ADEA AND REDUCTION IN FORCE -

HOW EMPLOYERS CAN AVOID CLAIMS OF AGE DISCRIMINATION

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I. INTRODUCTION

The Age Discrimination in Employment Act ("ADEA") was passed by Congress in 1967. The Act grew out of Title VII of the 1964 Civil Rights Act. House and Senate members were unsuccessful in including prohibitions against age discrimination in the civil rights statute, but Section 715 of Title VII required the Secretary of Labor to prepare a fact-finding study on the effects of age discrimination in employment. Based on that study, the ADEA was passed.[1]

The focus of this article is to outline the key features of the ADEA in the context of a reduction in force ("RIF"). Companies are faced with difficult decisions today regarding the size and structure of their work force. Management is presented with reducing its work force to enable the company to meet business objectives in light of a declining economy, corporate reorganization and/or escalating business costs. Given a decision to reduce the work force, management should be aware of the ADEA to avoid age discrimination litigation and to reduce the risk of liability from reductions in force.

II. AGE DISCRIMINATION DEFINED

The ADEA applies to private employers with at least twenty workers, labor organizations with at least twenty-five members or that operate a hiring hall or office that recruits potential employees or obtains job opportunities, federal, state and local governments and employment agencies.[2] The purpose of the ADEA is "to promote employment of older persons based on their ability rather than age."[3] Although the purpose of the Act is to prevent age discrimination, it does not completely define or explain age discrimination. The ADEA only says that "it shall be unlawful . . . to discriminate against any individual . . . because of such individual's age."[4]

III. THE BURDENS OF PROOF AND PERSUASION

Courts apply the same standards and methods of proof developed under Title VII employment discrimination claims to age discrimination cases brought under the ADEA.[5] The United States Supreme Court established the standard test for employment discrimination in McDonnell Douglas Corp. v. Green.[6] McDonnell Douglas held that Title VII plaintiffs must: (1) be in the protected class, (2) be qualified for the job, (3) be rejected, despite their qualifications, and (4) show that "the position remained open and the employer continued to seek applicants from persons of complainant's qualifications" after the rejection.[7]

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[1] Jessica Lind, "The Prima Facie Case of Age Discrimination in Reduction-in-Force Cases" 94 Mich. L. Rev. 832, 834-35 (December 1995).

[2] 29 U.S.C. Sections 630(a)-(c), (e) and Section 633(a)(1996).

[3] 29 U.S.C. Section 621(b)(1996).

[4] 29 U.S.C. Section 623(a)(1996).

[5] Lind at pp. 834-35.

[6] 411 U.S. 792, 802 (1973); see also Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 260 (1981)(clarified that burden of persuasion remains with the plaintiff at all times).

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

Application of the McDonnell Douglas test to ADEA claims generally requires the plaintiff to prove a prima facie case of age discrimination.[8] The plaintiff can raise an inference of age discrimination in the typical ADEA pretext case by showing:

> (1) he is within the protected class, i.e. over forty; (2) he was qualified for the position at issue; (3) he was dismissed despite being qualified; and (4) he was replaced by a person sufficiently younger to permit an inference of age discrimination.[9]

Once such a showing has been made, there is a fair inference that age was a motivating factor in the employer's decision. The employer then bears the burden of coming forward with evidence rebutting that inference.[10] The employer is not required to prove the truth of its reason, but must only state an explanation for its actions.[11] "The defendant must only raise 'a genuine issue of fact as to whether it discriminated against plaintiff' in order for the defendant to avoid summary judgment. Ultimately, the plaintiff still has the burden of persuasion in making out his or her discrimination claim."[12]

When the employer satisfies this burden, the presumption of discrimination drops away and the plaintiff must come forth with evidence tending to show that the defendant's explanation is a pretext for discrimination.[13] The plaintiff has both the burden of production and persuasion in convincing

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[8]A plaintiff alleging intentional discrimination by an employer may present direct evidence of discriminatory motive or circumstantial evidence from which intentional discrimination may be inferred. The court's evaluation of direct evidence is not difficult. An example of direct evidence would be a policy that allocates benefits depending on the age of the employee. If direct evidence is present, the circumstantial route of proving age discrimination is not relevant. Trans World Airlines, Inc. v. Thurston, 105 S.Ct. 613 (1985). However, "plaintiffs rarely come to court with the 'smoking gun' in hand." They tend to rely on circumstantial evidence because employers rarely leave direct evidence of discrimination. Lind, at pp. 835-36. See also United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 n.3 (1983)(direct vs. circumstantial evidence); Hollander v. American Cyanamid Co., 895 F.2d 80, 85 (2d Cir. 1990)(plaintiffs most often build their employment discrimination cases from circumstantial evidence which undercuts the employer's proffered explanation); Holzman v. Jaymar-Ruby, 916 F.2d 1298, 1303 (7th Cir. 1990)(no smoking gun in typical age discrimination case).

Note that there are two distinct legal theories under which a plaintiff can prove employment discrimination. Under the "disparate treatment" theory, a plaintiff must show that her employer intentionally treated him or her less favorable than others because of his or her race, religion, national origin or age. Under the "disparate impact" theory, the plaintiff must show that a facially neutral employment practice affected members of a protected class more harshly than those outside the protected class. The "disparate impact" theory also requires the plaintiff to show that the employment practice cannot be justified by business necessity. Although ADEA cases may involve either one of these theories, the focus of this article is on "disparate treatment" claims in the RIF context. Some courts, including the Third Circuit, have found that the ADEA does not recognize "disparate impact" claims. Lind, at p. 835 n. 17 (citing DiBiase v. SmithKline Beecham Corp., 48 F.3d 719 (3d Cir. 1995)(doubting whether disparate impact theory is available under the ADEA in light of Supreme Court's holding in Hazen Paper Co. v. Biggins, 113 S.Ct. 1701 (1993) and Houghton v. Sipco, Inc., 38 F.3d 953, 958-59 (8th Cir. 1994)(assuming disparate impact liability applies under the ADEA)).

[9]Armbruster v. Unisys Corp., 32 F.3d 768, 777 (3d Cir. 1994)(citing Burdine, 450 U.S. at 253; McDonnell Douglas, 411 U.S. at 802; and Gray v. York Newspapers, Inc., 957 F.2d 1070, 1078 (3d Cir. 1992)).

[10]Andrew J. Ruzicho and Louis A. Jacobs, Litigating Age Discrimination Cases, Section 2:01 (1990 Cum. Supp.)(citing Burdine, supra).

[11]Burdine, 450 U.S. at 254-55.

[12]Julie Vigil, "Expanding the Hostile Environment Theory to Cover Age Discrimination: How Far Is Too Far?" 23 Pepp. L. Rev. 565, 572 (January 1996).

[13]Lind at p. 778 (citing Burdine, 450 U.S. at 254-55, 257; Gray, 957 F.2d at 1078).

the trier of fact of his or her age discrimination claim.[14] "[T]he factfinder must determine "'whether the rejection was discriminatory"' within the meaning of the ADEA."[15]

IV. APPLICATION OF McDONNELL DOUGLAS TO RIF CASES

In recognition of the various factual situations of employment discrimination, courts have applied the four McDonnell Douglas elements as circumstances require.[16] This notion is particularly applicable because "the realities of a RIF render strict application of the McDonnell Douglas prima facie case impractical."[17] A claimant whose job has been eliminated through a RIF could never show that their employer replaced them or sought applicants for that position as required by the fourth McDonnell Douglas element.[18] However, an employer may be engaging in age discrimination in reducing its work force. The ADEA is violated if an employer considers age in deciding which workers to lay off.[19] Therefore, if strict application of the McDonnell Douglas test were applied to a RIF case, the terminated employees would have no remedy.

Courts are not consistent as to what showing, in addition to the first three elements of McDonnell Douglas, must be made to support an inference of age discrimination in RIF cases.[20] They have applied two different approaches. The Coburn approach was first set forth by the D.C. Circuit in Coburn v. Pan American World Airways.[21] Under Coburn, RIF plaintiffs must show "that a similarly situated younger employee was treated more favorably than the plaintiff".[22] "Similarly situated" means that the retained employee's job responsibilities resembled those performed by the plaintiff and that the position required similar qualifications and afforded the same status as that of the plaintiff.[23]

The Coburn approach is applied by the Third Circuit. In the RIF context, the Third Circuit has held that to establish a prima facie case under the McDonnell Douglas pretext framework, "the plaintiff must show he was in the protected class, he was qualified, he was laid off and other unprotected

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[14] Id. at p. 572 (citing Burdine, 450 U.S. at 256).

[15] Id. (citing St. Mary's Honor Ctr. v. Hicks, 113 S.Ct. 2742, 2753 (1993) (quoting Aikens, supra, 460 U.S. at 714-15 (1983)).

[16] Lind at p. 838. Ruzicho and Jacobs at Section 2:02.

[17] Lind at p. 840.

[18] If a claimant challenges whether a RIF actually occurred, the court may properly required that plaintiff to show replacement. Under this situation, the employer's explanation for termination of the employee may be a pretext. See Lind at p. 840 n. 48.

[19] Id. at p. 840 (citing 29 U.S.C. Sections 621-634 (1994)).

[20] Id. at 840.

[21] 711 F.2d 339 (D.C.Cir.), cert. denied, 464 U.S. 994 (1983).

[22] Lind at p. 841.

[23] Id. (citing Hill v. Bethlehem Steel Corp., 729 F. Supp. 1071, 1075 n.6 (E.D.Pa. 1989)(plaintiff must show that those retained were similarly situated in terms of qualifications and position)). See also Healy v. New York Life Ins. Co., 860 F.2d 1209 (3d Cir. 1988), cert. denied, 490 U.S. 1098 (1989); Chipollini v. Spencer Gifts, Inc., 814 F.2d 893 (3d Cir.), cert. dismissed, 483 U.S. 1052 (1987).

workers were retained."[24] This approach has been criticized as putting too low a burden on RIF plaintiffs in proving a prima facie case because it does not require the plaintiff to demonstrate that they were more qualified than the younger employees retained. All the plaintiff is required to show is that they were qualified for the position they held.[25] As a consequence, "under the Coburn approach, an employer who properly focused on the relative qualifications of employees when deciding whom to discharge during a RIF nevertheless may be presumed to have discriminated against the plaintiff."[26] This presumption defeats the purpose of the ADEA -- "to promote employment of older persons based on their ability rather than age."[27]

Another criticism of the Coburn approach is that it improperly modifies the McDonnell Douglas test because it does not support an inference of discrimination.[28] In essence, this standard does not protect employers from having to defend against frivolous claims of age discrimination. The reason for this is that, in the RIF context, the retention of younger employees should not be inherently suspicious and suggestive of age discrimination. Unlike non-RIF cases, in which courts assume that employers do not fire qualified employees, RIF cases involve laying off workers due to economic circumstances and qualified workers may be let go for legitimate reasons.[29] The retention of a younger employee over an older employee may be explained by superior qualifications, personality or higher seniority.[30] Age discrimination is an inappropriate inference under the circumstance of a RIF.

Other courts have applied the Williams approach, first adopted by the Fifth Circuit in Williams v. General Motors Corp. to analyze RIF cases.[31] This approach is more flexible than the Coburn approach, and provides that the plaintiff must produce "'evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue.'"[32] This approach has been criticized for causing procedural problems by effectively collapsing the pretext stage of the analysis into the prima facie case.[33]

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[24]Armbruster v. Unisys Corp., 32 F.3d 768, 777 (3d Cir. 1994)(citing Semen v. Coplay Cement Co., 26 F.3d 428, 433 (3d Cir. 1994); Billet v. Cigna Corp., 940 F.2d 812, 816 n.3 (3d Cir. 1991)(other citations omitted).

[25]Lind at p. 841 (citing Coburn, 711 F.2d at 343; Healy, 860 F.2d at 1214; Chipollini, 814 F.2d at 897; and Massarsky v. General Motors Corp., 706 F.2d 111 (3d Cir. 1982), cert. denied, 464 U.S. 937 (1983)).

[26]Lind at pp. 841-42.

[27]Id. at p. 842 n. 61 (citing 29 U.S.C. Section 621(a)(4)(1994)).

[28]Id.

[29]Id.

[30]Id. at p. 843.

[31]656 F.2d 120 (5th Cir. 1981), cert. denied, 455 U.S. 943 (1982).

[32]Lind at p. 843 (quoting Williams, 656 F.2d at 129). In proving its prima facie case, the plaintiff was also required to show that she was a member of the protected class, had been discharged or demoted, and was qualified to assume another position at the time of the discharge or demotion.

For other cases applying the Williams approach, see Earley v. Champion International Corp., 907 F.2d 1077, 1081-84 (11th Cir. 1990) and Stumph v. Thomas & Skinner, Inc., 770 F.2d 93, 95-97 (7th Cir. 1985).

[33]Lind at p. 844. A discussion of this criticism goes beyond the scope of this article.

V. AN EXAMPLE OF APPLICATION OF McDONNELL DOUGLAS TO AN RIF CASE FROM THE THIRD CIRCUIT

In White v. Westinghouse Electric Co.,[34] plaintiff James White appealed a district court order which granted his former employer, Westinghouse, summary judgment in his age discrimination action. The court reversed and remanded the case for further proceeding, finding that the timing of White's discharge was sufficient to raise a genuine issue of material fact.

White worked for Westinghouse from 1956 until January 31, 1986. In 1982, White's transportation manager position was consolidated with another position held by younger employer, Jeffrey Neubert. White was given the newly created position of Senior Engineer, Transportation, Nuclear Project and reported to Neubert. White's assignments were cut back in September 1985. This was done, according to a memo signed by Neubert and White, because White's job performance was not satisfactory. Finally, on November 5, 1985, Neubert notified White that he would be discharged due to a reduction in force. Westinghouse had a reduction goal of 5-10%.

White, one of ten in the Transportation Department, was selected for discharge for two reasons according to Neubert and his supervisor. His performance rating had been the lowest in the department in two previous years and his position was the most expendable. Two of the employees retained in the department were older (58 and 52) and two one year younger than White, who was 51. White was not replaced and his job responsibilities were not reassigned to anyone else. White allegedly requested that his termination date be extended by about three months so that he could complete 30 years of service to be eligible for higher benefits.

The court noted that the ADEA makes it unlawful for an employer "'to discharge any individual . . . because of such individual's age."[35] However, it does not prohibit action "where the differentiation is based on reasonable factors other than age."'[36] In the typical ADEA case where direct evidence is unavailable, the McDonnell Douglas method of proof applies. Quoting Burdine, the court explained that:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, non-discriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.[37]

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[34] 862 F.2d 56 (3d Cir. 1988).

[35] Id. at 59 (citing 29 U.S.C.A. Section 623 (a)(1)(West 1985)).

[36] Id. (citing 29 U.S.C.A. Section 623(f)(1)(West 1985)).

[37] Id. at 59 (quoting Burdine, 450 U.S. at 252-53).

The burden of persuasion remains with the plaintiff at all times.[38]

The court also expressed that the application of the McDonnell Douglas test required the plaintiff to show "'only that he is a member of the protected class and that he was laid off from a job for which he was qualified while others not in the protected class were treated more favorably.'"[39]

The court found that White successfully made out a prima facie case by showing (1) that he was in the protected class and (2) that Westinghouse retained three members of the department under 40 years of age, and therefore not in the protected class. Westinghouse did not assert that White was not qualified.

Therefore, the burden of production shifted to Westinghouse to produce some legitimate non-discriminatory reason for discharging the plaintiff. Westinghouse met this burden by offering two reasons for the discharge: that his performance rating was poor and that his position was expendable.

The burden of production then shifted back to White, requiring him to produce evidence from which a factfinder could infer that Westinghouse's explanation was a mere pretext. White responded by producing evidence which allegedly showed a corporate "policy" aimed at reducing the average age of managers in the Water Reactors Division. He also noted the timing of his discharge three months before completing his 30 years of service. This prevented him from taking early retirement at 58 rather than 60 and from receiving increased pension benefits.

With respect to the evidence of a corporate "policy" to reduce the average age of managers, the court found White's evidence insufficient to meet his burden on the pretext issue and raise a genuine issue of material fact. However, with respect to the timing of White's discharge, the court found that the lower court should have denied defendant's motion for summary judgment. The district court had calculated that "'discharging White before his thirtieth anniversary saved Westinghouse two years of early retirement pension benefits totalling $24,472.56, plus $15.69 per month for the rest of his life, if he cho[se] early retirement.'"[40] The Third Circuit found that by focusing on the dollar amounts of the pension benefits which are inextricably linked to the employee's years of service with the company and, therefore, to his age, the district court improperly dismissed this argument as irrelevant to age discrimination. The court concluded that the district court improperly decided issues of fact because the timing of White's discharge raised genuine issues of material fact as to whether Westinghouse's proffered reasons for discharge were a pretext for impermissible discrimination. The case was remanded for trial.

VI. LATEST WORD FROM THE SUPREME COURT OF THE UNITED STATES

The Supreme Court established a new prima facie burden for ADEA plaintiffs to satisfy on April 1, 1996, when the court decided O'Connor v. Consolidated Coin Caterers Corp..[41] The specific

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[38] Id. (citations omitted).

[39] Id. (quoting Massarsky, 706 F.2d at 118).

[40] Id. at 62.

[41] 116 S.Ct. 1307, 64 U.S.L.W. 4243 (1996).

issue addressed by the Court was whether a plaintiff alleging that he was discharged in violation of the ADEA must show that he was replaced by someone outside the age group protected by the ADEA to make out a prima facie case under the McDonnell Douglas framework.

Before O'Connor, most courts interpreted the fourth McDonnell Douglas prong to require the plaintiff to show that he or she was replaced by someone younger. In RIF cases, most courts interpreted the fourth prong to require the plaintiff to show that younger employees were not laid off, that younger employees assumed the plaintiff's duties or that younger employees' jobs were not eliminated, depending on the circumstances.[42] The Fourth Circuit required the plaintiff to show that he or she was replaced by someone outside the ADEA protected class, someone younger than age 40.

In O'Connor, the plaintiff was employed as a general manager of a geographic region for Consolidated. One of Consolidated's geographic regions was eliminated in 1989. Restructuring resulted in O'Connor changing regions with a younger employee. The next year, because O'Connor was slow in responding to problem accounts, Consolidated reassigned several geographic territories to a younger employee. Then the parent company decided to combine some of Consolidated's operations with the parent's operations. This resulted in a fewer number of regions. As a result of this reorganization, O'Connor lost his job at the age of 56. A 40-year-old employee took over O'Connor's region. Consolidated terminated O'Connor because it felt he could not handle a larger region.

The Fourth Circuit affirmed the district court's decision to grant Consolidated's motion for summary judgment.[43] The district court and the Fourth Circuit agreed with Consolidated's argument that O'Connor did not present a prima facie case of age discrimination because O'Connor was replaced by a person from the protected group. O'Connor's replacement was 40-years-old. The Fourth Circuit found that O'Connor failed to state a prima facie case because he was replaced by a person from the protected class, even though he was younger than O'Connor.

The Supreme Court rejected the Fourth Circuit standard, holding that "the fact that an ADEA plaintiff was replaced by someone outside the protected class is not a proper element of the McDonnell Douglas prima facie case." The Court explained that the ADEA "bans discrimination against employees because of their age" and that it "limits the protected class to those who are 40 or older." Therefore, it is irrelevant whether a person in the protected class lost out to another person from the protected class in determining whether the plaintiff has a prima facie case. The Court explained that:

> the proper solution to the problem lies not in making an utterly irrelevant factor an element of the prima facie case, but rather in recognizing that the prima facie case requires "evidence adequate to create an inference that an employment decision was based on an [illegal] discriminatory criterion. . . ."

It is important to note that even though the Fourth Circuit also concluded that the petitioner could not prevail under the modified McDonnell Douglas standard applied to RIF cases, the Supreme

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[42]Thomas J. Piskorski, "O'Connor v. Consolidated Coin Caterers Corp. - Supreme Court Establishes New Prima Facie Burden for ADEA Plaintiff To Satisfy; Age Discrimination in Employment Act" 22 Employee Relations Law Journal 95 (September 1996).

[43]See 56 F.3d 542 (4th Cir. 1995).

Court limited its review to the Fourth Circuit's treatment of the case as a standard age discrimination case.[44]

Some commentators believe that O'Connor's new standard will actually benefit employers.[45] Thomas Piskorski, in an article appearing in the Employee Relations Law Journal, argues that application of the Supreme Court's analysis in O'Connor makes it clear that a prima facie case requires evidence adequate to create an inference that an employment decision was based on an illegal discriminatory criterion. Piskorski emphasizes that the Supreme Court developed this new standard:

> "In the age-discrimination context, such an inference can not be drawn from the replacement of one worker with another worker insignificantly younger. Because the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class."[46]
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> Piskorski specifically includes RIF cases and job elimination cases in arguing that "O'Connor will allow employers to argue that the court should require the ADEA plaintiff, as the fourth prong to his or her prima facie case, to present 'evidence adequate' to create an inference that an employment decision was based on an illegal discriminatory reason." This is of significant importance as ADEA cases are one of the most dangerous types of discrimination cases for an employer to have to defend because of their emotional appeal to juries. O'Connor will help employers in their attempts to obtain pretrial dismissal of ADEA claims to avoid juries.

VI. DEFENSES TO AN ADEA ACTION

Defenses to an ADEA action include the following:

A. Bona Fide Occupational Qualification ("BFOQ")

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[44]See footnote 1 of the Supreme Court's opinion.

[45]Piskorski, supra.

[46]Id. (quoting O'Connor).

Note that O'Connor did not decide the issue of "whether an employee who alleges age discrimination must also prove that his or her replacement was younger and, if so, how much younger." The Equal Opportunity Commission ("EEOC") recently issued "Guidance on Age Discrimination Cases" in this area. According to the EEOC, there is no clear test for determining whether the relative age difference between a termination and replacement employee is determinative. The EEOC lists some specific situations in which it would conduct a careful review to determine whether age discrimination occurred despite a slight difference in age. See Felhaber, Larson, Fenlon and Vogt, P.A., "Age Discrimination: EEOC Guidance and a Significant Federal Court Decision" 6 Minnesota Employment Law Letter Issue 12 (February 1997)(citing EEOC Enforcement Guidance No. 915.002 (9/18/96) and Greene v. Safeway Stores, 98 F.3d 554 (10th Cir. 1996)(holding that replacement by an older employee is not fatal to a former employee's age discrimination claim)).

Differential treatment of individuals due to their age is consistent with the ADEA "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business.[47]

B. Reasonable Factor Other Than Age

Employers may engage in practices that have a disparate impact on the protected class of older applicants or employees "where the differentiation is based on reasonable factors other than age."[48] This defense addresses an element of the plaintiff's case -- the existence of age as a motivating factor. Although the Supreme Court has not directly ruled on this issue, it has indicated that this is not an affirmative defense. The employer has no burden of persuasion.[49] It should be noted that this defense is not to be interpreted literally as such an interpretation would preclude any disparate impact liability under the ADEA.[50] "Consequently, factors closely correlated to age or impacts that are disparate but do not divide applicants or employees into age-differentiated groups would still be violative of the ADEA."[51]

C. Corporate Reorganization

This defense is particularly application to RIF cases. Employers typically have clear business-related purposes in reorganizing, and RIF's are reasonable means to serve those purposes. A defense exists unless the employer: "(1) refused to consider retention/relocation because of an employee's age; or (2) regarded the employee's age as a negative factor in the decision-making process affecting that employee."[52]

Typical circumstantial evidence of age discrimination may include a comparison of the average age of the work force before and after reorganization, documents or statements made indicating age as a relevant factor, or statistical

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[47]29 U.S.C. Section 623(f)(1). Examples in which a BFOQ has been proven include the following: entry-level intercity bus drivers over 40 year old; mandatory retirement at ages 50 and 60 for uniformed state police; entry-level commissioned campus police officers over 45 years old and highway patrol, including radio operators over age 32. Ruzicho and Jacobs, supra, at Section 4:01 (citations omitted). Any further explanation of this defense is beyond the scope of this article as the focus is on RIF cases.

[48]29 U.S.C. Section 623(f)(1).

[49]Ruzicho and Jacobs, supra, at Section 4:02.

[50]Id.

[51]Id. (citations omitted). For example, salary may be so tied to age when seniority produces regular raises that saving from terminating more expensive employees will not serve as a reasonable factor other than age. Id. at n. 22 (citing Metz v. Transit Mix, Inc., 828 F.2d 1202 (7th Cir. 1987)). By contrast, "'factors that sometimes accompany advancing age, such as declining health or diminished vigor and competence'" are not unlawful bases for an employment decision." Id. at n. 23 (citing Loeb v. Textron, Inc., 600 F.2d 1003, 1016 (1st Cir. 1979)).

[52]Id. (citing Williams v. General Motors Corp., 656 F.2d 120 (5th Cir. 1981)).

evidence of older employees being adversely affected or, in the alternative, of younger employees being more favorably treated.[53]

However, if the employer implements a scoring system or other evaluative tool which does not include a rating for age and under which arguably capable employees are graded by several people whose ratings are incorporated into a cumulative score that is followed, the defense will be recognized.[54] In addition, a neutral system of terminating employees with less experience will also be effective. Furthermore, even if there is a disparate impact on higher salaried employees, this may be acceptable if no evidence demonstrated a correlation between age or seniority and salary.[55]

Another factor examined when this defense is offered is whether older decision-makers were used in the decision-making process. Offering testimony from older decision-makers can bolster this defense.[56]

Furthermore, in a case of real economic necessity requiring drastic cost reduction, if forced retirement is the least drastic alternative, this may be recognized as a defense.[57]

As previously indicated, the RIF must be genuine, not merely a pretext. An employer increasing the work force, forecasting better profits, and implementing a RIF without informing high-level administrators of its existence, will not fair well in using this defense.[58]

D. Employee Benefit Plans

Under Section 623(f)(2) of the ADEA, bona fide retirement, pension, insurance or other employee benefit plans are specifically exempted from the ADEA proscriptions. However, a plan may not require or permit the involuntary retirement of anyone within the protected class.[59]

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[53]Id. (citing Herman v. National Broadcasting Co., Inc., 744 F.2d 604 (7th Cir. 1984)(corporate decision-maker had elicited a list of employees potentially affected by a RIF due to changes in technology with a category for date of birth)).

[54]Id. (citing Stendebach v. CPC International, Inc., 691 F.2d 735 (5th Cir. 1982)(system used favored employee with more company seniority in a tie)).

[55]Id. at Section 4:03 (Supp. 1990)(citing Holt v. Gamewell Corp., 797 F.2d 36 (1st Cir. 1986).

[56]Id. (citing LaGrant v. Gulf & Western Mfg. Co., Inc., 748 F.2d 1087 (6th Cir. 1984)).

[57]Id. (citing EEOC v. Chrysler Corp., 733 F.2d 1183 (6th Cir. 1984)).

[58]Id. (citing Hillenbrand v. M-Tron Industries, Inc., 827 F.2d 363 (8th Cir. 1987)).

[59]29 U.S.C. Section 623(f)(2).

The employer must show the following in proving this affirmative defense:

1. the employer's action must "observe," that is, conform to the terms of the plan;

2. the plan must be bona fide in the sense that it offers substantial benefits for employees and is thus genuine, rather than a sham;

3. the benefits must be provided for employees as part of an integrated plan, not simply a fringe benefit unrelated to any plan; and

4. the plan must not be a subterfuge to evade the ADEA; thus, the plan could either have been adopted prior to the ADEA (1967), be purely voluntary, or have a business or economic purpose.[60]

It is perfectly acceptable for a plan to apportion benefits by age without losing insulation from the ADEA. An example of this is a plan which diminishes apportionment of benefits as the employee approaches normal retirement age.[61]

E. Bona Fide Seniority System

Employees may be treated differently by age if done "to observe the terms of a bona fide seniority system."[62] However, such a system may not "require or permit the involuntary retirement of any individual" in the protected class.[63]

F. Good Cause

The ADEA does not make it unlawful "to discharge or otherwise discipline an individual for good cause."[64] Under this statutory section, even if the employer mistakenly rejected or discharged the plaintiff without good cause, the plaintiff must still show that age motivated the employer's decision-making process. The absence of good cause is insufficient.[65]

G. Waiver and Settlement

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[60]Ruzicho and Jacobs, supra, at Section 4:05 (citations omitted).

[61]Id. (citing Patterson v. Independent School Dist. No. 709, 742 F.2d 465 (8th Cir. 1984)).

[62]29 U.S.C. Section 623(f)(2).

[63]Id. Any further discussion of this defense is beyond the scope of this article.

[64]29 U.S.C. Section 623(f)(2).

[65]Ruzicho and Jacobs, supra, at Section 4:06.

ADEA rights may be waived when agreements are fairly reached and a totality of the circumstances approach is often used to determine whether a waiver is valid.[66]

H. Causation

This defense comes into play when the plaintiff produces evidence that is so revealing of discriminatory animus that it is not necessary to rely on any presumption from the prima facie case to shift the burden of production. In this type of situation, the employer must persuade the factfinder "that even if discrimination was a motivating factor in the adverse employment decision, it would have made the same employment decision regardless of its discriminatory animus."[67]

VII. DECREASING RISK OF ADEA LITIGATION FOLLOWING A RIF

A. ADEA Releases

One of the main tools used by employers in reducing jobs is the early retirement window. Under this type of program employers will usually offer an enhanced retirement and/or severance benefits to employees within a specified age and service criteria to encourage early retirement. A waiver of the right to sue the company for age discrimination or other legal claims is often made a condition for receiving enhanced early retirement benefits. It important to keep in mind that voluntary programs are of particular concern because they typically target older employees with higher salaries or wages. Therefore, an employer considering voluntary reductions must do so through careful planning to avoid costly litigation. Amendments made to the ADEA must be followed in order to obtain enforceable waivers.[68]

The Older Worker's Benefit Protection Act ("OWBPA"), signed into law in October 1990, amended the ADEA by expanding its scope to include employee benefits. Employee benefits are included with "compensation, terms, conditions or privileges of employment" for which an employer may not discriminate on the basis of age. The OWBPA addresses several topics, including waivers of liability

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[66]Ruzicho and Jacobs, supra, at Section 4:07 & n. 51 (Supp. 1990) (citing Runyan v. National Cash Register, 787 F.2d 1039 (6th Cir. 1986)(en banc), cert. denied, 107 S.Ct. 178 (1986)(waiver was allowed due to a factual dispute over the intent and motivation of the employer and the status of the discharged employee as a labor attorney familiar with the ADEA)). A more detailed discussion of waivers appears below under the section entitled "Decreasing Risk of ADEA Litigation".

[67]Armbruster, 32 F.3d 768, 778 (3d Cir. 1994)(citing Price Waterhouse v. Hopkins, 490 U.S. at 244-46; Griffiths v. Cigna Corp., 988 F.2d 457, 469-70 & n.12 (3d Cir. 1993)). Note that the evidence required to establish a Price Waterhouse case is "direct" evidence. "[T]he evidence required to come within the Price Waterhouse framework must directly reflect a discriminatory or retaliatory animus on the part of a person involved in the decisionmaking process. . . . If the plaintiff produces such evidence, the burden of production and the risk of non-persuasion shift to the defendant to introduce evidence showing the defendant would have made the same adverse employment discrimination regardless of the discrimination." Armbruster, 32 F.3d at 778-79.

[68]Joseph W. Ambash and Thomas Z. Reicher, "Proper Planning Key To Avoiding Discrimination Suits; Age Discrimination In Retirement Benefit Programs" 27 Pension World at p. 14 (May 1991). See also Rosemary E. Pearce and Paul T. Shultz, "Recent Appellate Ruling Poses New Uncertainties For Early Retirement Windows" 21 Employee Relations Law Journal at p. 131 (December 22, 1995); and Jack R. Elliot, "Risks And Opportunities In Downsizing The Work Force; Includes Related Article With List Of Considerations For Waivers And Releases" 41 Risk Management at p. 101 (April 1994).

of ADEA claims and early retirement incentive programs which are sometimes used by companies initiating a RIF.

Early retirement programs that are voluntary and consistent with one of the purposes of the ADEA - prohibiting arbitrary age discrimination in employment - are allowed under the OWBPA.[69] The OWBPA provides a number of significant refinements to the ADEA, including:

* guidance on permissible age-based differences in employee benefit plans

* confirmation of the validity of voluntary early retirement incentive plans

* permission for defined benefit plans to provide subsidized early retirement benefits and Social Security supplements

* permission for employers to obtain waivers of ADEA rights under certain conditions

* permission for severance pay to be reduced by retiree medical benefits and additional pension benefits under certain circumstances

* permission for long-term disability benefits to be reduced by pension benefits in certain cases.[70]

In addition, the OWBPA established standards for waivers of rights under the ADEA. For instance, an individual may not waive any right or claim under the ADEA unless the waiver is knowing and voluntary.[71] For a waiver to be knowing and voluntary, it must: (1) be part of an agreement between the individual and the employer written to be understood by the individual (or by the average eligible individual, in the case of a voluntary early retirement incentive program); (2) specifically refer to the rights or claims arising under the ADEA; (3) relate only to the rights or claims that arise before the date the waiver is executed; (4) be made in exchange for consideration (value) given to the individual in exchange for the waiver which is in addition to the value to which the individual is already entitled; and (5) advise the individual in writing to consult with an attorney prior to signing the agreement.[72]

OWBPA's waiver provisions lay out specific communication and timing requirements. If there is a dispute over compliance with these requirements, the employer bears the burden of proof, as an affirmative defense, that it satisfied

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[69]Ambash and Reicher, supra.

[70] Pearce and Shultz, supra.

[71]Id. (citing Section 626(f) of the ADEA, as amended by OWBPA).

[72]Id.

the requirements of the waiver process.[73] Under an early retirement offering, eligible employees are to be provided with written notice containing information related to: (1) the class, unit, or group of employees the program covers; (2) the program's eligibility criteria; (3) the opening, closing and revocation periods of the program; (4) the job titles and ages of individuals eligible or selected for the program; and (5) the ages of all individuals in the same job classification or organizational unit who are eligible or selected for the program.[74] In addition, eligible employees must have at least 45 days (21 days for individual terminations) to consider the agreement.[75] Furthermore, the agreement must state that the employees have at least seven days to revoke the agreement once it is signed and that the agreement becomes effective or enforceable only after the revocation period has expired.[76]

Post-OWBPA litigation concerning waivers indicates that employers who have complied with OWBPA are faring well, but also that the OWBPA has created more issues than it has resolved.[77] For example, the Third Circuit sanctioned the use of a release made a condition of the receipt of a lump sum benefit in McVeigh v. Philadelphia National Bank.[78]

Other commentary on the OWBPA is quite critical. Although the statute was intended to increase the fairness of releases and the likelihood that unsupervised waivers would survive challenge in court, the OWBPA has left unclear certain requirements for binding releases. The problem stems from ambiguity in OWBPA and also circumstances surrounding releases themselves, which when construed to favor the rights of employee-releasors, can decrease the enforceability of ADEA releases.[79]

For example, there is a continuing split among the circuits on the issue of whether an invalid release may be ratified and made enforceable. More specifically, the issue is whether a plaintiff ratifies the waivers when they fail to tender back their severance benefits.[80]

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[73] Id.

[74] Id.

[75] Id.

[76] Id.

[77] Pearce and Shultz, supra.

[78] Id. (citing McVeigh, 993 F.2d 224 (3d Cir. 1993)).

[79] William L. Kandel, "Preventative Maintenance Through ADEA Releases: Conflicts Among The Circuits Threaten To Unravel OWBPA" 21 Employment Litigation at p. 129 (Spring 1996).

[80] Id. (citing Oberg v. Allied Van Line, 15 EBC 2163 (N.D. Ill. 1992)(court concluded that because Allied did not comply with OWBPA's statutory information as to waivers, the waiver was invalid), aff'd, 11 F.3d 679 (7th Cir. 1993)) and Wamsley v. Champlin Refining &

Another split has developed with regard to the standard for determining whether an ADEA release was made knowingly and voluntarily.[81] Prior to OWBPA, governmental involvement in ADEA waivers was generally avoided if the parties met federal common law criteria for knowing and voluntary releases of ADEA rights.[82] The Eleventh Circuit has held that in determining whether the ADEA release was knowing and voluntary, the federal common law rule as well as OWBPA requirements are to be considered. "The Eleventh Circuit described this as investigating the 'totality of the circumstances,' that is, 'an open-ended list of factors,' to determine enforceability of the release."[83]

The Seventh Circuit in Pierce v. Atchison, Topeka & Santa Fe Railway Co.,[84] a pre-OWBPA case, acknowledged the "totality of circumstances" test in the Second, Third, Fifth, Tenth and Eleventh Circuits, and contrasted this federal criteria with the general state law principles of contract construction followed in the Fourth, Sixth and Eight Circuits.[85] The court imposed the "totality of circumstances" standard for review because Pierce had signed the release without legal counsel and because of the underlying federal civil right. However, the court made it clear that the "totality" test is limited to the issue of "knowing and voluntary". If represented by counsel and absent claims of fraud or duress, there is presumption that execution was knowing and voluntary. The plaintiff must raise the issue of "knowing and voluntary" to invoke the federal test. Therefore, "[a]lthough the court merely described the 'totality' test, and left its application to the trial court, the caveats as to its limited usage and the context of state common law contract principles indicate that plaintiffs will have a hard time in the Seventh Circuit seeking to void ADEA releases."[86]

Another issue which has received recent attention is whether employees protected by the ADEA must be offered extra consideration in exchange for their release of ADEA claims. In DiBiase v. SmithKline Beecham Corp., the Third Circuit held that an employer does not violate the ADEA by offering enhanced severance benefits to all employees terminated as a result of a RIF in return for a

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Chemicals, Inc., 11 F.3d 534 (5th Cir. 1993)(court found that invalid releases under OWBPA are voidable, but not void, if waiver failed to meet OWBPA requirements)).

[81]Kandel, at p. 132.

[82]See Cirillo v. Arco Chemical Co., 862 F.2d 448 (3d Cir. 1988) and Runyan v. National Cash Register Corp., 787 F.2d 1039 (6th Cir.), cert. denied, 479 U.S. 850 (1986).

[83]Id. (citing Griffith v. Kraft General Foods, Inc. 62 F.3d 368 (11th Cir. 1995)). Griffith is particularly risky to employers in that circuit because plaintiffs are not required to tender back severance pay as a condition to suing over an ADEA release there. Id. at p. 133 (citing Forbus v. Sears, Roebuck & Co., 958 F.2d 1036 (11th Cir.), cert. denied, 113 S.Ct. 412 (1992)(rejecting contrary authority in the Fourth and Fifth Circuits). Note that Kandel describes the Eleventh Circuit as a hostile environment for releases. Id. at p. 134.

[84]65 F.3d 562 (7th Cir. 1995).

[85]Kandel, at p. 137.

[86]Kandel, at p. 138.

general release of all claims.[87] The lower court had ruled that this practice discriminated against employees over the age of 40.

John DiBiase was employed by SmithKline as a supervisor of computer operators at its Philadephia data center. SmithKline consolidated four computer data centers in Pennsylvania. Following this consolidation, DiBiase moved to King of Prussia, Pennsylvania. SmithKline decided on a RIF between 1991 and early 1992. The company's personnel manager prepared an "adverse impact analysis" as part of an assessment of the possible consequences of a RIF. The analysis examined gender, race, and age to determine if there would be an adverse impact from the RIF. DiBiase was laid off along with one other shift supervisor in February of 1992. He was 51-years-old at the time.

SmithKline offered employees terminated in the RIF a separation benefit plan. The plan provided for a lump sum payment based on the employee's length of service, and for continued health coverage. It provided for twelve months salary and three months of continued health benefits. In addition, it offered enhanced benefits for employees who would sign a general release of all claims against the company.

DiBiase declined to sign the release and ultimately filed a complaint against SmithKline alleging that the company fired him because of his age in violation of the ADEA and that the benefit plan violated the ADEA because it discriminated against him and other employees 40 years and older by having higher requirements for them to qualify for the additional separation benefits than those that applied to employees who were under the age of forty.

The Third Circuit reversed a summary judgment order favoring DiBiase, because the SmithKline policy was not discriminatory on its face. The court noted that the plan was an "archetypical example of a facially nondiscriminatory policy." The package was made available to any employee willing to sign the release, regardless of the employees age. In addition, all claims were waived, not just ADEA claims. Consequently, the court held there was no disparate treatment by SmithKline.

B. Avoiding Trouble

In the RIF situation, the two types of age-related issues that arise have been describes as follows:

[F]irst, the selection of those individual workers who are either slated to lose their jobs or are offered incentives; second, the structuring of benefits to employees who either agree voluntarily to accept early retirement or similar incentives or are laid off involuntarily or otherwise dismissed.[88]

[87]48 F.3d 719 (3d Cir. 1995), cert. denied, 116 S.Ct. 306 (1995).

[88]Mark S. Dichter and Mark A. Trank, "Learning To Manage Reductions-In-Force" 80 Management Review at p. 40 (March 1991).

In the case of an involuntary RIF, an employee challenging his or her termination bears the burden of demonstrating that his or her retirement was involuntary. As a primary rule, employers should ensure that all employment terminations under an RIF are based on objective, uniform performance standards to avoid liability under the ADEA.

To avoid claims and minimize liability under OWBPA, employers should be fully aware of what is permitted under the Act and what is forbidden, with respect to early retirement and other exit incentive programs.

With respect to challenges that a an early retirement plan was not truly voluntary, courts recognize that although employees are faced with difficult choices, that does not render a plan involuntary, provided the employer did not coerce or otherwise pressure the worker in making his or her decision. Employers should be aware, however, of factors courts are likely to consider when determining whether a RIF was truly voluntary:

> * Circumstances of the offer, including time allowed for the decision and details provided about the offer.
>
> * Information provided to employees regarding the likelihood of future involuntary force reductions; the objective and purpose of the reduction program; the reason particular units, jobs or employees were selected for the program; and opportunities for future reemployment with the company or transfers within the company.
>
> * Other factors, including employee knowledge of prior poor performance and informal communications from supervisors.[89]

Employers can also limit their exposure to legal challenge by requiring employees participating in a voluntary program to sign releases and waivers. Monetary incentives in exchange for releases and waivers may also be offered in involuntary terminations. Since the enactment of OWBPA, a waiver must include the following points, at a minimum:

> (1) It must be part of an agreement between the individual and the employer that is written in a manner calculated to be understood by the individual or by the average individual eligible to participate.
>
> (2) It must specifically refer to the rights or claims arising under the ADEA.
>
> (3) It cannot permit the individual to waive rights or claims that may arise after the date the waiver is executed.
>
> (4) It must permit the individual to waive rights or claims only in exchange for consideration in addition to anything of value to which the individual is already entitled.

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[89] Id.

(5) It must advise the individual in writing to consult with an attorney prior to executing the waivers.

(6) It must give the individual a period of at least 21 days within which to consider the agreement, or, if the waiver is in connection with an exit incentive or other employment termination program offered to a group or class of employees, give the individual a period of at least 45 days within which to consider the agreement.

(7) It must provide that the individual may revoke the agreement for a period of at least seven days following the agreement's execution.

(8) If the waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, it must inform the individual in writing as to any class, unit or group of individuals covered by the program; any eligibility factors for the program; any time limits applicable to the program; the ages and job titles 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.[90]

The employer's risk can be minimized through the use of enforceable waivers and releases, in addition to careful planning and implementation.

For employers who decide on an involuntary RIF, the following suggestions may help to avoid litigation down the road:

1. Articulate sound business reasons for the decision to implement a RIF.

2. Document business needs and goals. This may include the preparation of internal memoranda that articulate the goals to be achieved through the RIF and the relationship of those goals to business needs. However, note that attempting to create records to support the firing of older workers may constitute direct evidence of discrimination.

3. Avoid creating harmful documents. Do not create or maintain records related to the RIF that indicate employees' ages or retirement profiles, since these documents might later be discoverable.

4. Implement the RIF in a manner that comports with the company's articulated goals and rationale.

5. Decide about job functions. Make informed decisions regarding which jobs must be retained, which can be consolidated and which should be cut back or eliminated.

6. Use job analysis to review proposed changes. Review the proposed reductions arrived at through the job analysis to ensure that they meet the prescribed goals.

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[90] Id.

7. Use well-defined criteria to select employees to be laid off.
8. Evaluate each employee to determine who will be retained. Use uniform, objective standards of performance and evaluation.

9. Rank all employees. Rank all employees in accordance with their value to the performance of the department's remaining work functions after the RIF, and follow the ranking as closely as possible. Use non-subjective, uniform criteria of ranking for each employee.

10. Review all tentative decisions in order to ferret out unfair evaluations or systemic bias. The review should include statistical analysis of both the pre-RIF and post-RIF workforces.

11. Minimize the impact of the RIF on employees. Consider a hiring freeze during execution of the RIF.

12. Special treatment of older workers is not required. The ADEA does not require special treatment of employees within the protected group, or the creation of jobs or the bumping of other employees. Exercise a policy of creating or locating other jobs or transferring employees without regard to employees' ages.[91]

The formation of a committee to plan, implement and monitor an involuntary RIF program for ADEA compliance is a good way to track all of the suggestions listed above.[92]

VIII. CONCLUSION

Given the volatile nature of age discrimination litigation brought under the ADEA, employers should carefully plan and implement voluntary and involuntary RIF's to reduce the risk of future litigation.

[beb\ADEA2]

[91]Dichter and Trank, supra. See also Martin J. Bressler, Deidre A. Grossman and Howard Bagdorf, "Bullet To Dodge In Postacquisition Cutbacks" Mergers & Acquisitions at p. 59 (September, 1995/October, 1995); Ambash and Reicher, supra.

[92]Ambash and Reicher, supra.