "test" plaintiffs for trial, LLNS filed four motions for summary judgment/adjudication. As the trial approached, LLNS argued that additional discovery was required, convincing the court to bifurcate the plaintiffs' claims into the Phase One and Two trials. LLNS also filed four writ petitions and a petition for review in the California Supreme Court, each time attempting to further delay the proceedings.

LLNS's aim in all of this was clear – drag things out and force the plaintiffs to settle cheap. This was a particularly cynical strategy given the advanced age of the plaintiffs.

CASE FACTS

The case finally settled on September 30, 2015, after several long days of mediation and four months of post-mediation negotiations. There had been no serious offer prior to that time. LLNS agreed to pay $37.25 million to settle the claims of 129 plaintiffs; one plaintiff decided not to settle. LLNS had demanded confidentiality, but the plaintiffs refused because the settlement was to be paid solely with federal funds. Therefore, the plaintiffs contended that confidentiality was against public policy.

Please feel free to contact Gary Gwilliam or Randy Strauss of Gwilliam, Ivary, Chiosso, Cavalli & Brewer for further comment at (510) 832-5411 or ggwilliam@giccb.com.

Peter Rukin
***Partner,* Rukin Hyland Doria & Tindall LLP**
KEY ELEMENTS OF AN EFFECTIVE WRONGFUL DISCHARGE CASE

Effectively Handling Multiple Plaintiff Employment Law Cases

J. Gary Gwilliam and Randall E. Strauss
Partners
Gwilliam Ivary Chiosso Cavalli & Brewer APC

ASPATORE

Introduction

This chapter discusses the advantages of bringing wrongful termination and discrimination claims on behalf of multiple plaintiffs in the same action. In addition, strategic considerations are discussed. Effective use of multiple-plaintiff suits can increase the value of those cases, and the odds of successfully resolving them, when compared with suits brought solely by individuals.

This chapter stems from a brainstorming conversation with J. Gary Gwilliam and Randall E. Strauss, during which they discussed two recent cases being handled by their firm, Gwilliam Ivary Chiosso Cavalli & Brewer APC, and their thoughts on the subject of multi-plaintiff employment litigation.

The Role of Multiple Plaintiffs in Employment Litigation

We are experienced plaintiff's employment law attorneys: Gary Gwilliam has been doing this work for well over twenty years and has tried more than 180 jury trials to verdict, including over 150 representing plaintiffs in civil cases. Randy Strauss has been practicing for nearly twenty years, the last seven have focused exclusively on plaintiffs' employment law work. In that time, we have found that there is a great advantage to having more than one plaintiff involved in a lawsuit against their employer. In a case involving an individual plaintiff, the defense will typically try to make it look as if the plaintiff's case is unique, unusual, and isolated from the experiences of their coworkers. However, if you are representing more than one plaintiff, it becomes much harder for the defense to make such claims. Additionally, the plaintiffs will be able to share the costs and expenses of litigation—which is important, because these cases tend to involve a lot of time and work—and a good attorney can use stronger cases to bolster cases that are less clear cut, but equally valid.

Even if you do not have more than one plaintiff in an employment law matter, it is always a great advantage to have either former or current employees who will testify on your client's behalf. The goal is to remove the defense contention that a terminated employee was a poor performer. Coworker testimony can be effective in this regard. Conversely, if you are dealing with a single plaintiff and the defense is able to find a number of witnesses who can contradict your client's testimony or criticize them in some way, it will be almost impossible to win your case.

When representing multiple plaintiffs, it is very important to explain any potential conflicts that may exist. Each client has the right to your undivided loyalty and counsel. It is unethical and illegal to favor the rights of one client at the expense of any other. You need to make sure that you have fully and completely disclosed all facets of multiple representation, and ensure that each plaintiff understands that while the issues in their cases will be addressed individually, the goal is to bring a consolidated action for the benefit of all. At the same time, it is essential to maintain good attorney-client communications. Basically, if one plaintiff wants to speak to us on an individual basis, they need to know that they can tell us anything without the other plaintiffs knowing about it. This confidentiality continues through all phases of the litigation. In fact, the individual settlements in multiple plaintiff cases should be confidential, unless a client chooses to disclose the terms to a co-plaintiff, and the settlement agreement does not otherwise prohibit disclosure.

Disadvantages and Advantages of Employment Litigation

Certainly, a major disadvantage of handling employment law cases is the fact that they require a lot of work. In virtually every case, you must respond to a motion for summary judgment, which can be very burdensome. In order to defeat summary judgment, plaintiffs need to develop evidence that usually requires multiple depositions and extensive written discovery. Fortunately, in California, we are given seventy-five days' notice to respond to these motions, but you still have to marshal your evidence through declarations and depositions before the end of that period. Ultimately, we have a very good record in terms of successfully winning motions for summary judgment, although occasionally a court will decide against us, necessitating a lengthy and costly appeal.

Basically, if you are going to take on any type of employment law case you have to be prepared to invest sufficient time and money and get your discovery done in a timely manner, so that by the time a motion for summary judgment comes in you will have taken all of your depositions and obtained the necessary documents. Also, it is important to keep in mind that employment law cases traditionally take a long time to resolve.

One advantage of these types of cases is possibly being able resolve the dispute early on in the process because the defense already knows so much about the plaintiff—their former employee. The issues in dispute, the testimony of employer-controlled witnesses, and the key documents are usually already known to the defense by the time the litigation commences, so that they often can evaluate a case early and be prepared to enter into meaningful settlement discussions. In addition, defendants know that plaintiffs can be awarded attorney's fees in cases of statutory discrimination. Typically, successful defendants are not awarded attorney's fees, unless the plaintiff's case is deemed "frivolous." This can help to encourage early settlement discussions.

The bottom line is you have to be prepared to put in the necessary time, effort, and money to win an employment litigation matter—but that is true with respect to any major plaintiff's case.

Gary has an extensive background in plaintiff's personal injury (PI) cases, including more than 150 civil jury trials. However, in recent years he has become a strong proponent of taking on more employment law cases, particularly wrongful termination cases. To that end, he has been speaking to plaintiff's lawyers on the topic, "Employment Law is the New Frontier for Trial Lawyers" in an effort to promote more employment litigation among traditional PI plaintiff's lawyers. He points out that plaintiff's lawyers in this area receive attorney's fees; that there is a possibility of settling these cases early on; and that jurors tend to like employment and wrongful termination cases because they are also working people. Certainly, if we are working on a contingency fee basis it becomes harder to make money if the case turns out to be lengthy, but in cases that carry attorney's fees, he has been awarded as much as $800 an hour. Therefore, if the defense really wants to run us into the ground, and take a case through trial, they are ultimately going to pay out a very large amount in attorney's fees.

Exposing the Employer's Motives in Wrongful Discharge Cases

One of the challenges in employment discrimination cases relates to the concept of pretext. When we are battling a summary judgment motion, we have to show the court that our client has a good case that deserves to go to trial—and the easiest way to do that it is to provide proof that the reasons

the employer gave for firing our client are not true. When we take depositions of the representatives of the employer who were involved in the decision-making process regarding our client's termination, more often than not they trip themselves up because they do not seem to have compared notes. Ultimately, one supervisor will say one thing and another will say something else; then you can point out the inconsistencies of their statements and suggest that they are making up stories. For us, that is a very satisfying and fun part of litigation.

The issue may not be so straight forward in multiple plaintiff cases. Where one decision maker is responsible for terminating all plaintiffs, pretext may be easier to establish than when multiple decision makers are involved. Obviously, if a supervisor gives a truth-challenged explanation for letting go multiple employees, they all benefit from the appearance of pretext. But, where each plaintiff is terminated by a different supervisor, it may be more difficult to establish pretext. In such situations, we look to see if a common motive may be established on the part of upper management.

Succeeding in Employment Litigation: Choosing the Right Cases

The key to being successful in multi-plaintiff litigation is picking the right cases, and this is best done by screening them carefully. As in any case, you need to have a plaintiff who can tell their story in a clear, concise, and appealing way. The plaintiff must also understand that employment litigation is hard on individuals and their families. In fact, our firm takes on less than one out of a hundred cases, because many people do not have good claims. Essentially, you must gather all possible information in relation to your client's case early on, and interview the client carefully. Many lawyers make a big mistake in terms of not doing this kind of research as soon as possible and conducting a formal investigation early on, including hiring an investigator.

This work is compounded in multi-plaintiff cases, where you obviously need to fully investigate the claims of each plaintiff, and ensure that each case can stand on its own merits. Nonetheless, if one plaintiff has an exceptionally strong case, or is able to tell a compelling and charismatic story, they may be able to help overcome shortcomings in this regard by other plaintiffs if a jury is made to understand that they were all mistreated by the employer in a similar way for similar reasons.

Top Challenges of Wrongful Discharge Cases

Again, the biggest challenge in relation to wrongful discharge matters and other types of employment law cases is that they can be very work intensive. You may be lucky in terms of settling a case early on, but if you are going to file a complaint, you have to be prepared to spend enough time, money, and effort to do so and be prepared to face a major motion for summary judgment.

As noted, these cases are expensive; therefore, you must have the funding to see a case through trial. You are probably going to be taking three to five times the number of depositions you might take in a normal case, and if you do not have enough money to litigate effectively, the defense will wind up taking you to trial or force a cheap settlement on you.

Unfortunately, many of these cases are handled by lawyers who do not have sufficient experience in employment litigation—you should not take on an employment law case if you do not have some experience in this area, or you are unable to bring a more experienced lawyer on board to assist you. You need to keep in mind that the defense will have a big law firm on their side; therefore, you must be prepared for an all-out litigation war.

Recent Multi-Plaintiff Employment Law Cases

One recent multi-party employment case we handled was *Wiley v. Wyndham Vacation Ownership, Inc., et al.*[1] In that case, we represented ten time-share salespeople who all alleged various forms of discrimination against their employer. Most of the plaintiffs were supervised by a manager who was well documented to exhibit reprehensible discriminatory animus against almost every protected class imaginable, including older workers, Arab-Americans, women, and employees on disability. The court held the cases together throughout discovery, enabling us to enjoy economies of scale. Most of the depositions we had to take of defendant's witnesses were common to all ten plaintiffs. In addition, the experts we hired were beneficial to all. The defense filed motions for summary judgment against all ten plaintiffs, and the court allowed extensive briefing beyond the

[1] *Wiley v. Wyndham Vacation Ownership, Inc., et al,* Contra Costa Superior Court Case No. C05-01991.

statutory requirements. The dispositive motion process lasted for several months, but all plaintiffs emerged with the majority of their claims intact. It was on to trial.

The court determined to try the case in phases, with two plaintiffs set for trial initially. Last minute mediations resulted in resolving three of the cases, including one of the plaintiffs first set for trial. Interestingly, the defense made it clear that it would never settle the other plaintiff's case. That case proceeded to trial, where we won a verdict of $1 million. An award of attorney's fees brought the final judgment to well over $2 million. Following this trial, another plaintiff settled through mediation, one settled after both sides gave their opening statements at trial, and the final case resulted in a jury verdict in favor of the plaintiff.

Each of the ten plaintiffs benefited by consolidating his or her case with the others. Although each case was resolved on its own merits, each plaintiff was a witness on behalf of the others, which lent credibility to their common complaints of discrimination by their employer. Each was able to lower litigation costs by sharing the expenses, and each benefited by coordinating the complicated discovery and dispositive motion phases of the case. This was a textbook example of the positive features of multi-plaintiff employment litigation.

One of the most interesting multi-plaintiff cases we have worked on in our careers is *Andrews vs. Lawrence Livermore National Security LLC.*[2] In this case our firm represents 130 individual plaintiffs, all of whom were laid off on May 22, 2008 by the Lawrence Livermore Lab, which had been managed by the University of California for many years until 2007, when it was taken over by a private consortium headed primarily by Bechtel. Immediately after this privatization, 430 long-term workers were let go. The average age of our 130 plaintiffs is fifty-four, and the average amount of time they worked at the lab was roughly twenty years. These 130 plaintiffs—unlike the vast majority of plaintiffs we represent—are not "at will" employees; they had contracts that required "reasonable cause" before they could be terminated. We litigated this case for four years before the first "test" trial involving breach of contract claims for five "test" plaintiffs. This process

[2] *Andrews vs. Lawrence Livermore National Security LLC,* C 11-3930 CW, 2012 WL 160117 (N.D. Cal. Jan. 18, 2011).

was extremely time consuming and expensive, involving over seventy depositions and hundreds of thousands of documents. After sixty days of trial, on May 10, 2013, a jury found in favor of all five plaintiffs on their claim of breach of the implied covenant of good faith and fair dealing. In addition, four of the five prevailed on their breach of contract claims. A second phase trial is set to commence in September 2013, on the remaining claims of age discrimination.

This is a very high-profile case, and much of the legal community has been very interested in its outcome. It could be argued that we have too many plaintiffs, but they were all similarly situated in that they were all terminated during the same layoff that was governed by the same layoff rules and policies. Prior to commencing litigation, we carefully interviewed all of these individuals—in fact, we turned down about fifty of these cases when they first came to us.

Once again, this is a case where the plaintiffs are benefiting by being part of a consolidated action involving multiple plaintiffs. Our litigation costs and expert fees are substantial, far more than would be justified in bringing any of these cases individually. By sharing these costs, however, these plaintiffs are able to gather the evidence they need to pursue their claims. They are able to blend their voices in a common chorus, establishing the illegal behavior on the part of their former employer in terminating them during the layoff.

Other Advice for Employment Law Attorneys

As plaintiff's attorneys, we are always concerned about possible changes in the law. Certainly, in recent times the US Supreme Court has handed down some very bad decisions, from a plaintiff's attorney's perspective, as has the California Supreme Court. For instance, in one case, the court decided that if the defense can prove that your client was going to be terminated anyway, despite evidence of unlawful discrimination, your remedies might be severely limited. Consequently, it is important to stay on top of developments that can cause you problems in litigating these cases.

You should also keep in mind that the economy can play a major role in employment litigation—not only with respect to the number of cases that

arise, but also in terms of how jurors view them. In a down economy, many people lose their jobs—and obviously, not everyone who loses their job has a good employment law case. At the same time, a down economy provides employers with an opportunity to engage in mischief if they are inclined to break the law or terminate people improperly.

It is also important to be aware of juror bias issues. As experienced as we are in this area, we always hire a jury consultant when working on these cases. Today's juries are more sophisticated, knowledgeable, and more prejudiced in many respects, which means that you have a lot of issues that you have to deal with, and a good jury consultant can help you strategize more effectively.

Many of these cases have a potential for a big recovery, as they involve significant wage losses and emotional distress, which allows you the opportunity to sue for punitive damages. Consequently, when we have a big employment law case we will almost always assemble a focus group. Basically, our jury consultants will hire "jurors" to listen to the case, and we try very hard to mimic the jury pool that we are going to be drawing from. In the *Andrews* case, we conducted extensive jury research at various stages of the litigation that proved invaluable in achieving the jury verdict.

Conclusion

In conclusion, our advice to other lawyers in this practice is to be careful during the intake process; be prepared to put sufficient money and time into it; and bring in a specialist if necessary. We are always distressed when we see plaintiff's lawyers who think they have a good case, and thereafter try to litigate as cheaply as possible. All too often we are asked to work on cases where the client's previous lawyers made missteps in the initial phases of the litigation.

You must also be prepared for the defense to not be forthcoming in terms of the discovery process. These cases can be very document intensive, involving lots of e-mails and other records such as performance evaluations—and all of these documents can help you build your case. Unfortunately, even though we always request these documents, the defense is not always willing to give us everything we are entitled to—in

which case, we have to be prepared to go to court and bring a motion to compel. Essentially, discovery in these cases can be more difficult and challenging than in a personal injury case.

Key Takeaways

- Keep in mind that there is a great advantage to having more than one plaintiff involved in a lawsuit against their employer. If you are representing more than one plaintiff, it becomes much harder for the defense to claim your client's case is unique. Also, multiple plaintiffs can share the costs of litigation, including hiring experts.
- Explain any potential conflicts that may exist during the client intake process; make sure that you have put everything that your clients have told you in writing; and also make sure that each plaintiff understands that while the issues in their cases will be addressed individually, the goal is to bring a consolidated action.
- Be prepared to invest sufficient time and money in your case and get your discovery done in a timely manner, so that by the time a motion for summary judgment comes in you will have taken all of your depositions and obtained the necessary documents.
- Screen your cases carefully. You need to have a plaintiff who can tell their story in a clear, concise, and appealing way. Engage in early evaluation and preparation of an employment law case before you sign a contingency fee contract and file your administrative or formal complaint in court.
- Stay on top of developments in the law that can cause you problems in litigating these cases. Assemble a focus group that mimics the jury pool that you are going to be drawing from. Be careful during the intake process; be prepared to put sufficient money and time into it; and bring in a specialist if necessary.

***J. Gary Gwilliam**, a partner at Gwilliam Ivary Chiosso Cavalli & Brewer APC, is considered one of the best consumer trial attorneys in the state. His reputation and skill in representing seriously injured plaintiffs is well known. Mr. Gwilliam has tried 150 jury cases, of which more than one hundred were personal injury cases. He has handled major cases in every area of consumer law, including serious automobile and construction accidents, products liability, medical malpractice, bad faith insurance, civil rights (including police misconduct), wrongful termination, and employment discrimination.*

Mr. Gwilliam is a former president of the Consumer Attorneys of California and was nominated Trial Lawyer of the Year in 1995 and 1996 by the Trial Lawyers for Public Justice. He is also a 2001 recipient of the California Lawyer Attorney of the Year Award for employment law. A noted lecturer and motivational speaker, Mr. Gwilliam has conducted seminars and workshops around California and the United States for many years. His ethics seminar, "How to Get a Winning Verdict in Your Personal Life," won him a Consumer Attorneys of California Presidential Award in 1994. He is the author of numerous articles on California consumer law and is frequently called on to serve as an expert witness on the standard of care for lawyers' conduct.

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AGE DISCRIMINATION IN FOCUS

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Summary of Topics

Introduction: The Aging Workforce and Age Discrimination, 2016

I. Workforce Trends

A. *The workforce is rapidly aging*. "The U.S. Bureau of Labor Statistics forecasts that by 2016 one-third of the U.S. labor force will be in the 50-plus age category, compared with 27% in 2007." Society for Human Resources Management, *Executive Summary, Preparing for An Aging Workforce* (December 2014) ("SHRM 2014"), https://www.shrm.org/Research/SurveyFindings/Documents/14-0765%20Executive%20Briefing%20Aging%20Workforce%20v4.pdf

B. *Most employers have been slow to respond*. "One-third or less of respondents indicated the increasing age of their organization's workforce had prompted changes in general management policy/practices (28%), retention practices (33%), and recruiting practices (35%) to 'some' or 'a great extent.'" SHRM 2014

II. Trends in Age Discrimination

A. "*Age Discrimination Is Widespread in U.S. Job Market.*" Bloomberg BNA Daily Labor Report, 206 DLR A-9 (Oct. 27, 2015). "Despite laws that prohibit it, age discrimination is pervasive in the U.S. – especially for older women—and the older you are, the more discrimination you face, according to the authors of a National Bureau of Economic research study released Oct. 26."

B. NBER Study: Neumark, David; Burn, Ian; Button, Trevor, *Is It Harder For Older Workers to Find Jobs? New and Improved Evidence from a Field Experiment,* NBER Working Paper No. 21669 (National Bureau of Economic Research Oct. 2015), http://www.nber.org/papers/w21669.pdf

C. EEOC Charge Data (FY 2015), https://www.eeoc.gov/eeoc/statistics/enforcement/adea.cfm

1. Total charges: 20,144 – higher than any year '97-'07; lowest since '07.
2. Monetary benefits (other than thru litigation): $99.1M – highest ever.
3. Resolutions: No cause – 65.7% (13,980); Cause - 2.9% (611); Settlements 8.0%; Merits Resolutions 16.9%; Administrative Closures 17.4% (overlaps ~ 100+%).

D. EEOC Litigation Data (FY 2015)
https://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm

1. ADEA Suits Filed – 14. Since '12 – 45 (avg. 11.25 per yr.). '97-'11: 25-50/yr.
2. All Suits Filed '12-'15 – range of 148 to 174; '91-'11 – range of 271 to 465.

E. The Dilemma – (Mis)Perceptions of Older Workers: "Evidence shows that *ageism, stereotypes, and misinformation about mature persons continue to be issues across all segments of society, including the workplace.* . . . a series of studies by

AARP . . . identify the perceptions held by managers about employees age 50 and older. These studies revealed that the positive perceptions characteristic of older workers held by managers include their experience, knowledge, work habits, attitudes, commitment to quality, loyalty, punctuality, even-temperedness, and respect for authority. These same studies also reveal some negative perceptions held by managers about the mature worker: inflexibility, unwillingness or inability to adapt to new technology, lack of aggression, resistance to change, complacency, and the presence of physical limitations that increase the cost of health insurance. . . . . While . . . these findings may appear confusing or contradictory, they [identify a] *delicate balance between positive and negative perceptions that, depending on the industry or work environment, may affect a manager's decision to hire, retain or advance an older worker"* [emphasis supplied].

Tishman, Francine M.; Van Looy, Sara; and Bruyère, Susanne M., *Employer Strategies for Responding to an Aging Workforce*, National Technical Assistance and Research (NTAR) Center to Promote Leadership for Increasing the Employment and Economic Independence of Adults with Disabilities (March 2012), https://www.dol.gov/odep/pdf/ntar_employer_strategies_report.pdf

E. DFEH Data
http://www.dfeh.ca.gov/res/docs/Statisitcs/2015/DFEH%20Report%20to%20the%20Legislature%20(2).pdf

1. Age discrimination complaints (2014): 4338
2. Total employment cases referred for litigation (2014): 32

Discussion

I. LEGAL DEVELOPMENTS

ADEA

A. Waiver of Claims?: The OWBPA

Last year the ADEA panel addressed the pending controversy in *McLeod, et al. v. General Mills, Inc*., No. 0:15-cv-00494-JRT-HB (D. Minn.), in which the defendant employer responded to plaintiffs' collective action complaint by filing a Motion to Dismiss or to Compel Arbitration. Defendant terminated Plaintiffs in a group layoff and required them to sign, in return for a severance payment, an agreement releasing all claims and also agreeing to individual arbitration of any challenge to their termination or the validity of the release. Plaintiffs and their amici, the EEOC and AARP, argued that the Older Workers Benefit Protection Act of 1990 ("OWBPA"), P.L. 101-433, codified at, inter alia, 29 U.S.C. § 626(f), required the district court to decide whether the release was valid, and if not, to invalidate the entire agreement containing the release, including the mandatory arbitration clause.

The district court denied the motion to dismiss and refused to compel arbitration. *McLeod v. General Mills Inc.*, No. 0:15-cv-00494-JRT-HB, 2015 U.S. Dist. LEXIS 144396 (Oct. 23, 2015) (per Chief Judge John R. Tunheim).

The inclusion of a mandatory arbitration clause in a severance and release agreement presented to workers in connection with group layoffs is a new phenomenon. The rejection of this device by the district court is a rare, if narrow (and possibly only temporary) victory against the behemoth that is the general trend of judicial deference to forced arbitration.

The dispute in *McLeod* arose out of a large reduction-in-force, of approximately 850 General Mills employees, as part of what the company called "Project Refuel". Plaintiffs alleged that the layoffs "affected employees age 40 or over at much higher rates than younger employees" and further, that General Mills had replaced those terminated with much younger workers. 2015 U.S Dist. LEXIS 144396 at *3. Plaintiffs filed individual and collective age discrimination claims, based on both disparate treatment and disparate impact theories. *Id.* at 8.

The release agreement at issue declared that:

> any dispute about the validity or enforceability of the release or the assertion of any claim covered by the release . . . will be resolved exclusively through a final and binding arbitration on an individual basis and not in any form of class, collective, or representative proceeding.

2015 U.S Dist. LEXIS 144396 at *6. In addition, the agreement included "a broad release from all causes of action or claims against General Mills, including claims arising under the ADEA." *Id.* at *7. The Complaint asserted a claim for a declaration that the Plaintiffs' release agreements with General Mills are unenforceable because they were not signed "knowingly and voluntarily" as mandated by the ADEA and the OWBPA amendments to the age Act. *Id.* at *8.

The *McLeod* Court acknowledged the confrontation of two countervailing bodies of law.

On the one hand,

> there is a strong federal policy in favor of enforcing arbitration agreements. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).* If claims are arbitrable under the FAA, the claims must be referred to arbitration, and the judicial proceedings must be stayed pending that arbitration. *See id.*; *9 U.S.C. §§ 2, 3.* In determining whether a claim is arbitrable, the court must first decide whether a valid agreement to arbitrate exists between the parties, and then decide whether the specific dispute falls within the scope of that agreement. *Daisy Mfg. Co. v. NCR Corp., 29 F.3d 389, 392 (8th Cir. 1994).* In engaging in the inquiry, the Court applies "ordinary state law contract principles to decide whether parties have agreed to arbitrate a particular matter." *Simitar Entm't, Inc. v. Silva Entm't, Inc., 44 F. Supp. 2d 986, 992 (D. Minn. 1999).*

2015 U.S Dist. LEXIS 144396 at *10-11.

On the other hand, the district court noted, "ADEA claims cannot be waived unless the waiver is "knowing and voluntary." *29 U.S.C. § 626(f).*" 2015 U.S Dist. LEXIS 144396 at *11. The court quoted various specific OWBPA requirements, then observed that the law also says:

> [i]n any dispute that may arise over whether any of the [waiver] requirements [listed above] . . . have been met, the party asserting the validity of a waiver shall have the burden of proving **in a court of competent jurisdiction** that a waiver was knowing and voluntary." *Id. § (f)(3)* (emphasis added).

Id. at *13-14 (emphasis in original).

General Mills argued that despite plaintiffs' "contention that their waivers of their substantive ADEA claims in the release agreements did not meet the requirements of the OWBPA . . . the arbitration provision of the release agreements is still binding and compels the plaintiffs to make their argument regarding the validity of their waiver of substantive ADEA rights in an arbitral forum, not in federal court." *Id.* That is, since the Plaintiffs did not challenge the validity of the arbitration provisions themselves "(e.g., that the signatures were forged or that they were forced to sign under duress)" General Mills asserted that the arbitration provisions are "valid and enforceable and there is nothing left for the [district court] to decide." *Id.* (citing *Faber v. Menard, Inc.*, 367 F.3d 1048, 1052 (8th Cir. 2004) ("The Supreme Court has established that an arbitral forum is, as a general matter, adequate to preserve statutory rights and adjudicate statutory claims."); *id.* (stating that an arbitration agreement will generally be upheld "unless a party can show that it will not be able to vindicate its rights in the arbitral forum").

General Mills also argued that the arbitration clause in its severance agreement was enforceable because it was severable from the remainder of the agreement, even if, as plaintiffs' alleged, the overall agreement was invalid under the OWBPA. In this regard, the district court noted, "in general, even if the broader agreement, of which an arbitration agreement is just a part, is held invalid, the Supreme Court has held that the arbitration provisions are severable and still valid. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 448-49 . . . (2006)." 2015 U.S Dist. LEXIS 144396 at *15.

Nevertheless, the district court explained:

> Despite these general principles, there are instances in which an arbitration agreement is not enforceable. While the FAA requires enforcement of an arbitration agreement in general, the Supreme Court and the Eighth Circuit have also noted that an express "contrary congressional command" in a different statutory regime might "preclude a waiver of the judicial forum." *Owen v. Bristol Care, Inc., 702 F.3d 1050, 1052 (8th Cir. 2013).* The dispute at the heart of this case is whether OWBPA contains any contrary congressional command that would preclude enforcement of the arbitration agreements in this case.

2015 U.S Dist. LEXIS 144396 at *15. The district court went on to conclude that the OWBPA's "court of competent jurisdiction" directive constitutes just such a contrary congressional command." *Id.* at *22.

The district court expressly distinguished *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), and *CompuCredit v. Greenwood,* 132 S. Ct. 665 (2012), Supreme Court decisions that General Mills said required deference to arbitration. The district court explained:

> while the *Gilmer* and *CompuCredit* decisions rest on a statutory provision that read at the time of *Gilmer* that a plaintiff could bring a suit "in any court of competent jurisdiction," *Gilmer, 500 U.S. at 29* (internal quotation marks omitted), and that now reads that "[a]ny person aggrieved **may** bring a civil action in any court of competent jurisdiction," *29 U.S.C. § 626(c)(1)* (emphasis added), the plaintiffs rely on a provision that states that, in a dispute over whether the waiver requirements of the OWBPA have been complied with, "the party asserting the validity of a waiver **shall** have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary," *id. § 626(f)(3)*.

2015 U.S Dist. LEXIS 144396 at *21-22.

As a result, the district court agreed to entertain "further motion practice and an eventual determination by the Court as to whether the release agreements at issue comply with the waiver provisions of the OWBPA at *Section 626(f)(1)*", including as to what the district court called "the compelling argument that the release agreements did not meet the understandability requirements of Section 626(f)(1)(A) by seeming to foreclose the employee's ability to raise ADEA claims in court." 2015 U.S Dist. LEXIS 144396 at * 27 & n.6.

Significantly, the district court considered the OWBPA's legislative record instructive. In the specific context of whether Congress intended courts to address the validity of waiver agreements, the district court noted:

> When viewed in context, it is clear that Congress wanted courts to interpret and apply the OWBPA waiver provisions at *Section 626(f)(1)*, to ensure waivers meet their requirements. Most obviously, throughout its discussion of the purposes underlying the OWBPA's ADEA waiver provisions, the Senate Report on the OWBPA repeatedly refers to the critical role **courts** will play in interpreting and applying those waiver requirements and ensuring that waiver agreements pass muster. S. Rep. No. 101-263, at 1537 (1990) ("The Committee expects that **courts** reviewing the 'knowing and voluntary' issue will scrutinize carefully the complete circumstances in which the waiver was executed." (emphasis added)); *id.* ("The bill establishes specified minimum requirements that must be satisfied before a **court** may proceed to determine factually whether the execution of a waiver was 'knowing and voluntary.'" (emphasis added)); *id.* at 1538 ("The Committee expects that **courts** will pay close attention to the language used in the agreement, to ensure that the language is readily understandable to individual employees

> regardless of their education or business experience." (emphasis added)); *id.* at 1540 (restating the language of *Section 626(f)(3)*).

2015 U.S Dist. LEXIS 144396 at * 25-26. More generally, the district court also observed:

> the OWBPA made it harder for companies to cajole employees, upon termination, to give up their ADEA rights -- especially in the context of a large-scale group layoff, in which individual employees have little-to-no leverage. S. Rep. No. 101-263, at 1511, 1520, 1537-41 (1990) (noting that in large-scale layoffs, "the terms of the [layoff or termination] programs generally are not subject to negotiation between the parties" and noting that under those "circumstances, the need for adequate information and access to advice before waivers are signed is especially acute"); H.R. Rep. No. 101-664 (1990); 135 Cong. Rec. E816-01, 1989 WL 172178 (Mar. 15, 1989) (statement of Rep. Augustus F. Hawkins) (stating the purposes underlying the Age Discrimination in Employment Waiver Protection Act of 1989, which was incorporated in large part into the OWBPA, and highlighting that the need for more stringent waiver requirements stems from employers' attempts to use waivers as a condition of severance pay at termination).

2015 U.S Dist. LEXIS 144396 at *11.

Several cautionary notes are necessary in closing. First, General Mills invoked its right, under the FAA, to appeal a finding of non-arbitrability. *See* 9 U.S.C. § 16(a)(1). Second, the 8th Circuit stayed further proceedings in the district court pending appeal. And third, the district court read *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009), broadly, declaring that there "the Supreme Court explicitly stated that an arbitration agreement did not need to meet the 'knowing and voluntary' requirements of Section 626(f)(1)." 2015 U.S Dist. LEXIS 144396 at *19-20 (citing 556 U.S. at 259). Hence, the argument that waiver of a right to proceed in court – and thus, of a right to a jury trial -- must satisfy Section 626(f)(1) of the OWBPA "fails under explicit Supreme Court precedent." *Id.* Only § 626(f)(3), not § (f)(1), secures a judicial forum.

B. Lack of Jurisdiction?: Sovereign Immunity and State Defendants

In *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000), the Supreme Court held that the Eleventh Amendment to the U.S. Constitution prohibited recovery of monetary relief (in the form of back pay or exemplary damages) in ADEA cases against state entities. This ruling has been a serious impediment to effective enforcement of the ADEA in instances of age discrimination by state employers as the possibility of recovering only attorney's fees and litigation costs has not proven sufficient to encourage many private litigants to sue or private counsel to represent them. The EEOC has occasionally brought ADEA lawsuits against state entities, but not in sufficient numbers with adequate impact to provide the deterrent that exists under other employment discrimination laws under which monetary relief is available against state employers

Ironically, the subsequent decision in *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001), while equally restrictive in the remedies it recognized as legitimate under the Americans with Disabilities Act, has had nowhere near as limiting an impact on private employment litigation against state employers. The reason for this striking discrepancy is the availability of an alternative path for employment litigators and aggrieved litigants facing discrimination at the hands of state employers, to wit, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, a statute enacted under the Spending Clause of the Constitution, rather than the Commerce Clause, the basis for the ADEA and the ADA. Under the Rehab Act, private litigants can obtain compensatory and punitive damages against offending employers; however, no such Spending Clause legislation exists prohibiting age discrimination in employment. The Age Discrimination Act of 1975, 42 U.S.C. §§ 6101-6107, is Spending Clause legislation, directed against age discrimination by recipients of federal financial assistance, analogous to the Rehab Act, but the ADA of 1975 does not apply to employment discrimination by state (or local or any other) entities. *See* 42 U.S. C. § 6103(c)(2) ("Nothing in this chapter shall be construed to amend or modify the Age Discrimination in Employment Act of 1967(29 U.S.C. §§ 621-634) as amended, or to affect the rights of responsibilities of any person or party pursuant to such Act.").

Another difference between the ADEA and the ADA is the degree to which the Supreme Court has addressed the special problem of prospective injunctive or declaratory relief against state employers under the legal fiction embodied in *Ex parte Young*, 209 U.S. 123 (1908). In *Garrett*, the Court expressly stated that such relief was available. 531 U.S. at 374 ("Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by private individuals in actions for injunctive relief under Ex parte Young, 209 U.S. 123 (1908)."). One year earlier, however, in the closely analogous circumstances presented in *Kimel*, for some reason the Court made no mention of the possibility of private enforcement litigation pursuant to *Ex parte Young*.

It turns out this difference has mattered, in that there are numerous decisions affirming the validity of ADA claims under *Young*, while there are relatively few decisions discussing, much less approving, such claims on behalf of ADEA litigants.

In the recently filed case of *Taaffe v. Drake*, No. 2:15-cv-02870-TPK (S.D. Ohio), an age discrimination suit against Ohio State University (OSU) officials on behalf of two former instructors in the University's English as a Second Language (ESL) program, the plaintiffs faced a motion for judgment on the pleadings challenging the court's jurisdiction to consider their suit based on *Ex parte Young*. On April 29, 2016, the Magistrate Judge who the parties agreed to hear their case issued a ringing endorsement of the validity of ADEA litigation premised on *Young*. *Id.* (Document #35) (Opinion and Order) (copy in materials.) This thus-far unpublished ruling should help support ADEA enforcement litigation against other state employers.

In the Complaint, whose allegations the Magistrate Judge was constrained to construe in a light most favorable to the complainants, plaintiffs Julianne Taaffe and Kathryn Moon contended that they were successful longtime ESL instructors, in their late fifties or early sixties, who encountered abusive conduct at the hands of two successive ESL program directors, one hired in 2009 and the next in 2013. Taaffe and Moon recounted various anecdotes purporting to show that the first of these administrators "expressed disfavor for older employees" and the latter

was "openly hostile to them. Slip op. at 3. Taaffe complained that the second supervisor gave her an unwarranted negative evaluation. She and Moon both further charged that: they complained of age bias up the chain of command and filed an EEOC charge; the University conducted a superficial investigation exonerating their supervisors; shortly after the investigation ended the University eliminated their jobs and reclassified them as limited tenure contract employees; and when their contracts ended they were terminated and replaced by younger, far less experienced and qualified colleagues. *Id.* at 3-4.

The *Taaffe* court addressed and rejected each of three arguments by defendants challenging the court's jurisdiction. First, OSU argued "that the defendants, as individuals, are not 'employers' within the meaning of the ADEA" and that hence, the ADEA does not provide an independent cause of action against the individual defendants justifying claims for injunctive relief under the Young exception to the Eleventh Amendment. Slip op. at 2. Second the University asserted that plaintiffs had failed to allege in sufficient detail how each of the defendants had discriminated against them based on their age. *Id.* Third, OSU sought to dismiss claims against two former administrators who no longer worked for the school, including the principal wrong-doer, who the University recently had terminated from the ESL program. *Id.*

On point one, the *Taaffe* court acknowledged and reaffirmed that "every federal court which has considered the question, including the Court of Appeals for the Sixth Circuit (albeit in an unpublished decision), has held that it is appropriate for a public employee to seek injunctive relief against individual state officials under the ADEA." *Id.* at 4 (alluding to *Meekison v. Voinovich*, 67 Fed. Appx. 900 (6th Cir. June 18, 2003)). The court also pointed to an FMLA decision of the Sixth Circuit as analogous to the "employer" issue under the ADEA. *Id.* at 7 (discussing *Diaz v. Michigan Dept. of Correction*s, 703 F.3d 956 (6th Cir. 2013)). The court concluded:

> It is hard to find a meaningful way to distinguish [*Diaz*'] key holding there, which is that under a similar definition of "employer" that excludes individual public officials, *Ex parte Young* is nonetheless a proper vehicle under which to bring injunctive relief actions against such officials when it is alleged that the State or one of its instrumentalities violated the statute in question. Given the Congress clearly understood how *Ex parte Young* operates, and that it provided for injunctive relief against States in both the FMLA and the ADEA, it would be surprising if Congress meant to eliminate *Ex parte Young* actions simply by using a definition of "employer" which precludes individual liability on the part of governmental officials.

Id.

Moreover, the court distinguished decisions of the U.S. Supreme Court and the Sixth Circuit rejecting *Ex Parte Young* claims both under statutes that do not "provide for a private cause of action for injunctive relief," like the FLSA, *see* Slip op. at 5-6 (distinguishing *Michigan Corrections Organization v. Michigan Dept. of Corrections*, 774 F.3d 895 (6th Cir. 2014)), and in circumstances – like "a quiet title action by a Native American tribe against a state – that "implicates special sovereignty interests," *id.* at 9 (distinguishing and quoting *Idaho v. Coeur*

d'Alene Tribe of Idaho, 521 U.S. 261, 281 (2000)). Further the Magistrate Judge rejected an argument by the University that the availability of a state court forum alone justified rejection of an *Ex parte Young* claim for injunctive relief in federal court. "That," *Taaffe* said, "would represent a drastic shift in federal jurisprudence and practice which the *Coeur d'Alene* court did not contemplate and which federal courts have not adopted." *Id.*

On point two, the *Taaffe* court bluntly observed that "Defendants are simply incorrect on how the law operates here." Id. at 11. That is, plaintiffs asserting claims against a state employer for injunctive relief under *Ex parte Young* – such as the reinstatement that plaintiffs Taaffe and Moon seek in their suit -- do not have to name individual defendants who committed acts of the challenged discrimination. Rather, "[t]he proper defendants in such an action are the ones who have the power to provide the relief sought, whether or not they were involved in the allegedly illegal conduct at issue." *Id.*

Finally, the *Taaffe* court faulted OSU for misunderstanding the Federal Rules in charging that two individual defendants had to be dismissed because they no longer worked for the University. It chided the OSU defendants: "That obviously cannot be the law." *Id.* at 13. "[A]pparently," the court observed, defendants

> fail to recognize both that the plain language of Rule 25 makes the substitution of parties automatic under these circumstances, without any need for action by the Court or the parties, and that if it were otherwise, a plaintiff could be deprived of an otherwise viable cause of action simply because a defendant chose, on multiple occasions, to replace its decision-makers. That obviously cannot be the law.

Id. Consistent with the doctrine of "automatic" substitution, the court stated that "a substitution of parties has occurred," and it turned down defendants' motion to dismiss as moot. *Id.*

C. Disparate Treatment: Blatant Ageism Leads to Large Recoveries

1. Examples of Blatant Ageism (in the past year)

a. *Thomas v. Heartland Emp't Servs.*, 797 F.3d 527 (8th Cir. 2015).

Summary judgment for employer reversed in part.

Conservative panel restores termination claim under Missouri Human Rights Act, which treats proof of age discrimination more leniently than under federal law – i.e., the *Gross* "but-for cause" standard does not apply; rather, liability may be shown if age was a contributing factor to an adverse employment action.. The case involved an "account liaison" employed by a home health care and hospice care provider. The court found genuine fact disputes as to the role played by a hospice administrator who made statements the court deemed direct evidence age may have played a role in Thomas' termination:

Administrator Hagen once described Thomas as an "old short blond girl," allegedly told co-workers "older people didn't work as fast or were [not] as productive as younger employees," and assertedly told a client disturbed by Thomas' firing that he "like[d] to keep himself surrounded with young people."

b. ***Goudeau v. Nat'l Oilwell Varco, LP***, 793 F.3d 740, 475-76 (5th Cir. 2016).

Summary judgment for employer on ADEA claim reversed.

"Mike Perkins [age 57] became Goudeau's supervisor. On one occasion, when they stepped outside to smoke, Perkins told Goudeau that 'there sure are a lot of old farts around here,' and asked Goudeau about his job duties. In the same exchange, Perkins inquired about the ages of two older employees whom he also supervised, Joe Jett and Bill Fisher, and how long they had been working for NOV. Perkins then said that he planned to fire both Jett and Fisher."

"On a number of occasions, Perkins asked if the facility's smoking area was "where the old people meet." Perkins also once remarked that Goudeau wore 'old man clothes.' Goudeau contends that Perkins also referred to Goudeau as an 'old fart.'"

Held: Plaintiff need not show these ageist remarks amounted to "direct evidence of discrimination." Rather, "[i]n a circumstantial case like this one, in which the discriminatory remarks are just one ingredient in the overall evidentiary mix, we consider the remarks under a 'more flexible' standard. *See Reed v. Neopost USA, Inc.*, 701 F.3d 434, 441 (5th Cir. 2012). (citing *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 226 (5th Cir.2000)). To be relevant evidence considered as part of a broader circumstantial case, 'the comments must show: '(1) discriminatory animus (2) on the part of a person that is either primarily responsible for the challenged employment action or by a person with influence or leverage over the relevant decisionmaker.'' *Squyres v. Heico Cos., L.L.C.*, 782 F.3d 224, 236 (5th Cir. 2015) (quoting *Reed*, 701 F.3d at 441)."

c. ***McCartt v. Kellogg USA, Inc.*****,** No. 5: 14-318-DCR, 2015 U.S. Dist. LEXIS 139455, *8-20 (D. Ky., Oct. 14, 2015).

Summary judgment denied on employers ADEA discrimination claims. ADEA retaliation, FLSA and state claims dismissed.

Plaintiff James B. McCartt was over age 60 when his employer terminated him in a downsizing. McCartt's prior 1st-level manager Taylor reported to McCartt that his 2d-level manager told Taylor in the latter's mid-year evaluation meeting that McCartt "is too old and set in his ways to make the changes necessary. We need to, more or less, move in different directions." One month later McCartt's 1st and 2d level managers informed him of his termination.

Held: The 2d-level manager's statement was sufficient evidence of age-discriminatory animus to justify denial of summary judgment.

The court said it was "analogous to the cases finding direct evidence of age bias . . . First, the statement clearly suggests a negative view of McCartt's age, unlike . . . where the speaker merely observed the fact that the plaintiff was old and that he had announced his retirement. . . .The present action is also unlike . . .where the speaker could have merely been suggesting that the plaintiff leave, rather than suggesting that he leave *because of* his age . . . .Instead . . . the statement is similar to the supervisor's statement in *Wells[v. New Cherokee Corp.*, 58 F.3d 233 (6th Cir. 1995)], where the speaker said that the employee was "too old to do the job." 58 F.3d at 237.

The court added: "Also, the offending statement suggests animus because it directly concerns the plaintiff and the adverse employment decision at issue. . . . [The] statement is also dissimilar to [cases] where the speaker never mentioned the possibility of an adverse employment decision. . . . . Here, [the second-level supervisor] allegedly stated a need to 'move in a different direction'."

Thus, "[the] statement . . . sufficiently suggests illegitimate bias to create an issue of material fact for the jury to decide. . . . . Taylor's reaction to the remark supports this fact, as he was so 'shocked' and 'upset' that he informed co-workers at Kellogg of the interaction."

d. ***Cage v. City of Chicago***, No. 1:14-cv-16818 (N.D. Ill.) (Feb. 25, 2016).

Summary judgment motion by defendant-employer City Department of Water Management denied. For employer to be responsible under ADEA, supervisor need only be "influential participant" in adverse employment action – here suspension – and not exert a "singular" influence.

The district court gave credence to age-based epithets allegedly used by supervisor who assertedly "heavily influenced" suspension of the plaintiff, an African-American female: "old black b----" and "old n----- b----."

e. ***Morse v. Ill. Dep't of Corr.*,** No. 1:12-cv-10263, 2015 U.S. Dist. LEXIS 141580 (N.D. Ill. Oct. 16, 2015)

Defendant–employer state prison system denied summary judgment. Plaintiff former state dental assistant raised fact issue for trial whether order that she submit to a mental exam and her suspension until she complied violated ADEA.

Alleged ageist statements relied on by district court included: that plaintiff was "old and slow" (by supervisor); and that plaintiff could be replaced by younger staff who would be paid much less (by prison warden).

2. **Examples of Large Recoveries (in the past year)**

   a. ***Simers v. Los Angeles Times Commc'ns, LLC*,** Cal. Super. Ct., No. BC524471 (Jan. 5, 2016) ($5 million). Court reduced jury award of $7.1 million by deleting $2.1M in economic damages, leaving $5M in noneconomic damages. Plaintiff was demoted and resigned.

   b. ***King v. CVS Caremark Corp***., No. 1:12-cv-01715 (N.D. Ala.) (Feb. 23, 2016) ($1.23 million). Jury awarded $1,065,383 to former pharmacist fired when he was 65; court doubled this (to $2,130,766), awarding liquidated damages for willful conduct. The court later vacated award of life insurance benefits valued at $450,000 – or $900,000 when doubled (because compensatory award included life insurance premiums and plaintiff had not died).

   c. ***EEOC v. PMT Corp.***, No. 4-cv-00599 (D. Minn.) (Mar. 4, 2016) ($1.02 million and consent decree providing injunctive relief – revised hiring practices for sales reps; four years of reports and monitoring; training for all employees involved in hiring; and retention of HR consultant to review and recommend workplace changes). Suit involved practices 2007-16 resulting in 70 sales rep hires, but none of the applicants over age 40 (or female)).

   d. ***Karlo v. Pittsburgh Glass Works, LLC***, No. 2:10-cv-01283 (W.D. Pa.) ($922,000) (Jan.22, 2016). Jury awarded $362,052 in backpay and $560,008 in front pay in this age retaliation case arising out of a 2009 RIF. Post-trial motions - including for a new trial – are pending, as is an appeal on behalf of opt-in plaintiffs denied the opportunity to maintain a collective action. (The jury award was followed by a finding of willfulness so the $ could double.)

   e. ***EEOC v. Tepor, Inc.***, No. 4:12-cv-00075 (E.D. Tenn.) ($600,000 to be divided among 25 older laid-off workers, and a two-year consent decree providing injunctive relief – a new layoff policy; a new policy prohibiting age bias, including detailed reporting requirements; annual employee training; and EEOC monitoring and compliance reviews).

   f. ***Dinkgrave v. Genova Prods., Inc.***, No. 14-103756 (Mich. Cir. Ct.) (Oct. 29, 2015) ($550,000). Settlement of claims under Michigan Elliot-Larsen Civil Rights Act by former executive of gutter and fencing products firm terminated at age 63 after 30 years with his employer. "Don, you're a dinosaur."

   g. ***Gerundo v. AT&T, Inc.***, No. 5:14-cv-05171 (E.D. Pa.) (Han 13, 2016) ($370,000). Jury award to senior executive "surplussed" while AT&T retained younger, less qualified employees.

D. Disparate Impact: What Isn't an RFOA? Is age bias in hiring covered DI?

1. **Not an RFOA?**

a. **A maximum years of experience requirement?** *Kleber v. CareFusion Corp.*, No. 1:15-cv-01994 (N.D. Ill.) (Complaint filed March 5, 2015).

". . . Plaintiff submitted an online application for the 'Senior Counsel, Procedural Solutions,' position after seeing its announcement on the Defendant's website. The 'Qualifications' for the position included the requirement that candidates have '3 to 7 years (no more than 7 years) of relevant legal experience." Complaint, ¶1.

"At approximately the same time, defendant had another advertisement on its website for the position of 'Senior Counsel, Labor & Employment,' which included a requirement that any applicant have 'no more than 5 years[] of legal experience . . . ." *Id.*, ¶23.

"Although he was taken aback . . . Mr. Kleber still applied . . . for several reasons: first, . . . [he] has been out of work for over three years, and there are mounting strains on his family's financial situation. Second, the position genuinely interested him. . . . the job announcement described a position that appears anything but entry-level. . . . the person selected would be required to [perform] 'without significant supervision' . . . ' . . . assume complex projects . . . independently manage . . . ' [and] 'work autonomously' . . . ." *Id.,* ¶24

"In its . . . response to Mr. Kleber's charge of age discrimination, . . . the Defendant stated that it set a maximum of years of legal experience . . . 'based on the reasonable concern that an individual with many more years of experience would not be satisfied with less complex duties or taking direction from an attorney with less experience which could lead to issues of retention." *Id.*, ¶26.

"On information and belief the selected candidate was 29 years old." *Id.*, ¶27.

b. **Near-exclusive recruiting on-campus?** *Rabin v. PricewaterhouseCoopers LLP*, No. 3:16-cv-02276 (N.D. Ca.) (Complaint filed April 27, 2016).

"PwC maintains discriminatory policies, patterns, and/or *practices that have an adverse impact* on applicants and prospective applicants ages 40 and older in violation of the ADEA *and are not, and cannot be, justified by reasonable factors other than age, including* but not limited to the following: its *near-exclusive reliance on "Campus" track hiring to fill entry-level accounting positions*, its requirement that applicants for entry-level positions be currently affiliated with a college or university, its failure to advertise the vast majority of open entry-level positions to the general public, its preference for hiring and retaining 'Millennials,' and its mandatory early retirement policy." Complaint, ¶80.

c. **Hiring profile favoring recent grads?** *Villarreal v. R.J. Reynolds Tobacco Co., et al.,* No. 2:12-CV-0138 (N.D. Ga.) (Complaint filed June 6, 2012)

"The RJ Reynolds resume review guidelines used by Defendants in screening applications for the Territory Manager position included criteria that, although not expressly directed at age, have disparate impact on applicants over the age of 40, in violation of the ADEA. Those criteria include, without limitation: a. That the "Targeted Candidate[s]" are those "2-3

years out of college" or "[r]ecent college grad[s];" b. That the "Targeted Candidate[s]" are those who "[a]djust[ ] easily to changes;" and c. The directive to "Stay Away From" applicants who have been "[i]n sales for 8-10 years." Complaint, ¶46

"The "Blue Chip TM" profile also included criteria that, although not expressly directed at age, have disparate impact on applicants over the age of 40, in violation of the ADEA, including, without limitation, that a "Blue Chip TM" has "1-2 years of experience." *Id.,* ¶47.

2. **Is disparate age impact in hiring prohibited discrimination?**

***See Villarreal v. R.J. Reynolds Tobacco Co.*, 806 F.3d 1288 (11th Cir. 2016), *vacated by, rehearing, en banc, granted by Villarreal v. R.J. Reynolds Tobacco Co.*, 2016 U.S. App. LEXIS 2879 (11th Cir. Feb. 10, 2016).**

a. *Hiring Criteria*: "RJ Reynolds employs regional sales representatives known as Territory Managers. With the assistance of recruiting services, the company used a set of 'resume review guidelines' in screening applicants for these positions. These guidelines list a number of characteristics RJ Reynolds wanted in its new hires, some of which relate to age. For example, the guidelines tell hiring managers to target candidates who are '2-3 years out of college' but to 'stay away from' candidates with '8-10 years' of prior sales experience. As it turns out, RJ Reynolds's hiring statistics suggest a pattern of hiring younger applicants. Of the 1,024 people hired as Territory Managers from September 2007 to July 2010, only 19 were over the age of 40." 806 F.3d at 1290-91.

b. *Charge Filed* (RJR: after being contacted by a "plaintiff's class action attorney"). "Mr. Villarreal first applied for a Territory Manager [TM] position in November 2007 by submitting an online application. He was 49 years old at the time. RJ Reynolds never responded to his application. . . . on May 17, 2010, Mr. Villarreal filed a [collective action] charge of unlawful discrimination with the [EEOC], alleging that RJ Reynolds had discriminated against him on the basis of his age. . . . While his charge . . . was pending. . . Mr. Villarreal applied [to be a TM] five more times, and was rejected each time. He amended his charge . . . to add these applications and rejections." *Id.* at 1291.

c. *District Court*: Dismissed disparate impact claim on legal grounds and dismissed disparate treatment claim regarding 2007 job application as untimely; denied motion to amend, in order to supplement argument for tolling, on grounds it would be futile. Villarreal voluntarily dismissed remaining disparate treatment claims and appealed issues of equitable tolling and of availability of disparate impact hiring claim under the ADEA.

d. *Panel Ruling*: "[F]irst . . . a question of first impression in this Circuit: whether § 4(a)(2) of the ADEA**,** 29 U.S.C. § 623(a)(2), authorizes disparate impact claims by applicants for employment. We hold that it does, though not because the language of the statute plainly requires this reading. In fact, the statute is unclear on this question. However, the Equal Employment Opportunity Commission (EEOC), the agency charged with enforcing the ADEA**,** has reasonably and consistently interpreted the statute to cover

claims like Mr. Villarreal's**.** We must defer to that reading rather than venture our own guess about what the statute means." "[S]econd, . . . whether Mr. Villarreal is entitled to equitable tolling of the ADEA's limitations period. We conclude that he is. *Id*. at 1290.

e. *Key Issues*:

i. ADEA Text, § 4(a), 29 U.S.C. § 623(a): it is 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 privileges of employment, because of such individual's age **[Disparate Treatment Provision]**; [or]

(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 **[Disparate Impact Provision]**.

ii. *Griggs v. Duke Power* and § 703(a)(2) of Title VII.

iii. The 1972 Amendment of § 703(a)(2) but not 623(a)(2) and the Analogy to *Gross v. FBL*.

iv. The Opinions in *Smith v. City of Jackson;* also, *Francis Parker* and other lower court decisions prior to *Smith.*.

v. Other Textual References to Applicants in the ADEA.

vi The ADEA's Legislative History: the Wirtz Report.

vii. EEOC's Disparate Impact Regulation.

viii.Tolling and the Reasonable Prudent Person Standard: *Reeb*.

"The District Court . . . found that Mr. Villarreal was not entitled to equitable tolling because he did not allege either that RJ Reynolds had misrepresented relevant facts or that he had diligently pursued his rights by asking the company why he had not been hired. On appeal, Mr. Villarreal contends that the District Court applied the wrong legal standard, and under the specific facts of his case, those allegations are not required. We agree."

"Forty years ago, our predecessor Circuit first considered this issue in Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924 (5th Cir. 1975). Reeb observed that courts must take special care when considering the timeliness of employment discrimination claims because an employee may not always have

enough information to file suit within the limitations period. Id. at 929-31. Indeed, as it explained, "[s]ecret preferences in hiring and even more subtle means of illegal discrimination, because of their very nature, are unlikely to be readily apparent to the individual discriminated against." Id. at 931. Thus, the court held that in employment discrimination cases, the limitations period is equitably tolled "until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." Id. at 930." 806 F.3d at 1303-04.

FEHA

A. Successes under FEHA: *Andrews v. Lawrence Livermore Nat'l Laboratory*

B. Successes under FEHA: *Anderton v. Bass Underwriters*

Bass terminated Barbara Anderton, then 61, from its Sacramento office in 2013 after almost 15 years in her position and replaced her with a much younger male. Anderton brought age and sex bias charges under FEHA.

A California Superior Court, Sacramento County jury awarded Anderton $2 million in compensatory damages Oct. 1 and $2.75 million in punitive damages Oct. 6.

Plaintiff's counsel is Mark Velez, The Velez Law Firm, Roseville, Ca.

See "Carmichael woman wins multimillion-dollar age discrimination suit," Sacramento Bee (Oct. 15, 2015), http://www.sacbee.com/news/local/crime/article39362280.html.

In her complaint, "Anderton alleged 'pushback' from Bass executives after she lobbied for a promotion for a long-tenured female subordinate in her Sacramento office occupied largely by men. Questions from executives and those waiting in the wings about her age and whether Anderton planned to retire followed, then became commonplace . . . ."

Anderton also alleged that in 2012, a corporate VP asked her "You're getting ready to retire, right?" then suggested a possible successor, though Anderton said she had no intention of retiring until age 65, and later asked, "How old are you anyways?"

Among the lines of defense pursued by Bass were that Anderton's case was a "family dispute," as her brother Joe originally hired her for Bass' Sacramento office, and further, that Bass took on Anderton when she was 47 – i.e., already an "older" worker, in mid-career.

II. TRIAL PRACTICE: WHAT WORKS IF YOU GET TO TRIAL?

State Age Discrimination Law

A. FEHA: Advantages of Litigating Age Cases in State Court in CA

B. Advantages of Litigating Age Cases in State Court in Other States

1. **More lenient (Title VII-like) intent/causation/proof standard in disparate treatment cases: "motivating factor" or equivalent vs. "but-for standard from *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009) (ADEA).**

2. **More lenient (Title VII-like) proof standard in disparate impact cases: "business necessity" vs. "reasonable factors other than age" (ADEA).**

<u>What Works</u>

A. Case Intake: Recognizing a Strong Age Case When It Walks in the Door

B. Themes that Work in Age Cases: the Reptile Theory and Beyond

C. How to Pick a Winning Jury in an Age Case

D. How to Use Technology . . . to Help Win an Age (or Any Other) Case

CUTTING-EDGE ISSUES IN AGE DISCRIMINATION & THE AGING WORKFORCE

NELA 30th Annual Convention
Atlanta, Georgia June 26, 2015

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Summary of Topics

I. **Getting to Court: Does the Older Worker Benefit Protection Act Provide a Way Around Forced Arbitration Clauses in Severance Agreements?**

II. **Disparate Treatment: Is There Such a Claim for Age Discrimination in Hiring?**

Discussion

I. Getting to Court: Does the Older Worker Benefit Protection Act Provide a Way Around Forced Arbitration Clauses in Severance Agreements?

This section draws heavily on AARP's amicus curiae brief supporting plaintiffs in *McLeod, et al. v. General Mills, Inc.*, No. 0:15-cv-00494-JRT-HB (D. Minn.). The principal authors of the brief are Laurie A. McCann, Dara S. Smith and myself.

See also attached: *McLeod, et al. v. General Mills, Inc.*, No. 0:15-cv-00494-JRT-HB (D. Minn.) (Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion to Dismiss or to Compel Arbitration) (Mar. 26, 2015).

Congress enacted the Older Workers Benefit Protection Act of 1990 ("OWBPA"), P.L. 101-433, codified at, inter alia, 29 U.S.C. § 626(f), as an amendment to the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621-34, out of concern that older workers laid off during reductions in force were being coerced into waiving their rights under the ADEA when their employers pressured them to sign broad releases of rights and claims in exchange for severance pay. The OWBPA established

that "[a]n individual may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary." 29 U.S.C. § 626(f)(1) (2012). It set forth strict requirements that a defendant-employer "shall" meet in order to prove, "in a court of competent jurisdiction," that the waiver meets these requirements. 29 U.S.C. § 626(f)(3). Years later, the Supreme Court reinforced Congress' intent when it flatly rejected a defendant-employer's attempt to bend the strictures of this statutory requirement, explaining that the ADEA "incorporates no exceptions or qualifications," and refusing to "open the door to an evasion of the statute." *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427 (1998).

Nonetheless, in *McLeod v. General Mills, Inc.*, No. 0:15-cv-00494-JRT-HB (D. Minn.), the employer argues that because the plaintiffs (its former employees) signed releases (during their termination by General Mills in a large-scale reduction in force) purporting to waive their ADEA claims, their right to a jury trial, and their right to bring a collective action, the district court should not "take Congress at its word," *Oubre*, 522 U.S. at 427, but rather, should dismiss the plaintiffs' ADEA claims entirely or submit them to arbitration without first determining whether the plaintiffs' waivers were knowing and voluntary under the OWBPA. AARP and the plaintiffs argue that the district court should not allow this "evasion of the statute." *See Oubre*, 522 U.S. at 427. Instead, they argue that the district court should require General Mills to meet its statutory burden to prove, *in the district court*, that the release of ADEA rights and claims – including the individual arbitration clause – met the stringent requirements Congress imposed for precisely these circumstances. The OWBPA's statutory text and the Supreme Court's instructions in *Oubre*, plaintiffs and AARP contend, require nothing less.

A. The OWBPA's Plain Language Requires a Defendant-Employer to Prove the Enforceability of a Release of ADEA Rights and Claims in a "Court of Competent Jurisdiction," Not at Arbitration.

Because the OWBPA's language – i.e., its text stating that an employee "may not waive any right or claim" and further, that an employer bears the burden of proof "in a court of competent jurisdiction" that a waiver was "knowing and voluntary" – is "plain, simple, and straightforward, the words must be accorded their normal meanings." *United States v. Jones*, 811 F.2d 444, 447 (8th Cir. 1987); *see also Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" (internal citations omitted)).

The ADEA's legislative scheme makes this meaning especially clear. *See King v. Ahrens*, 16 F.3d 265, 271 (8th Cir. 1994) ("[W]hen the plain language of a statute is clear in its context, it is controlling." (internal citations omitted)). Another subsection of the ADEA setting out various other affirmative defenses to age discrimination claims, 29 U.S.C. § 623(f)(2), provides that a party arguing that its allegedly discriminatory actions were taken "to observe the terms of a bona fide seniority system . . . not intended to evade the purposes of th[e ADEA]," *id.* § 623(f)(2)(A), or "to observe the terms of a bona fide employee benefit plan," § 623(f)(2)(B)(i) and (ii), must prove that defense "in *any civil enforcement proceeding* brought under this chapter." 29 U.S.C. § 623(f)(2) (2012) (emphasis added). Different words used in the same statute are presumed to have different meanings. *See, e.g.*, *Russello v. United States*, 464 U.S. 16, 23 (1983) ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each.")

This conclusion is not undermined by cases holding that the *McLeod* plaintiffs may agree to arbitrate their claims rather than bringing them in court, notwithstanding statutory language (including the language of the ADEA) stating that individuals have a right to sue "in a court of competent jurisdiction." *See, e.g.*, *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 670-71 (2012) (discussing cases, including *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), in which the Court "recognized that contractually required arbitration of claims satisfies the statutory prescription of civil liability in court"). In *CompuCredit Corp.*, for instance, the Court explained that the description of a civil cause of action "in the context of a court suit" is not a "congressional command" precluding arbitration. *Id.* at 670.

Unlike the provisions analyzed in such cases, the OWBPA's language is not permissive; it is mandatory. *See* 29 U.S.C. § 626(f)(3) (2012). It does not provide that a plaintiff "may" bring a suit in court, but rather, it commands that a party raising a release of rights and claims as an affirmative defense "shall" prove that it has met its burden *in court*. *Id.; see Lopez v. Davis*, 531 U.S. 230, 241 (2001) (noting Congress' use of a mandatory "'shall' . . . to impose discretionless obligations"); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("[T]he mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion.")

Employees can in appropriate circumstances waive their right to sue in court by agreeing to pursue their claims in an arbitral forum, but they cannot waive a defendant's congressionally mandated obligation to meet the OWBPA's burden of proof in court, rather than at arbitration. *See Oubre* at 426-27 ("Courts cannot with ease presume ratification of that which Congress forbids."). Consequently, the OWBPA's text

unequivocally requires a district court, rather than an arbitrator, to assess whether a defendant employer has demonstrated that a release of rights and claims was knowing and voluntary under the OWBPA.

B. The OWBPA's Legislative History Supports the Same Interpretation.

Congress chose the "court of competent jurisdiction" language deliberately. It was concerned about the need for judicial supervision to ensure that waivers of ADEA rights and claims were genuinely knowing and voluntary. The report of the Senate Committee on Human Labor and Resources accompanying the OWBPA, as enacted by Congress and signed into law by President George H. W. Bush, expresses concern about the fact that waivers in ADEA cases would not be supervised by the EEOC and emphasizes the need for the OWBPA's requirements to "be strictly interpreted to protect those individuals covered by the Act." S. Rep. No. 101-63, at 31 (1990). The section of the Report discussing "[w]aivers as an affirmative defense" not only stresses that the party seeking to enforce the release bears the burden to prove its validity, but also expressly reaffirms that the party seeking enforcement must meet this burden "in a court of competent jurisdiction." *Id.* at 35.

This language further demonstrates that in § 626(f)(3)of the ADEA, in contrast to any other section in the statute, Congress deliberately chose to insert this language out of a desire for unequivocal clarity about the forum in which defendant-employers must prove that individuals knowingly and voluntarily waived their ADEA rights and claims. It was Congress' unambiguously-stated intent to ensure that the OWBPA was strictly enforced in court, to assure a court's supervision of older workers' waivers of rights and claims.

C. An Individual Arbitration Clause in a Severance Agreement Waiving the Right to a Jury Trial and the Right to Bring a Collective Action Is Unenforceable Unless It Was Knowing and Voluntary.

The severance agreement in the *McLeod* case contains an individual arbitration clause, reciting an agreement to arbitrate all disputes and to pursue claims only on an individual basis. This arbitration clause, if enforced, would waive the plaintiffs' right to a "trial by jury" under the ADEA. *See* 29 U.S.C. § 626(c)(2) (2012); *see also Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 585 (1978) (holding that plaintiffs have a right to a trial by jury on factual issues in ADEA cases). The language regarding individual adjudication would, if enforced, waive the plaintiffs' right to bring a collective action by suing on behalf of themselves and "other employees similarly situated," a right also conferred by the ADEA. *See* 29 U.S.C. § 216(b) (2012) (incorporated by reference into the ADEA by 29 U.S.C. § 626(b)); *see also Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 167-68 (1989) (discussing collective actions under ADEA).

Because the OWBPA unambiguously requires a defendant to prove in court that a waiver was knowing and voluntary in order to enforce a waiver of "any right or claim under the [ADEA]", General Mills must meet this burden in the *McLeod* case to successfully enforce the individual arbitration clause. *See Hammaker v. Brown & Brown, Inc.*, 214 F. Supp. 2d 575, 580-81 (E.D. Va. 2002) ("[T]he plain meaning of the statute requires that waivers of any statutory right, including the right to a jury trial, must conform to the OWBPA to be enforceable."); *Thiele v. Merrill Lynch, Pierce, Fenner & Smith*, 59 F. Supp. 2d 1060, 1064 (S.D. Cal. 1999) ("Section 626(f)(1) is not ambiguous about the domain of protected rights because it defines that domain as all rights conveyed

by the ADEA. As such, the plain language of this statute requires that waivers of *any* statutory ADEA rights must meet the § 626(f)(1) requirements.").

Moreover, *Oubre* makes clear that the OWBPA supersedes all other sources of authority in assessing the enforceability of ADEA waivers; it "incorporates no exceptions or qualifications." *Id.* at 427. Accordingly, the *McLeod* case is unlike other contexts where the Federal Arbitration Act (FAA), Pub. L. No. 68–401, 43 Stat. 883 (1925), may require arbitration clauses to be treated as severable and enforceable independent of contract principles that would otherwise invalidate them as part of an unenforceable agreement. *See, e.g., Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006). When the agreement, like the one at issue in *McLeod*, purports to waive "any right or claim" under the ADEA, § 626(f), the OWBPA unequivocally mandates that the defendant prove that this waiver was knowing and voluntary as to *all* of those rights. *See Oubre*, 522 U.S. at 426-27. Nothing in the statute, which postdates the FAA by more than a half century, allows individual arbitration agreements to escape this unqualified requirement.

This principle is entirely consistent with cases holding that the ADEA permits individuals to agree to arbitration. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991). Indeed, this view harmonizes the goals of the FAA with the goals of the OWBPA by permitting individuals to waive rights and claims under the ADEA, including the right to a jury trial and the right to use the collective action mechanism. Nor does this approach do anything to upset any agreement to arbitrate any other rights or claims arising under numerous other statutes. A court must simply ensure that in the limited category of instances in which older workers agree to waive their rights to bring

collective age discrimination actions or to bring those age discrimination actions in a judicial forum, their decision to do so is knowing and voluntary.

D. Congress Enacted the OWBPA to Protect Vulnerable Older Workers from Being Pressured into Waiving Age Discrimination Claims in Exchange for Severance Pay, Particularly in the Context of Large-Scale Reductions in Force in Which Affected Workers Typically Are Pressured into Waiving All Potential Rights and Claims.

A case like *McLeod* presents exactly the scenario Congress had in mind when it enacted the OWBPA. The OWBPA's legislative history unequivocally evinces Congress' concern about older workers forfeiting their ADEA claims in exchange for severance pay during large reductions in force. Indeed, the report of the Senate Committee on Labor and Human Resources expressly stated that its "major concern . . . [was] that early retirees or employees being offered the chance to participate in exit incentive or other group termination programs can be effectively forced to waive their right to file a claim when the employer conditions such participation on the signing of a waiver." S. Rep. 101-79, at 9 (1989). The Committee explained that workers in these circumstances are often especially vulnerable to coercion given their relatively low wages, lack of savings, and dishearteningly low likelihood of finding other employment. *Id.* In addition, the Committee pointed to specific abusive practices experienced by older workers who were offered severance pay in exchange for a waiver of their ADEA rights and claims (along with numerous other rights and claims) when faced with termination.[1] *Id.* at 9-10. The Committee described older workers' testimony that they "signed waivers without knowing or understanding the facts of any claim they might have." *Id.* at 10. These

[1] The waiver in *McLeod*, as in most severance agreements, goes far beyond the ADEA to cover claims under myriad federal and state employment laws. The focus on ADEA rights in OWBPA cases should not mask this huge benefit to employers in reduction in force cases, or even in individual termination cases.

employees sought information from their superiors, who falsely advised them, without fear of contradiction, that reductions in force that were actually focused on eliminating older workers were "economically motivated" or part of a general restructuring. *Id.* at 10-11. The Committee also discussed some employers' "extreme pressure" on employees to waive their ADEA rights and claims, which was "tantamount to coercion." *Id.* at 11. These older workers were faced with a Hobson's choice between accepting whatever severance was available in exchange for a waiver of their rights, and facing long-term unemployment with no severance and little savings. *See id.* at 11-12. Moreover, employers refused to allow such older workers any time to consider that choice. *Id.*

The enactment record of the OWBPA and the ADEA both reveal that older workers with potential ADEA claims faced especially severe consequences in reduction-in-force situations, and, thus, especially profound danger of coercive pressure to waive their ADEA rights. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 2(a)(3), 81 Stat. 602 ("[T]he incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave…."). This continues to be the case. Since long before the ADEA's enactment in 1967, and long before the OWBPA's birth a generation later, older workers consistently have faced much greater difficulty securing employment after losing a job in a reduction in force.

This longstanding problem was a critical consideration in the enactment of the OWBPA generally, and in requiring close supervision of waivers of ADEA rights in severance agreements in particular. The Senate Committee on Labor and Human

Resources noted that "[t]he problem [of coercive pressure on older workers] is particularly acute in large-scale terminations and layoffs," where individuals are not as aware of all of the surrounding circumstances, including "that age may have played a role in the employer's decision, or that the program may be designed to remove older workers from the labor force." S. Rep. 101-79, at 9 (1989). The Committee explained that "[o]lder workers too often learn of these group termination programs in an atmosphere of surprise and uncertainty," when they are unaware of their employers' motives, and that once terminated, they are no longer in a position to discover whether the employers hire younger workers to replace them. *Id.* at 21.

Agreements in these circumstances, as opposed to individual separation agreements, tend to be standardized, one-size-fits-all, non-negotiable packages. *Id.* Moreover, whereas individually terminated workers may be able to evaluate the validity of their employers' reasons for terminating them specifically – *e.g.*, alleged poor performance or other individual issues – workers terminated as a group are "generally advise[d] . . . that the termination is *not* a function of their individual status," leaving them to make a critical choice without necessary information. *Id.*

Even cases concluding that pre-dispute agreements to arbitrate age discrimination cases need not comply with the OWBPA concede that the OWBPA was enacted to protect workers from hastily waiving claims *in separation agreements*, in exchange for severance pay. *See*, *e.g.*, *Bennett v. Dillard's, Inc.*, 849 F. Supp. 2d 616, 618 (E.D. Va. 2011) ("[T]he OWBPA was adopted to stop employers from coercing or misleading older employees into signing unfair separation agreements. . . . It addresses situations in which the employer uses its economic power (or the threat of exercising economic power) to

push older employees to accept a severance package."); *Linton v. KB Home Ind., Inc.*, No. 1:07–CV–0048–DFH–TAB, 2007 U.S. Dist. LEXIS 48780, at *14 (S.D. Ind. July 5, 2007) (unpublished) ("Congress enacted the OWBPA to 'ensure[ ] that older workers are not coerced or manipulated into waiving their rights to seek legal relief under the ADEA.'" (internal citations omitted)).

II. Disparate Impact: Is There Such a Claim for Age Discrimination in Hiring?

This section draws heavily on AARP's amicus curiae brief supporting the plaintiff-appellant in *Villarreal v. R.J. Reynolds Tobacco Co.,* No. 15-10602 (11th Cir.). The principal authors of the brief are Laurie A. McCann, Dara S. Smith and myself.

See also attached: *Villarreal v. R.J. Reynolds Tobacco Co.,* No. 15-10602 (11th Cir.). (Brief of Plaintiff-Appellant Richard M. Villarreal) (Mar. 23, 2015).

When Congress enacted the ADEA, the most pressing problem it sought to remedy was rampant age discrimination in hiring, including age-neutral hiring criteria unrelated to performance that unfairly disadvantaged older workers. Almost 50 years later, this problem still exists. Despite some progress, older workers are still overrepresented among the long-term unemployed. The issue whether the ADEA provides a claim to challenge such age-neutral hiring barriers affecting older workers has been posed by a negative decision in *Villarreal v. R.J. Reynolds Tobacco Co.*, No. 2:12-CV-0138-RWS, 2013 U.S. Dist. LEXIS 30018 (N.D. Ga. Mar. 6, 2013).

The district court in *Villarreal* ruled that § 4(a)(2) of the ADEA, 29 U.S.C. § 623(a)(2), does not support a disparate impact claim to challenge hiring discrimination on grounds of age. 2013 U.S. Dist. LEXIS 30018 at *12-13. From 2007-11, Villarreal, an experienced middle-aged salesman, applied for positions to market RJ Reynolds ("RJR") tobacco products. In 2012, Villarreal filed an ADEA charge with the EEOC upon

learning that RJR hired based on "resume review guidelines" and a "Blue Chip TM" profile preferring recent college graduates.

The district court ignored the plain text of § 4(a)(2) of the ADEA, as well as the ADEA's legislative history, thereby denying victims of age discrimination in hiring one of the most effective means to combat covert age bias. The plaintiff presented the district court with identical language that the U.S. Supreme Court found prohibits neutral hiring policies or practices that adversely impact Title VII's protected groups, yet the district court read key words out of the ADEA's comparable section to justify its decision.

A. The Plain Language of § 4(a)(2) of the ADEA Supports Applying Its Protections to Prospective Employees.

In *Smith v. City of Jackson*, the Supreme Court concluded that since Congress used identical language in sections 4(a)(2) of the ADEA and 703(a)(2) of Title VII, Congress intended their protections to be the same, as to both *whom* they protect and *what* they protect. 544 U.S. 228, 233 (2005) ("Except for substitution of the word 'age' for the words 'race, color, religion, sex, or national origin,' the language of [§ 4(a)(2)] in the ADEA is identical to that found in § 703(a)(2) of the Civil Rights Act of 1964 (Title VII).") Acknowledging the existence of "differences between age and the classes protected in Title VII," *Smith* declared nonetheless that "Congress obviously considered those classes of individuals to be sufficiently similar to warrant enacting identical legislation at least with respect to employment practices it sought to prohibit." *Id*. at 236 n.7.

The district court in *Villarreal* mistakenly focused on the fact that § 703(a)(2) of Title VII was amended – after it was incorporated in *haec verba* into the ADEA, *Lorillard v. Pons*, 434 U.S. 575, 584, 98 S. Ct. 866, 872 (1978) – to add the phrase

"applicants for employment." On this basis, the district court incorrectly applied the flawed reasoning of *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 129 S. Ct. 2343 (2009), to presumptively conclude that by not similarly amending the ADEA in 1972, Congress intentionally narrowed the scope of § 4(a)(2) of the ADEA to exclude prospective employees from its protections. In so holding, the district court took no notice of the fact that the 1972 amendment to Title VII was intended merely to express Congress's *agreement* with court decisions already applying § 703(a)(2) to job applicants.

In addition to protecting the same broad group of "any individual[s]," sections 703(a)(2) and 4(a)(2) also prohibit the same type of employer actions. As the *Smith* Court explained, "[n]either § 703(a)(2) nor the comparable language in the ADEA simply prohibits actions that 'limit, segregate, or classify' persons; rather, the language prohibits actions that 'deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's race or age." *Id*. at 235, 1542 (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988)) (emphasis in original).

It was in this context that *Smith* identified a "key textual difference" between sections 4(a)(1) and 4(a)(2) of the ADEA. The *Smith* Court juxtaposed § 4(a)(1) – which "makes it unlawful for an employer 'to fail or refuse to hire . . . *any individual* . . . because of *such individual's* age,'" with § 4(a)(2) – which "makes it unlawful for an employer 'to limit. . . 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,'" to stress the fact that in § 4(a)(1) the focus "is on the employer's actions with respect to the target individual," but in § 4(a)(2) the

focus is on the employer's actions regarding its employees generally and how those actions may adversely affect an *individual*. 544 U.S. at 236 n.6, 125 S. Ct. at 1542 n.6 (emphasis added). Significantly, the *Smith* Court did not deem significant enough to warrant any mention the fact that § 4(a)(2) of the ADEA does not include the term "applicants" or refer to hiring.

Additional textual support demonstrating that Congress's focus in enacting § 4(a)(2) of the ADEA was *individuals* who might be deprived of employment opportunities, or who might be otherwise adversely affected by the way an employer limits, segregates or classifies its employees, is the parallel structure of the ADEA's other prohibitory sections. In addition to sections 4(a)(1) and 4(a)(2), the phrases "any individual" and "because of such individual's age" also appear in: § 4(b), 29 U.S.C. § 623(b) (prohibiting age discrimination by employment agencies); § 4(c)(1), 29 U.S.C. § 623(c)(1); and § 4(c)(2), § 623(c)(2) (prohibiting age discrimination by labor organizations). The idea that "any individual" is meaningless in § 4(a)(2), but significant in the others, is inconceivable.

The only section in the ADEA's prohibitions that does not use the term "any individual" is the seldom-cited § 4(a)(3), which makes it unlawful "to reduce the wage rate of *any employee* in order to comply with this chapter." 29 U.S.C. § 623(a)(3). This is the only ADEA prohibition that focuses on an employer's current employees; after all, it is impossible to reduce the wage rate of anyone but current employees. Section 4(a)(3) demonstrates that Congress knew how to limit a prohibited practice to current employees by using only the term "employees" and not the broader term "any individual" in the textual description of the prohibited practice. By contrast, in § 4(a)(2) Congress

prohibited employers from actions that "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*." 29 U.S.C. § 623(a)(2) (emphasis added).

Finally, Congress made one other choice of legal significance regarding the scope of section 4(a)(2) of the ADEA. That is, Congress included the term "employees" in § 4(a)(2) *in addition to* "any individual." Thus, in § 4(a)(2), Congress prohibited employers from taking actions regarding its employees generally that would discriminate against "any individual." Both the Supreme Court, and the Eleventh Circuit – in which *Villarreal* is pending, have held: "Th[e] deliberate variation in terminology within the same sentence of a statute suggests that Congress did not interpret the two terms as being equivalent." *United States v. Williams*, 340 F.3d 1231, 1236 (11th Cir. 2003) citing *United States v. Bean*, 537 U.S. 71, 76 n.4 (2002).

The district court in *Villarreal* erred in selectively ignoring significant terms in § 4(a)(2) of the ADEA and effectively rewriting that section to only protect current employees. This approach was flawed because the ADEA's prohibitions, which are contained in a remedial statute, are to be "broadly construed to effectuate its general purpose: ameliorating age discrimination in employment." *Sperling v. Hofffmann-LaRoche, Inc.*, 118 F.R.D. 392, 403 (D.N.J. 1988). *See also Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 765-66 (1979) (Blackmun, J., concurring).

Applying the proper analysis in *Villarreal* would require the Eleventh Circuit to interpret R.J. Reynolds' actions limiting its Territory Manager employees to those who satisfied its ideal candidate profile as "depriv[ing] or tend[ing] to deprive [such] individual[s]" – who did not meet the ideal candidate profile (or satisfy RJR's "Resume

Review Guidelines") – of the opportunity to be employed by R.J. Reynolds as a Territory Manager. An individual cannot become an employee if the way that a defendant employer limits its ideal employees eliminates them from contention.

B. *Smith v. City of Jackson* Supports Applying § 4(a)(2)'s Protections to Prospective Employees.

In the district court in *Villarreal*, the district court recited from Justice O'Connor's concurring opinion in *Smith v. City of Jackson* to declare that § 4(a)(2) does not protect individuals who experience age-based bias during their efforts to find employment. *See Villarreal v. R.J. Reynolds Tobacco Co.*, 2013 U.S. Dist. LEXIS 30018, at *14-15 (N.D. Ga. Mar. 6, 2013). Justice O'Connor, however, was not speaking for the Court in her concurrence, which has no precedential value. The actual *Smith* decision, i.e., the plurality opinion, is more of an Achilles heel than a boon to the argument that § 4(a)(2) does not protect applicants. After all, in concurring, Justice Scalia indicated that he "agree[d] with all of the Court's reasoning," 544 U.S. at 243, but wrote separately to state his opinion that the Court should have "deferr[ed] to the reasonable views of the Equal Employment Opportunity Commission . . . ." *Id.*

And the plurality's failure to address whether § 4(a)(2) protects "applicants" does not change the fact that Justice O'Connor's statement has no precedential value. *See Alexander v. Sandoval*, 532 U.S. 275, 285 n.5 (2001) ("[A majority's] holding is not made coextensive with the concurrence because their opinion does not expressly preclude . . . the concurrence's approach. The Court would be in an odd predicament if a concurring minority of the Justices could force the majority to address a point they found unnecessary (and did not wish) to address, under compulsion of [the] principle that silence implies agreement.").

The *Smith* plurality's analysis of differences between sections 4(a)(1) and 4(a)(2) of the ADEA did not discuss the absence of the terms "hiring" or "applicants" in section 4(a)(2); in addition, the plurality noted only two textual differences between the ADEA and Title VII that "make it clear that even though both statutes authorize recovery on a disparate-impact theory, the scope of disparate-impact theory under ADEA is narrower than under Title VII." 544 U.S. at 2404. These two differences are: (1) the ADEA's reasonable factors other than age (RFOA) provision, 29 U.S.C. § 623(f)(1), is the employer defense to a disparate impact under the ADEA as opposed to "business necessity" under Title VII, and (2) "the pre-1991 interpretation [in *Ward's Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)] of Title VII's identical language" (in § 703(a)(2), as in § 4(a)(2) of the ADEA) "remains applicable to the ADEA." 544 U.S. at 240.

Limiting disparate impact claims under the ADEA to those brought by current employees would render the disparate impact theory under the ADEA narrower than under Title VII. Yet *Smith* did not mention that as a distinction between the two. Instead, *Smith* listed two age discrimination in hiring cases as "appropriate" ADEA disparate impact cases. 544 U.S. at 237, 238 n.8 (citing *Wooden v. Bd. of Ed. of Jefferson Cnty.*, 931 F.2d 376 (6th Cir. 1991) and *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419 (10th Cir. 1993)).

Smith supports applying the disparate impact theory to combat age discrimination in hiring and in no way suggests that it cannot be used by older job applicants victimized by employer policies or practices that adversely affect their efforts to secure employment. *Smith* delineated the only two ways Congress narrowed the scope of the disparate impact theory under the ADEA. No additional limitations should be implied. *See Andrus v.*

Glover Const. Co., 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of contrary legislative intent.") (internal citation omitted).

C. The ADEA's Legislative History Addresses the Unjust Impact of Age-Neutral Barriers to Hiring Older Workers and Reflects Congress's Intent to Provide a Means to Secure Relief for Such Injuries in the Form of a Disparate Impact Claim.

Introduction. The ADEA's legislative record powerfully supports the proposition that eliminating hiring discrimination against older workers was Congress's principal focus – indeed, arguably the primary purpose – in passing the ADEA. Thus, it is nonsensical to conclude that Congress favored significantly lesser protection for the job-seeking group it was most concerned about.

Interpreting the ADEA to allow disparate impact hiring claims is consistent with the stated purposes of the law which grew out of Congress's concern that "older workers find themselves disadvantaged in their efforts to retain employment, *and especially to regain employment when displaced from jobs,*" and that "the incidence of unemployment, especially long-term unemployment . . . is relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave." 29 U.S.C. § 621(a)(1), (a)(3) (emphasis added).

When the ADEA was enacted, approximately half of all private job openings explicitly barred applicants over age 55, and a quarter barred those over 45. *See* U.S. Dep't of Labor, *The Older Worker: Age Discrimination in Employment*, Report of the Secretary of Labor Under Section 715 of the Civil Rights Act of 1964, 6 (1965) ("Wirtz Report"). Section 4(a)(1) has been instrumental in eliminating such job ads and other blatant forms of age discrimination in hiring. However, much work remains to be done.

For instance, older workers still experience far longer periods of unemployment and are disproportionately represented among the long-term unemployed. *See* Sara E. Rix, *Long-Term Unemployment: Greater Risks and Consequences for Older Workers*, AARP Public Policy Institute (Feb. 2015), http://www.aarp.org/content/ dam/aarp/ppi/ 2015-2/AARP953_LongTerm Unemployment_ FSFeb2v1.pdf. One reason for that disparity is that employers still engage in subtle and covert discriminatory behavior to deny older job applicants fair treatment. To combat this type of bias § 4(a)(2)'s protections are critical.

The Wirtz Report. For more than three decades, the Supreme Court has looked to the 1965 report to Congress by U.S. Labor Secretary Willard Wirtz as the preeminent source for construing the legislative intent behind the ADEA. In *EEOC v. Wyoming*, 460 U.S. 226, 230-32 (1983), the Court explained that the Wirtz Report's "findings were confirmed throughout the extensive factfinding undertaken by the Executive Branch and Congress," and that after the Report's submission, Congress directed the Secretary "to submit specific legislative proposals for prohibiting age discrimination." President Johnson endorsed these proposals, and they culminated in the 1967 law enacted by Congress. *See also Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 587-91 (2004) (discussing the strong influence of the Wirtz Report on the ADEA's text).

DOL compiled the Wirtz Report after Congress directed the Secretary to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and the consequences of such discrimination on the economy and individuals affected," in Section 715 of the 1964 Civil Rights Act, Pub. L. No. 88-352, 78 Stat. 241, 265 (1964).

In the Wirtz Report, the ADEA's principal architect identified a need to combat arbitrary age-neutral employer restrictions that impede job offers to older workers, and that are unrelated to their ability to do the work well. Such barriers, the Report said, included unnecessary educational, testing and physical qualifications that compound the burdens imposed by overt age bias.

In *Smith,* a majority of Justices found the Wirtz Report highly persuasive in establishing that the ADEA encompasses disparate impact hiring claims. *Smith v. City of Jackson*, 544 U.S. 228, 238 (2005) ("we think the history of the enactment of the ADEA, with particular reference to the Wirtz Report, supports the pre-*Hazen Paper12* consensus concerning disparate impact liability."). *See Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).

Indeed, *Smith* specifically suggests that the Wirtz Report anticipated the ruling in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), in the context of unjustified hiring criteria:

> The congressional purposes on which we relied in *Griggs* have a striking parallel to . . . important points made in the Wirtz Report . . . just as *Griggs* recognized that the high school diploma requirement, which was unrelated to job performance, had an unfair impact on African-Americans who had received inferior educational opportunities in segregated schools . . . the Wirtz Report identified the identical obstacle to the employment of older workers. "Any formal employment standard which requires, for example, a high school diploma will obviously work against the employment of many older workers—unfairly if, despite his [or her] limited schooling, an older worker's years of experience have given him [or her] the relevant equivalent of a high school education." Wirtz Report 3. Thus, just as the statutory text is identical, there is a remarkable similarity between the congressional goals we cited in *Griggs* and those present in the Wirtz Report.

Smith, 554 U.S. at 235 n.5 (internal citation omitted).

While the origins of race-related and age-related inequity attributable to an unnecessary high school diploma requirement differ, the impact is the same: poorer prospects of securing jobs, in some instances unrelated to a worker's ability to perform. Thus, one specific basis for approving disparate impact liability in *Griggs* and in *Smith* was a precise form of hiring discrimination identified in the Wirtz Report. *See also* Wirtz Report at 12 ("Even for many plant production jobs in the major industries, employers for a variety of reasons seek young workers with high school educations or equivalent vocational training.").

Another "striking parallel" between the Wirtz Report and *Griggs*, also involving hiring discrimination, involves the disparate impact of testing requirements that are unrelated to job qualifications and performance. The Wirtz Report objected to arbitrary requirements that some job applicants "pass a variety of aptitude and other entrance tests." *Id.* at 14. Specifically, it noted that younger workers' "recency of education and testing experience," rather than any strong connection between test results and "average performance" or "steadiness of output," explained younger applicants' greater success in securing some jobs. *Id.* at 14-15. It reasoned that some jobs genuinely require workers with "better" or more "recent" education, but others do not. For instance, "average performance of older workers compares most favorably in office jobs, where productivity . . . r[i]se[s] with age." *Id.* at 14. Likewise, in *Griggs*, the Supreme Court faulted Duke Power for relying on aptitude test results as hiring criteria because of their lack of a "demonstrable relationship" to job performance, and grossly disparate pass rates favoring whites and disfavoring black applicants. 401 U.S. at 430-31 & 430 n.6.

Thus, six years prior to *Griggs*, the Wirtz Report described as unjust the precise hiring criteria the Supreme Court later held unlawful on a theory of disparate impact. The Wirtz Report's prescience should not be casually dismissed as coincidence and its consistent and repeated attention to inequities that disadvantaged older applicants belies the notion that the ADEA may be reasonably read to disallow hiring claims brought pursuant to the disparate impact theory.

More broadly, the overwhelming thrust of the Wirtz Report is the inhumanity of employers' irrational resistance to hiring skilled and productive older workers. The Wirtz Report opens by lamenting tragedy "at the hiring gate":

> There is . . . no harsher verdict in most men's lives than someone else's judgment that they are no longer worth their keep. It is then, when the answer at the hiring gate is "You're too old," that a man turns away, in [a] poet's phrase, finding nothing to look backward to with pride and nothing forward to with hope.

Wirtz Report at 1.

A significant portion of the Wirtz Report focuses on "[t]he most obvious kind of age discrimination in employment," but plainly does not describe it as the "only" kind of hiring age bias, i.e., "not hiring people over a certain age . . . ." *Id.* at 6, 7-11. Subsequent sections maintain a focus on hiring discrimination. For instance, they discuss the "many reasons why a particular older worker does not get a particular job," *id.* at 11, 12-16, and next, the impact on older worker hiring of employers' "personnel policies" and "seniority systems," as well as "workman's compensation laws," and "private pension, health and insurance plans." *Id.* at 15-17. The final sections also stress the challenges older workers face in finding and keeping work. *See id.* at 17-25. Nowhere does the Report indicate that hiring discrimination is a lesser problem than age bias in terminations or other aspects of

employment. It follows that ADEA claims for disparate impact hiring bias should receive equal – not less – priority based on the Wirtz Report.

Congressional Consideration of the ADEA. In reports accompanying legislation that became the ADEA, the congressional committees responsible for developing the ADEA stressed the objective of eliminating hiring discrimination. The House Committee on Education and Labor, *see* H.R. Rep. 90-805 (1967) [House Report], and the Senate Committee on Labor and Public Welfare, *see* S. Rep. 90-723 (1967) [Senate Report], stated that "the purpose of [these bills] [was] to promote the employment of older workers based on their ability." House Report at 1 (discussing H.R. 13054); Senate Report at 1 (discussing S. 830). Both reports quoted the Wirtz Report's support for legislation banning age discrimination in hiring:

> The possibility of a new nonstatutory means of dealing with such arbitrary discrimination has been explored. That area is barren * * * A clear cut and implemented Federal policy * * * would provide a foundation for a much-needed vigorous, nationwide campaign to promote hiring without discrimination on the basis of age.

House Report at 2; Senate Report at 2. Both committees also quoted President Johnson's message endorsing a draft ADEA of 1967 "transmitted to Congress" by Secretary Wirtz, and praising it as a response to the pressing need of many older workers to be hired. The President's message, both Committees observed, highlighted the numbers of unemployed older workers, their substantial (40%) representation among "the long-term unemployed," and the large amount of federal expenditures on unemployment insurance for older workers. *Id.*

In committee hearings, prominent ADEA supporters echoed themes in the Wirtz Report indicating that the proposed law was designed to address covert or indirect age

hiring restrictions. The chief sponsor of the ADEA, Senator Yarborough, declared: "It is time that we turn our attention to the older worker who is not ready for retirement – but who cannot find a job because of his age, despite the fact that he is able, capable, and efficient. He is not ready for retirement – but *he is, in effect, being retired* nonetheless, regardless of his ability to do the job." *Age Discrimination in Employment: Hearing on S. 830 and S. 788 Before the S. Subcomm. on Labor, Comm. on Labor and Public Welfare,* 90th Cong. 22 (1967) [1967 Senate Hearings] (emphasis added). He added: "Our industrial system has *apparently almost unconsciously* placed a premium on youth." *Id.* Senator Javits quoted the Wirtz Report at length, including its call for Congress to enact a law that "declares, clearly and unequivocally, and implements, as far as is practical, *a national policy with respect to hiring on the basis of ability rather than age*." *Id*. at 26 (emphasis added).

One committee witness, testifying regarding disparate impact claims, spoke to the lack of empirical evidence that non-discriminatory factors other than age explain age-based disparities in hiring data. *Id.* at 175-89 (Statement of Dr. Harold L. Sheppard, Social Scientist, Upjohn Institute for Employment Research).Dr. Sheppard described what he called the "obstacle course set up by our public institutions and private employers" confronting older workers "becoming unemployed after many years of continuous employment." *Id.* at 176. The obstacle course, he said, "includes . . . conscious and *unconscious patterns of discrimination against older jobseekers*." *Id.* (emphasis added). Sheppard rebutted the assertion that "skill level is the simple explanation for the problems of older job seekers," summarizing the results of studies using "multiple classification analysis" (now known as multiple regression analysis") that

"when every other factor was taken into account" to assess workers' unemployment, "age was still found to be significantly related to unemployment status." *Id.* at 181.

As the ADEA neared enactment, congressional leaders shepherding the law focused on the ADEA's potential to address older worker unemployment by breaking down age discrimination in hiring. Mr. Perkins, the manager of the House bill, proclaimed that it was "a bill to promote employment of middle aged and older persons on the basis of ability." 113 Cong. Rec. 34738, 34740 (1967). Perkins invoked conditions "[i]n [his] own district in Kentucky," in which "thousands of former coal miners" learned that "age is a great handicap in finding a job." *Id.* He claimed the ADEA would redress "this longstanding misconception about the employability of older workers" despite their superior "reliability, productivity, and attendance." *Id.* Senate floor manager Yarborough summarized that "[i]n simple terms, this bill prohibits [age] discrimination in hiring and firing." 113 Cong. Rec. 31248, 31252 (1967). *See id.* 31256 ("Should those 65 or older applying for positions they are eminently qualified to fill be discriminated against in favor of someone with less experience but who happens to be 10 or 20 or 30 years younger?") (Sen. Young, D., Oh.).

Finally, just days before the House agreed to final changes to the ADEA passed by the Senate, Rep. Burke offered grounds for Congress to conclude that age bias in hiring is especially serious:

> It is one of the cruel paradoxes of our time that older workers holding jobs are considered invaluable because of their experience and stability. But let that same worker become unemployed and he is considered "too old" to be hired. Once unemployed, the older worker can look forward to longer stretches between jobs than a young worker in the same position.

113 Cong. Rec. 34742 (daily ed. Dec. 4, 1967). Nowhere in the record of the ADEA's enactment is there a hint that Congress intended older applicants to have less legal protection than incumbent older workers. The evidence is entirely to the contrary. It makes no sense to interpret the ADEA to deny applicants a disparate impact claim.

D. Federal Regulations and Advisory Opinions Issued Shortly After Enactment of the ADEA Reaffirm that Age-Neutral, Non-Job-Related Hiring Restrictions with Adverse Impacts on Older Applicants Violate the ADEA.

Following the ADEA's enactment, Secretary Wirtz supervised the issuance of interpretive regulations and opinion letters implementing the ADEA. These documents support language in the Wirtz Report, in legislative hearing testimony and the law itself, to the effect that the ADEA permits older employment applicants to challenge age-neutral, non-performance-related hiring practices with an adverse disparate impact on those applicants' job prospects. This post-enactment evidence supports evidence from the ADEA's legislative record that Congress intended the ADEA to cover disparate impact hiring claims.

Within days after the ADEA went into effect, the DOL promulgated interpretive regulations. *See* 29 C.F.R. Part 860 (1968). These required, inter alia, with regard to physical requirements for job applicants and incumbents, that: (a) age-neutral fitness standards be "reasonably necessary for the specific work to be performed"; (b) a "differentiation based on a physical examination, but not one based on age" was "reasonable" only for positions which "necessitate" stringent physical requirements; and (c) pre-employment physical examinations distinguish between the physical demands of various jobs. These provisions "were entirely consistent with Secretary Wirtz's findings three years earlier that physical requirements (i.e., strength, speed, dexterity, quantity of

work) were employers' most frequently mentioned consideration for restrictions on the hiring of older workers, but that many of these requirements had 'no studied basis.'" Keith R. Fentonmiller, *Continuing Validity of Disparate Impact Analysis for Federal Sector Age Discrimination Claims*, 47 Am. U. L. Rev. 1071, 1104, n. 195, 196 (1998) (quoting Wirtz Report at 8, and referring to the Secretary's Research Materials at 4, 11-12). The Secretary submitted the "Research Materials" along with and in support of the Report. *See* Wirtz Report at ii.

In addition, the regulations provided that age-neutral employment criteria, including educational level, had to have "a valid relationship to job requirements." 29 C.F.R. § 860.103(f)(1)-(2). In this respect, the regulations also "echoed the Secretary's prior criticism of unfair educational requirements that 'penalize' the older worker [and] his finding that written tests with 'little direct relationship to the jobs' tended to preclude the employment of otherwise qualified older applicants." Fentonmiller, *supra*, at 1104-05, nn. 198-200 (citing Research Materials at 81 and at 14, and Wirtz Report at 3). *See also* 29 C.F.R. § 860.104(b) (1969) (ADEA rule revised to clarify that even a validated employee test had to be "specifically related to the requirements of the job," as well as "fair and reasonable.").

Also in 1968, Secretary Wirtz's Labor Department issued advisory opinions confirming that the ADEA applied to age-neutral employer practices, including hiring criteria. DOL declared, inter alia, that "'facially-neutral job requirements and employment practices, such as testing, must be validated and job-related.'" Fentonmiller, *supra*, at 1104 and n.204.

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Significant Age Discrimination Decisions
July 2015 – May 2016

COURT OF APPEALS CASES

ATTORNEY'S FEES; STATE LAWS; MIXED-MOTIVES. *Peterson v. Bell Helicopter Textron, Inc.*, 806 F.3d 335 (5th Tex. 2015), *cert. denied*, 2016 U.S. Lexis 2813 (U.S., Apr. 25, 2016). Plaintiff David Paterson succeeded on a motivating factor theory of age discrimination under the Texas Commission on Human Rights Act (TCHRA) in federal district court. The jury awarded him no damages after finding that he would have been terminated anyway. In response to post-trial motions and despite injunctive relief being raised for the first time in them, the District Court enjoined the defendant from "discriminating on the basis of age in determining whom to terminate in future RIFs" and awarded attorney's fees to the plaintiff. On appeal, the 5th Circuit reversed this grant of relief. The district court justified its injunctive order based on Fed. R. Civ. P. 54(c), which provides that "final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Calling this case "a paradigm of how Rule 54(c) should not have been employed," the Court found that Rule 54(c)

is inapplicable when the relief granted is sought late in a case because it prejudices defendants. The Court stated: "In sum, Peterson's failure to seek injunctive relief until after the judgment was entered unduly prejudiced Bell and waived Peterson's claim, which cannot be salvaged by Rule 54(c)."

The court also reasoned that attorney's fees were inappropriate since the plaintiff was not a prevailing party due to the appeals court order vacating injunctive relief and leaving the Plaintiff without any relief on the merits. The Fifth Circuit rejected plaintiff's argument that Title VII authorizes attorney's fees when an employee proves discrimination was a motivating factor in an employer's adverse employment decision in a mixed motive case, and so, the TCHRA does too, even in a case of age bias. The Court of Appeals concluded it was bound by Texas' substantive law to follow the "prevailing party" theory in deciding whether to reward attorney's fees.

PREXTEXT: "HONEST BELIEF". *Moffat v. Wal-Mart Stores, Inc.*, 620 Fed. Appx. 453 (6th Cir. 2015). Walmart terminated the Plaintiffs, ages 54, 62 and 59, allegedly for violating company policy – i.e., by taking home plants that otherwise would have been thrown away. Plaintiffs filed suit alleging age discrimination and claiming that Wal-Mart did not terminate three other employees, ages 19, 21, and 23, who also violated the same policy. The court found that while Wal-Mart articulated a legitimate nondiscriminatory reason for the terminations, a reasonable jury could find this reason was pretextual since Wal-Mart does not have a zero-tolerance policy for gifts violations and the violations were "technical –and seemingly innocent". The court also rejected Wal-Mart's "honest belief" defense because the Plaintiffs' manager's "testimony shows that he did not ascertain or know all the relevant facts, and that he did not think it important to know such facts before terminating Plaintiffs' employment."

PROMOTIONS; "SUBSTANTIALLY YOUNGER"; AGEIST REMARKS. *France v. Johnson*, 795 F.3d 1170 (9th Cir. 2015). The Ninth Circuit explicitly adopted the Seventh Circuit's standard for the "substantially younger" requirement, articulated in *O'Connor v. Consol. Coin Caterers' Corp*., 517 U.S. 308 (1996). France, a 54-year-old Border Patrol Agent who applied for a promotion, was turned down in favor of employees aged 44, 45, 47, and 48. The Court of Appeals considered whether France had satisfied the fourth element necessary to establish a prima facie case of age discrimination. The court initially averaged the selected employees' ages and found only an eight year average difference between them and France. However, it then decided to use instead a rule establishing a rebuttable presumption that a ten-year difference in ages between a plaintiff and a replacement worker was sufficient to support an ADEA claim. *See Hartley v. Wisc. Bell*, 124 F.2d 887 (7th Cir. 1997). The Ninth Circuit stated simply that this standard is "reasonable and workable". Despite the fact that the age difference between France and three comparators was below ten years, the court ruled France had met his burden to establish a prima facie case by presenting evidence of a remark during his job interview by one interviewer to the effect that the interviewer preferred "younger dynamic" employees for the position.

HIRING; 'NEARLY TECHNICAL"COMPARATOR. *Trask v. Sec'y, VA*, No. 15-11709, 2016 U.S. App. LEXIS 6168 (11th Cir. Apr. 5, 2016). In a failure to hire case, two female pharmacists alleged age and gender discrimination when they were not selected for newly created positions after a nationwide restructuring. The Eleventh Circuit found that the Plaintiffs' comparator was not similarly situated, i.e., "nearly identical," as he held advanced certification required for the position. The Court of Appeals noted the comparator obtained this certification

through a pilot training program available at his workplace, a program to which the Plaintiffs lacked access. But the court discounted this inequity, and instead, was persuaded of the absence of age bias by the employer's selection of a woman in her mid-50s for one of the pharmacist positions. The court ultimately affirmed a ruling below that Plaintiffs failed to present a prima facie case of age bias.

JOINT EMPLOYER; MINIMUM NUMBER OF EMPLOYEES. *Bridge v. New Holland Logansport, Inc.*, 815 F.3d 356 (7th Cir. 2016). The court affirmed the dismissal of the Plaintiff's age discrimination complaint because the employer had fewer than the 20 employees required by the ADEA. Plaintiffs attempted to prove that another company constituted a joint employer, so as to satisfy the statutory requirement. The Seventh Circuit, relying on a totality of the circumstances test emphasizing the employer's control over an employee's work, rejected Plaintiffs' proposed joint employer argument, even though certain employees performed payroll, accounting, and HR functions for both companies and the two companies shared a health insurance plan.

"SUBSTANTIALLY YOUNGER." *Liebman v. Metro Life Ins. Co.*, 808 F.3d 1294 (11th Cir. 2015). The Eleventh Circuit reversed summary judgment for the defendant-employer, permitting a termination claim to proceed, and reaffirming the *O'Connor* "substantially younger" standard in circumstances where the 49-year-old Plaintiff was just seven years older than his 42-year-old replacement (and both were within the class protected by the ADEA). The case also included an ERISA claim, as the Plaintiff alleged that he was terminated after his supervisor made statements indicating envy of the Plaintiff's generous pension benefits. Libman also introduced evidence

showing that Defendant avoided paying $90,000 in benefits by terminating the Plaintiff before his pension had fully vested.

DISTRICT COURT CASES

FEDERAL SOVEREIGN IMMUNITY. *Conn v. Am. Nat'l Red Cross*, No. 1:13-cv-01810, 2016 U.S. Dist. LEXIS 28249 (D.D.C. Mar. 7, 2016). The court determined that the American National Red Cross' Congressional charter included a "sue or be sued" clause that abrogated its federal sovereign immunity, even though it could be construed to be a federal instrumentality.

OWBPA; AGEIST STATEMENTS; SETTLEMENT. *Melan v. Belle Vernon Area Sch. Dist.*, No. 14-1445, 2015 U.S. Dist. LEXIS 163913 (W.D. Pa. Dec. 7, 2015). Where a teacher took lengthy medical leave and was then forced to voluntarily retire, the court overruled her contentions that by reaching a settlement with the district, the teacher had waived her discrimination claims against the school system, and instead, had to submit to a contractual grievance process. The court ruled both that the waiver of age discrimination claims in the settlement was not "knowing and voluntary" under the OWBPA and further, that the teacher had not waived federal disability discrimination claims or state claims under the settlement. The court also ruled that the settlement contract made no reference to precluding a court forum for resolution of the teacher's various bias claims.

OWBPA. *Barnes v. Hershey Co.*, No. 12-1334, 2015 U.S. Dist. LEXIS 89947 (N.D. Cal. July 9, 2015). The court weighed whether six former sales managers' waivers of ADEA claims involved group terminations, thus implicating stricter requirements under the OWBPA. The court allowed one Plaintiff's claim to proceed, as that Plaintiff had been terminated as part of a more localized group layoff. The court approved the waivers of claims approved by the five

other Plaintiffs, as they had not completed "performance improvement plans" assigned to them by Hershey, and also since the Company had given them individualized reasons for their terminations.

GROSS; EEOC; PATTERN OR PRACTICE CLAIMS; AGEIST STATEMENTS. *EEOC v. Darden Rests., Inc.*, No. 1:15-cv-20561, 2015 U.S. Dist. LEXIS 151741 (S.D. Fla. Nov. 9, 2015). The court rejected a motion to dismiss and concluded that, in the absence of Supreme Court or Eleventh Circuit guidance, the higher burden of proof for ADEA claims established under *Gross* does not impact the EEOC's ability to bring ADEA pattern-or-practice claims. The agency's complaint also includes allegations of express ageist statements, including that the company was looking for "fresh" employees, was trying to project a "youthful" image, and was looking for people with less experience.

"SAME ACTOR" INFERENCE; PRIMA FACIE CASE. *Nash v. Optomec, Inc.*, No. 15-1845, 2016 U.S. Dist. LEXIS 60485 (D. Minn. May 5, 2016). Plaintiff Nash was hired at 54 by an executive of the Defendant employer. Eleven months later, the same executive fired Nash. Nash sued for age discrimination alleging he was fired due to ageist stereotypes including having "limited capabilities", "physical dexterity problems", "stubbornness" and "an inability to think on his feet". The district court found that the Plaintiff had failed to establish a prima facie case of age discrimination because when an employer is hired and fired by the "same actor" within a short time frame the suspicion of age discrimination is "completely eroded." The court additionally found that the Plaintiff had not sufficiently connected alleged stereotypes to age bias.

FEDERAL SECTOR; DISPARATE IMPACT. *K.H. v. Sec'y of the Dep't of Homeland Sec.*, No. 15-cv-02740, 2015 U.S. Dist. LEXIS 155466 (N.D. Cal. Nov. 16, 2015). The court held that federal marshals who alleged age discrimination against the TSA may proceed under a disparate impact theory of discrimination. The court relied on *Palmer v. United States*, 794 F.2d 534, 536 (9th Cir. 1986), which involved an ADEA suit against the US Forest Service. In *Palmer*, the court explained that "[a] plaintiff alleging discrimination under the ADEA may proceed under either of two theories: disparate treatment or disparate impact." The Ninth Circuit rejected the argument that *Palmer* was inapplicable because it was decided before *Smith v. City of Jackson*, 544 U.S. 228 (2005), holding that since *Smith* was focused on the section 623 of the ADEA, dealing with private actors, and not section 633a, focused on federal employers, it provides little guidance regarding federal-sector ADEA claims. The court held that despite the lack of an explicit waiver of immunity in regard to disparate impact claims against federal employers, the prohibition against age discrimination found in section 633a of the ADEA is "simple and sweeping" enough to allow such claims to be brought against the federal government.

INTERIM RELIEF. *Zhou v. IBM*, 2015 U.S. Dist. LEXIS 160544 (N.D. Iowa Dec. 1, 2015). A pro se litigant filed what was interpreted to be a prayer for a preliminary injunction to keep his wages from being reduced due to age discrimination. The court found that the Plaintiff could not show that he would suffer irreparable harm absent interim relief because he had an adequate legal remedy in the form of monetary damages if he won his case. As to the possibility that the Plaintiff's job might be terminated, the court stated, "Such speculative damages are insufficient to support granting a preliminary injunction—the mere possibility of remote injury cannot constitute irreparable harm."

STATE COURT CASES

MOTION TO DISMISS; HARASSMENT. *Wells v. Regents of the Univ. of Cal.*, No. 3:15-cv-01700, 2015 U.S. Dist. LEXIS 150595 (N.D. Cal. Nov. 5, 2015). The court granted in part and denied inpart a motion to dismiss California state law claims of discrimination, retailiation, harassment and intentional infliction of emotional distress. Seven employees filed suit, five of whom alleged, inter alia, that a University manager harassed older employees until they retired or quit. The harassment assertedly included refusing to provide training, giving unwarranted negative performance reviews, and failing to extend permanent offers. The University moved to dismiss age harassment claims by five Plaintiffs. The Court granted the motion as to the two Plaintiffs over 40, but only one of the three others. According to the Court, Plaintiffs Wells and Cordova, but not Plaintiff O'Neill, showed sufficient evidence of harassment "severe enough to create a hostile work environment."

DISPARATE IMPACT; WHETHER STATE LAW STANDARDS ARE STRICTER.

Scamman, et al. v. Shaw's Supermarkets, Inc., No. 2:15-cv-00295-JDL, 2016 U.S. Dist. LEXIS 10271 (D. Maine, Jan. 26, 2016), *on certification*, No. FED-16-031 (Supreme Judicial Court of Maine). In 2012, Shaw's terminated 110 full-time employees in its Maine stores. In selecting employees for layoff, Shaw's considered only full-time employees and excluded part-time employees. The terminated employees were disproportionately older. Plaintiffs filed complaints of age discrimination with EEOC and the Maine Human Rights Commission (MHRC) on behalf of themselves and others similarly situated. In 2015, applying the business necessity standard, the MHRC found reasonable grounds to conclude that Shaw's had violated the MHRA by implementing an age-neutral layoff policy that had a disparate impact on older workers.

Following that finding, Plaintiffs filed a complaint in Maine's Superior Court, after which Shaw's removed the case to the federal district court. Finding that no state precedent clarified the appropriate standard that applies to employers' defenses in disparate impact age discrimination cases under the MHRA, both parties jointly asked the federal district court to certify a motion to have the Maine Supreme Judicial Court determine the correct standard. Plaintiffs concede that they would not be able to prevail under the RFOA standard, but assert that a genuine issue of material fact exists as to whether Shaw's policy was justified by business necessity. The Supreme Judicial Court granted the motion to certify on January 26, 2016. Briefs have been filed and the matter is pending.

STATUTE OF LIMITATIONS; TOLLING. *Peterson v. City of Minneapolis*, No. A15-1711, 2016 Minn. App. LEXIS 30 (Minn. Ct. App. May 2, 2016). The Minnesota Human Rights Act has a one year statute of limitations that can be tolled

> during the time a potential charging party and respondent are voluntarily engaged in a dispute resolution process involving a claim of unlawful discrimination under this chapter, including arbitration, conciliation, mediation or grievance procedures pursuant to a collective bargaining agreement or statutory, charter, ordinance provisions for a civil service or other employment system or a school board sexual harassment or sexual violence policy.

After alleging age discrimination, the police officer Plaintiffs filed a complaint with the City's Department of Human Resources. After two years the Department found that discrimination did not occur. Plaintiffs brought a lawsuit that was dismissed as untimely. On appeal the Minnesota Court of Appeals ruled that the City's internal complaint mechanism counted as a "dispute resolution process" tolling the statute of limitations.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Julianne Taaffe, et al.,	:	
Plaintiffs,	:	
v.	:	Case No. 2:15-CV-2870
Michael V. Drake, et al.,	:	Magistrate Judge Kemp
Defendants.	:	

OPINION AND ORDER

Plaintiffs Julianne Taaffe and Kathryn Moon, both former staff members of the Ohio State University who taught in the English as a Second Language program, filed this complaint alleging that they and other older workers in that program were the subject of age discrimination, and that after both Plaintiffs complained about their treatment, their positions were eliminated and they were forced into retirement. They brought discrimination and retaliation claims against five University officials, including OSU president Dr. Michael Drake; OSU provost Joseph E. Steinmetz; Cheryl Achterberg, a college dean; Sandra Stroot, interim chair of the Department of Teaching and Learning; and Robert Eckhart, Executive Director of the English as a Second Language programs - all officials who "hold the authority to effect prospective relief for the Plaintiffs regarding all employment matters." (Complaint, ¶6). This case has been referred to the Magistrate Judge for full disposition by consent of the parties. See Doc. 13.

On February 4, 2016, all defendants moved for judgment on the pleadings. Defendants assert generally that "this court is not the proper forum for private statutory age discrimination

claims under the ... ADEA ... against these individual defendants." Doc. 18, at 2. They then argue that the defendants, as individuals, are not "employers" within the meaning of the ADEA, that this case does not fall within the Eleventh Amendment exception for actions for injunctive relief against state officials as explained in Ex parte Young, 209 U.S. 123 (1908), that the factual allegations are insufficient as to each Defendant, and that neither Defendant Steinmetz nor Defendant Eckhart has the power to provide any injunctive relief which the Court might order. The motion has been fully briefed, including a sur-reply filed by Plaintiffs. For the following reasons, the motion for judgment on the pleadings will be denied.

I. Legal Standard

A motion for judgment on the pleadings filed under Fed.R.Civ.P. 12(c) attacks the sufficiency of the pleadings and is evaluated under the same standard as a motion to dismiss. Amersbach v. City of Cleveland, 598 F.2d 1033, 1038 (6th Cir. 1979). In ruling upon such motion, the Court must accept as true all well- pleaded material allegations of the pleadings of the opposing party, and the motion may be granted only if the moving party is nevertheless clearly entitled to judgment. Southern Ohio Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 479 F.2d 478, 480 (6th Cir. 1973). The same rules which apply to judging the sufficiency of the pleadings apply to a Rule 12(c) motion as to a motion filed under Rule 12(b)(6); that is, the Court must separate factual allegations from legal conclusions, and may consider as true only those factual allegations which meet a threshold test for plausibility. See, e.g., Tucker v. Middleburg-Legacy Place, 539 F.3d 545 (6th Cir. 2008), citing, inter alia, Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). It is with these standards in mind that the motion for judgment on the pleadings must be decided.

II. Factual Background

Because the case is before the Court by way of a motion for judgment on the pleadings, the only relevant facts are those contained in the complaint. The Court will summarize them briefly.

The two Plaintiffs are older individuals, in their late fifties or early sixties. Each was an instructor in OSU's English as a Second Language program, and each began working there in 1983. Each was a well-regarded professional.

In 2009, OSU hired a new director of the ESL programs. He served in that position for four years. During his tenure, he expressed disfavor for older employees. University officials did not discipline him for doing so. In 2013, that director was replaced by Defendant Eckhart, who was less qualified for the position than older employees within the ESL program. Mr. Eckhart "was openly hostile to older workers" (Complaint, ¶21) and took steps to eliminate them while promoting younger replacements, many of whom were less qualified. He specifically targeted Plaintiff Taaffe, giving her an unmerited low evaluation. She complained about that treatment to Defendant Achterberg and filed a charge of discrimination with the EEOC. Plaintiff Moon made a similar complaint, as did others, and OSU commissioned an investigation of these complaints. The investigation was superficial and did not substantiate the complaints made. Plaintiffs asked Defendant Drake, the University President, to look into the matter, but received no response.

Less than a week after the investigation was completed, Plaintiffs' positions were eliminated, and they were "reclassified as lecturers with limited contractual appointments." (Complaint, ¶37). The result was that Plaintiffs faced a likely pay cut and had no assurance of future employment.

Additionally, they faced the prospect of a substantial loss of retirement benefits and vacation pay if they did not retire quickly. Each retired, a result which Defendant Eckhart had predicted as a result of the changes he instituted. Their jobs were then reclassified and posted, but once Plaintiffs and other older workers applied for those positions, the posting was removed. As relief for these actions, Plaintiffs seek reinstatement and other ancillary relief.

III. Discussion

Defendants advance four separate reasons why either the complaint, or certain defendants, should be dismissed. The Court will discuss these arguments in turn, grouping some of them together because they raise related issues.

A. Relief Available against Individual Defendants

The first issue raised is whether the Court can grant relief under the ADEA against individual defendants. Defendants assert that, under the statute, only an "employer" can be held liable, and that the employer in this case is the University and not any of its officials. They concede that, in some circumstances, agents of an employer can count as the employer, but assert that this concept is inapplicable to governmental agencies like OSU. Plaintiffs respond that every federal court which has considered the question, including the Court of Appeals for the Sixth Circuit (albeit in an unpublished decision), has held that it is appropriate for a public employee to seek injunctive relief against individual state officials under the ADEA.

The Court begins with the key case upon which Defendants rely, Michigan Corrections Organization v. Michigan Dept. of Corrections, 774 F.3d 895 (6th Cir. 2014). That was an FLSA case brought by certain corrections officers and their union against the Michigan Department of Corrections and its director seeking overtime pay and declaratory relief. The district court

dismissed any claim for damages as barred by the Eleventh Amendment, and further concluded that no claim for declaratory relief could be asserted against the Department's director. The Court of Appeals, affirming, concluded that because the FLSA does not create a private right of action for injunctive relief (such relief can be granted only in actions brought by the Department of Labor), and because any claim for money damages was barred by the Eleventh Amendment, the plaintiffs simply had no private right of action that could form the basis for a declaratory judgment. It noted that the Declaratory Judgment Act, 28 U.S.C. §2201, does not create a cause of action, but can be invoked only when there is "a preexisting right enforceable in federal court." Id. at 902. Similarly, the Court of Appeals held that "Ex parte Young provides a path around sovereign immunity if the plaintiff already has a cause of action from somewhere else" - which, in the case of a suit brought under the FLSA, the plaintiffs did not. Id. at 905.

Clearly, there are differences between the FLSA and the ADEA. The latter statute provides for a private cause of action for injunctive relief. See 29 U.S.C. §626(c)(1)("Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter..."). That difference, according to Defendants, is immaterial because, under 29 U.S.C. §630(b), agents of a State, of a political subdivision of a State, or of a State agency or instrumentality do not meet the statutory definition of an "employer." Thus, there is no private right of action against officials like the Defendants under the ADEA, and nothing to support relief under a statute like the Declaratory Judgment Act, or, more importantly, under an Ex parte Young theory.

Since Plaintiffs cite a number of cases permitting actions

for injunctive relief against state officials in cases brought under the ADEA, it is instructive to see how they have dealt with this issue. The Court begins with Meekison v. Voinovich, 67 Fed. Appx. 900 (6th Cir. June 18, 2003), which affirmed a decision on this issue rendered by Judge Marbley of this Court. In his opinion, Judge Marbley recognized that individual defendants could not be held liable under the ADEA, but he concluded that an injunctive action could proceed against individual defendants. Meekison v. Voinovich, 17 F.Supp.2d 725 (S.D. Ohio 1998). The Court of Appeals agreed, noting that "private individuals may sue for injunctive relief to enforce the standards of the ADA under Ex parte Young ... [and] [t]he same is true under the ADEA." Meekison, 67 Fed. Appx. at 901. It does not appear, however, that either court in that case was presented with the precise argument which Defendants make here. The same is true for decisions such as Smith v. Grady, 960 F.Supp.2d 735, 756 (S.D. Ohio 2013), which, without much discussion, allowed claims for injunctive relief under the ADEA to proceed against state officials.

Most of the other decisions cited in Plaintiff's responsive memoranda comment that actions for injunctive relief against state officials can be maintained under the ADEA, but those comments are *dicta*, usually because the only named defendant was the State or a State agency. See, e.g., Shahin v. Delaware, 563 Fed.Appx. 196, 198 (3d Cir. Apr. 21, 2014)("Shahin filed suit against the State of Delaware and OMB and did not name any state officials. Accordingly, the defendants are immune from suit"). While these cases provide some indirect support for Plaintiffs' position, none address the dichotomy which exists between Ohio State's status as an "employer" and the Defendants' status as "non-employers." On the other hand, Plaintiffs correctly point out that there do not appear to be any cases which have held,

either for the reasons advanced by Defendants here or for any other reason, that a suit under the ADEA for injunctive relief cannot be maintained against the appropriate State officials. And, as Plaintiffs also observe, there are decisions such as Diaz v. Michigan Dept. of Corrections, 703 F.3d 956 (6th Cir. 2013) which allow suits for prospective injunctive relief brought under the FMLA to proceed against state officials even though the Court of Appeals has held that "the FMLA's individual liability provision does not extend to public agencies," see Mitchell v. Chapman, 343 F.3d 811, 832 (6th Cir. 2003).

There is a strong argument to be made that Diaz, a published decision, is binding on this Court. It is hard to find a meaningful way to distinguish the key holding there, which is that under a similar definition of "employer" that excludes individual public officials, Ex parte Young is nonetheless a proper vehicle under which to bring injunctive relief actions against such officials when it is alleged that the State or one of its instrumentalities violated the statute in question. Given the Congress clearly understood how Ex parte Young operates, and that it provided for injunctive relief against States in both the FMLA and the ADEA, it would be surprising if Congress meant to eliminate Ex parte Young actions simply by using a definition of "employer" which precludes individual liability on the part of governmental officials. After all, if an ADEA Plaintiff prevails on his or her claim for reinstatement, that relief will be implemented by the official acting as an agent for the State, and it effectively runs against the statutorily-defined "employer" even though the Ex parte Young fiction requires that the injunction be directed to individual State employees. That is, in this Court's view, the correct resolution of the interplay between the ADEA and Ex parte Young, and the Court would so hold even if Diaz could somehow be distinguished.

The primary flaw in Defendants' argument is the failure to recognize that Ex parte Young creates a legal fiction which permits a plaintiff to obtain legal relief for a violation of either federal constitutional or federal statutory rights when such relief would otherwise be barred by the Eleventh Amendment. True, there must be some underlying source supporting the claim asserted; in the §1983 context, it is that statute's incorporation of constitutional rights themselves. In the statutory context, the statute in question must confer rights on the plaintiffs who seek to use Ex parte Young as a vehicle for obtaining relief. The FLSA does not confer such rights. On the other hand, statutes like the FMLA and the ADEA do. Once those rights are identified, if the Eleventh Amendment operates as a bar to their being asserted directly against a plaintiff's "employer" because that employer is a State or State agency immune from suit, Ex parte Young allows the involved officials to be named as "stand-ins" for the State. That is what the Plaintiffs have done here, and this Court is simply not convinced that the definitional provisions of 29 U.S.C. §630(b) prohibit, or fail to provide a proper basis, for that action.

Defendants make an additional argument about Ex parte Young in their reply memorandum (which is the reason why Plaintiffs filed a sur-reply). There, they assert that even if the predicates for an Ex parte Young action exist here, under the Supreme Court's decision in Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997), the Court should decline to entertain the case. That is so, they claim, because Coeur d'Alene limited the use of Ex parte Young to circumstances "where there is no state forum available to vindicate federal interests" and where allowing a suit in federal court would "serve[] the important interest in interpreting federal law." Reply Memorandum, Doc. 29, at 5. They point to the availability of an action against

the University in the Ohio Court of Claims, and argue that the Court of Claims can easily interpret federal law.

The Court agrees with Plaintiffs that this is not a fair reading of Coeur d'Alene. If it were, it could be argued that because the Ohio Court of Claims has the power to decide issues of federal law, and because it is an available forum for suits against the State of Ohio (albeit with some procedural restrictions), the federal courts should not permit any case to proceed under an Ex parte Young theory if the same or similar claims could be brought in the Ohio Court of Claims - or, by extension, in any forum in which a State has executed a limited waiver of sovereign immunity. That would represent a drastic shift in federal jurisprudence and practice which the Coeur d'Alene court did not contemplate and which federal courts have not adopted. The true import of Coeur d'Alene's lead opinion - joined in for the most part by only two justices - was to recognize "the wisdom and necessity of considering, when determining the applicability of the Eleventh Amendment, the real affront to a State of allowing a [federal] suit to proceed." Id. at 277. Those justices were concerned that the underlying claim was, in essence, an action to quiet title, something "which implicates special sovereignty interests." Id. at 281. Further, a quiet title action itself could not be maintained against the State in a federal court due to the Eleventh Amendment bar. The result of issuing the injunction requested would be "an immediate effect on jurisdictional control over important public lands..." Id. at 282. Both the lead opinion and Justice O'Connor's concurring opinion considered that to be a critical factor, but the concurrence expressed concern about adopting a case-by-case approach to applying Ex parte Young in the future, contending that it was not and had never been the law that such an approach was appropriate, and noting that the availability of a state

forum was not ordinarily a bar to federal court litigation brought for the purpose of vindicating federal rights. The dissenting opinion similarly decried the lead opinion's approach as "at odds with Young's result as [well as] with the foundational doctrine on which Young rests," noting that the concurring opinion "charts a more limited course that wisely rejects the lead opinion's call for federal jurisdiction contingent on case-by-case balancing." Id. at 297 (Souter, J., dissenting).

By contrast, this case is a garden-variety ADEA case. It implicates no special sovereign interests of the State of Ohio. As Plaintiffs argue in their sur-reply, the Court of Appeals has essentially rejected this reasoning in a suit brought under the ADA. Carten v. Kent State University, 282 F.3d 391, 397 (6th Cir. 2002). Again, that decision is likely binding on this issue even though a different statute was involved, since the legal precepts are indistinguishable. But, even if it were not, the facts of this case do not remotely resemble those presented in Coeur d'Alene, and there is simply no basis for excluding these Plaintiffs from federal court just because they may also have had the right to sue OSU in the Ohio Court of Claims.

B. Personal Involvement

Defendants' next argument is that, even if Plaintiffs have asserted an ADEA claim that can properly be considered by this Court, they have not pleaded it against the right parties. They assert that "[t]he only proper defendant under an *Ex parte Young* claim is a state actor in his/her official capacity who is threatening or undertook acts that violate federal law and who has the authority to provide the prospective injunctive relief sought," Doc. 18, at 13. Based on this statement of the law, Defendants contend that the allegations in the complaint are, as to four of the five named defendants, so "sparse and speculative

that the court should dismiss the Complaint." Id. at 14. In their view, the only Defendant against whom the Plaintiffs may have stated an ADEA claim is Defendant Eckhart. However, he is no longer the Executive Director of the ELS Program and therefore cannot provide Plaintiffs with any relief. Consequently, Defendants argue that the claims against him should be dismissed as well - essentially leaving Plaintiffs without a remedy even if they can prove an ADEA violation.

As with their Coeur d'Alene argument, Defendants are simply incorrect on how the law operates here. It is true that in a suit for money damages against a state official sued in his or her individual capacity, the plaintiff must allege that the defendant was personally involved in the actions constituting a violation of the plaintiff's constitutional or statutory rights. See, e.g., Bellamy v. Bradley, 729 F.2d 416, 421 (6th Cir. 1984)(a §1983 plaintiff must show that each defendant "encouraged the specific incident of misconduct or in some other way directly participated in it"). But when only prospective injunctive relief is requested, that type of showing is unnecessary. The proper defendants in such an action are the ones who have the power to provide the relief sought, whether or not they were involved in the allegedly illegal conduct at issue. Otherwise, plaintiffs in these types of situations would potentially be left without any remedy if the groups of defendants who violated the law and those who could fix the problem if ordered to do so were mutually exclusive.

Ex parte Young, 209 U.S. at 157, states the applicable principle in this way: "In making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional it is plain that such officer must have some connection with the enforcement of the act...." That is a different standard than the "personal involvement" test applied

in cases like Bellamy v. Bradley, which are concerned with liability for money damages. As noted in Luckey v. Harris, 860 F.2d 1012, 1015 (11th Cir. 1988), "[p]ersonal action by defendants individually is not a necessary condition of injunctive relief against state officers in their official capacity. All that is required is that the official be responsible for the challenged action." This Court has expressly followed that holding. See, e.g., Brown v. Collins, 2008 WL 4059887, *3 (S.D. Ohio Aug. 25, 2008)(Kemp, M.J.), adopted and affirmed 2009 WL 152315 (S.D. Ohio Jan. 20, 2009). Even the governor of a state can be a proper defendant for purposes of obtaining prospective injunctive relief in the proper circumstances based on the governor's duty to enforce the law. See, e.g., Allied Artists Picture Corp. v. Rhodes, 679 F.2d 656, 665 n. 5 (6th Cir. 1982).

The primary case relied on by Defendants is Children's Healthcare is a Legal Duty, Inc. v. Deters, 92 F.3d 1412 (6th Cir. 1996). That case arose, however, in the context of a suit asking the court to strike down portions of an allegedly unconstitutional state law. In those circumstances, the Court of Appeals held that, absent some actual prospect of enforcement of the statute against the plaintiffs, they could not simply sue the Attorney General, who is tasked with the enforcement of laws in Ohio, and ask for prospective relief. This case, by contrast, involves actions which have already been taken - not future actions which may or may not occur - and a request for relief against officials who have the power to remedy the effects of those actions, should the Court find them to have been taken in violation of the ADEA. Clearly, the same concern about an actual threat of enforcement of an unconstitutional statute does not apply here. It is useful to note that high-ranking university officials are typically named as defendants in suits invoking the

ADEA, even if it seems likely that those officials were not directly involved in individual acts of discrimination. See, e.g., Benson v. University of Maine System, 857 F.Supp.2d 171 (D. Me. 2012)(permitting joinder of university chancellor as proper party in an ADEA failure-to-hire case); Siring v. Oregon State Bd. of Higher Educ., 927 F.Supp.2d 1030 (D. Or. 2012)(suit brought against Board of Higher Education based on claim under the ADEA for discriminatory firing). The Court finds that the complaint alleges a sufficient nexus between the positions held by the defendants and the ability to order reinstatement to satisfy the "connection" requirement of Ex parte Young, and that, with the exceptions noted below, no defendant is entitled to dismissal on these grounds.

As Plaintiffs note, the University has asserted that two of the named defendants no longer have any authority to reinstate the Plaintiffs to their former positions. If that is true, they are no longer proper defendants. However, Plaintiffs correctly point out that in such a situation, an automatic substitution of parties occurs under Fed.R.Civ.P. 25(d). Defendants claim that the Court should view the prospect of a "revolving door of defendant substitutions" as a reason to accept their theory of what type of personal involvement is required under Ex parte Young. They apparently fail to recognize both that the plain language of Rule 25 makes the substitution of parties automatic under these circumstances, without any need for action by the Court or the parties, and that if it were otherwise, a plaintiff could be deprived of an otherwise viable cause of action simply because a defendant chose, on multiple occasions, to replace its decision-makers. That obviously cannot be the law. The Court therefore recognizes that a substitution of parties has occurred, which moots the motion to dismiss as it applies to Defendants Steinmetz and Eckhart, because they are no longer parties to the

case.

IV. Conclusion

Having found no merit in any of the arguments advanced by Defendants in their motion for judgment on the pleadings, that motion (Doc. 18) is denied.

/s/ Terence P. Kemp
United States Magistrate Judge