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The Age Discrimination in Employment Act (ADEA): Overview and Current Legal Developments

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ABSTRACT

This report discusses the Age Discrimination in Employment Act (ADEA) and current legal and legislative developments. The ADEA prevents employment discrimination against persons over the age 40. The ADEA makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." It applies, not only in hiring, discharge and promotion, but also prohibits discrimination in employee benefit plans such as health coverage and pensions. The Equal Employment Opportunity Commission (EEOC) is responsible for enforcing the provisions of the ADEA. Abstract begins here.

The Age Discrimination in Employment Act (ADEA): Overview and Current Legal Developments

Summary

This report discusses the Age Discrimination in Employment Act (ADEA) and current legal and legislative developments. The ADEA, which prevents employment discrimination against persons over the age of 40, was enacted "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." It applies to employers, labor organizations, and employment agencies. Workers 40 or older constitute 45 percent of the total labor force of the United States. The group consists mostly of baby-boomers, or those born between the years 1946 and 1957. This fact, coupled with the increasing number of companies downsizing their workforce, has led to a dramatic increase in the number of ADEA claims.

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

The ADEA does not prohibit the compulsory retirement of a bona fide executive or high policy-maker who has reached age 65 and is entitled to a nonforfeitable annual retirement benefit of at least $44,000. The Age Discrimination in Employment Amendments of 1996 reinstated the exemption for certain bona fide hiring and retirement plans applicable to state and local firefighters and law enforcement officers. The ADEA Amendments of 1996 also require the Secretary of Health and Human Services to develop tests to gauge the ability of firefighters and law enforcement officials to accomplish their jobs. The Higher Education Act of 1998 allows institutions of higher education to offer age-based incentives to encourage tenured employees to voluntarily retire without violating the ADEA.

An employer under the ADEA is a "person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." A labor organization is covered by the ADEA if it is "engaged in an industry affecting commerce, any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan . . . dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment." An employment agency and its agents are subject to the ADEA if the agency "regularly undertakes with or without compensation" the procurement of employees for an employer, other than an agency of the United States. The ADEA covers congressional and most federal employees.

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Background

The Age Discrimination in Employment Act (ADEA)[1] of 1967, as amended, seeks to address the longstanding problem of age discrimination in the work-place.[2] The ADEA, which prevents employment discrimination against persons over the age of 40, was enacted "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."[3] The ADEA makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[4] It applies, not only in hiring, discharge and promotion, but also prohibits discrimination in employee benefit plans such as health coverage and pensions. In addition to employers, the ADEA also applies to labor organizations and employment agencies.

Age discrimination in employment is a growing issue as the average American can expect to live until almost 80 years of age.[5] By 2004, the entire baby boomer

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[1] 29 U.S.C.A. §§ 621-634 (West 1985 & Supp. 1996).

[2] Employees seeking a remedy for age discrimination in employment also have the option of a constitutional claim. The Equal Protection Clause states in part, "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Before an equal protection argument could be made, the plaintiffs would have to show state action. In Gregory v. Ashcroft, 501 U.S. 452 (1991), the U.S. Supreme Court considered a Fourteenth Amendment Equal Protection Clause challenge to a state mandatory retirement law. In Ashcroft, the plaintiffs were Missouri state judges required to retire at the age of 70 by state law. The Court reviewed the judges' claim under the rational basis test, noting that "age is not a suspect classification under the Equal Protection Clause" and the plaintiffs did not "have a fundamental interest in serving as judges." Ashcroft, 501 U.S. at 470. Ultimately, the Court held that the voters of Missouri had a legitimate and rational basis for requiring retirement of their state judges to ensure the competency and efficacy of their judiciary.

[3] 29 U.S.C.A. § 621.

[4] 29 U.S.C.A. § 623.

[5] Steven D. Kaye, Mary Lord, Pamela Sherrid, Stop Working? Not boomers: The Me

(continued...)

generation, or those born between 1946 and 1964, will be covered by the ADEA.[6] Currently, baby boomers make up 45 percent, or 60 million of 134 million workers in the American labor force.[7] Approximately, 17,000 age discrimination complaints were filed annually between 1991 and 1995.[8]

The issue of age discrimination has concerned Congress for several years. Prior to the ADEA, section 715 of the Civil Rights Act of 1964, required the Secretary of Labor to study the issue of age discrimination in employment.[9] The resulting report surmised that a clear-cut federal policy was needed to address age discrimination. President Lyndon B. Johnson suggested the Age Discrimination in Employment Act in his Older Americans message delivered in early 1967.

After passage, the ADEA went through a series of amendments to strengthen and expand its coverage of older employees. Originally, the ADEA only covered employees between the ages of 40 and 65. Eventually the upper age limit was extended to age 70, and then eliminated altogether. In 1978, as part of the Reorganization Plan No. 1, enforcement authority of the ADEA was transferred from the Department of Labor to the Equal Employment Opportunity Commission (EEOC).[10]

Current ADEA Provisions

The ADEA prevents employers,[11] employment agencies[12] and labor organizations[13] from discriminating because of age in the hiring, termination, placement, representation or any other manner against employees 40 years of age and older. It also prevents retaliation against employees for filing or participating in an ADEA claim.[14]

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[5] (...continued)
Generation May Not Know It Yet, But Many Will Need a Paycheck into their 70s, U.S. News & World Report, June 12, 1995.

[6] Kirstin Downey Grimsley, Next for Boomers: Battles Against Age Bias?, Wash. Post. Feb. 9, 1997, at H1.

[7] Id.

[8] Id.

[9] P.L. 88-352, 78 Stat. 241, 265 (1964).

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

[11] 29 U.S.C.A. § 623(a).

[12] 29 U.S.C.A. § 623(b).

[13] 29 U.S.C.A. § 623(c).

[14] 29 U.S.C.A. § 623(d). The U.S. Supreme Court, in Robinson v. Shell Oil Co., 519 U.S. ____, 117 S. Ct. 843 (1997), extended the protection from retaliation provided to employees who file or participate in discrimination suits. The lower court had held that such protection applied only to current employees, not past employees. The Court refused to so limit the interpretation of "employee," concluding that "employee" as defined in Title VII also applies
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The ADEA also prohibits age-biased advertisements.[15] According to the EEOC's regulations, want ads that contain phrases such as, "age 25 to 35," "young", "college student", "recent college graduate","boy", "girl," or similar terms are prohibited under the Act, unless an exception applies.[16] Even phrases that favor some members of the class, but discriminate against others is prohibited, *e.g.*, "age 40 to 50", "age over 65", "retired person", or "supplement your pension."[17] On the other hand, the request for the age or date of birth of an applicant on an employment application or use of the phrase "state age" on a want ad is not necessarily a violation of the Act.[18] It is not per se a violation because there may be legitimate reasons for requesting the age or date of birth of an applicant. But the EEOC will "closely [scrutinize the application] to assure that the request is for a permissible purpose and not for purposes proscribed by the Act."[19]

Who Is Covered under the ADEA

The ADEA covers employees[20] forty years and older.[21] However, the ADEA does not prohibit the compulsory retirement of a bona fide executive or high policymaker who has reached age 65 and is entitled to a nonforfeitable annual retirement benefit of at least $44,000.[22] The Age Discrimination in Employment Amendments of 1996 reinstated the exemption for certain bona fide hiring and retirement plans applicable to state and local firefighters and law enforcement officers.[23] The ADEA Amendments of 1996 also required the Secretary of Health and

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[14] (...continued)
to former employees. Since the ADEA is closely modeled after Title VII of the Civil Rights Act, it will apply to those former employees who filed ADEA claims.

[15] 29 U.S.C.A. § 623(e).

[16] 29 C.F.R. § 1625.4 (1996).

[17] 29 C.F.R. § 1625.4(a).

[18] 29 C.F.R. § 1625.4(b), 1625.5.

[19] 29 C.F.R. § 1625.5.

[20] According to 29 U.S.C.A. § 630(f), an "employee" is defined as "an individual employed by any employer . . ." Excluded from the definition of employee are state elected officials or an appointee of such person. However, state employees covered by civil service laws, are considered employees, as well as American citizens working for American employers abroad. Section 633a of the ADEA extends its application to Federal Government employees. The Congressional Accountability Act of 1995, 2 U.S.C.A. § 1301-1438 (West 1985 & Supp. 1997), extended the rights and protections of the ADEA to Congressional employees. In Gregory v. Ashcroft, 501 U.S. 452 (1991), the Court upheld a Missouri statute that required mandatory retirement of judges at age 70. The majority found, after an analysis of the definition of an employee and its exclusions, that state judges fall within the exception to the ADEA regarding "appointee on the policymaking level." Id. at 467.

[21] 29 U.S.C.A. § 631(a).

[22] 29 U.S.C.A. § 631(c)(1).

[23] Omnibus Consolidated Appropriations Act of 1997, P.L. 104-208, 110 Stat. 3009 (1996).
(continued...)

Human Services to develop tests to gauge the ability of firefighters and law enforcement officials to accomplish their jobs.[24]

The Higher Education Amendments of 1998(HEA) added a new section to the ADEA regarding voluntary retirement incentive plans for tenured faculty of higher education institutions. The HEA of 1998 allows institutions of higher education to offer tenured employees who become eligible to retire "supplemental benefits" to encourage them to voluntarily retire. Supplemental benefits are those benefits above and beyond retirement or severance benefits generally offered to employees of the institution. If certain requirements are met, supplemental benefits may be reduced or eliminated on the basis of age without violating the ADEA. However, the ADEA continues to prevent an institution from reducing or ceasing non-supplemental benefits on the basis of age. Furthermore, the amendment does not apply to causes of action arising before the October 1, 1998 enactment of the HEA of 1998.

An employer under the ADEA is a "person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."[25] It is unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[26] The term "employer" includes agents, states, their political subdivisions and accompanying agents, but excludes the United States or any corporation wholly owned by the United States Government.[27] However, the United States Supreme Court in *Kimel v. Florida Board of Regents* held that state employees could not bring suit against the state

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[23] (...continued)
The ADEA Amendments of 1996 state that an employer is not in violation of the Act "if the individual was discharged after the date described in such section, and the individual has attained
(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1993; or
(B)(i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after the date of enactment of the Age Discrimination in Employment Amendments of 1996; or
(ii) if applicable State or local law was enacted after the date of enactment of the Age Discrimination in Employment Amendments of 1996 and the individual was discharged, the higher of
(I) the age of retirement in effect on the date of such discharge under such law; and
(II) age 55;"

[24] Id.

[25] 29 U.S.C.A. § 630(b). An "industry affecting commerce" is defined as "any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry `affecting commerce' within the meaning of the Labor-Management Reporting and Disclosure Act of 1959."

[26] 29 U.S.C.A. § 623.

[27] 29 U.S.C.A. § 630.

under the ADEA.[28] The Court reasoned that states have sovereign immunity and are immune from suit unless the state consents or an exception applies. While, the *Kimel* decision effectively eliminated the ability of state employees to bring suit under the ADEA, the Act may be enforced against states by the EEOC.

In addition, the ADEA covers employees in certain military departments, executive agencies, the United States Postal Service, the Postal Rate Commission, certain District of Columbia employees, Federal Government legislative and judicial employees in competitive service and employees in the Library of Congress. Congressional employees of the House and Senate are covered by the ADEA pursuant to the Congressional Accountability Act of 1995.[29]

A labor organization is covered by the ADEA if it is "engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan . . . dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment."[30] The ADEA defines a labor organization engaged in an industry affecting commerce as one that has a hiring hall or is a certified employee representative, or if not certified, holds itself out as the employee's bargaining representative.[31]

An employment agency and its agent are subject to the ADEA if they "regularly undertake with or without compensation" the procurement of employees for an employer, other than an agency of the United States.[32]

Filing an ADEA Claim

The Equal Employment Opportunity Commission (EEOC) is responsible for enforcing the provisions of the ADEA.[33] The Act requires the EEOC, after receiving a charge of unlawful discrimination, to seek compliance with the Act through methods such as conciliation, conference, or persuasion before instituting legal proceedings.[34] A claimant under the ADEA may bring a civil action in state or federal court and seek

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[28] 139 F.3d 1426 (11th Cir. 1998), reh'g denied, 157 F.3d 908 (11th Cir. 1998), cert. granted, 67 U.S.L.W. 3464 (U.S. Jan. 25, 1999)(No. 98-791)(No. 98-796), aff'd, No. 98-791, No. 98-796, slip op. (U.S. Jan. 11, 2000). See CRS Report RL30364, Legal Issues Affecting the Right of State Employees to Bring Suit Under the Age Discrimination in Employment Act and Other Federal Labor Laws, by Kimberly D. Jones.

[29] Certain federal employees are covered under Section 633a and Congressional employees are covered under the Congressional Accountability Act of 1995. 2 U.S.C.A. §1301.

[30] 29 U.S.C.A. § 630(d).

[31] 29 U.S.C.A. § 630(e).

[32] 29 U.S.C.A. § 630.

[33] 29 U.S.C.A. § 626(a). The Department of Labor was originally responsible for enforcement of the ADEA. The authority was transferred to the EEOC in 1978 pursuant to Reorg. Plan No. 1 of 1978, 92 Stat. 3781 (1978).

[34] 29 U.S.C.A. § 626(b).

a jury trial, unless the EEOC brings suit on behalf of the aggrieved, in which case his right to bring suit yields to the EEOC.[35]

No civil action may be filed until 60 days after "a charge alleging unlawful discrimination has been filed with the [EEOC]."[36] The timeline for filing an ADEA charge varies depending on where the alleged violation occurred. Generally, a grievant must file a complaint with the EEOC within 180 days of the alleged discriminatory act. However, if the state where the alleged unlawful practice took place has an age discrimination law and a corresponding enforcement agency, then the time by which a grievant must file with the EEOC is extended to within 300 days of the alleged unlawful practice.[37] A charge must be filed with the EEOC within 30 days upon notification that the state agency has terminated its proceedings.[38] The sixty-day deferral period for filing a civil suit also applies to charges filed with a state agency, unless the state agency proceedings are earlier terminated. Due to the 60 day deferral period, a complainant must file with the corresponding state or local agency within 240 days of the alleged discriminatory act to ensure that the charge will be filed with the EEOC within the 300-day limit.[39]

In non-deferral states, or states without a corresponding enforcement agency, the grievant must file a claim with the EEOC within 180 days of the alleged unlawful practice. No civil action may be filed until 60 days after filing a charge with the EEOC.[40] However, if the EEOC terminates or dismisses the charge, even within the 60 day period, then the grievant may file a civil action within 90 days of receipt of termination.

When bringing a civil case, there are two types of discrimination claims, disparate treatment and disparate impact. Disparate treatment occurs when an employer intentionally discriminates against an employee or enacts a policy with the intent to treat or affect the employee differently from others because of the employee's

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[35] Lehman v. Nakshian, 453 U.S. 156 (1981). The Court held that ADEA did not grant the right to a jury trial to an employee suing the Federal Government.

[36] 29 U.S.C.A. § 626(d).

[37] 29 U.S.C.A. § 626(d).

[38] 29 U.S.C.A. § 633(b). The U.S. Supreme Court, in Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979), held that the ADEA requirement of pursuing a remedy under state law is mandatory, not optional. However, the Court also held that this provision is satisfied by filing with the applicable state agency and that exhaustion of state remedies is not needed before filing a complaint with the EEOC.

[39] Mohasco Corp. v. Silver, 447 U.S. 807 (1980). A complaint filed with a state or local agency after 240 days may still be timely if the state or local agency terminates its proceedings before 300 days.

[40] 29 U.S.C.A. § 626(d). The statute of limitations for civil actions is two years from the date the cause of action accrued, or, in the case of willful violations, three years from the date the cause accrued. 29 U.S.C.A. § 255 (West 1985 & Supp. 1996). However, the statute of limitations is tolled when the EEOC is seeking to resolve claims through conciliation and conference. However, the statute of limitations will not be tolled beyond one year. 29 U.S.C.A. § 626(e)(2).

age.[41] Disparate impact occurs when the employer's acts or policies are facially neutral, but have an adverse impact on a class of employees and are not justified as job related and consistent with business necessity. According to the Court in *Hazen Paper Co. v Biggins*, the ADEA explicitly allows disparate treatment claims, but the Court has yet to decide whether an employee may recover under the disparate impact theory.[42] This has resulted in confusion for litigants, and courts alike, as some federal courts of appeals allow disparate impact claims, while others do not.[43]

Since the ADEA was modeled after Title VII, courts look to Title VII decisions for guidance on adjudicating ADEA claims. However, the unique protections of the ADEA have not always fit neatly into the Title VII framework. In cases where the plaintiff is alleging disparate treatment and there is no direct evidence of discrimination, courts refer to the Title VII burden of proof framework established by the U.S. Supreme Court in *McDonnell Douglas v. Green*,[44] and *Texas Dept. of Community Affairs v. Burdine*.[45] The burden of proof requires the plaintiff to establish a prima facie case. Once the plaintiff, by a preponderance of the evidence, proves a prima facie case then the burden of production shifts to the employer, "to articulate

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[41] In proving disparate treatment based on age the plaintiff can show that age was a motivating factor in the employer's decision. The plaintiff does not have to show that it was the only factor. Kralman v. Illinois Dept. of Veteran's Affairs, 23 F.3d 150 (7th Cir. 1994), cert. denied, 115 S. Ct. 359, 130 L.Ed.2d 313 (1994).

[42] 507 U.S. 604 (1993). The majority states: "[t]he disparate treatment theory is of course available under the ADEA, as the language of that statute makes clear. . . . By contrast, we have never decided whether a disparate impact theory of liability is available under the ADEA." Id. at 609-610. The facts of Biggins reflect a growing concern among older workers who are close to the vesting of their pensions. The plaintiff, Walter Biggins, was fired weeks before he was scheduled to vest under his employer's pension plan. The plan allowed vesting after ten years of service. Although the Court held that firing an employee to prevent vesting is actionable under the Employees Retirement Income Security Act (ERISA), 29 U.S.C.A. § 1001 et seq. (West 1985 & Supp. 1996), such firing "would not constitute discriminatory treatment on the basis of age." Id. at 612. However, the Court did not dismiss the possibility of pension status being used as a proxy for age. The Court was not faced with a situation where vesting was based on age rather than length of service. If vesting were based on an employee's age, then firing an employee to avoid vesting could possibly result in liability under both the ADEA and ERISA. Id. at 613.

[43] The Courts of Appeals for the Eighth Circuit and the D.C. Circuit have allowed disparate impact claims. Smith v. City of Des Moines, Iowa, 99 F.3d 1466 (8th Cir. 1996); Koger v. Reno, 98 F.3d 631 (D.C. Cir. 1996). However, the Third, Seventh and Tenth Circuit Courts of Appeals have not. DiBiase v. Smith Kline Beecham Corp., 48 F.3d 719 (3d Cir. 1995), cert. denied, 116 S. Ct. 306 (1995); Gehring v. Case Corp., 43 F.3d 340 (7th Cir. 1994), cert. denied, Gehring v. J.I. Case Corp., 115 S. Ct. 2612 (1995); Furr v. Seagate Tech., 82 F.3d 980 (10th Cir. 1996), cert. denied, Doan v. Seagate Tech., 117 S. Ct. 684 (1997). See also Frances A. McMorris, Age-Bias Suits May Become Harder to Prove, Wall St.J., Feb. 20, 1997, at B1.

[44] 411 U.S. 792 (1973).

[45] 450 U.S. 248 (1981).

some legitimate, nondiscriminatory reason for the employee's rejection."[46] If the employer rebuts the employee's prima facie case, the employee may still prevail if he can show that the employer's defense is merely a pretext and that the employer's behavior was actually motivated by discrimination.[47] While the burden of production shifts to the employer to rebut the employee's prima facie case, the burden of persuasion remains on the plaintiff at all times.[48]

The confusion occurs when defining what constitutes a prima facie case under the ADEA. According to *McDonnell Douglas* (a Title VII case), a prima facie case is made when the plaintiff shows: "(1) that he belongs to a racial minority; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite his qualifications, he was rejected; and (4) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."[49]

The Supreme Court has attempted to clarify the prima facie case applicable to the ADEA in its decisions in *Trans World Airlines, Inc. v. Thurston*,[50] and *O'Connor v. Consolidated Coin Caterers Corp.*[51] In *Thurston*, the Court held that the prima facie elements of *McDonnell Douglas* are inapplicable where the plaintiff produces evidence of direct discrimination.[52] In *Thurston*, the Court upon finding direct evidence of discrimination, then considered the employer's defenses. While not explicitly stated in *Thurston*, it appears that even after evidence of direct discrimination, the burden of production shifts to the employer to articulate a legitimate reason for the discriminatory behavior. If the employer succeeds, the employee still has an opportunity to prove the employer's proffered reason is merely a pretext for discrimination. Again, the burden of persuasion remains at all times on the plaintiff.

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

[47] St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). In Hicks, the Supreme Court revisited the burden of proof scheme established by McDonnell Douglas and Burdine. Justice Scalia, writing for the majority, held that it is not enough for the plaintiff to show that the employer's proffered reason was false. The plaintiff must show that the employer's proffered reason is both false and that the employer's actions were motivated by discrimination.

[48] Burdine, 450 U.S. at 255-256.

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

[50] 469 U.S. 400 (1985).

[51] 116 S. Ct. 1307 (1996).

[52] The Court agreed with the court of appeals stating:

TWA contends that the respondents failed to make out a prima facie case of age discrimination under McDonnell Douglas v. Green, 411 U.S. 792 (1973), because at the time they were retired, no flight engineer vacancies existed. This argument fails, for the McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination. . . . The shifting burdens of proof set forth in McDonnell Douglas are designed to assure that the `plaintiff [has] his day in court despite the unavailability of direct evidence'. Id. at 121 (quoting Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979)).

In *Consolidated Coin*, the Court held that a prima facie case is not made out by simply showing that an employee was replaced by someone outside of the class. The plaintiff must show that he was replaced because of his age.[53] The Court evaluated whether the prima facie elements evinced by the Fourth Circuit Court of Appeals were required to establish a prima facie case. The Fourth Circuit held that a prima facie case is established under the ADEA when the plaintiff shows that: "(1) he was in the age group protected by the ADEA; (2) he was discharged or demoted; (3) at the time of his discharge or demotion, he was performing his job at a level that met his employer's legitimate expectations; and (4) following his discharge or demotion, he was replaced by someone of comparable qualifications outside of the protected class."[54] The Court held that the fourth prong, replacement by someone outside of the class, is not the only manner in which a plaintiff can show a prima facie case under the ADEA.[55] A violation can be shown even if the person was replaced by someone within the protected class. For example, replacing a 76 year old with a 45 year old may be a violation of the ADEA, if the person was replaced because of her age.

Employer Defenses to the ADEA

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

The ADEA is not violated if the action taken against an employee is due to a "bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of the particular business."[56] According to the Court in *Thurston*, in order to be considered a valid BFOQ "the age-based discrimination must relate to a

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[53] O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307 (1996).

[54] 116 S. Ct. 1307, 1309 (1996).

[55] Justice Scalia, writing for the majority states:

As the very name `prima facie case' suggests, there must be at least a logical connection between each element of the prima facie case and the illegal discrimination for which it establishes a `legally mandatory' rebuttable presumption. . . . The element of replacement by someone under 40 fails this requirement. The discrimination prohibited by the ADEA is discrimination `because of [an] individual's age.'" Consolidated Coin, 116 S. Ct. at 1310 (quoting Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254, n.7 (1981)).

[56] 29 U.S.C.A. § 623(f)(1). According to the Supreme Court in Western Air Lines Inc. v. Criswell, 472 U.S. 400 (1984), the BFOQ must be more than "convenient" or "reasonable", but must be "`reasonably necessary . . . to the particular business.'". Id. at 414. The employer could prove a BFOQ defense of an age-based qualification due to safety concerns based on either of two ways. First the employer could show that it had factual basis for believing that persons over a certain age would be unable to perform the job safely. In the alternative, the employer could show that "age was a legitimate proxy for the safety-related job qualifications by proving that it is `impossible or highly impractical' to deal with the older employees on an individualized basis." Id.

`particular business.'"[57] The particular business referred to "is the job from which the protected individual is excluded."[58] In *Johnson v. Mayor of City Council of Baltimore*, the Court held that Baltimore's reliance on the Federal Government's mandatory retirement provision for Federal firefighters was not a BFOQ which Baltimore could rely on to require mandatory retirement of city firefighters under the age of 70.[59] The Court in *Western Air Lines, Inc., v. Criswell*, upheld a jury instruction given by the Fifth Circuit Court of Appeals regarding the BFOQ defense.[60]

> The court recognized that the ADEA requires that age qualifications be something more than `convenient' or `reasonable'; they must be `reasonably necessary . . . to the particular business,' and this is only so when the employer is compelled to rely on age as a proxy for the safety-related job qualifications validated in the first inquiry. This showing could be made in two ways. The employer could establish that it `had reasonable cause to believe, that is, factual basis for believing, that all or substantially all [persons over the age qualifications] would be unable to perform safely and efficiently the duties of the job involved.'
>
> Alternatively, the employer could establish that age was a legitimate proxy for the safety-related job qualifications by proving that it is `impossible or highly impractical' to deal with the older employees on an individualized basis. `One method by which the employer can carry this burden is to establish that some members of the discriminated-against class possess a trait precluding safe and efficient job performance that cannot be ascertained by means other than knowledge of the applicant's membership in the class.'[61]

The Older Americans Act Amendments provided an exemption to employers where compliance with the ADEA with regard to an employee based in a foreign country would violate the laws of that country.[62] The ADEA does not apply where the company is not controlled by an American employer.[63] The Act provides courts with a four prong analysis to determine whether a company is under an American employer's control. The determination is based on the interrelation of operations, common management, centralized control of labor relations and common ownership or financial control between the employer and the corporation.[64]

The ADEA is also not violated when the action taken is pursuant to a bona fide seniority system or employee benefit plan.[65] The seniority system may not require or

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[57] Thurston, 469 U.S. at 122.

[58] Id.

[59] 472 U.S. 353 (1984).

[60] Id. at 414.

[61] Id. at 414-15.(quoting Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228 (5th Cir. 1969)).

[62] 29 U.S.C.A. § 623(f)(1).

[63] 29 U.S.C.A. § 623(h)(2).

[64] 29 U.S.C.A. § 623(h)(3)(A)-(D).

[65] 29 U.S.C.A. § 623(f)(2). Bona fide is defined as a system or plan that is not being used to

(continued...)

permit mandatory retirement of employees because of age.[66] A bona fide employee benefit plan must satisfy the "equal cost equal benefit" principle which provides parity between the amount employers spend on benefits for older and younger workers.[67] If it costs more to provide the same benefit to the protected class, the employer has the option of paying the same amount for benefits of the protected class as it does for employees outside of the protected class. This is so, even if it results in workers in the protected class receiving fewer benefits. However, employers may not pay less for benefits of members of the protected class than they pay for younger employees.

Another exemption to the ADEA is if "the differentiation is based on reasonable factors other than age."[68] Of course, a defense to the ADEA is that the employee was discharged or disciplined for good cause, not age.[69]

An employee may waive his rights under the ADEA, if such waiver was knowing and voluntary.[70] A knowing and voluntary waiver is defined in the act by a consideration of factors.[71] A waiver given in settlement of a charge filed with the

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[65] (...continued)
evade the purposes of the Act.

[66] 29 U.S.C.A. § 623(f)(2)(A). The ADEA explicitly allows voluntary retirement as an incentive of early retirement plans. 20 U.S.C.A. § 623(f)(2)(B)(ii). The ADEA does exempt from its provisions bona fide executives, high policy-makers and state and local firefighters and law enforcement officers.

[67] 29 U.S.C.A. § 623(f)(2)(B).

[68] 29 U.S.C.A. § 623(f)(1).

[69] 29 U.S.C.A. § 623(f)(3). In McKennon v. Nashville Banner Pub. Co., 513 U.S. 352 (1995), the Court considered whether after-acquired evidence of employee misconduct would bar an ADEA claim. The Court, held that after-acquired evidence, which if discovered would have led to the employee's discharge, does not bar an ADEA claim, but may reduce the amount of damages.

[70] 29 U.S.C.A. § 626(f).

[71] 29 U.S.C.A. § 626(f)(1). A waiver is knowing and voluntary if:
(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
(B) the waiver specifically refers to rights or claims arising under this chapter;
(C) the individual does not waive rights of claims that may arise after the date the waiver is executed;
(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;
(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;
(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or
(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(continued...)

EEOC or in a civil action is not considered knowing and voluntary unless the general requirements for a waiver are met and the individual has a reasonable opportunity to consider the settlement.[72] The person asserting validity of the waiver has the burden of proving that the waiver was knowing and voluntary. The waiver provision is inapplicable to the EEOC, and an employer may not interfere with an employee's participation with the EEOC in investigating or pursuing a claim of alleged unlawful practices. In *Oubre v. Entergy Operations, Inc.*, the Supreme Court considered whether an employee had to return money she received as part of a severance agreement before bringing suit under the ADEA.[73] The employee received severance pay in return for waiving any claims against the employer. The Court held that the plaintiff did not have to return the money before bringing suit, because the employer failed to comply with three of the requirements of the waiver provisions under the ADEA.[74]

A related issue is the effect of arbitration clauses on ADEA claims. The Court held in *Gilmer v. Interstate/Johnson Lane Corp.*,[75] that the ADEA does not preclude enforcement of a compulsory arbitration clause. The plaintiff in *Gilmer*, signed a registration application with the New York Stock Exchange (NYSE), as required by his employer. The application provided that the plaintiff would agree to arbitrate any claim or dispute that arose between him and Interstate. Gilmer filed an ADEA claim with the EEOC upon being fired at age 62. Interstate filed a motion to compel arbitration based on the application and the Federal Arbitration Act (FAA),[76] which was enacted to change the "longstanding judicial hostility to arbitration . . . ."[77]

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

[72] 29 U.S.C.A. § 626(f)(2).

[73] 118 S. Ct. 838 (1998).

[74] Id. at 842.

[75] 500 U.S. 20 (1990).

[76] 9 U.S.C.A. § 1 et seq. (West 1970 & Supp. 1997).

[77] According to Justice White, writing for the majority, the FAA was enacted to "reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts." Id. at 24.

The lower court held that nothing in the language of the ADEA or its legislative history prohibited arbitration of ADEA claims.[78] The U.S. Supreme Court agreed. Since the FAA represents a federal policy favoring arbitration, it is the burden of the person agreeing to arbitrate to show that Congress evinced an intent to prevent arbitration.[79] Initially, the Court did not find that the goal of the ADEA was hindered by allowing arbitration of ADEA claims.[80] In a prior decision, the Court held "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[81] Nor would compulsory arbitration interfere with the duty of the EEOC to enforce the provision.[82] The Act's emphasis on informal methods of dispute resolution, such as conciliation and persuasion, weighed in favor of arbitration, instead of against it.[83] In addition, the Court found the arbitration procedures of the NYSE were more than adequate to safeguard the employee's rights under the ADEA. NYSE's arbitration procedures addressed concerns of bias,[84] discovery procedures,[85] the type of relief granted,[86] and unequal bargaining power.[87] Justice White, writing for the majority, found that Gilmer's reliance on the Court's decision in *Alexander v. Gardner-Denver Co.*,[88] was misplaced. *Gardner-Denver* held that a plaintiff's civil action under Title VII is not precluded by an arbitration decision handed down pursuant to a collective-bargaining agreement.[89] The cases were found to be distinguishable since *Gardner-Denver* did not deal with enforceability of an agreement to arbitrate statutory claims; occurred under a collective bargaining agreement to resolve contractual rights; and was not covered by the Federal Arbitration Act.[90] Ultimately, the Court found that Gilmer failed to meet his burden of showing an intent by Congress to preclude arbitration of ADEA claims.

The Supreme Court revisited the issue of mandatory arbitration of statutory antidiscrimination claims in *Wright v. Universal Maritime Service Corp*.[91] In *Wright*,

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[78] Id. at 24.

[79] Id. at 26.

[80] Id. at 26-28.

[81] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1987).

[82] Id. at 28-29.

[83] Id. at 29.

[84] Id. at 30.

[85] Id. at 31.

[86] Id. at 32.

[87] Id. at 32-33.

[88] 415 U.S. 36 (1974).

[89] Gardner-Denver, 415 U.S. at 59-60.

[90] Gilmer, 500 U.S. at 35.

[91] 119 S. Ct. 391 (1998). The Court considered "whether a general arbitration clause in a collective-bargaining agreement (CBA) requires an employee to use the arbitration procedure (continued...)

the Court held that "a union-negotiated waiver of employees' statutory right to a judicial forum for claims of employment discrimination" contained in a collective bargaining agreement must be clear and unmistakable.[92] A general arbitration clause contained in a collective bargaining agreement's grievance procedure is not enough to waive an employee's right to pursue statutory antidiscrimination claims in court. However, the Court did not address whether a "union's waiver of the rights of represented employees,"[93] even if clear and unmistakable, would be valid if an employee sought a judicial forum in lieu of the union's arbitration procedures.[94]

Remedies

The remedies available under the ADEA are patterned on the Fair Labor Standards Act.[95] The prevailing plaintiff may be entitled to "employment, reinstatement, promotion, and the payment of wages lost and an additional amount as liquidated damages."[96] The wages received are considered unpaid minimum wages or unpaid overtime compensation.[97] A willful violation of the Act gives rise to liquidated damages. According to the Court in *Trans World Air Lines v. Thurston*,

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[91] (...continued)
for an alleged violation of the Americans with Disabilities Act of 1990 (ADA)." Id. at 392-93. Wright was a longshoreman who was subject to a CBA between his union and the association that represented several stevedore companies. The CBA contained a general arbitration clause. When Wright was refused work after returning from an injury, he filed suit alleging violation of the ADA. The employers filed for dismissal of Wright's suit for failure to use the arbitration procedures contained in the collective bargaining agreement. The Fourth Circuit Court of Appeals affirmed dismissal of Wright's claim on the basis that the "general arbitration provision in the CBA . . . was sufficiently broad to encompass a statutory claim arising under the ADA. . . " Id. at 394. Ultimately, the Court did not address the issue of whether Wright had to seek arbitration on the basis that the "cause of action Wright asserts arises not out of contract, but out of the ADA, and is distinct from any right conferred by the collective-bargaining agreement." Id. at 396. However, the court does state that any CBA requirement to arbitrate a statutory claim "must be particularly clear." Id. The Court quotes from an earlier case, "'[W]e will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable." Id.

[92] Id. at 396.

[93] Id. at 397. See also U.S. Library of Congress, Congressional Research Service Report 98-940, "Enforceability of Mandatory Arbitration Agreements: Wright v. Universal Maritime Service Corp." by Jon O. Shimabukuro.

[94] The Court concludes: "We hold that the collective-bargaining agreement in this case does not contain a clear and unmistakable waiver of the covered employees' rights to a judicial forum for federal claims of employment discrimination. We do not reach the question whether such a waiver would be enforceable." Wright, 119 S. Ct. at 397(emphasis added).

[95] Section 626(b) states: "The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section."

[96] 29 U.S.C.A. § 216(b).

[97] 29 U.S.C.A. § 626(b).

"a violation of the Act [would be] `willful' if the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA."[98] The plaintiff, upon proving his claim of age discrimination, is entitled to reasonable attorney's fees and costs.[99]

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[98] 469 U.S. 111, 126 (1985).

[99] 29 U.S.C.A. § 216(b).

APPENDIX

Amendments to the ADEA

1974 Amendment

Prior to 1974 an "employer" was covered if he had twenty-five or more employees.[100] The 1974 amendments reduced the number of required employees from twenty-five to twenty, thereby expanding the coverage of the ADEA. The Act was also amended to apply to Federal, state and local government employees, but excluded state elected officials and their personal staff and appointees.[101] Funding for the Act was increased from three million to five million dollars.

1978 Amendment

In 1978, Congress extended coverage of the ADEA by increasing the upper-age limit of the protected class of non-federal employees from 65 to 70 years of age, and eliminating the upper age limit for federal employees. Congress also commissioned the Secretary of Labor to conduct a study of the effect of the increase of the upper age limit with an eye toward eliminating the upper age limit for non-federal employees.

In regard to involuntary retirement, the 1978 Amendments prohibited use of a bona fide seniority system or employee benefit plan to require involuntary retirement due to age.[102] This amendment clarified the ADEA's application to employee benefit plans that pre-dated the ADEA.[103] However high ranking executives, policy makers and employees under an unlimited tenure contract at an institution of higher education, between the ages of 65 and 70, were exempt from this provision.[104]

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[100] Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, §28, 88 Stat. 55, 78 (1974).

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

[102] This change to the ADEA was in response to the Supreme Court decision in United Air Lines v. McMann, 434 U.S. 192 (1977).

[103] The Fifth Circuit Court of Appeals in Brennan v. Taft Broadcasting Co., 500 F.2d 212 (5th Cir. 1974), upheld mandatory retirement under an employee benefit plan that pre-dated the ADEA. The Fourth Circuit of the Court of Appeals in McMann v. United Air Lines, Inc., 542 F.2d 217 (4th Cir. 1976) held that mandatory retirement compelled by an employee benefit plan constituted a `subterfuge' to evade the provisions of the ADEA. The U.S. Supreme Court in United Air Lines, Inc., v. McMann, 434 U.S. 192 (1977), overturned the Fourth Circuit's decision. Congress responded with the Age Discrimination in Employment Act Amendments of 1978, legislatively overturning the Supreme Court's decision.

[104] High ranking executives and policy makers were defined as someone who held such a position the immediately proceeding two years and was entitled to certain forms of annual

(continued...)

The 1978 Amendments also sought to strengthen the enforcement procedures of the ADEA. First, the right to a jury trial was codified into the ADEA.[105] Second, the Amendments detailed the time line for filing an ADEA claim. An allegation of violation of the ADEA should be filed with the Secretary within 180 days of the alleged unlawful practice. An individual may file suit under the ADEA 60 days after filing a charge with the Secretary of Labor. If the alleged unlawful practice occurred in a state having a prohibition against age discrimination in employment, and a corresponding enforcement agency, then the grievant must file with the Secretary within 300 days from the alleged unlawful practice or within 30 days after receipt of notice of termination of proceedings under State law. The Secretary, upon receipt of a charge of an unlawful practice, is responsible for seeking an elimination of the alleged practice through informal methods of conciliation. An informal resolution must not exceed one year.

1982 Amendment

The 1982 Amendments entitled employees between the ages of 65 and 69 to coverage under any group health plan also offered to employees under age 65.[106]

1984 Amendments

The Deficit Reduction Act of 1984 amended the ADEA to entitle spouses of employees ages 65 through 69 to coverage under group health benefits similar to spouses of employees under age 65.[107] The Older Americans Act Amendments extended coverage of the ADEA to U.S. citizens working abroad for American companies.[108] However, employers are exempted from complying with the ADEA, if to do so, would violate the laws of the country where the employee is working.[109] Whether the employer of a U.S. citizen working abroad is liable under the ADEA is based on the determination of whether the U.S. employer controls the corporation. Factors to determine control include: "interrelation of operations, common

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[104] (...continued)
employees benefits totaling, at least, $27,000.

[105] 29 U.S.C.A. § 626(c)(2) (West 1985). The Supreme Court in Lorillard v. Pons, 434 U.S. 575 (1977), considered whether "there is a right to a jury trial in private civil actions for lost wages under the [ADEA]." Id. at 576. The Court held that, although not explicitly stated in the Act, a right to a jury trial was available based on the statutory scheme of the ADEA.

[106] Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, Title I, § 116(a), 96 Stat. 353 (1982).

[107] Deficit Reduction Act of 1984, Pub. L. No. 98-369, Title III, § 2301(b), 98 Stat. 1063 (1984).

[108] Older Americans Act Amendments, Pub. L. No. 98-459, Title VIII, § 802(a), 98 Stat. 1792 (1984).

[109] The ADEA does not apply where the employer is a foreign person not controlled by an American employer.

management, centralized control of labor relations, and common ownership or financial control."[110]

1986 Amendments

The Age Discrimination in Employment Amendments of 1986 eliminated the upper age limit for non-federal employees, hereby covering most employees age 40 or older.[111] Elimination of the upper age limit was motivated by the fact that the population most affected by the limitation was the most vulnerable group, poor workers. Concern over the cost of retirement has caused workers to stay in the workforce beyond retirement.

On the other hand, the ADEA did not apply to the hiring, discharge or mandatory retirement of a firefighter or law enforcement officer pursuant to state law or a bona fide hiring or retirement plan. This exemption expired on December 31, 1993, but was reinstated by the Age Discrimination in Employment Amendments of 1996.[112] The 1986 Amendments required a joint study by the Secretary of Labor and the Equal Employment Opportunity Commission (EEOC) on the effectiveness of physical and mental fitness tests for firefighters and law enforcement officers. The EEOC would use the results of the study to create guidelines for the use of physical and mental fitness tests in determining the ability of firefighters and law enforcement officers to perform their jobs.

The 1986 Amendments also allowed for the mandatory retirement of tenured employees at institutions of higher education who have reached 70 years of age until December 31, 1993. At that time this exemption expired, and tenured faculty are now protected under the ADEA. A study was also commissioned to examine the effects of eliminating mandatory retirement for tenured employees.

1988 Amendments

The Age Discrimination Claims Assistance Act of 1988 extended the statute of limitations for claims the EEOC failed to process before the statute of limitations expired.[113] Another extension was granted two years later with the Age Discrimination Claims Assistance Act of 1990.[114]

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[110] 29 U.S.C.A. § 623(h)(3)(A)-(D).

[111] Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (1986). The upper age limit was actually removed months earlier by the Budget Reconciliation Act, Pub. L. No. 99-272, Title IX, § 9201(b), 100 Stat. 171 (1986). The Older Americans Pension Benefits subtitle, included in the Budget Reconciliation Act Public Law 99-509 section 9201, prohibited age discrimination in employee pension benefit plans.

[112] Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

[113] 29 U.S.C. § 626 (1994). See also Pub. L. No. 100-283, 102 Stat. 78 (1988).

[114] 29 U.S.C. § 626 (1994). See also Pub. L. 101-504, 104 Stat. 1298 (1990).

1990 Amendments

The Older Workers Protection Act sought to clarify the ADEA's application to employee benefit plans. The Act overturned the U.S. Supreme Court decision, *Public Employees Retirement System of Ohio v. Betts*,[115] which held that bona fide employee benefit plans which were not a subterfuge for discrimination were permissible under the ADEA. One of the concerns surrounding the enactment of the ADEA was the cost to employers of providing employee benefits to older workers. The "equal benefit or equal cost" principle allowed employers to proportionally reduce the amount of money spent on an older worker's employee benefits, so that the amount spent on the older worker is equivalent to the amount spent on a younger worker. This principle did not allow employers to reduce or deny benefits because of age, but did allow employers to deduct for any increased costs that would make insuring or providing benefits to older workers more expensive. It was believed that to not account for increased costs would prevent employers from hiring older workers. This is permissible under the ADEA even if such a reduction reduces the amount of benefits an older worker receives. The Older Workers Protection Act restored the use of the "equal benefit or equal cost" principle after it had been invalidated by the Supreme Court in *Betts*. In addition, the 1990 Amendment established criteria for waiving any rights of claims under the ADEA.

1995 Amendment

The Congressional Accountability Act of 1995 extended the rights and protections of the ADEA, and several other civil rights laws, to congressional employees.[116]

1996 Amendments

The Age Discrimination in Employment Amendments of 1996 reinstated the exemption for state and local firefighters and law enforcement officers created by the 1986 Amendments.[117] The exemption created by the 1986 Amendments had expired

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[115] 492 U.S. 158 (1989).

[116] 2 U.S.C.A. § 1301. "Employees" as defined under the Congressional Accountability Act include employees of the:

(A) House of Representatives
(B) Senate
(C) Capitol Guide Service
(D) Capitol Police
(E) Congressional Budget Office
(F) Office of the Architect of the Capitol
(G) Office of the Attending Physician
(H) Office of Compliance; or
(I) Office of Technology Assessment

[117] Federal law enforcement officers and federal firefighters are covered under different provisions. Section 3307 of Title 5 allows heads of agencies to establish its own minimum and

(continued...)

on December 31, 1993. The 1996 Amendments also reinstated the requirement that the Secretary of Health and Human Services identify or create tests that would assess the ability of firefighters and law enforcement officials to perform their tasks.

1998 Amendments

The Higher Education Amendments of 1998 added a new section to the ADEA regarding voluntary retirement incentive plans for tenured faculty of higher education institutions.[118] Section 4 of the ADEA was amended to allow institutions of higher education[119] to offer supplemental benefits to tenured employees "upon voluntary retirement that are reduced or eliminated on the basis of age."[120] Supplemental benefits are defined by the amendment as "benefits . . . in addition to any retirement or severance benefits which have been offered generally to employees."[121] The institution may not reduce or cease non-supplemental benefits on the basis of age. If an institution offers a supplemental benefits plan, a tenured employee upon becoming eligible for retirement has at least 180 days to elect to retire and receive both her regular benefits and supplemental benefits. Upon electing to retire, an institution may not require retirement before 180 days.

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[117] (...continued)
maximum age limits for original appointments of federal law enforcement officers and firefighters. 5 U.S.C.A. § 3307 (West 1996). Section 8425 gives the mandatory retirement ages of federal firefighters and law enforcement officers. 5 U.S.C.A. § 8425 (West 1996).

[118] Higher Education Act Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1581 (1998).

[119] An "institution of higher education" is defined as (A) a proprietary institution of higher education; [and] (B) a postsecondary vocational institution . . . " 20 U.S.C.A. § 1088 (West 1990 & Supp. 1998).

[120] Higher Education Amendments of 1998 § 941(a), 29 U.S.C.A. § 623(m) (1998).

[121] Higher Education Amendments of 1998 § 941(a), 29 U.S.C.A. § 623(m)(2) (1998).