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THE IDC MONOGRAPH:

THE AGE DISCRIMINATION IN EMPLOYMENT ACT:

A SEVENTH CIRCUIT PERSPECTIVE

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I. Introduction.

A. Scope of the Monograph.

As the maturation of the baby boomer generation continues, the prohibition against age discrimination is and will be a growing concern to employers. With corporate downsizing and extensive layoffs being frequent occurrences in corporate America, litigation involving claims of age discrimination is expected to flourish. As more claims are filed, more case law is developed, and federal and state regulations continue to proliferate. It is expected that attorneys who practice in the area of age discrimination will find no shortage of work as the new millennium arrives.

The purpose of this article is to provide the reader with an overview of the Age Discrimination in Employment Act of 1967 ("ADEA"),[1] with special emphasis on how this statute has been applied and interpreted by the Seventh Circuit Court of Appeals. Covered practices, enforcement procedures, and defenses to ADEA claims will be examined. Statutory remedies will be reviewed, and practical considerations for the preparation of waivers and releases of ADEA claims will also be discussed. This article hopefully will provide insight to Illinois employers and the attorneys who counsel them regarding the ever-increasing impact of the ADEA in the employment relationship.

B. Purpose of ADEA.

The ADEA, which was enacted in 1967, was designed to prohibit discrimination in employment for workers between the ages of 40 and 65. Amendments extended the upper age of the protected class to 70, but eventually, the upper limit was eliminated. In 1990, the Older Worker's Benefit Protection Act ("OWBPA") amended the ADEA significantly with respect to employee benefit plans by overruling the Supreme Court's holding in *Public Employees Retirement System v. Betts*.[2] In *Betts*, the court held that employee benefit plans which discriminate on the basis of age did not violate the ADEA. The OWBPA prohibits discrimination against older workers for all employment benefits except when age-based reductions in employee benefit plans are justified on the basis of significant cost considerations. This is a carefully crafted exception to the general prohibition against age-discrimination for elderly retirement plans.[3]

The intent of the ADEA is to "promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination employment; and to help employers and workers find ways of meeting problems arising from the impact of age on employment."[4] The statute, therefore, takes a proactive approach to issues affecting the aging worker, by not only prohibiting discrimination on the basis of age, but by encouraging employers and employees to work together cooperatively in addressing age-related employment issues.

C. Coverage of the ADEA.

The ADEA concerns itself with multiple aspects of the employment relationship. It prohibits discrimination with respect to "terms, conditions and privileges" of employment because of age. It disallows employers from segregating, or otherwise limiting employment opportunities or affecting employee status of workers because of age. It regulates the employment relationship even before its begins by prohibiting employers from failing or refusing to hire because of age. With the aforementioned purposes of the ADEA in mind, court decisions construing the statute have generally interpreted it to disallow discrimination with respect to hiring, promotions, training, compensation, discipline, and discharge of employees over the age of 40.

All employers who have at least 20 employees are subject to the ADEA's provisions.[5] In 1974, the ADEA was extended to state and local governmental employees. The statute applies to public and private employers, labor unions, and employment agencies. The ADEA was the first employment discrimination law with extraterritorial application. It expressly applies to protect U.S. citizens employed by U.S. entities abroad. It also applies to foreign corporations controlled by American employers.

As noted above, the ADEA generally protects all employees over the age of 40 who work for an employer who is subject to the ADEA. There are exceptions to the statute to be mindful of, however. While the ADEA generally prohibits an employer from compelling an employee to retire due to age, there is a narrow exception which permits employers to retire a bona fide executive ("BFE") or high policy-making executive ("HPE") who is over the age of 65, who has held his or her position for the past two years, and has annual vested retirement benefits of $44,000 or more.[6]

For an employer to utilize the BFE exception, two requirements must be met. First, the employer must show that the employee falls within the definition of a "bona fide executive" under the regulations implementing the Fair Labors Standards Act ("FLSA"). An employer must also show that the employee has substantial executive authority over a significant number of employees and a large volume of business.[7] For an employer to utilize the HPE exception, there must be a demonstration that the targeted employee is not a BFE, but has a significant role in the development and implementation of corporate policy.[8]

II. Covered Practices.

This section will discuss the Seventh Circuit's interpretation of the ADEA and how the court has defined prohibited conduct as well as the court's receptiveness to various employer defenses. Section 4 of the ADEA[9] sets the parameters of the type of conduct prohibited under the Act. The ADEA does not protect an older worker from being fired for good cause.[10] Rather, it protects him or her from being fired solely because of age.[11] Generally, an employer has not violated the ADEA unless it would not have acted "but for" its motivation to discriminate against an employee because of his or her age.[12] Even where an employer acts with mixed motives, one permissible, one forbidden, the Seventh Circuit has not held the employer liable.[13]

A. Prohibited Employment Practices.

1. Hiring and Terms of Employment.

Employers seeking qualified candidates to fill open positions must comply with the ADEA. Section 4(a) prohibits employers from indicating any preference, limitation, specification, or discrimination, based on age in an advertised job opening.[14] This includes advertisements containing such words as "age 25 to 35," "young," "college student," "recent college graduate," "boy," or "girl."[15] Employers also cannot express preference for an older employee with such words as "age 40 to 50," "age over 65," "retired person," or "supplement your pension."[16]

During the hiring process, employers may not refuse to hire a person because of his or her age.[17] However, an employer may request an applicant's date of birth or age on an application form.[18] Applications which request such information will be closely scrutinized by the EEOC to ensure that the request is for a "permissible purpose and not for purposes proscribed by the Act."[19] Employment applications requesting an applicant's age must also include a statement set forth in the regulations promulgated by the Department of Labor advising the applicant that the ADEA prohibits discrimination in pre-employment inquiries.[20]

The DOL regulations also prohibit employers from giving preference because of age to individuals who are forty and over.[21] For example, if two people apply for the same position and one is forty-two while the other is fifty-two, the employer may not lawfully turn down either one on the basis of age, but must make such decision on the basis of some other non-discriminatory factor.[22]

Once an employee is hired, the employer is prohibited from discriminating against the employee with respect to his compensation, terms, conditions, or privileges of employment, because of the worker's age.[23] Employers
cannot use their employee's age to limit, segregate, or classify them in any way which may deprive any individual of employment opportunities or adversely affect the worker's status as an employee.[24] Employers also are prohibited from reducing the wage of any employee in order to comply with the Act.[25]

The Seventh Circuit readily holds employers responsible for ADEA violations when they use age as a factor in making employment decisions.[26] When an employer denies a worker an employment opportunity based on the belief that older employees are less efficient or less productive, the ADEA will provide a remedy.[27] This is true even where the comparator (the person being treated more favorably than the plaintiff) is also a member of the protected class, as long as the comparator is younger than the plaintiff.[28]

Importantly, the Seventh Circuit has refused to allow employees to maintain ADEA claims on the theory that certain practices, while neutral on their face, tend to have a disparate impact on workers over the age of forty.[29] Thus, it is not enough for an employee to show that the employer relied on some factor that may correlate to age in making employment-related decisions.[30] Rather, the evidence must show that the employer specifically used age as a factor in its decision-making.[31] Note that the Seventh's Circuit's refusal to recognize disparate impact claims under the ADEA is in direct conflict with decisions in the majority of the other federal appellate circuits.[32]

The Seventh Circuit has recognized that in rare circumstances plaintiffs may bring hostile work environment claims under the ADEA.[33] The Seventh Circuit has refused to interpret the ADEA as prohibiting reverse age discrimination.[34]

2. Reductions in Force.

Oftentimes, employers are required for various reasons to lay off a number of employees. These layoffs are referred to as reductions in force, or "RIFs." Employees forty or older often claim that they were unjustly targeted for the layoff based upon their age. In such cases, the plaintiff need only show that younger employees were treated more favorably.[35] In RIF cases, the Seventh Circuit does not require a plaintiff to prove that he has been replaced by a younger employee.[36] This is because generally, when a company reduces or restructures its workforce, it does not simply hire a new person to fill the discharged employee's old position. Rather, jobs are often consolidated and/or work is shifted to other existing employees.[37] The Seventh Circuit has declined to apply this standard in single-discharge cases.[38]

In a RIF case, the inference of discrimination is raised by the more favorable treatment of younger employees
(typically the act of not firing them) and is premised on some degree of overlap between the plaintiff's job and the younger employee's job.[39] For example, a mechanic terminated in a RIF case could not make a *prima facie* case because a younger chemist was retained.[40] However, the overlap of jobs is implicit when the terminated employee's responsibilities are absorbed by other employees.[41] The inference of discrimination comes from the belief that the employer selected the plaintiff for termination based on age from a group of employees who were equally qualified for termination based on criteria other than age.[42]

3. Retaliation.

Section 4(d) of the ADEA prohibits employers from retaliating against employees or applicants for employment because such individuals have opposed the employer's age discrimination.[43] Under this section, employers cannot retaliate against anyone who makes a charge, testifies, assists, or participates in any manner in an investigation, proceeding, or litigation under the ADEA.[44] The retaliation provision not only protects the employee who claims she was being discriminated against, but also all of her co-workers who come to her aid during an investigation or litigation of her claims.[45] The co-workers are protected by this section even if they are under forty years old.[46]

In order to demonstrate the "causal link" element of a *prima facie* case of retaliatory discharge, a plaintiff must establish that the employer's subsequent employment decision and complaint of discrimination were not wholly unrelated.[47]

B. Lawful Employment Practices.

Section 4(f) of the ADEA provides certain exceptions whereby employers are allowed to take a person's age into consideration during the hiring process as well as when making decisions affecting existing employees.[48] The first of these exceptions, bona fide occupational qualifications (BFOQ's) is considered a true affirmative defense.[49] As such, the employer admits that age played a role in its decision-making but claims that it was justified in taking age into consideration because age is a bona fide occupational qualification for the job.[50]

1. Bona Fide Occupational Qualifications.

Employers may discriminate on the basis of an employee's age where age is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of the particular business.[51] Department of Labor regulations pertaining to this defense set forth the elements which an employer must establish before it can rely on this defense.[52] Specifically, an employer must demonstrate 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.[53] If the BFOQ is based on public safety concerns, the employer must prove that the challenged practice effectuates that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact.[54]

The Seventh Circuit, in *Monroe v. United Air Lines, Inc.*, has established a two-prong test for employers to establish a BFOQ.[55] Under this test, an employer must show (1) that the challenged qualification is reasonably related to the "essential operation" of its business, and (2) that there is either a factual basis for believing that all or substantially all persons above the age limit would be unable to effectively perform the duties of the job, or that it is impossible or impracticable to determine job fitness on an individualized basis.[56] The test was adopted by the Supreme Court in *Western Air Lines, Inc. v. Criswell*.[57]

The BFOQ defense focuses on the particular position from which the protected individual is excluded, and not on the business as a whole.[58] In order to assert the BFOQ defense, employers must also make a particularized factual showing that age is an effective representative for the qualification in question.[59]

2. Reasonable Factors Other Than Age.

Employers may take any action otherwise prohibited by the ADEA where the differentiation is based on reasonable factors other than age (RFOA's).[60] When an employment practice uses age as a limiting criterion, the defense that the practice is justified by a RFOA is unavailable.[61]

Decisions which are made for reasons independent of age, but which happen to correlate to age, are not actionable under the ADEA[62] For example, in *EEOC v. Francis W. Parker School*,[63] the employer refused to hire a sixty-three year old teacher because he qualified for too high of a salary. The court refused to find an ADEA violation. Instead, the court stated that the employee's policy of linking wages to experience was an economically defensible and reasonable means of determining salaries. Even though the policy disproportionately affects older applicants, the fact that older workers were disparately impacted was not sufficient to establish ADEA liability. However, an employer would be subject to liability where the practice constituted a pretext for a forbidden stereotype about older workers.[64]

Similarly, the ADEA does not prevent employers from firing employees to reduce costs.[65] In *Anderson v. Baxter Healthcare Corp.*, the Court noted that "[w]age discrimination is age discrimination only when wage depends directly on age, so that the use for one is a pretext for the other; high covariance is not sufficient . . ."[66] Even though compensation is typically correlated with age, the correlation is not perfect. Therefore, the Seventh Circuit has refused to find that a decision based on compensation level is necessarily "age-based."[67]

The mere fact that an employer hires a younger replacement has been found too insubstantial to support an inference of age discrimination.[68] As long as the protected employee is not being replaced because of his age, there is no ADEA liability.[69]

3. Good Cause Relating to Termination.

Nothing in the ADEA prohibits an employer from discharging or disciplining an individual for good cause.[70] One of the most common defenses is that the employee was not meeting the employer's legitimate expectations.[71] This defense goes directly to the plaintiff's *prima facie* case since, as will be discussed below, a plaintiff must establish that she was meeting her employer's legitimate expectations in order to state a cause of action under the ADEA.

Moreover, despite the at-will nature of employment in Illinois, in the case of a terminated employee, once the plaintiff sets forth a *prima facie* case of age discrimination, the employer must come forward with a legitimate, non-discriminatory reason for the employee's discharge.[72] Typically, the employer will argue that it had good cause to terminate the worker and the reason for her termination had nothing to do with her age.[73]

4. Seniority Systems.

Employers are allowed to observe the terms of a bona fide seniority system even though it would otherwise discriminate against employees based on their age.[74] However, employers cannot establish seniority systems for the purpose of avoiding ADEA liability.[75] No seniority system is allowed to require or permit the involuntary retirement of any employee forty or over because of his or her age.[76] Any such seniority system must be based on length of service as the primary criterion, but other factors such as merit, capacity, or ability may be taken into account.[77] The ADEA allows employers to offer older workers early retirement options but requires adherence to specific requirements for releases signed by employees. These requirements will be discussed in Section VI of this monograph.

Seniority systems that give employees with longer lengths of service lesser rights, and result in discharge or less favored treatment to those forty and over, run the risk of being found a "subterfuge" to evade the Act.[78] Employers must also communicate the essential terms and conditions of the seniority system to employees in order for the seniority system to be "bona fide."[79]

Even though the ADEA on its face prohibits using age as a criterion for employment decisions, the Seventh Circuit allows employers to develop retirement plans that discriminate in favor of older workers.[80] In *Karlen v. City Colleges of Chicago*, the court noted that "[e]ntitlement to early retirement is a valued prerequisite of age--an additional option available only to the older worker and only slightly tarnished by the knowledge that sometimes employers offer it because they want to ease out older workers."[81] However, retirement plans that withhold benefits from older persons in order to induce them to retire violate the Act.[82]

5. Benefit Plans.

Employers may observe the terms of a bona fide employee benefit plan even though it would otherwise discriminate against employees based on their age.[83] For each benefit, the actual amount of payment made on behalf of an older worker must be no less than that made or incurred on behalf of a younger worker, as permissible under Section 1625.10 of the DOL regulations.[84] No benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual.[85] Moreover, no such benefit plan can require or permit the involuntary retirement of any individual forty or older, because of her age.[86]

Notwithstanding these rules, Section 4(l) allows employers to establish benefit plans which provide for attainment of a minimum age as a condition of eligibility for normal or early retirement benefits.[87] There are also a number of detailed provisions concerning calculation, distribution and administration of benefit plans that are beyond the scope of this monograph.

Employers may extend additional benefits, such as increased severance pay, to employees forty or over if the employer has a reasonable basis to conclude that those benefits will counteract problems related to age

discrimination.[88] Employers may not extend such benefits as a means to accomplish practices otherwise prohibited by the Act.[89]

As stated in the introduction, the OWBPA[90] amended the ADEA to specifically prohibit employers from denying benefits to older employees. An employer may reduce benefits based on age only if the cost of providing the reduced benefits to older workers is the same as the cost of providing benefits to younger workers. The impact of the OWBPA on the language that must be contained in releases is discussed in Section VI of this monograph.

In 1993, the U.S. Supreme Court ruled in *Hazen Paper v. Biggens*[91] that firing an employee to prevent his pension benefits from vesting would not violate the ADEA. The court found that such conduct does not constitute disparate treatment under the Act, even if the employer's decision-making was correlated with age. Such conduct would, however, violate the Employment Retirement Income Security Act of 1974 (ERISA).

The Seventh Circuit has been especially pro-employer in this area. In *Karlen v. City Colleges of Chicago*, the court found that employers may legally vary employee benefits according to the cost to the employer; and "if, because older workers cost more, the result of the employer's economizing efforts is disadvantageous to older workers, that is simply how the cookie crumbles."[92] In order to vary benefits based on age alone, the employer must prove a close correlation between age and cost, otherwise the inference of discrimination will be strong.[93] The court suggested that a close correlation will exist, and therefore a permissible motive, in the context of life insurance benefits, since premiums are likely be tied to age.

6. Apprenticeship Programs.

As of May 8, 1996, the EEOC regulations no longer permit entry-age limitations in apprenticeship programs without proof that the limitation is a bona fide occupational qualification.[94] It is generally unlawful for apprenticeship programs, including joint labor-management apprenticeship programs, to discriminate on the basis of an individual's age. Age limitations in apprenticeship programs are valid only if they fall within certain specific exceptions under the ADEA, or if the EEOC grants a specific exemption. Therefore, apprenticeship programs are essentially treated the same as other positions within the company.

III. Enforcement Procedures.

A. Administrative Proceedings.

1. Timing Requirements.

No civil action may be commenced by an individual under the ADEA until 60 days after a charge alleging unlawful discrimination has been filed with the EEOC. This charge shall be filed within (a) 180 days of the alleged unlawful act, or (b) 300 days of the alleged unlawful act if the state in which the alleged violation occurred has a state law prohibiting age discrimination and a state agency with authority to grant or seek relief. 29 U.S.C. §626(d). In some circumstances the filing period will be tolled for equitable reasons. The extended period of 300 days to file a federal EEOC charge may be applicable even though the individual has not sought relief from the state in a timely manner. Under the ADEA, the time for filing a charge commences when the complaining party is informed of the challenged employment action.

2. Responding to Illinois Department of Human Rights (IDHR) or EEOC Investigation.

a. Employer's first knowledge of the filing of an age charge with the IDHR or EEOC may come through service of the charge by mail.

The employer should initially determine: (1) whether the charge and its service are timely; and (2) whether the employer can identify the charging party and the nature of the alleged discrimination. If the charge is untimely or the employer is unable to ascertain the identity of the alleged discriminatee, the employer should so inform the IDHR/EEOC and either claim that the IDHR/EEOC has no jurisdiction or that it wishes to know the identity of the individual to complete its investigation.

b. The Employer's Initial Investigation.

After determining the nature of the claim of discrimination and the employee involved, the employer should conduct a timely, full and thorough investigation utilizing personnel who were not involved in the alleged discrimination and who have expertise with respect to employment discrimination law. To protect the investigation by the attorney/client privilege, the investigation should be conducted pursuant to the directions of corporate or outside counsel, and investigative files prepared should be prepared for counsel. Affidavits should be taken if appropriate from witnesses who are interviewed and a complete investigative file should be prepared listing all available evidence, both in favor of and against the employer. The investigation should be done with care so that the investigation does not itself give rise to a Title VII, §704(a) violation by being perceived by employees or the IDHR/EEOC as a retaliation or harassment because of the filing of the complaint.

c. Settlement Options.

After completing its investigation, the employer should make a determination of liability. If there is a probable violation of the ADEA/IHRA the employer may: (1) engage in mediation with the IDHR or in settlement negotiations with the EEOC; or (2) settle the matter with the charging party with the possible involvement of private counsel or the State Agency.

d. Position Statement/Letter Brief - Supplying Information and Witnesses.

(1) Position Statement.

It is critical that at some stage in the IDHR/EEOC's investigation, the employer must supply the IDHR/EEOC with a position statement/letter brief thoroughly analyzing the facts from the employer's point of view, and containing legal analysis and citation of authority, if applicable. The Position Statement should be prepared from the same perspective as a motion for summary judgment. The position statement/letter brief should be submitted prior to a predetermination interview/fact finding conference because the IDHR/EEOC's determination may be drafted before the time of the predetermination interview.

(2) IDHR/EEOC Interrogatories.

The IDHR/EEOC will usually submit a set of interrogatories which request information relating to the charge being investigated. A flat refusal to answer the interrogatories may be met with the issuance of a

subpoena by the EEOC for access to the underlying data. The employer is best advised to submit its position statement/letter/brief at this juncture, answering the interrogatories in the context of its position statement/letter/brief or providing additional information to answer all relevant interrogatories.

(3) Field Investigation - EEOC.

Prior to the arrival of the EEOC investigator, the employer should ask the investigator which members of management the investigator wishes to interview. All of these members of management should be questioned by a company EEOC specialist or counsel prior to being interviewed by the EEOC investigator. The respondent's representative should attend EEOC interviews of management personnel. The EEOC will not normally permit management representatives to attend interviews of non-management employees. Such non-management employees should be made available to the investigator at the employer's plant during working hours.

e. Fact Finding Conference - Suggestions.

The employer and counsel should prepare its witnesses just as it would for a deposition. The employer's counsel should consider submitting in advance of the conference a list of proposed questions to be asked by the IDHR/EEOC investigator because counsel's participation at the conference is limited.

f. Practical Considerations For The Position Statement/Letter Brief.

Submit no affidavits with the position statement. The EEOC will take sworn statements if it conducts a field investigation. Treat the Position Statement as a discovery document because if suit is filed or a Complaint is filed with the Illinois Human Rights Commission (IHRC), the employee's attorney will see it when reviewing the IDHR/EEOC file. Instead of submitting affidavits, use one notary paragraph at the end of the position statement for the company representative who will sign the position statement.

3. Right to Sue Letters/Limitations Periods.

An individual has 90 days after the completion of the EEOC's investigation and the receipt of a "right to sue" letter in which to file a civil action under the ADEA. An individual may, however, still file suit at any time after 60 days have elapsed since the filing of the charge of discrimination with the EEOC.[95]

B. Private Lawsuits.

The Supreme Court set forth the basic allocations of burdens in an ADEA case in *McDonnell Douglas Corp. v. Green*.[96] First, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination.[97] The plaintiff may prove discrimination through the direct or indirect method.[98] Second, if the plaintiff proves a prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason" for the employee's treatment.[99] Third, the plaintiff then has the burden of proving that the legitimate reason offered by the Defendant was a pretext for discrimination.[100]

The ultimate burden of persuasion remains at all times with the plaintiff.[101] Therefore, even if the trier of fact rejects the defendant's proffered reasons for the employment decision, this rejection does not compel judgment for the plaintiff since this would permit a shifting of the burden.[102] There must be an actual finding of unlawful discrimination for the defendant to be held liable.[103]

1. Prima Facie Case.

To establish an ADEA violation, the plaintiff must be able to demonstrate that he suffered a materially adverse change in the terms or conditions of his employment because of his age.[104] To establish an ADEA violation, a plaintiff may do so under either the direct method or the indirect burden shifting method of proof.[105]

a. Direct Method.

A plaintiff may prove age discrimination through "direct or circumstantial evidence that age was the determining factor in the plaintiff's discharge."[106] In other words, "an ADEA plaintiff must establish that he would not have been discharged 'but for' his employer's motive to discriminate against him because of his age."[107]

Under the direct proof method, the plaintiff must show either an acknowledgment of discriminatory intent by the defendant or its agents, or circumstantial evidence that provides the basis for an inference of intentional discrimination.[108] The Seventh Circuit has outlined three types of circumstantial evidence of intentional discrimination: 1) suspicious timing, ambiguous statements, behavior toward or comments directed at other employees in the protected group, and other evidence from which an inference of discriminatory intent might be drawn; 2) evidence that employees similarly situated to the plaintiff other than in the characteristic on which the employer is forbidden to base a difference in treatment (i.e. age, race, sex, etc.) received systematically better treatment; or 3) evidence that the plaintiff was qualified for the job in question but was passed over in favor of (or replaced by) a person not having the forbidden characteristic and that the employer's stated reason for the difference in treatment is unworthy of belief or, a mere pretext for discrimination.[109]

The mere fact that an employer hires a younger replacement for the plaintiff is too insubstantial to support an inference of age discrimination.[110] The mere fact that an older employee is replaced by a younger one does not permit an inference that the replacement was motivated by age discrimination.[111]

(1) Age-Related Remarks: Non-Decisionmaker.

Unless the non-decisionmaker's age-related remarks upon which the plaintiff relies were related to the employment decision in question, they cannot be evidence of a discriminatory discharge.[112] It is necessary to show that the employer actually relied on the remarks in making the decision.[113] Only evidence probative of the actual decisionmaker's motive is relevant.[114]

(2) Age-Related Remarks: Decisionmaker.

The decisionmaker's remarks must be related to the employment decisions.[115] In order to be admissible, the prior statements must be "relatively contemporaneous to the termination of employment and must be related to the employment decision in question."[116] The burden is on the plaintiff to provide the requisite nexus between the alleged discriminatory remarks by the decisionmaker and the employment decision in order to demonstrate that the plaintiff's age was a substantial factor in the defendant's decision.[117]

(3) Asking the Employee When They Plan To Retire.

In *Colosi v. Electri-Flex Co.*,[118] the Seventh Circuit held that a company has a legitimate interest in learning its employees' plans for the future, and it would be absurd to deter such inquiries by treating them as evidence of unlawful conduct. In *Colosi*, the Seventh Circuit held that there was no direct evidence of age discrimination even though the plaintiff stated in his deposition that shortly before he was fired his boss twice asked him when he was planning to retire and both times the plaintiff replied: "Never."[119] In *Colosi*, the Seventh Circuit

rejected the argument that these two statements inferred that the company thought the plaintiff was too old to be working.[120]

(4) Decisions Based On Pension Status Or Salary.

The Supreme Court in *Hazen Paper Co. v. Biggins*,[121] held that an employer does not violate the ADEA even when it bases its termination decision on factors such as salary and pension status, even though such factors are closely correlated with age:

> It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age...
>
> When the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, *as pension status typically is.*[122]

(5) Low Number of Employees Older than 40.

Some plaintiffs want to show that there are no or a small number of employees over 40 years of age currently working for the defendant; or that the only employees to reach the age of 62 were either terminated or retired; or that the defendant replaced employees over 40 with employees under 40.

The introduction of these kinds of numbers is probably contrary to Seventh Circuit law. The Seventh Circuit has held that statistics showing that the number of older employees decreased over the years shows little, if anything, about age discrimination.[123] In *Brown v. M&M Mars*, the Seventh Circuit held that "this phenomenon represents the normal course of employment histories and is nothing to marvel at."[124] Similarly, the Seventh Circuit has held that "when older employees leave the work force, for whatever reasons, they will often be replaced by younger employees. This does not give rise to an inference that an employee was fired because of his age."[125]

The absence of employees over the age of forty should not be admissible to prove a prima facie case of discrimination without a comparison to the relevant labor pool.[126] Statistics are meaningless and should normally be disregarded without evidence that there existed somewhere a pool of persons over 40 years of age qualified to assume the positions.[127]

(6) Plaintiff In the Protected Class.

The mere fact that the plaintiff is in the "protected age group" of being 40 or more years of age is not, in and of itself, evidence of age discrimination. Being 40 or more years of age does not confer any special status on anyone.[128]

b. Indirect Method.

To establish a prima facie case of discriminatory discharge under the indirect method of proof, a plaintiff must show that: (1) he was more than 40 years old; (2) he performed his job satisfactorily; (3) he was discharged (either actually or constructively) or subjected to another adverse employment action; and (4) the employer sought a younger replacement for him.[129]

If the plaintiff establishes his prima facie case, he creates a rebuttable presumption of discrimination. The burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the employee's

discharge.[130] If the employer succeeds in articulating such a reason, the burden shifts again to the plaintiff to show that his employer's proffered reasons are a pretext for age discrimination.[131]

Where the hirer and firer of the plaintiff is the same individual and the employee was in the protected class when he was hired, there is a strong inference that discrimination was not the determining factor in the plaintiff's termination, especially where there is a short period of time between the hiring and firing.[132]

Most indirect method cases center on proof of the second element of a prima facie case, whether the plaintiff was performing his job satisfactorily. The Seventh Circuit has held that the trier of fact must focus upon a plaintiff's performance at the time of his termination.[133] Any of the plaintiff's own self-interested assertions concerning his abilities are not sufficient to raise a genuine issue of fact.[134] The employee's perception of himself is not relevant. It is the perception of the decisionmaker which is relevant.[135]

2. Pretext.

Once a defendant shows a legitimate non-discriminatory reason for an employee's termination, even if a prima facie case has been shown by the employee, the employee must then prove not only that the legitimate non-discriminatory reason was a false reason, but also that the employer's actions were a pretext for discrimination based on age: a causal chain in which age plays a dispositive role.[136]

A plaintiff may demonstrate pretext by presenting evidence that: 1) the employer's proffered reasons are factually baseless; 2) the proffered reasons were not the actual motivation for the dismissal; or 3) the proffered reasons were insufficient to motivate the dismissal.[137]

In trying to establish that the employer's explanation

was merely pretextual, the plaintiff must "focus on the specific reasons advanced by the employer to support the discharge.[138] Pretext requires more than a mistake by the employer; rather it "means a lie, specifically a phony reason for some action." [139]

An employee may show that the employer's reasons were false either directly by persuading that a discriminatory reason more likely motivated the employer, or indirectly by showing that the employer's offered reason is unworthy of belief.[140] The Seventh Circuit recently clarified that age-related statements of a decisionmaker unrelated to the employment decision in question, which are not direct evidence of discriminatory intent, may be evidence of pretext if the statements are accompanied by other evidence.[141]

Any pretext determination is concerned with "whether the employer honestly believes in the reasons it offers," not whether it made a bad decision.[142] The Seventh Circuit has held that courts do not "sit as a super-personnel department" or "determine whether the employer exercised prudent business judgment."[143] Therefore, it is not for the trier of fact to decide whether the employer exercised prudent business judgment but rather whether the employer had a legitimate, non-discriminatory reason for its business decisions.[144]

3. Willful Violations.

If the plaintiff proves a willful violation, liquidated damages in an amount equal to the amount of back pay damages is awarded.

To prove that an employer willfully violated the ADEA, the plaintiff must prove that "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute."[145] Simply knowing that the ADEA exists or having a company policy of
non-discrimination does not establish willfulness.[146] A violation is willful if it is done voluntarily, deliberately, and intentionally and not by accident, inadvertence, or ordinary negligence.[147]

IV. Defenses To ADEA Claims

The successful defense of claims brought under the ADEA[148] requires the defendant to be familiar with defenses available both by operation of the ADEA itself, as well as those recognized in cases interpreting the statute. Enforcement of the statute will frequently require that the plaintiff comply with a series of administrative prerequisites, so an understanding of the administrative deadlines is also an important part of defending ADEA litigation. Moreover, there are times when rulings in related state actions can have a preclusive impact on the viability of an ADEA claim in federal court. In the following paragraphs, we review the major defenses that have been applied by the courts interpreting the ADEA.

A. Bona Fide Occupational Qualification.

Under the ADEA, employers are allowed to differentiate between individuals based on age "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business."[149] This is a narrowly construed affirmative defense that applies primarily to the hiring and discharge of an employee.[150] To prevail, an employer must present evidence that treating employees differently based on age is reasonably necessary to its primary mission, it is impractical to make individualized decisions, and there is a factual basis for believing that all older individuals would be unable to perform safely and efficiently.[151]

The BFOQ defense has been successful in support of limitations on hiring for entry level campus police officers over 45[152] and entry level highway patrol officers over 32.[153] A mandatory retirement age of 50 for uniformed state police has also been successfully defended.[154]

Employers have not been successful in using the BFOQ defense where advances in science have made it more practical to individually screen.[155] Examples include mandatory disqualification of airline flight engineers at age 60,[156] mandatory retirement of state troopers at age 55[157] and mandatory retirement of school bus drivers at age 65.[158]

The existence of a bona fide occupational qualification is a question of fact.[159] The defendant should expect to present evidence from such sources as medical experts, scientists (i.e. gerontology), governmental regulations and industry practice.[160] This evidence should be focused on the particular position at issue rather than the enterprise as a whole.[161]

B. Reasonable Factors Other Than Age.

Employment decisions which have a disparate impact on the ADEA's class of older employees are not prohibited "where the differentiation is based on reasonable factors other than age."[162] This defense arises by statute and it is not considered an affirmative defense.[163]

The "reasonable factors other than age" defense (RFOA) is used when the employer's decision involves factors which may also correlate with a person's age. Examples of such factors include work experience and years of service. Although these factors may correlate with age, they are analytically distinct and do not violate the ADEA when relied upon independently of age considerations.[164]

In *Hazen Paper Co. v. Biggins*,[165] a 62 year old technical director was terminated a few weeks short of his pension vesting. The plaintiff made a claim under both ERISA and the ADEA. The jury found for the plaintiff on both counts and the First Circuit affirmed. The Supreme Court reversed.

Critical to the Supreme Court's analysis was its opinion that inaccurate stereotyping of the elderly was "the essence of what Congress sought to prohibit" when it enacted the ADEA.[166] Although it "requires the employer to ignore an employee's age...it does not specify further characteristics that an employer must also ignore."[167] "When the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is."[168] Nevertheless, "because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of

service is necessarily 'age based'."[169] Since the decision to fire Biggins was not based on misconceptions about the competence of older workers, Hazen Paper did not violate the ADEA.

The Seventh Circuit has interpreted the RFOA defense as prohibiting the use of disparate impact theory to prove an ADEA claim.[170] In *EEOC v. Francis W. Parker School*,[171] the Seventh Circuit followed *Hazen Paper Co*. and held that decisions made independent of age but which happen to correlate with age are not actionable under the ADEA. As a result, the court upheld a school policy linking wage to years of experience which precluded the school from hiring a 63 year old drama teacher with 30 years of experience in favor of an applicant with one year of experience. The position ultimately paid $22,000. Presumably, the applicant's 30 years of experience would have cost the school too much money in salary for the position.

In sum, the RFOA defense is useful in situations where the employer's decision has a differential impact on persons protected under the ADEA. To be successful with this defense, it must not be a pretext for age discrimination but instead, involve factors that are analytically distinct from age.

C. Good Cause.

A related but broader defense than the RFOA defense is the "good cause" defense which permits an employer "to discharge or otherwise discipline an employee for good cause."[172] Simply put, an employer can still discharge an employee for reasons unrelated to age. This is an affirmative defense where the employer bears the burden of presenting evidence to the fact finder that justifies the decision.[173] A plaintiff may claim that the reason given is a pretext for discrimination but if the plaintiff fails to support his pretext argument with evidence, the defense will prevail.

In *Visser v. Packer Engineering Associates, Inc.*,[174] the 64 year old plaintiff was terminated nine months short of the full vesting of his Packer Engineering pension for failing to pledge his unqualified loyalty to Kenneth Packer. Two of his co-workers had recently left the employment of Packer Engineering with valuable clients. As a result of his termination, he eventually joined the breakaway firm but lost two-thirds of his pension benefits. He then brought suit under the ADEA to recover for the loss of these benefits.

In holding that summary judgment was proper in favor of the defendant, the court observed that the plaintiff had failed to present evidence that Packer wanted to save money on pension costs or that the reason for the discharge, disloyalty, was a pretext for age discrimination. Standing alone, Packer's knowledge of Visser's age and pension rights was not enough evidence to withstand a motion for summary judgment.[175]

Other examples of where the good cause defense has proven successful have involved termination for poor performance (inability to close deals or failure to sell aggressively),[176] failing to promote due to inferior human relations skills (previously called a female superior a "bitch" and numerous uncontested reports of sexual indiscretions with colleagues),[177] termination for falsifying time cards,[178] and poor quality control habits.[179]

Evidence of good cause not only serves to challenge the element of the plaintiff's prima facie case that he was doing his job well enough to meet his employer's legitimate expectations, it also serves to establish that age was not a motivating factor in the employment decision. Evidence of dishonesty, abusive conduct toward superiors or co-workers or the failure to meet age-neutral measuring standards for performance will support this type of affirmative defense.

D. Good Faith Reliance Upon Administrative Ruling.

The ADEA provides for a very limited defense based upon an employer's good faith reliance upon an administrative guideline or regulation. This defense, codified as part of the Portal-to-Portal Act, involves situations where an employer can prove reasonable reliance upon a written administrative regulation, order, ruling or interpretation that has been issued by a specific agency.[180] The above is incorporated by reference in the ADEA at §29 U.S.C. 626(e), which provides that "Section 259 of this title shall apply to actions under this chapter." If the employer is able to prove good faith reliance, that acts as a bar to any action or proceeding under the ADEA. This is true even if the regulation, order, ruling or interpretation is later modified or rescinded by the agency or invalidated by a court.[181]

The defense is extremely narrow, and requires proof of three elements: (1) the employer's action must have been taken in reliance on an authorized agency ruling; (2) the employer's action was in conformity with the agency guideline; and (3) the employer's action was taken in good faith.[182] An employer will be denied the defense if it relies upon a non-specified agency[183] or if the employer fails to comply with the regulation supposedly relied upon.[184]

An example of an employer that successfully relied upon the good faith reliance defense is found in *Quinn v. New York State Electric and Gas Corp.*[185] There, the employer, who had been sued under the ADEA, asserted that it had relied upon a Department of Labor regulation to exclude persons older than 32 years of age from entering a bona-fide apprenticeship program. In holding that the employer was entitled to assert the defense, the *Quinn* court noted that the employer had in good faith relied upon a Department of Labor regulation that specifically exempted apprenticeship programs from the provisions of the ADEA.[186] This was despite the fact that the *Quinn* court had
previously ruled that the regulation at issue was contrary to the ADEA and thus invalid.[187]

Accordingly, employers seeking to utilize this defense must be able to demonstrate compliance and reliance upon an appropriate regulation. If all elements are met, the good faith defense may operate to relieve the employer from liability under the ADEA.

E. Employee Benefit Plans.

In drafting the ADEA, Congress was concerned that there would be an adverse effect on the hiring of older workers if employers were required to treat all workers alike with regard to benefit plans. As a result, a trade off was reached in favor of encouraging the hiring of older workers over insuring that the older workers had absolutely equal benefits.[188] Therefore, §623(f)(2) of the ADEA created an exemption that allowed older workers to be paid lower benefits in plans that were not "a subterfuge to evade the purposes of the Act."[189]

To establish the affirmative defense[190] set up by §623(f)(2) of the Act, the employer must prove four things:

(1) the plan must be bona fide in the sense that it offers substantial benefits for employees and is not a sham;
(2) the benefits provided must result from the type of plan described in the section, not what would be considered a fringe benefit;
(3) the employer's action must conform to the terms of the plan; and
(4) the plan must not be a subterfuge to evade the purposes of the ADEA.[191]

The EEOC regulations define "subterfuge" as a discriminatory benefit plan not justified by age-related cost considerations.[192]

Because this exemption allows for disparate treatment of older workers, the disparate impact approach frequently used in Title VII cases would appear to be inapplicable.[193] However, the disparate impact must result from neutral factors such as years of service or years of participation in the plan rather than a specific limitation which refers to age.[194]

In defending a bona fide benefit plan against a charge of age discrimination, the employer should be ready to present evidence on cost comparisons between younger and older workers. Benefit levels should only be reduced to a level where there is an equivalency between benefit plan costs for all workers. If the cost incurred for younger workers is roughly equal to that for older workers, the plan should not violate the ADEA despite the fact that older workers receive lower benefit amounts.[195]

F. Bona Fide Seniority System.

The ADEA permits employers to treat employees differently by age "to observe the terms of a bona fide seniority system."[196] Any bona fide seniority system must be based on length of service as the primary criterion for the equitable allocation of employment opportunities and prerogatives to younger and older workers.[197] However, no seniority system shall require or permit the involuntary retirement of any individual between the

ages of 40 and 70.[198] Finally, to be considered a bona fide seniority system, the essential terms and conditions of the system must be communicated to all affected employees and applied uniformly regardless of age.[199]

In raising the affirmative defense[200] of a bona fide seniority system, the employer bears the burden of presenting evidence that non-age related factors were used despite the fact that there may be a disparate impact on older employees.[201] This impact is acceptable when motivated by legitimate business reasons.

In *Finnegan v. Trans World Airlines, Inc.*,[202] senior airline employees brought an ADEA action against TWA after it changed its vacation policy by imposing a four week cap on the amount of vacation time non-contract employees could accrue each year. Some of the senior (older) employees had accrued up to seven weeks. TWA made this change in policy as a result of a difficult business climate and the troubled financial condition of the corporation. Under their vacation policy, an employee's vacation time was based on the number of years of continuous service with the airline. The amount of vacation time that can be accrued per year was based on the employee's seniority within the vacation system.

In holding that the change in the benefit seniority system did not violate the ADEA, the Seventh Circuit found that the plaintiffs had failed to even make out a prima facie case without deciding the issue of whether disparate
impact theory can ever be applied to a case of this type. The district court had ruled that the theory was not applicable to §623(f)(2). Instead, the court focused its analysis on the fact that across the board cuts of wages or benefits are so tenuously related to discrimination that they do not reach the prima facie threshold.

> A company that for legitimate business reasons decides to cut wages across the board, or to cut out dental insurance, or to curtail the use of company cars is not required to conduct a study to determine the impact of the measure on employees grouped by age and if it is non-random to prove that the same amount of money could not have been saved in some different fashion...virtually all elements of a standard compensation package are positively correlated with age.[203]

It was enough that the decision was company wide and made in response to business adversity even though its impact may be felt more by the older workers.

G. Reductions in Force.

Although a reduction in force (RIF) is technically not an affirmative defense to an ADEA violation, the frequency of charges arising from RIFs has put this kind of claim in a special category of ADEA litigation. In the absence of direct evidence, a slightly altered McDonnell-Douglas burden shifting analysis still applies. The first three elements remain the same, namely that the plaintiff must establish over-40 status, satisfactory performance, and discharge. In a RIF situation, the fourth element changes: instead of proving that the employer hired a younger replacement, the plaintiff must instead show that younger employees were treated more favorably than the plaintiff because of the plaintiff's age.[204]

The Seventh Circuit has also specifically rejected arguments that RIFs have a disparate impact on all older employees of a company.[205] Accordingly, the only two theories for going forward on an ADEA claim are direct evidence or burden-shifting.

The RIF typically comes up either in response to the plaintiff's allegations of less-than-favorable treatment, or else as the employer's legitimate reason for the discharge. The Seventh Circuit has been receptive to the idea that a general reduction in force can satisfy the requirement of an employer's "legitimate, non-discriminatory reason" for the termination.[206] The focus in the remainder of each case's discussion becomes whether the RIF was a genuine basis for the employee's termination, or instead was simply pretext, with the real reason being age animus. Factors in analyzing whether the RIF is pretextual include an analysis of other employees' reassignments or terminations,[207]
deviations from an otherwise observed seniority system,[208] and economic necessity of reductions in cost.[209] As always, in analyzing pretext issues, it is not so important that the employer's approach be correct, but that the employer honestly believes in the reasons it asserts.[210] Unless the employee is able to prove that the reduction

in force is "phony," downsizing as a result of demonstrable economic necessity will generally prevail over allegations of age discrimination.

H. Waiver, Release (or Setoff).

As is more fully discussed in Section IV of the Monograph, ADEA was modified in 1990 by the OWBPA, which added the provisions now found at 29 U.S.C. §626(f). These provisions have frustrated employers' attempts to enforce settlement/waiver agreements since 1990.[211] The leading case regarding waivers is the United States Supreme Court's January 26, 1998 decision in *Oubre v. Entergy Operations, Inc.*[212] There, the Court partially resolved a conflict among circuit courts that governed the validity of releases under the ADEA.

In *Oubre*, the Supreme Court was confronted with the issue of whether a release that failed to adhere to the statutory requirements of §626(f) of the ADEA could be enforced.[213] Although the employee had signed a settlement agreement and waiver in connection with her separation, the agreement at issue allowed her only 14 rather than a minimum of 21 days to consider the agreement. Additionally, the agreement failed to incorporate a 7-day revocation period, and it made no specific reference to Oubre's rights under the ADEA. In exchange for her signing the agreement, the settlement provided that she would receive payments over the course of four months. After receiving the payments, Oubre then filed her charge of age discrimination and proceeded to file a complaint in federal court.[214]

Defendant Entergy moved to dismiss, noting that although the release failed to meet ADEA requirements for releases, Oubre had nonetheless ratified the defective release by failing to return, or offer to return, the settlement payments. The Court rejected the ratification argument, noting that Congress had imposed a strict, unqualified statutory stricture on waivers. Accordingly, the Court held that it could not use the common-law doctrine of ratification to undermine the statutory requirements of the ADEA.[215] Accordingly, the defective release, which was invalid,[216] could not be used to defeat Oubre's ADEA claim.[217]

Knowing the implications of *Oubre* is critical to determining whether one has a viable waiver defense. As now revealed by *Oubre*, the ADEA's prerequisites are to be adhered to in all respects, and the failure to do so will "foreclose the employer's defense."[218] As amended by the OWBPA, the party asserting the validity of a waiver has the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary.[219] Documentary evidence and express acknowledgement of each aspect of the elements of a waiver appears to be an effective method of ensuring compliance.[220]

On the other hand, since the OWBPA amendments, employers have had their releases and waivers declared invalid for reasons including failure to comply with specified timing requirements,[221] failure to make proper disclosures regarding ADEA rights,[222] and a failure to provide required job title and age information in connection with an exit program.[223] Employers should note that the requirements for validity of individual waivers is different than the requirements for validity of waivers offered in connection with an RIF.[224] Waivers in connection with an EEOC charge are also subject to slightly different standards.[225]

As a final matter, if an employer is faced with an invalid release, and has already paid out settlement funds, the employer should be sure to file counterclaims for restitution or recoupment, and also should plead the alternative affirmative defense of setoff.[226] Although the settlement funds may not be recouped, they can at least be applied against any adverse judgment, and if there is no judgment against the employer, a collection action against the former employee can be instituted, if necessary.

I. Claim or Issue Preclusion.

At times, the concepts of collateral estoppel or *res judicata* will arise in connection with ADEA claims. Typically, these defenses are based upon litigation in which related issues have already been decided. The effect of previously decided issues or claims can give rise to additional affirmative defenses that can be raised by the employer.

For example, in *Brzostowski v. Laidlaw Waste Systems, Inc.*,[227] the plaintiff was barred from proceeding with his ADEA claim after she had previously sued her employer on a state law breach of contract theory and lost. The *Brzostowski* court noted that the elements of a *res judicata* defense were threefold: (1) judgment on

the merits in an earlier action; (2) identity of the parties in the earlier and later action; and, (3) identity of the cause of action between both suits.[228] Moreover, the court noted that *res judicata* operates to bar not only issues that were actually raised in an earlier lawsuit, but also all issues that *could have been raised*.[229]

In *Brzostowski*, the first and second elements were conceded. Thus, the only issue before the court was whether there was "identity" between the two actions, one alleging breach of contract, the other alleging a violation of the ADEA.

The court held that there was identity between the two actions, and thus the second ADEA action was barred by operation of *res judicata*. In so holding, the court noted that the claims both arose out of the "same core of operative facts," namely plaintiff's termination and whether the employer complied with its legal obligations.

The *Brzostowski* case teaches that the focus in *res judicata* caselaw is on the facts giving rise to the claims, and it is this approach that has been relied upon in subsequent caselaw.[230] Accordingly, an employer seeking to avail itself of the defenses of collateral estoppel or res judicata must inquire initially about whether there has been previous litigation between the employer and employee that has been brought to judgment.[231] If so, and if there is a commonality between the factual allegations, a defense of collateral estoppel or *res judicata* may be available to the employer.[232]

J. After-Acquired Evidence.

After-acquired evidence is evidence discovered after an employee is discharged in violation of the ADEA and the employer later discovers wrongful conduct of the employee that would have led to discharge if it had been discovered sooner.[233] Until fairly recently, a split existed among the Courts of Appeal as to whether after-acquired evidence could operate to bar recovery under the ADEA.[234] The Seventh Circuit in *Kristufek v. Hussman Foodservice Co. (Toastmaster Div.)*[235] held that such evidence could not be used to completely bar recovery, because the proper focus was on whether the termination was properly based upon what was known at the time of the discharge.[236]

The Supreme Court resolved this issue with its holding in *McKennon v. Nashville Banner Publishing Co.*,[237] in which the Court held that recovery under the ADEA could not be barred by the discovery of evidence subsequent to the unlawful termination. In so holding, the court noted that the employer could not have been motivated by knowledge it did not have, and thus could not legitimately assert that the employee's termination was based upon information that it did not have.[238] The Court also distinguished after-acquired evidence (where the misconduct is discovered *after* the termination) from mixed-motive situations (where the misconduct or other basis for firing is known at the time of termination).[239] Accordingly, an ADEA plaintiff is not barred from recovery by after-acquired evidence that would have been sufficient to justify termination. But that same evidence will operate to limit an ADEA plaintiff's recovery.

The *McKennon* court also held that in after-acquired evidence situations, neither reinstatement nor front pay will be appropriate remedies where the employer "would have terminated, and will terminate, in any event and upon lawful grounds."[240] In addition, a back pay award is to be based upon the date of the employee's unlawful discharge to the date the new information was discovered.[241]

Thus, in practice, after-acquired evidence can be used to limit the amount of damages that can be recovered from an employer who has been found to have violated the ADEA. In order to rely upon after-acquired evidence, the employer must be able to establish that the severity of the wrongdoing was such that the employee would have been terminated on those grounds alone if the employer had known of it at the time of the discharge.[242] Accordingly, it has been noted that evidence that particular misconduct would have led to termination must be produced in order to rely upon this defense.[243] Critical to mounting this defense will be affidavits and established policies and practices that show that misconduct will result in termination.[244]

K. Procedural Defects.

Perhaps the most straightforward defenses available to an employer are those that arise out of the failure to comply with requirements set forth by the EEOC for filing charges. As a matter of well-settled procedure, in

Illinois, an aggrieved employee must file a charge with the EEOC within 300 days of an alleged unlawful practice.

In States that do not have an equivalent state agency for the enforcement of prohibitions against age discrimination, the filing period is 180 days.[245] Because Illinois' Human Rights Act prohibits age discrimination, with investigations authorized by the Department of Human Rights, the provisions of 29 U.S.C. §626(d)(2) apply, which extends the period for filing to within 300 days of the alleged unlawful practice.

In States where there is no worksharing agreement between the state investigating agency and the EEOC, an additional prerequisite for the 300-day limitation period is the filing of a claim with the state agency within 240 days of the alleged discrimination.[246] In Illinois, a worksharing agreement between the Illinois Department of Human Rights and the EEOC appears to have avoided many of the quandaries arising out of the applicability of a 240-day versus 300-day limitations period.[247]

Even assuming, however, that the charge is timely filed, a separate limitations period applies once a charge with the EEOC is either dismissed or terminated. Pursuant to 29 U.S.C. §626(e), the EEOC must now issue a notification to the plaintiff, who must then institute a civil action within 90 days of receipt of the notice.[248]

In nearly every case, the employer's ability to prove one or more of the defenses described above will defeat or severely prejudice the plaintiff's ability to go forward on an ADEA claim. At a minimum, these defenses have a significant impact upon a plaintiff's recoverable damages. Accordingly, counsel representing employers will do well to ensure full familiarity with the wide range of defenses that have been recognized under the ADEA.

V. Remedies Under The ADEA.

The remedial provisions of the Age Discrimination In Employment Act are set forth in sections 626(b) and 626(c)(1) of the Act.[249] These provisions are aimed at making the victim of age discrimination whole. In order to achieve this goal, section 626(b) of the ADEA incorporates the remedial and enforcement provisions of section 211(b), section 216 (except subsection (a)) and section 217 of the Fair Labor Standards Act (FSLA).[250] In addition, section 626(c)(1) of the ADEA provides courts with broad discretionary power to "grant such legal or equitable relief as will effectuate the purposes of" the ADEA. The broad range of remedies available under the ADEA and the relevant portions of the FLSA include:

(1) back pay;
(2) reinstatement;
(3) front pay;
(4) liquidated damages (equal to the amount to back pay);
(5) other injunctive relief such as reinstatement or promotion;
(6) reasonable attorney's fees; and
(7) costs of the action.

In analyzing the remedies available, it is useful to review and consider cases decided under both the ADEA and the FLSA as well as cases applying similar remedies under other statutes, such as Title VII, §1983 of the Civil Rights Act, and the Americans with Disabilities Act.

Below is a brief overview of the legal and equitable remedies available as well as factors which may mitigate certain types of relief and the tax treatment of an ADEA settlement or award.

A. Back pay (Lost Wages And Benefits).

Generally, once discrimination has been shown, an award of back pay is made in order to restore a victim of discrimination back to the position he would have been in absent the discrimination.[251] Back pay includes those losses suffered from the date the discrimination occurred up to the time of trial or the date the discrimination is otherwise remedied. Such losses typically consist of lost wages and fringe benefits such as

health, disability and life insurance, social security, savings plans and pensions. A back pay award may also take into consideration lost raises and opportunities to work overtime.[252]

Although back pay is presumed appropriate in an ADEA case, this presumption may be rebutted if the aggrieved employee would not have been hired or would have been discharged even if no discrimination had occurred. A back pay award may also be denied where the award would bankrupt the employer and render it judgment proof.[253] Also, where there is uncontroverted evidence that the employee planned to quit his or her job, back pay should not be awarded if this would place the employee in a better position than he or she would have been had the discrimination not occurred.[254]

In calculating lost wages, all you need to remember is that an employee is only entitled to the amount the employee would have earned but for the discrimination. Calculating the value of lost benefits is more difficult and expert testimony may be required. The case law provides little guidance on how benefits should be calculated. For instance, there is a split of authority among the circuits over whether the remedy for lost insurance benefits is to simply convert to cash or, instead, to limit recovery to those expenses actually incurred by either replacement of lost insurance or because of occurrence of the insured risk.[255]

There are several factors which should be considered to help reduce the amount of a back pay award. One such factor is after-acquired evidence of wrongdoing. If an employer discovers that the plaintiff engaged in conduct which by itself would have justified termination if known at the time, such evidence is relevant to the calculation of a back pay award. Specifically, in situations where the wrongful conduct of the employee is discovered after termination, through the course of discovery, the recovery for back pay is limited to the date of the unlawful action through the date that the new information was discovered.[256]

Another factor is subsequent employment. If plaintiff secures equal or greater pay through subsequent employment, he or she is not entitled to back pay. It is an employee's duty to mitigate any back pay loss by undertaking reasonable efforts to locate comparable employment.[257] However, an employee has no duty to go into another line of work, accept a demotion or take a demeaning position. Similarly, there is no obligation to seek employment which is not consistent with one's skills, background, and experience.[258] The burden is on the employer to demonstrate an employee's failure to mitigate damages by showing a lack of diligence in the employee's job search and availability of comparable work. Based upon this
evidence, the trier of fact makes a prediction of when reasonable efforts should have resulted in employment. However, as some courts have acknowledged, a former employee may postpone immediate efforts to seek employment upon the reasonable expectation that he or she would be reinstated.[259] Defense counsel may want to consider utilizing a vocational rehabilitation expert to testify about the reasonableness of an employee's efforts.

When the employee obtains a new job with another salary, it is relatively easy to determine the extent of mitigation.[260] However, if a terminated employee establishes a business of his own as a reasonable alternative to finding other comparable employment, mitigation of damages is not so readily determined because of the nature of self-employment. In such cases, the court must analyze the specific pay and benefit mechanism to determine whether the employee is paid a salary, whether personal expenses have been absorbed by the business or whether any benefits have been disguised as expenses or reinvested profits.[261] Defense counsel should guard against plaintiffs using the ADEA as a tool for insuring plaintiff's fledgling business while it continues to sustain losses. Ordinarily, damages should only extend to that point in time when the sting of the discriminatory conduct has ended. The burden still remains on the employer to prove whether and by how much the back pay award should be reduced. A jury's verdict will be sustained so long as there is a rational basis for it in the evidence. [262]

An employer's offer of reinstatement may also stop the accrual of back pay provided the offer is unconditional and relates to an acceptable job position.[263] A plaintiff may reject the offer of reinstatement if rejection is reasonable under the circumstances such as the existence of an intolerable work atmosphere.[264]

Another factor to be considered in calculating back pay is the receipt of post-employment benefits. Typically, unemployment benefits or welfare payments received by a plaintiff during the period for which back pay is awarded are treated as collateral benefits for which deductions cannot be made from the back pay

award.[265] However, not all courts have strictly applied this rule. The Seventh Circuit has followed the Second Circuit in holding that a district court has discretion to deduct unemployment compensation from the back pay award in order to avoid providing an injured party with double recovery.[266] A similar argument can be made with regard to pension and retirement benefits.[267] However, the Eighth Circuit held that a discharged employee who is forced by lost wages to withdraw from pension and retirement plans should not have his back pay award setoff by pension benefits received.[268] Finally, severance pay may also be deducted from the amount of back pay owed.[269]

B. Reinstatement.

Reinstatement is considered a preferred remedy under the ADEA and may be required by a court whenever appropriate. However, courts recognize that hostility may preclude reinstatement where the relationship between the employer and the employee has become poisoned and the poison is so harmful to the employer's legitimate concerns as to make reinstatement an inappropriate remedy.[270] As a result, reinstatement tends to be a more feasible option for an hourly-wage worker than a high-level manager.[271] Where reinstatement is precluded because of existing hostility that is not likely to change, front-pay will be awarded.[272]

Reinstatement may be denied where the employer can establish that the employee would not have been employed due to an independent non-discriminatory, after-the-fact reason. In *McKennon v. Nashville Banner Pub. Co.*,[273] the U.S. Supreme Court refused to impose reinstatement when after-acquired evidence of removing and copying confidential business records sufficed to justify the plaintiff's discharge independent of any age discriminatory motivation. The Supreme Court stated that neither reinstatement nor front pay are appropriate where the employer would have terminated the employee anyway on lawful grounds.[274] Similarly, when an unconditional offer of reinstatement is unreasonably rejected, no further duty to reinstate will be imposed.[275]

C. Front Pay.

If reinstatement is not appropriate or feasible, a court has the discretion to award front-pay based upon a prediction about how long the plaintiff would have remained employed.[276] Front pay is the difference (after discounting to present value) between what the plaintiff would have earned in the future had he been reinstated at the time of trial and what he would have earned in his next best employment.[277] As with back pay, lost benefits may be included in front-pay awards so long as the plaintiff has not found employment with equal benefits or a superior salary that would offset the lost benefits that would have otherwise accrued. Although it varies by jurisdiction, in the Seventh Circuit, the availability and amount of front pay is determined by the judge and not the jury.[278]

D. Liquidated Damages.

Where there is a willful violation of the ADEA, an employer can be ordered to pay liquidated damages of double the back pay award. The Supreme Court has defined "willfulness" as occurring where an employer acts either with knowledge or with reckless disregard for whether its conduct violated the ADEA.[279]

The "reckless disregard" standard may be proven by circumstantial evidence and can be found even when age was not the predominant motivating factor or the employer's conduct was less than outrageous.[280] A willful violation has also been found where an employer fails to seek advice for decisions that clearly implicate the ADEA.[281] On the other hand, a court has discretion to excuse an employer from paying liquidated damages if it finds that the employer was acting in good faith and reasonably believed that its conduct was lawful.[282]

In calculating liquidated damages, only the back pay award, including fringe benefits, is doubled.[283]

No damages other than liquidated damages are available in an ADEA action. Therefore, there can be no recovery for compensatory or punitive damages.[284] In addition, an ADEA plaintiff may not recover damages for pain and suffering or for emotional distress.[285]

E. Prejudgment Interest.

Prejudgment interest on back pay may be awarded to compensate a plaintiff for the loss of the use of money.[286] However, there is a split of authority as to whether an award of prejudgment interest may be made along with a liquidated damages award.[287] The Seventh Circuit has opined that prejudgment interest should not be allowed where the plaintiff has been awarded liquidated damages.[288] However, a number of courts have held that it is within a court's discretion to award or deny prejudgment interest. These courts have denied interest when a "generous amount of" front-pay was awarded[289] or the amount of back pay was not easily ascertainable.[290]

F. Costs.

Costs, which are disbursements necessary for the prosecution or defense of a claim, are recoverable in an ADEA action. Under Fed.R.Civ.P. 54(d), routine costs such as docket fees, subpoena witness fees, jury charges and needed depositions transcripts may be awarded.

Where an employer makes an offer of judgment under Fed.R.Civ.P. 68 and the offer is rejected by the plaintiff who receives a judgment which is less than the offer, the plaintiff is liable for those costs incurred after the offer.[291] However, if the offer is accepted, the plaintiff, may be entitled to costs in addition to amount of damages already agreed on because she is deemed the prevailing party. To avoid this result, defense counsel should specifically state that an offer of judgment includes costs.

G. Preliminary Injunctions.

Preliminary injunctive relief, such as reinstatement during litigation, has been awarded where the plaintiff can show a substantial likelihood of success on the merits and evidence of irreparable harm. Irreparable harm has been held to exist where the employee's economic stability would otherwise be jeopardized by the employer's action.[292] A preliminary injunction may also be awarded to prevent further alleged discriminatory practices[293], or to ensure that the critical records sought by the EEOC during an investigation are not destroyed.[294]

H. Attorney Fee Awards.

Since the ADEA incorporates §16(b) of the FLSA, attorney's fees may be awarded to prevailing plaintiffs.[295] Although Title VII also awards a prevailing plaintiff with fees incurred in administrative proceedings,[296] courts are divided as to whether such fees are available under the ADEA.

The ADEA does not provide for an award of attorneys' fees to a prevailing defendant.[297] However, a successful defendant can recover costs under Fed.R.Civ.P. 55(d) and attorneys' fees under the common law rule if the plaintiff-employee brought the ADEA lawsuit in bad faith. A defendant may also be able to recover attorney's fees from the EEOC if the court finds that the agency's position in prosecuting the action was not "substantially justified".[298]

I. Tax Treatment For Recoveries.

The tax treatment of ADEA recoveries was decided by the U.S. Supreme Court in *Commissioner v. Schleier*.[299] Prior to *Schleier*, the majority of circuit courts held that ADEA recoveries were non-taxable. *Schleier* holds that amounts received by a plaintiff in settlement of an ADEA claim are not on account of personal injuries or sickness so as to fall within the exclusions to gross income and are, therefore, taxable.

In addition, on August 20, 1996, Congress passed the Small Business Job Protection Act of 1996, amending Internal Revenue Code §104 so as to make most emotional distress recoveries taxable. The principal target of this legislation, as expressed in a conference committee report, was employment litigation. The basic rule now is that, apart from actual medical expenses (which may include psychiatric expenses), a recovery or settlement is taxable income unless there is a showing of a physical injury or physical sickness.

The remedies available under the ADEA are, by necessity, flexible and multi-faceted to provide the courts with a range of tools necessary to redress the various harmful results of an employer's discriminatory action against older workers. In handling these cases, the alert practitioner should be aware of the wide range of

possible options available to the courts and factors which may eliminate or mitigate certain remedies. The remedies available in a particular factual situation can be determined by bearing in mind the broad statutory purpose of making the aggrieved party whole and the public policy interest of preventing double recovery or a windfall to the claimant.

VI. Special Consideration For Releases Under The ADEA.

Often, as part of a severance package or termination agreement, an employer will ask a departing employee to sign a waiver or release of potential claims, including those related to possible causes of action for age discrimination. A review of the ADEA would not be complete without a consideration of the requirements imposed by the ADEA and related legislation in order for such releases to be deemed valid and enforceable.

A. Prior Law and the OWPBA.

In 1989 the Supreme Court of the United States ruled that the ADEA's prohibition against discrimination in the terms, conditions and privileges of employment based upon the age of the worker did not extend to employee benefit plans or other common benefits of the employment relationship.[300]

In order to overcome the effect of this ruling, Congress passed the Older Worker's Benefit Protection Act ("OWBPA").[301]

The overall effect of the OWBPA was to require an employer to provide its older workers with the same level of benefits as provided to younger workers unless the employer can demonstrate a significant cost justification for not doing so, i.e., unless the employer can affirmatively demonstrate that the cost of providing a benefits to its older workers is significantly greater than the cost of providing that same benefit to younger employees. The net result of the passage of the OWBPA was to insure that any reduction in benefits to older workers is not based upon age considerations alone, but may be predicated upon
age-related cost justifications which exist independently of any discriminatory motive.

B. Effect of the OWBPA Upon Waivers and Releases of ADEA Claims.

Another important provision of the OWBPA was its requirement that all waivers and releases of claims under the ADEA by departing employees must be "knowing and voluntary" in order to be valid and enforceable. The statute provides that a waiver of any right or claim under the laws prohibiting age discrimination is not considered to be knowing and voluntary, and hence is not valid and enforceable, unless, at a minimum:

1. The waiver is part of a written agreement between the employer and the individual, and is worded in such a manner as to be calculated to be understood by the individual, or at least by the average individual who would be eligible to participate in such an agreement;
2. The waiver or release must specifically make reference to rights or claims arising under the ADEA;
3. The waiver or release cannot affect any rights or claims of the individual that may arise after the date on which the waiver is executed;
4. The waiver or release must be supported by consideration going to the individual in addition to any consideration to which he or she is already entitled to receive from the employer;
5. The individual signing the release or waiver must be advised under the written terms of the instrument to consult with an attorney prior to signing the agreement;
6. The individual must be given a period of at least 21 days in which to consider whether or not to sign the agreement. (If the waiver is requested in connection with an employment termination program offered to a group of employees, such as an early retirement incentive program, the consideration period is extended to at least 45 days);

7. The waiver or release must allow the individual a 7-day period after the signing of the agreement during which the employee may revoke the agreement; and
8. If the waiver is requested in connection with an employment termination program offered to a group of employees, such as an early retirement incentive program, the employer must inform the individual asked to sign the agreement of the

   existence of any class, unit or group of individuals covered by the program; must describe the eligibility factors for participation in the program, and must state any time limits applicable to participation in the program. The written notice must also list the job titles and ages of all individuals eligible or selected for the program, and must likewise contain a list of the ages of all individuals in the same organizational unit who are not eligible or selected for participation in the program.[302]

C. The Oubre Decision.

Early this year, the Supreme Court of the United States issued a cautionary tale to all employers who draft releases of ADEA claims in conjunction with the separation of employees within the protected class. The Supreme Court's decision serves as a strong indication of how strictly the lower courts are instructed to enforce the requirements of the OWBPA as to "knowing and voluntary" waivers.

The Supreme Court's opinion in the case of *Oubre v. Entergy Operations, Inc.*,[303] involved a power plant worker who had received poor performance reviews from her employer. She was given the option of either improving her performance during the coming year or accepting a voluntary termination agreement under the terms of which she would receive a series of installment payments during a four month period following her termination. The employee was given 14 days to consider the option during which time she also consulted with her attorney. She decided to accept the agreement and in doing so signed a release in which she "agree[d] to waive, settle, release and discharge any and all claims, demands, damages, actions or causes of action…" against her employer.[304]

After receiving the agreed-upon consideration promised by her former employer under the terms of the severance package, the plaintiff filed a charge of age discrimination against the company with the Equal Employment Opportunity Commission. The EEOC dismissed her charge on the merits but issued her a right to sue letter after which the plaintiff filed suit against her former employer in federal district court claiming constructive discharge on the basis of her age, and alleging violation of the ADEA violation as well as state law.

The plaintiff contended that the terms of the release did not meet the requirements of the OWBPA in several respects,[305] and was therefore not considered "knowing and voluntary" within the meaning of the statute, and hence was invalid and unenforceable.

The employer responded by contending that under state contract law dealing with waivers, the failure of the plaintiff to tender back to the employer any of the benefits which she received under the terms of the severance agreement (in this case, six periodic payments totaling $6,258) within a reasonable time after discovering any alleged deficiencies in the release which she had signed, served to ratify the release and thereby make it binding. The company also raised the defense of equitable estoppel based upon the plaintiff's retention of the severance payments which it had made to her.

The district court agreed with the company's position, granting summary judgment in favor of the defendant-employer,[306] and the Fifth Circuit Court of Appeals agreed.[307]

The Supreme Court granted certiorari[308] and reversed, ruling in favor of the former employee, holding that the release was unenforceable and provided the company no defense to the plaintiff's ADEA claim. Specifically, the Supreme Court ruled that the OWBPA, which is designed expressly to protect the benefit rights of older workers, contains "strict, unqualified statutory strictures on waivers…" which the courts are bound to apply.[309]

The OWBPA, said the Court, has established its own standards for assessing the validity of ADEA waivers, separate and apart from any rules of state contract law applicable to non-ADEA claims.[310]

The release in question fell short of the OWBPA's requirements since the employer failed to give the plaintiff sufficient time to consider her options to accept or reject the severance package (giving her 14 days to decided instead of the required 21), and since the terms of the release did not give the plaintiff 7 days after she signed the agreement in which to change her mind. Lastly, despite its broad, sweeping language as to the types of claims and causes of action intended to be covered under the terms of the release, the instrument failed to make specific reference to claims arising under the ADEA.[311]

Section 201 of the Older Workers Benefits Protection Act[312] therefore becomes an important checklist to which employers must strictly adhere in order to ensure the validity of any waivers or releases of ADEA claims by departing employees.

Conclusion

In the 31 years since its passage, the Age Discrimination in Employment Act has generated a significant body of case law which has come to dramatically affect the ways in which employers make decisions concerning the aging work force in this country. Given the ongoing "greying" of the baby boom generation, and the shear number of employees who fall within the statute's protected class, it is safe to say that the ADEA will continue to be a significant factor in decisions affecting the workplace for many years to come.

Endnotes

1 29 U.S.C. §621 et seq.
2 492 U.S. 158, 109 S.Ct. 2854 (1989).
3 29 U.S.C. §623(f)(2)(B).
4 29 U.S.C. §621.
5 29 U.S.C. §630(b).
6 29 U.S.C. §631(c)(1).
7 29 C.F.R. §1625.12(d)(2).
8 29 C.F.R. §1625.12(e).
9 29 U.S.C. §623.
10 *Shager v. Upjohn Co.,* 913 F.2d 398, 401 (7th Cir. 1990).
11 *Visser v. Packer Engineering Assoc., Inc.,* 924 F.2d 655, 657 (7th Cir. 1991).
12 *LaMontagne v. American Convenience Products, Inc.,* 750 F.2d 1405 (7th Cir. 1984), *Hozman v. Jaymar-Ruby, Inc.,* 916 F.2d 1298, 1304 (7th Cir. 1990); *Oxman v. WLS-TV*, 846 F.2d 448, 452 (7th Cir. 1988).
13 *Visser v. Packer Engineering Assoc., Inc.,* 924 F.2d 655, 657 (7th Cir. 1991).
14 29 U.S.C. §623(4)(a).
15 29 C.F.R. §1625.4(a).
16 *Id.*
17 29 U.S.C. §623(4)(a).
18 29 C.F.R. §1625.5.
19 *Id.*
20 *Id.*
21 29 C. F. R. §1625.2.
22 *Id.*
23 29 U.S.C. §623(a)(1).
24 29 U.S.C. §623(a)(2).
25 29 U.S.C. §623(a)(3).
26 *Anderson v. Stauffer Chemical Co.,* 965 F.2d 397, 400 (7th Cir. 1992).
27 *EEOC v. Francis W. Parker School,* 41 F.3d 1073, 1076 (7th Cir. 1994).
28 *Kralman v. Illinois Dept. of Veterans' Affairs,* 23 F.3d 150, 155 (7th Cir. 1994).
29 *EEOC v. Francis W. Parker School,* 41 F. 3d 1073 (7th Cir. 1994).
30 *Hazen Paper Co. v. Biggins,* 507 U.S. 604 (1993).
31 *Id.*
32 *See, e.g., Lyon v. Ohio Education Assoc. & Professional Staff,* 53 F.3d 135, 139 n.5 (6th Cir. 1995); *Houghton v. SIPCO, Inc.,* 38 F.3d 953, 958 (8th Cir. 1994); *Abbott v. Federal Forge, Inc.,* 912 F.2d 867, 872 (6th Cir. 1990).
33 *Young v. Will County Department of Public Aid,* 882 F.2d 290, 294 (7th Cir. 1989), citing *Henson v. City of Dundee,* 682 F.2d 897, 903-04 (11th Cir. 1982).
34 *Hamilton v. Caterpillar, Inc.,* 966 F.2d 1226 (7th Cir. 1992).
35 *Collier v. Budd Co.,* 66 F.3d 886 (7th Cir. 1995).

[36] *Id.*
[37] *Id.* at 890; *see also, Roper v. Peabody Coal Co.,* 47 F. 3d 925 (7th Cir. 1995).
[38] *Gadsby v. Norwalk Furniture Corp.,* 71 F.3d 1324 (7th Cir. 1995).
[39] *Oxman v. WLS-TV,* 846 F.2d 448, 455 (7th Cir. 1988).
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] 29 U.S.C. §623(d).
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Hunt-Golliday v. Metropolitan Water Reclamation Dist. of Greater Chicago,* 104 F. 3d 1004, 1014 (7th Cir. 1997).
[48] 29 U.S.C. §623(f).
[49] *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111 (1985).
[50] *Monroe v. United Air Lines, Inc.,* 736 F.2d 394 (1984).
[51] 29 U.S.C. §623(f)(1).
[52] 29 C.F.R. §1625.6.
[53] 29 C.F.R. §1625.6(b).
[54] *Id.*
[55] 736 F.2d 394 (7th Cir. 1984).
[56] 36 F.2d at 400, citing *Orzel v. City of Wauwatosa Fire Dept.,* 697 F.2d 743, 753 (7th Cir. 1983).
[57] 472 U.S. 400 (1985).
[58] *Trans World Air Lines, Inc. v. Thurston,* 469 U.S. Ill (1985).
[59] *Johnson v. Baltimore,* 472 U.S. 353 (1985).
[60] 29 U.S.C. §623(f)(1).
[61] 29 C.F.R. §1625.7(c).
[62] *Anderson v. Baxter Healthcare Corp.,* 13 F.3d 1120 (7th Cir. 1987); *Metz v. Transit Mix, Inc.,* 828 F.2d 1202, 1220 (7th Cir. 1987) (Easterbrook, J., dissenting).
[63] 41 F.3d 1073 (7th Cir. 1994).
[64] 41 F.3d at 1078.
[65] *Anderson, supra,* at 1126 (7th Cir. 1994).
[66] 13 F.3d at 1125-26 (citing *Metz v. Transit Mix, Inc.,* 828 F.2d 1202, 1212 (7th Cir. 1987) (Easterbrook, J., dissenting)).
[67] *Id.* at 1126 (citing *Hazen Paper Co. v. Biggins,* 507 U.S. 604 (1993)).
[68] *LaMontagne v. American Convenience Products, Inc.,* 750 F.2d 1405, 1412-13 (7th Cir. 1984).
[69] *Id.*
[70] 29 U.S.C. §623(f)(3).
[71] *See, e.g., Mills v. First Fed. Sav.& Loan Ass'n,* 83 F.3d 833, 843 (7th Cir. 1996)(plaintiff failed to meet employer's legitimate expectations when she was lackadaisical in performing her quality control responsibilities which were such an important aspect of her job).
[72] *Anderson v. Baxter Healthcare Corp.,* 13 F.3d 1120, 1122 (7th Cir. 1994).
[73] *Huhn v. Koehring Co.,* 718 F.2d 239 (7th Cir. 1983).
[74] 29 U.S.C. §623(f)(2).
[75] *Id.*
[76] *Id.*
[77] 29 C.F.R. §1625.8(a).
[78] 29 C.F.R. §1625.8(b).
[79] 29 C.F.R. §1625.8(c).
[80] *Karlen v. City Colleges,* 837 F.2d 314 (7th Cir. 1988).
[81] 837 F.2d at 317.
[82] 837 F.2d at 320.
[83] 29 U.S.C. §623(f)(2).
[84] 29 C. F. R. §1625. 10.
[85] 29 U.S.C. §623(f)(2).
[86] *Id.*
[87] 29 U.S.C. §623(l).
[88] 29 C.F.R. §1625.2(b).
[89] *Id.*
[90] 29 U.S.C. §626(f).
[91] 507 U.S. 604 (1993).
[92] 837 F.2d 314, 319 (7th Cir. 1988).
[93] 837 F.2d at 319.

[94] 61 Fed. Reg. 15,374, *rescinding* 29 C.F.R. §1625.13.
[95] 29 U.S.C. §626(e); Vol. 1, Howard C. Eglit, Age Discrimination, Section 6.37, N. 1130 (1997).
[96] 411 U.S. 792, 93 S.Ct. 1817 (1973)
[97] *McDonnell Douglass Corp., supra,* 411 U.S. at 802; *Bechold v. IGW Systems, Inc.,* 817 F.2d 1282, 1285 (7th Cir. 1987).
[98] *McDonnell Douglas Corp., supra,* 411 U.S. at 802.
[99] *Id.*
[100] *Id.*
[101] *See Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 253, 101 S.Ct. 1089 (1981).
[102] *St. Mary's Honor Center v. Hicks,* 113 S.Ct. 2742, 2749 (1993).
[103] *Hicks, supra,* 113 S.Ct. at 2749.
[104] *Monaco v. Fuddruckers, Inc.,* 1 F.3d 658, 660 (7th Cir. 1993); *Flaherty v. Gas Research Institute,* 31 F.3d 451, 456 (7th Cir. 1994).
[105] *Monaco, supra,* 1 F.3d at 660.
[106] *Gadsby v. Norwalk Furniture Corp.,* 71 F.3d 1324, 1330 (7th Cir. 1995), citing *Anderson v. Baxter Healthcare Corp.,* 13 F.3d 1120, 1122, (7th Cir. 1994).
[107] *Mills v. First Federal Savings & Loan Assoc.,* 83 F.3d 833, 841 (7th Cir. 1996).
[108] *Troupe V. May Dept. Stores Co.,* 20 F.3d 734, 736 (7th Cir. 1994).
[109] *Huff v. UARCO, Inc.,* 122 F.3d 374, 380 (7th Cir. 1997), citing *Troupe, supra.*
[110] *Monaco, supra,* 1 F.3d at 661.
[111] *Monaco, supra,* 1 F.3d at 661; *Goldstein v. Manhatten Industries, Inc.,* 758 F.2d 1435, 1443 (11th Cir. 1985); *La Montagne v. American Convenience Products, Inc.,* 750 F.2d 1405, 1412-1413 (7th Cir. 1984).
[112] *Monaco, supra,* 1 F. 3d at 660.
[113] *Monaco, supra,* 789 F.Supp. 944, 948 (N.D.I11. 1992), affirmed, 1 F.3d 658 (7th Cir. 1994); *McCarthy v. Kemper Life Insurance Companies,* 924 F.2d 683, 686 (7th Cir. 1991); *La Montagne, supra,* 750 F.2d at 1412; *Lindsey v. Baxter Healthcare Corporation,* 757 F.Supp. 888, 896 (N.D.Ill. E.D. 1991), affirmed in part, reversed in part, 962 F.2d 586, Amended on Denial of Rehearing.
[114] *Chiarmonte v. Fashion Bed Group, Inc.,* 129 F.3d 391, 397 (7th Cir. 1997); Lindsey *supra,* 757 F.Supp. at 896. See also, *Greanias v. Sears, Roebuck & Co.,* 774 F.Supp. 462, 472-473 (N.D.Ill. E.D. 1991), wherein the Court held that the possibility that the plaintiff s project manager once told the plaintiff he was "too old for this work" was not direct evidence of age discrimination where the project manager had no formal input into the review process and there was no evidence that the manager played a formal or informal part in the decision to terminate the plaintiff.
[115] *Monaco, supra,* 1 F. 3d at 660.
[116] *Rush v. McDonald's Corp.,* 966 F.2d 1104, 1116 (7th Cir. 1992).
[117] *Smith v. Firestone,* 875 F.2d 1325, 1329 (7th Cir. 1989) (race discrimination case); *McCarthy v. Kemper Life Insurance Companies,* 924 F.2d 683, 686 (7th Cir. 1991) (racial remarks two years prior to discharge).
[118] 965 F.2d 500, 502 (7th Cir. 1992)
[119] *Colosi, supra,* 965 F.2d at 502.
[120] *Colosi, supra,* 965 F.2d at 502.
[121] 507 U.S. 604 (1993)
[122] *Hazen Paper, supra,* 507 U.S. at 606 (emphasis added); *Anderson v. Baxter Healthcare Corp.,* 13 F.3d 1120, 1121 (7th Cir. 1994) (plaintiff could not prove age discrimination even if he was fired simply because the employer desired to reduce its salary costs by discharging the plaintiff); *EEOC v. Francis Parker School,* 41 F. 3d 1073, 1078 (7th Cir. 1994) (policy of linking wages to experience is an economically defensible and reasonable means of determining salaries for applicants).
[123] 883 F.2d 505, 511 n3 (7th Cir. 1998).
[124] *Brown, supra,* 883 F.2d at 511 n3.
[125] *Kier v. Commercial Union Ins. Co.,* 808 F.2d 1254, 1258 (7th Cir. 1987).
[126] *See, Smith v. General Scanning, Inc.,* 876 F.2d 1315, 1321 (7th Cir. 1989) ("the fact that only nine of the 106 new hires were over 40 tells us nothing, since plaintiff omitted vital information regarding the pool of applicants and whether qualified older employees were available or even applied for those jobs."). See also *Kier, supra, 808* F.2d 1254, 1258, wherein the Seventh Circuit held that "we are dubious of statistical evidence of hiring which fails to account for the applicant pool." In addition, a plaintiff cannot offer a statistical comparison without expert testimony as to methodology or relevance to the plaintiff's claim. *Carter v. Ball,* 33 F.2d 450, 456-57 (4th Cir. 1994); *Williams v. Cerberonics Inc.,* 871 F.2d 452, 455 nl (4th Cir. 1989).
[127] See generally *Hagans v. Andrus,* 651 F.2d 622, 627 (9th Cir. 1981).
[128] *Huhn v. Koehring Co.,* 718 F.2d 239, 244 (7th Cir. 1983); *Holly v. City of Naperville,* 603 F.Supp. 220, 231 n4 (N.D.Ill. *1985); Locke v. Commercial Union Ins. Co.,* 676 F.2d 205, 206 (6th Cir. 1982); *Toussaint v. Ford Motor Co.,* 581 F.2d 812, 815 (10th Cir. 1978).
[129] *Anderson v. Baxter Healthcare Corp.,* 13 F.3d 1120, 1122 (7th Cir. 1994); *Monaco, supra,* 1 F.3d at 660-661.
[130] *Anderson, supra,* 13 F.3d at 1122.
[131] *Anderson, supra,* 13 F. 3d at 1122.
[132] *Rand v. C.F. Industries, Inc.,* 42 F.3d 1139, 1147 (7th Cir. 1994); *E.E. O. C. v. Our Lady of Resurrection Medical Center,* 77 F. 3d 145, 152 (7th Cir. 1996); *Lowe v. J. B. Hunt Transport, Inc.,* 963 F.2d 173, 174 (8th Cir. 1992), cited with approval by the

Seventh Circuit in *Rand, supra,* 42 F. 3d at 1147; *Susie v. Apple Tree Preschool & Child Care Center, Inc.,* 866 F.Supp. 390, 396 (N.D. Iowa 1994).

[133] *Karazanos v. Navistar International Transportation Corp.,* 948 F.2d 332, 336 (7th Cir. 1991).

[134] *Williams v. Williams Electronics, Inc.,* 856 F.2d 920, 924 (7th Cir. 1988).

[135] *Karazanos, supra,* 948 F.2d at 337-338; *Weihaupt v. American Medical Association,* 874 F.2d 419 at 428 (7th Cir. 1989).

[136] *Friedel v. City of Madison,* 832 F.2d 965, 975 (7th Cir. 1987); *Karazanos, supra, 948* F.2d at 336. *St. Mary's Honor Center v. Hicks,* 113 S.Ct. 2742, 2747 (1993); *St. Mary of Nazareth Hospital v. Curtis,* 163 I11.App.3d 566, 516 N.E.2d 813, 817 (1st Dist. 1987).

[137] *Wolf v. Buss (America) Inc.,* 77 F.3d 914, 919 (7th Cir. 1996).

[138] *Smith v. Firestone Tire and Rubber Co.,* 875 F.2d 1325, 1329 (7th Cir. 1989).

[139] *Russell v. Acme-Evans Co.,* 51 F.3d 64, 68 (7th Cir. 1995).

[140] *Karazanos, supra,* 948 F.2d at 336.

[141] *Huff, supra,* 122 F.3d at 384-385.

[142] *Rand, supra,* 42 F.3d at 1145-1146.

[143] *Heerdink v. Amoco Oil Co.,* 919 F.2d 1256, 1260 (7th Cir. 1990).

[144] *Rand v. C.F. Industries, Inc.,* 42 F.3d 1139, 1145-46 (7th Cir. 1994).

[145] *Hazen, supra,* 507 U.S. 604, 617.

[146] *Trans World Airlines v. Thurston,* 469 U.S. 111, 105 S.Ct. 613, 625 (1985).

[147] *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 113 S.Ct. 1701, 1708 (7th Cir. 1993); Vol. 3, E. Devitt, C. Blackman and M. Wolff, Federal Jury Practice and Instructions (4th Ed. 1987), Section 106.07.

[148] The text of the ADEA is found at 29 U.S.C. §623-34.

[149] 29 U.S.C. §623(f)(1).

[150] 29 C. F. R. §1625.6(a). *See also Quinones v. City of Evanston,* 829 F.Supp. 237 (N. D. 111. 1993) (holding BFOQ defense not applicable to differential treatment in benefit decisions).

[151] *Western Airlines, Inc. v. Criswell,* 472 U.S. 400 (1985); *see also Usely v. Tamaiami Trail Tours,* 531 F.2d 224 (5th Cir. 1976).

[152] *EEOC v. University of Texas Health Science Center,* 710 F.2d 1091 (5th Cir. 1983).

[153] *EEOC v. Missouri State Highway Patrol,* 748 F.2d 447 (8th Cir. 1984).

[154] *Mahoney v. Trabucco,* 738 F.2d 35 (lst Cir. 1984).

[155] *EEOC v. Boeing Co.,* 843 F.2d 1213 (9th Cir. 1988).

[156] *Trans World Airlines, Inc. v. Thurston,* 469 U.S. Ill. (1985).

[157] *EEOC v. Kentucky State Police Dept.,* 860 F.2d 665 (6th Cir. 1988).

[158] *Tullis v. Lear School, Inc.,* 874 F.2d 1989 (11th Cir. 1989).

[159] *Western Airlines, Inc. v. Criswell, supra.*

[160] *Id.*

[161] *Trans World Airlines, Inc. v. Thurston, supra.*

[162] 29 U.S.C. §623(f)(1).

[163] *Western Airlines, Inc. v. Criswell,* 472 U.S. 86 (1985)(dicta).

[164] *Hazen Paper Co. v. Biggins,* 507 U.S. 604 (1993); *see also EEOC v. Francis W. Parker School,* 41 F. 3d 1073 (7th Cir. 1994).

[165] *Hazen Paper,* 507 U.S. 604, 113 S.Ct. 1701 (1993).

[166] *Hazen Paper,* 113 S.Ct. at 1706.

[167] *Id.,* 113 S.Ct. at 1707.

[168] *Id.,* 113 S.Ct. at 1706.

[169] *Id.,* 113 S.Ct. at 1707.

[170] *See, e.g. EEOC v. Francis Parker School,* 41 F.3d 1073 (7th Cir. 1994).

[171] *Id.*

[172] 29 U.S.C. §623(f)(3).

[173] *Id.*

[174] 924 F.2d 655 (7th Cir. 1991).

[175] 924 F.2d at 660.

[176] *Schultz v. General Electric Capital Corp.,* 37 F.3d 329 (7th Cir. 1994).

[177] *Lindsay v. Baxter Healthcare Corp.,* 962 F.2d 596 (7th Cir. 1992).

[178] *Mechnig v. Sears Roebuck & Co.,* 864 F.2d 1359 (7th Cir. 1988).

[179] *Cengr v. Fusibond Piping Systems, Inc.,* 135 F.3d 445 (7th Cir. 1998) (discussing failures in quality control as avoiding employee's *prima facie* case of proving that employee's performance met legitimate job expectations).

[180] The good faith reliance defense is codified at 29 U.S.C. §259 and provides:

"[N]o employer shall be subject to any liability or punishment ... 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 agency of the United States specified in subsection (b) of this section....."

[181] 29 U.S.C. §259(a) ("Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.").

[182] *Quinn v. New York State Elec. & Gas Corp.,* 621 F.Supp. 1086 (N.D.N.Y. 1985)(citing *EEOC v. Home Ins. Co.,* 672 F.2d 252 (2d Dir. 1982)).
[183] *See Gathercole v. Global Associates,* 560 F.Supp. 642 (N.D. Cal. 1983), *rev'd on other grounds,* 727 F.2d 1485 (noting that employer improperly relied upon a regulation issued by the Army, which was not part of Department of Labor).
[184] *Id.* (noting the employer did not act "in conformity with" a regulation at issue, thus precluding application of the good faith defense).
[185] 621 F.Supp. 1086 (N.D.N.Y. 1985).
[186] *Id.* Interestingly, the *Quinn* court had no difficulty with the fact that the regulation at issue was an EEOC regulation because the regulation was originally promulgated by the Department of Labor.
[187] *Quinn v. New York State Electric and Gas Corp.,* 569 F.Supp. 655 (N.D.N.Y. 1983).
[188] *Quinones v. City of Evanston,* 829 F.Supp. 237 (N.D.Ill. 1993).
[189] *Id.* at 329.
[190] 29 U.S.C. §623(f)(2).
[191] *EEOC v. Orange County,* 837 F.2d 420 (9th Cir. 1988).
[192] *Quinones,* 829 F.Supp. at 239; 29 C. F. R. §1625.10(d) (1992).
[193] *Treaton v. Scott Paper Co.,* 832 F.2d 906 (3d Cir. 1987).
[194] 29 U.S.C. §623(I)(2).
[195] 29 U.S.C. §1625.10(a) (I).
[196] 29 U.S.C. §623(f)(2).
[197] 29 C.F.R. §1625.8(a-c).
[198] 29 U.S.C. §623(f)(2).
[199] 29 C.F.R. §1625.8(a-c).
[200] 29 U.S.C. §623(f)(2).
[201] 29 U.S.C. §623(f)(2).
[202] *Finnegan v. Trans World Airlines, Inc.,* 967 F.2d 1161 (7th Cir. 1992).
[203] *Id.*, 967 F.2d at 1163-64.
[204] *Early v. Bankers Life & Cas. Co.,* 853 F.Supp. 1074 (N.D.Ill. 1994) (citing *Smith v. Gen Scanning, Inc.,* 876 F.2d 1315 (7th Cir. 1989)).
[205] *Gehring v. Case Corp.,* 43 F.3d 340 (7th Cir. 1994).
[206] *Smith v. Cook County,* 74 F.3d 829 (7th Cir. 1996) (citing *Taylor v. Canteen Corp.,* 69 F. 3d 773 (7th Cir. 1995)).
[207] *Smith,* 74 F.3d at 833.
[208] *Id.*, *(citing Ayala v. Mayfair Molded Products Corp.,* 831 F.2d 1314 (7th Cir. 1987)).
[209] *Lubekman v. Commonwealth Edison Co.,* 877 F.Supp. 1180 (N.D.Ill. 1995).
[210] *Id., (citing McCoy v. WGN Continental Broadcasting Co.,* 957 F.2d 368 (7th Cir. 1992).
[211] The substantive requirements of settlement agreements are discussed more thoroughly in an additional section of this monograph that deals specifically with the pitfalls inherent in securing waivers from older employees.
[212] ____ U. S. ____, 118 S.Ct. 838 (1998).
[213] 29 U.S.C. §626(f); see also Section VI of this article entitled "Special Considerations for Releases Under the ADEA."
[214] *Oubre,* 118 S.Ct. at 840-41.
[215] *Oubre,* 118 S.Ct. at 841.
[216] Justice Breyer noted in a concurring opinion that the release agreement was one that was "voidable," rather than void. In the context of an ADEA claim this would mean that the agreement would be enforceable at the option of the employee. *Oubre,* 118 S.Ct. at 843-45 (Breyer, J., concurring). As a practical matter, there are few situations where the distinction will make a real difference to the employee's ability to bring the claim: an employee making a claim is unlikely to allow a voidable contract to stand. As Justice Breyer noted, however, the distinction may affect an employer's ability to gain restitution of funds paid out in connection with a voidable agreement. *Id.; see also Oubre,* 118 S, Ct. at 846 n.1 (Thomas, J., dissenting)(agreeing with conclusion of concurrence that contract is merely voidable).
[217] The Court specifically noted the possibility that the release could still be effective for waiver of other claims that did not have the same strict requirements. This could include state or local prohibitions against discrimination, and even other Title VII claims.
[218] *Oubre,* 118 S.Ct. at 842.
[219] 29 U.S.C. §626(f)(3).
[220] *See LaCroix v. Detroit Edison Co.,* 964 F.Supp. 1144 (E.D. Mich. 1996), one of the few reported cases where the employer prevailed in enforcing a waiver agreement.
[221] *Oubre,* 118 S.Ct. at 840.
[222] *Id.*
[223] *Oberg v. Allied Van Lines, Inc.,* 11 F. 3d 679, 682 (7th Cir. 1994).
[224] *Compare* 29 U.S.C. §626(f)(1)(F)(I) and (F)(ii); *see also* 29 U.S.C. §626(f)(1)(H).
[225] *See* 29 U.S.C. §626(f)(2) (discussing standards applicable to waivers in EEOC proceedings).
[226] *Oubre,* 118 S.Ct. at 842; *see also Oberg v. Allied Van Lines, Inc.,* 11 F.3d 679 (7th Cir. 1993) (discussing setoff against any award in wake of invalid waiver).

[227] *Brzostowski v. Laidlaw Waste Systems, Inc.,* 49 F.3d 337 (7th Cir. 1995).
[228] *Brzostowski,* 49 F.3d at 338.
[229] *Id.*
[230] *See Tice v. American Airlines, Inc.,* 959 F.Supp. 928 (N.D.Ill. 1997) (applying judgment entered in 5th Circuit case to bar ADEA action based upon similar issues raised by airline pilots over the age of 60).
[231] *See EEOC v. Harris Chemin, Inc.,* 10 F.3d 1286 (7th Cir. 1993) (denying use of *res judicata* against EEOC because of distinct nature between EEOC and underlying plaintiff/employee).
[232] *See Anderson v. Chrysler Corp.,* 99 F.3d 846 (7th Cir. 1996) (denying use of *res judicata* to bar plaintiff's cause of action due to material distinctions in factual bases for earlier and later claims).
[233] *McKennon v. Nashville Banner Publishing Co.,* 513 U.S. 352 (1995).
[234] *Id.* at 355-56 (summarizing cases).
[235] *Kristufek v. Hussman Foodservice Co. (Toastmaster Div.),* 985 F.2d 364 (7th Cir. 1993).
[236] *Id.*
[237] 513 U.S. 352 (1995).
[238] *Id.* at 360.
[239] *The McKennon* court was careful to note that the analysis in this case could not be analogized to mixed-motive cases, where the employer has two *contemporaneous* motivations, one lawful and one not. It has been held that in a situation where an employer had competing motivations for terminating the employee, if one of the lawful motivations by itself was enough to justify the firing, the employee cannot prevail in a suit against the employer based upon the unlawful motivation. Id. at 359 (discussing implications of mixed-motive analysis in *Mt. Healthy City Bd. of Ed. v. Doyle,* 429 U.S. 274, 284-87 (1977)).
[240] *Id.* at 362.
[241] *Id.*
[242] *Id.* at 362-63.
[243] An example is *Petrovich v. LPI Service Corp.,* 949 F.Supp. 626 (N.D.Ill. 1996), where the court noted that misrepresentations on an employee's resume were insufficient to establish the after-acquired evidence defense where the employer had failed to submit evidence from managers that the discovery of the misrepresentations would have caused the employer to discharge the plaintiff. According to the *Petrovich* court, "requiring affidavits to prove the employers' reliance on after-acquired evidence is in line with Seventh Circuit case law before *McKennon.*" *Id.* at 630.
[244] A critical distinction here is between a policy that provides that misconduct "will result in termination" as opposed to "may result in termination." Although decided before the *McKennon* case, the Seventh Circuit questioned language providing that misconduct "may be cause for immediate dismissal" as being sufficient to give rise to a legitimate basis for termination. *Kristufek, supra.*
[245] 29 U.S.C. §626(d)(1).
[246] *See Anderson v. Board of Regents of University of Wisconsin System,* -- F. 3d No. 97-3255 (7th Cir. March 30, 1998).
[247] *See Quinones v. City of Evanston,* 829 F.Supp. 237 (N.D.Ill. 1993) (citing *Kainlowitz v. Board of Trustees of Univ. of Ill.,* 951 F.2d 765 (7th Cir. 1991)) and *Leffingwell v. Sears, Roebuck and Co.,* 717 F.Supp. 620 (N.D.Ill. 1989). Interestingly, the dichotomy between worksharing and non-worksharing state agencies was explored in *Anderson v. Board of Regents of the University of Wisconsin System,* in which the employee of a state agent sought to recover under the ADEA. In Wisconsin, the agency that investigated *state* employee claims was the Wisconsin Personnel Commission, which did *not* have a worksharing agreement with the EEOC. Accordingly, a filing with the Personnel Commission did not trigger a cross-filing with the EEOC, and the charge was thus untimely filed with the EEOC. This problem would presumably not arise in Illinois, because the scope of the definition of employer is extremely broad and includes state and local as well as private employers. 775 ILCS 5/2-101(b)(defining "employer" under Illinois Human Rights Act).
[248] This is a change from prior law. The 1991 amendment to §626(e) of the ADEA took effect on November 21, 1991, and provided for the 90-day right-to-sue period upon receipt of a notice of dismissal from the EEOC. Before the amendment, ADEA actions were subject to a two- or three-year statute of limitations as provided under the Fair Labor Standards Act, 29 U.S.C. §255. Additionally, tolling while the EEOC was attempting to conciliate was also provided under former §626(e).
[249] 29 USC §626(b) and §626(c)(1).
[250] 29 USC §211, 216 and 217
[251] *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 95 S.Ct. 2362 (1975); *Mitchell v. Obert DeMario Jewelry,* 361 U.S. 288, 80 S.Ct. 322 (1960).
[252] *Kelewae v. Jim Meagher Chevrolet, Inc.,* 952 F.2d 1052, 1055 (8th Cir. 1992).
[253] *EEOC v. O&G Spring & Wire Forms Specialty Co.,* 38 F.3d 872 (7th Cir. 1994).
[254] *EEOC v. Ilona of Hungary, Inc.* 108 F. 3d 1569, 1579-80 (7th Cir. 1997).
[255] *Pearce v. Carrier Corp.,* 966 F.2d 958, 959 and Nl (5th Cir. 1992).
[256] *McKennon v. Nashville Banner Publishing Co.,* 513 U.S. 352, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995); *Petrovich v. LPI Service Corp.* 949 F.Supp. 626 (N.D.Ill. 1996).
[257] *Meyer v. United Air Lines, Inc.* 950 F.Supp. 874 (N.D.Ill. 1997).
[258] *Coleman v. Lane* 949 F.Supp. 604 (N.D.Ill. 1996).
[259] *Fite v. First Tennessee Production Credit Association,* 861 F.2d 884, 892 (6th Cir. 1988).

[260] *See Smith v. Great American Restaurants, Inc.* 969 F.2d 430, 437-438 (7th Cir. 1991) (Self-employment can constitute employment for purposes of mitigating damages, as long as the self-employment is a reasonable alternative to finding comparable employment.) The attempt at self-employment requires good faith and serious effort at success even if the venture is ultimately unsuccessful. *Id.*
[261] *Carden v. Westinghouse,* 850 F.2d 996, 1005-1007 (3rd Cir. 1988).
[262] *See Smith* at 438-439.
[263] *Ford Motor Co. v. EEOC,* 458 U.S. 219, 102 S.Ct. 3057 (1982); *Graefenhaill v. Pabst Brewing Co.*, 870 F.2d 1198 (7th Cir. 1989) holds that a general offer is inadequate.
[264] *O'Donnell v. Georgia Osteopathic Hospital, Inc.,* 748 F.2d 1543 (11th Cir. 1984).
[265] *Craig v. Y & Y Snacks, Inc.,* 721 F.2d 77 (3rd Cir. 1983) (The lower court did offset unemployment benefits.); *E.E.O.C. v. Sandia Corp.,* 639 F.2d 600,624 (10th Cir. 1980).
[266] *Syvock v. Milwaukee Boiler Mfg. Co., Inc.,* 665 F.2d 149 (7th Cir. 1981).
[267] *EEOC v. O'Grady,* 857 F.2d 383 (7th Cir. 1988) (The lower court refused to offset pension benefits.)
[268] *Blake v. J. C. Penney Co., Inc.,* 894 F.2d 274, 282 (8th Cir. 1990).
[269] *Laughesen v. Anaconda Co., 510* F.2d 307 (6th Cir. 1975).
[270] *EEOC v. Century Broadcasting Corp.,* 957 F.2d 1446, 1462 (7th Cir. 1992) citing *to Combes v. Griffin Television, Inc.,* 421 F.Supp. 841, 846 (W.D.Okla. 1976).
[271] *Price v. Marshall Erdman & Associates, Inc.,* 966 F.2d 320, 325 (7th Cir. 1992)
[272] *Avitia v. Metropolitan Club of Chicago, Inc.,* 49 F.3d 1219 (7th Cir. 1995); *Coston v. Plitt Theaters, Inc.,* 831 F.2d 1321, 1331-32 (7th Cir. 1987).
[273] 115 S.Ct. 879 (1995).
[274] *Id.* at 886
[275] *Stanfield v. Answering Service, Inc.,* 867 F.2d 1290 (1lth Cir. 1989).
[276] *Price, supra*, 966 F.2d at 325.
[277] *Avitia, supra*, 49 F.2d at 1231.
[278] *Fortino v. Quasar Co.,* 950 F.2d 389, 398 (7th Cir. 1991).
[279] *Transworld Airlines, Inc. v. Thurston,* 49 US 111, 126, 105 S.Ct. 625 (1985); *Coston, supra,* 860 *F.2d at 835.*
[280] *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 113 S.Ct. 1701, 1710 (1993).
[281] *E.E. O. C. v. Century Broadcasting Corp.,* 957 F.2d 1444, 1459-60 (7th Cir. 1992).
[282] *Avitia,* 49 F.3d at 1223.
[283] *Cossman v. Calumet County,* 849 F.2d 1027, 1032 (7th Cir. 1988)
[284] *Pfeiffer v. Essex Wire Corp.,* 682 F.2d 684 (7th Cir.), cert. denied, 459 U.S. 1039 (1982) (damages for pain and suffering as well as punitive damages are not recoverable under the ADEA).
[285] *See Downey v. Commissioner of Internal Revenue,* 33 F.3d 836, 839 (7th Cir. 1994).
[286] *Downes v. Volkswagen of America, Inc.,* 41 F.3d 1132, 1144 (7th Cir. 1994).
[287] *Starceski v. Westinghouse,* 54 F.3d 1089 (3rd. Cir. 1995).
[288] *Graefenhain, supra*, 870 F.2d at 1210.
[289] *MacDissi v. Valmont Industries, Inc.,* 856 F.2d 1054, 1051 (8th Cir. 1988).
[290] *Domingo v. New England Fish Co.,* 727 F.2d 1429 (9th Cir. 1984).
[291] *Delta Air Lines, Inc. v. August,* 450 U.S. 346, 101 S.Ct. 1 146 (1981). Note, however, that this rule does not apply to an unsuccessful plaintiff. *Id.*
[292] *Monroe v. United Airlines, Inc.,* N.D.Ill. (1983).
[293] *EEOC v. Chrysler Corp.,* 546 F.Supp. 54 affd 733 F.2d 1183 (6th Cir. 1984).
[294] *EEOC v. Recruit USA, Inc.,* 939 F.2d 746 (9th Cir. 1991).
[295] 29 U.S.C §216(b).
[296] *See, New York Gaslite Club, Inc. v. Carey,* 447 U.S. 54, 100 S.Ct. 2024 (1980).
[297] *Mizamy v. Texas Rehabilitation Commission,* 522 F.Supp. 61 1 (S.D. 198 1), aff'd, 685 F.2d 1384 (5th Cir. 1982).
[298] *EEOC v. O& G Spring & Wire Forms Specialty Co.,* 38 F. 3d 872 (7th Cir. 1994).
[299] 115 S.Ct. 2159 (1995).
[300] *Pubic Employees Retirement System of Ohio v. Betts*, 749 U.S. 158, 109 S.Ct. 2854, 106 L.Ed 2d 134 (1989).
[301] 29 U.S.C. §626.
[302] 29 U.S.C. §626(f)(1)(A) through (H).
[303] U. S. 118 S.Ct. 838 (1998).
[304] 118 S.Ct. at 840.
[305] Specifically, 29 U.S.C. §§626(f)(1)(B), (F) and (G).
[306] *Oubre v. Entergy Operations, Inc.,* 1996 W.L. 902063 (E.D. La. 1996).
[307] *Oubre v. Entergy Operations, Inc.,* 112 F.3d 787 (5th Cir. 1996).
[308] U. S. 117 S.Ct. 1466 (1997).
[309] 118 S.Ct. at 841.
[310] *Id.*
[311] 118 S.Ct. at 840.

[312] 29 U.S.C. §626(f).