THE AGE DISCRIMINATION IN EMPLOYMENT ACT

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The Age Discrimination in Employment Act of 1967 (“ADEA”) is a federal law prohibiting discrimination against individuals who are at least 40 years of age in private and public employment. 29 U.S.C. § 621-34. The ADEA covers hiring, termination, compensation, and other terms and conditions of employment. 29 U.S.C. § 623(a)(1).

I. Overview of the Statutory Scheme

Borrowing heavily from Title VII’s substantive provisions and the Fair Labor Standards Act’s (“FLSA”) remedial and enforcement mechanisms, Congress created a complex statutory scheme in the ADEA. Congress hoped that the critical elements of the ADEA’s statutory scheme, as summarized below, would eradicate the age-based stereotypes detrimentally affecting older American workers.

A. Scope of Protection

The ADEA currently extends protection to private and public sector individuals who are at least 40 years of age. 29 U.S.C. §§ 631(a), 631(b) and 633a. There is no upper age cap. Covered individuals include not only persons employed within the United States, but also United States citizens employed overseas by United States corporations or their subsidiaries. 29 U.S.C. § 630(f).

Although individuals who are at least 40 years of age fall within the ADEA’s protected class, there is some debate as to whether a claimant can establish a prima facie case of age discrimination if he or she was discharged and replaced by an older individual. Most, but not all cases have held that a plaintiff cannot establish a prima facie case under these circumstances. See Loeb v. Textron, Inc., 600 F.2d 1003, 1013 n.9 (1st Cir. 1979) (“Replacement by someone older would suggest no age discrimination but would not disprove it conclusively.”); compare Taggart v. Time, Inc., 924 F.2d 43, 46 (2d Cir. 1991) (the plaintiff must show that the position was ultimately filled by a younger person), with Douglas v. Anderson, 656 F.2d 528, 533 (9th Cir. 1981) (replacement by an older employee does not necessarily foreclose a prima facie case if other evidence supports an inference of discrimination). The EEOC’s view is that preference for an older worker to the detriment of a younger worker (or vice versa) within the protected class violates the ADEA where the preference is based on age. See 29 C.F.R. § 1625.2(a). Arguably, the Supreme Court’s decision in O’Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307 (1996), supports the majority position. There, the Court held that an inference of age discrimination does not arise when one worker is replaced with an insignificantly younger worker.

B. Prohibited Practices

Congress enacted Section 4 of the ADEA (29 U.S.C. § 623) as the primary vehicle for combating age discrimination in employment. Subsection (a) delineates that it is unlawful for an employer: (1) because of age, to fail or refuse to hire a protected individual, to discharge a protected
individual, or to otherwise discriminate against an individual with respect to his or her compensation, terms, conditions, or privileges of employment; (2) because of age, to limit, segregate, or classify employees in any way which would deprive a protected individual of employment opportunities or adversely affect his or her status as an employee; or (3) to reduce one’s wage rate to comply with the Act. 29 U.S.C. § 623(a).

In subsections (b) and (c), Congress extended the ADEA’s coverage to employment agencies and labor organizations, respectively. 29 U.S.C. §§ 623(b) and (c). With regard to employment agencies, it is unlawful, because of age: (1) to fail or refuse to refer any individual for employment; (2) to classify or refer any individual for employment; or (3) to otherwise discriminate against an individual. 29 U.S.C. § 623(b). With regard to labor organizations, it is unlawful, because of age: (1) to exclude or expel any individual from membership; (2) to limit, segregate, classify its membership, or fail or refuse to refer any individual for employment in any way which would deprive or limit employment opportunities or affect the individual’s status as an applicant or employee; or (3) to cause or attempt to cause an employer to discriminate against an individual. 29 U.S.C. § 623(c).

In addition, the ADEA prohibits employers, employment agencies, and labor organizations from discriminating against an individual because such individual has opposed any prohibited practice, made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under the Act. 29 U.S.C. § 623(d).

Lastly, subsection (e) prohibits employers, labor organizations, and employment agencies from printing any notice or advertisement relating to employment or membership that indicates an age-based preference, limitation, or specification. 29 U.S.C. § 623(e). Accordingly, EEOC regulations prohibit advertisements containing age-based “trigger words,” such as “age 25 to 35,” “young,” or “recent college graduate.” 29 C.F.R. § 1625.4(a).

C. Definitions

The ADEA defines an “employer” as a person engaged in an industry affecting commerce with twenty or more employees for each working day in twenty or more calendar weeks in the current or preceding calendar year. The term includes a state, a political subdivision of a state, and an interstate agency, but not the United States. 29 U.S.C. § 630(b). Recently, however, the Supreme Court held that although Congress intended the ADEA to abrogate the States’ Eleventh Amendment immunity, such abrogation exceeded Congress’ authority under Section 5 of the Fourteenth Amendment when the substantive requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that could be targeted by the ADEA. *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000).

The ADEA defines an “employment agency” as “any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.” 29 U.S.C. § 630(c).

The term “labor organization” is defined as “a labor organization 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 so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.” 29 U.S.C. § 630(d). A “labor organization” is deemed to affect commerce if: (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer; or (2) if it has twenty-five or more members and satisfies various other statutory criteria. 29 U.S.C. § 630(e).

The ADEA defines an “employee” as “an individual employed by any employer except that the term ‘employee’ shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer’s personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.” The term “employee” also includes “any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.” 29 U.S.C. § 630(f). However, the ADEA does not cover foreign nationals who apply in foreign countries for jobs in the United States. See Reyes-Gaona v. North Carolina Growers Association, Inc., 250 F.3d 861 (4th Cir.), cert. denied, 122 S. Ct. 463 (2001).

D.  Defenses

Although the ADEA prohibits a broad array of age-based discriminatory practices, Congress has carved out numerous exceptions to these prohibitions. Some of these exceptions are traditional defenses, whereas others have been crafted or interpreted as affirmative defenses that must be plead and proven by the defendant.

Section 4(f) of the Act, 29 U.S.C. § 623(f), establishes six defenses to an ADEA claim. This Section has undergone numerous amendments since 1967, the most recent and significant being the Older Workers Benefit Protection Act of 1990 (“OWBPA”). Currently, Section 4(f) provides that it shall not be unlawful for an employer, employment agency, or labor organization to take any action otherwise prohibited by the Act: (1) where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business; (2) where the action is based on reasonable factors other than age (29 U.S.C. § 623(f)(1)); (3) where the practice involves an employee in a workplace in a foreign country, and compliance with the ADEA would cause the employer to violate the laws of the country in which the workplace is located (29 U.S.C. § 623(f)(1)); (4) to observe the terms of a bona fide seniority system (29 U.S.C. § 623(f)(2)(A)); (5) to observe the terms of a bona fide employee benefit plan (29 U.S.C. § 623(f)(2)(B)); or (6) to discharge or discipline an individual for good cause.

The EEOC defines the bona fide occupational qualification (“BFOQ”) defense as follows:

An employer asserting a BFOQ defense has the burden of proving that (1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or
(3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age.

29 C.F.R. § 1625.6(b). See also Western Air Lines v. Criswell, 472 U.S. 400 (1985).

Prior to the Supreme Court’s decision in Hazen Paper Co. v. Biggins, 113 S. Ct. 1701 (1993), numerous courts had rejected the “reasonable factors other than age” defense when raised with regard to employment practices empirically correlated to age, such as pension status or seniority. Clarifying the scope of the defense, the Hazen Court held that “[w]hatever the employer’s decision making process, a disparate treatment claim cannot succeed unless the employee’s protected trait actually played a role in that process and had a determinative influence on the outcome.” Hazen, 113 S. Ct. at 1706. Thus, when an employer’s motivating factor is pension eligibility, salary, or some other correlate with age unrelated to stereotypes, the employer’s decision does not constitute actionable disparate treatment, and the employer may raise the “reasonable factors other than age defense” to any such claim.

In addition to the § 4(f) defenses, the ADEA delineates other statutory “defenses,” including good faith reliance on administrative interpretations, knowing and voluntary release or waiver of liability (29 U.S.C. § 626(f)), compliance with the Act’s administrative exemptions (29 U.S.C. § 628), and failure to comply with the Act’s procedural requirements (29 U.S.C. § 626).

For example, Section 7(e) of the ADEA, 29 U.S.C. § 626(e), incorporates § 10 of the Portal-to-Portal Act, 29 U.S.C. § 259, which provides that:

[N]o employer shall be subjected to any liability … if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation of the … [EEOC], or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged.


The “definitions” section of the ADEA may also be raised in defense to an age discrimination charge. For example, a defendant may contend that it is not an “employer” because it does not employ the requisite number of employees, or that the plaintiff is not an “employee” because he or she is an elected public official of a state. 29 U.S.C. § 630 et seq.

E. Enforcement

The ADEA charges the Equal Employment Opportunity Commission (“EEOC”) with administration and enforcement responsibilities. Section 9 of the Act, 29 U.S.C. § 628, also provides that the EEOC “may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.” See 29 C.F.R. §§ 1625.13, 1627.15, 1627.16. The EEOC has issued regulations, interpretations, guidelines, policy statements, opinion letters, and other directives regarding various issues arising under the Act. These publications
have elicited varying degrees of judicial deference.

F. The Administrative Process

An ADEA claimant must comply with the Act’s procedural requirements as a prerequisite to filing an administrative charge and commencing a lawsuit in state or federal court. First, the claimant must file a timely and substantively sufficient charge with the EEOC. To be sufficient, a charge must be in writing, name the respondent, and generally allege the discriminatory acts. 29 C.F.R. § 1626.6.

In order to be timely, the charge must be filed with the EEOC within 180 days after the alleged unlawful practice occurred if there is no state deferral agency. If, however, the state has a deferral agency, the charge must be filed within 300 days after the alleged unlawful practice occurred or 30 days after receipt of notice of termination of proceedings under state law, whichever is earlier. 29 U.S.C. § 626(d). Under limited circumstances, this limitations period may be subject to equitable tolling.

In addition, the claimant must file a charge with a state deferral agency, if such an agency exists. 29 U.S.C. § 633(b). Although filing a charge with the state deferral agency is mandatory, the failure to file in a timely manner is not fatal to a later ADEA action. See Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979).

Claimants may commence a civil action no earlier than 60 days after filing an EEOC charge and no later than 90 days after receiving notice of dismissal or termination of EEOC proceedings. 29 U.S.C. § 626(d) and (e), as amended by the Civil Rights Act of 1991, Pub. L. No. 102-166, § 115(3), 105 Stat. 1071, 1079. Representative actions are cognizable under the ADEA. With regard to non-federal employees, representative actions under the ADEA differ substantially from class actions under Title VII, the significant difference being that representative actions under the ADEA do not follow the procedures specified by Rule 23 of the Federal Rules of Civil Procedure.

G. Remedies

With a few exceptions and clarifications, the ADEA incorporates the remedial provisions of the FLSA. 29 U.S.C. § 626(b). The ADEA’s enforcement mechanisms permit the EEOC to bring a suit on behalf of an aggrieved individual, or the aggrieved individual may commence a civil action “for such legal or equitable relief as will effectuate the purposes of” the Act. Id. at § 626(c)(1). In either case, the ADEA provides the right to a jury trial, whether legal or equitable relief is sought. Id. at § 626(c)(2). But see Guillory-Wuerz v. Brady, 785 F. Supp. 889, 891 (D. Colo. 1992) (U.S. government employees are not entitled to jury trials in ADEA actions). Equitable remedies include injunctive relief, reinstatement, instatement, and promotion. See 29 U.S.C. § 626(b) (courts may grant “without limitation judgments compelling employment, reinstatement or promotion”). Legal remedies include back pay, front pay, liquidated damages for willful violations, attorneys’ fees, and interest. But see Wildman v. Lerner Stores Corp., 771 F.2d 605 (1st Cir. 1985) (front pay “should not be awarded unless reinstatement is impracticable or impossible”). Although compensatory and punitive damages generally are not available under the ADEA, such damages may be recovered...