**Age Discrimination**

**Chapter Objective:**

The purpose of this chapter is to address what Workforce 2000 tells us will be a growing population in America's work force: older workers. The chapter identifies the arguments for and against protection on the basis of age and introduces the Age Discrimination in Employment Act. The Act places the burden of proving a case of age discrimination on the plaintiff claiming the discrimination, but then offers employers a number of defenses to these claims. Finally, unique issues which are raised during a reduction in force are confronted.

**Scenarios -** Points for discussion

***Scenario One:*** A firm is allowed to make decisions on a *purely* economic basis. However, the courts have said that where salary is a proxy for age, salary may not be used in order to determine retention. This is an extremely difficult issue and one which always serves as a great jumping off point for many of the problems raised by ageism and decision-making. See *Economic Concerns, p. 332.*

***Scenario Two:*** The ADEA would require that, as long as this individual is qualified at the time she is hired, the employer may not make a decision about her employment based on her age.

***Scenario Three:*** Similar to Scenario Two, Dan’s concerns regarding Mary’s years of experience and “stage” appear to be age-based. Instead of basing his decision on age-related stereotypes, Dan should make pre-employment inquiries that would help him assess Mary’s attitude toward this possible position, and to her ability to be part of a team with backgrounds that are different from her own.

 **LECTURE NOTES**

I. **Oldie . . . But Goldie?**

A. The introduction to this chapter contrasts America's treatment of its older workers with that of the Japanese.

B. It must be very strange indeed to those of other cultures like the Japanese, who revere age and believe that with it comes wisdom and insight unobtainable by the young.

C. In our culture the general perception is that with youth comes energy, imagination and innovation. With age comes decreasing interest, lack of innovation and imagination and a lessening of the quality of the person.

D. While statistics show that older workers are more reliable, harder working, more committed and have less absenteeism than younger workers--all characteristics which employers say they value--the general perception of them as employees is exactly the opposite. Furthermore, older workers are now more likely to remain on the job than their counterparts earlier in this century.

II. **Regulation - Age Discrimination in Employment Act of 1967**

A. In 1967, Congress enacted the Age Discrimination in Employment Act ("ADEA") for the express purpose of "promoting the employment of older persons based on their ability rather than age [and prohibiting] arbitrary age discrimination in employment."

1. The Act applies to employment by public and private employers, unions and employment agencies, as well as by foreign companies located in the United States with more than 20 workers.

2. On its effective date, the Act covered employees between the ages of 40 and 65. The upper limit was extended to 70 in 1978, and later removed completely. There is no longer an upper age limit, nor is mandatory requirement allowed except in certain circumstances.

**Lecture Note:** Have a student read the passage at the top of p. 431 from the *Graefenhain* case, then ask each student whether she or he believes that the ADEA and the prohibition against using age as a component of an employment decision is the "right" way to handle the problems the Act seeks to address, or whether there are other alternatives.

B. Distinction between ADEA and Title VII

1. Both are enforced by the EEOC, as well as through private actions.

2. However, discrimination based on age is substantively different from discrimination based on factors covered by Title VII in two important ways.

3. The ADEA is more lenient than Title VII regarding the latitude afforded employers' reasons for adverse employment decision.

4. The ADEA allows an employer to rebut a prima facie case of age discrimination by identifying any "reasonable factor other than age" which motivated the decision.

5. The Act only protects employees over forty from discrimination. Unlike Title VII, there is no protection from "reverse" discrimination. In other words, an individual under 40 can not file a claim under the Act based on the claim that she was discriminated against because of her youth -- that it was because she was too young.

1. It should be noted however, that certain *state* laws or *state* case law precedents allow for what might be considered a youth’s “reverse discrimination” claim under state age discrimination statutes.
2. One New Jersey man who claimed he was fired from a bank VP position because of his young age (25) was allowed to proceed in that state court.
3. The ADEA’s protection does not extend to state workers under the United States Supreme Court’s decision in *Kimel v. Florida Board of Regents*. You may also note, as the text does, that the proposed Older Workers Rights Restoration Act that was introduced in the U.S. Senate in May 2001 would effectively bring these workers back under the ADEA’s protection, as it would require states receiving federal funds to waive their immunity to ADEA suits brought by their state employees. [Note: you should check the current status of the bill.]
4. The Act has specific record-keeping provisions for employers. Employers are required to maintain the following information for **three years** for each employee and applicant, where applicable:
5. name
6. address
7. date of birth
8. occupation
9. rate of pay
10. compensation earned each week
11. Employers are required to maintain the following information for **one year** for each employee, and for both regular and temporary workers:
12. job applications, resumes, or other employment inquiries in answer to ads or notices, plus records about failure or refusal to hire.
13. records on promotion, demotion, transfer, selection for training, layoff, recall, or discharge of any employee.
14. job orders given to agencies or unions for recruiting personnel for job openings.
15. test papers
16. results of physical exams that are considered in connection with any personnel action.
17. ads or notices relating to job openings, promotions, training programs, or opportunities for overtime.

C. The Burdens of Proof

1. As in *McDonnell Douglas Corp. v. Green* (Title VII) and later adapted to age discrimination claims under the ADEA, the employee must establish the following four elements in order to persuade the court that she or he even has a claim for age discrimination:

a. he is in the protected class;

b. he was terminated or demoted;

c. he was doing his job well enough to meet his employer's legitimate expectations; and

d. others not in the protected class were treated more favorably.

2. **Member of the Protected Class.** In order to satisfy the first requirement of the prima facie case, the employee must merely show that the she or he is forty years old or older.

3. **Adverse Employment Action.** This may include a decision not to hire the applicant, or to terminate the employee.

4. **Qualified for The Position.**

a. If applicant is not qualified, then the employer's decision regarding the applicant would be justified and the applicant's claim fails.

b. The position requirements, however, must be legitimate requirements, and not merely devised for the purpose of terminating or refusing to hire older workers.

c. Courts have allowed this requirement to be met by the employee simply showing that the employee was never told that performance was unacceptable.

d. The qualifications requirement is not a difficult one and courts have even held that the fact that employee was hired initially indicated that he or she had the basic qualifications.

5. **Dissimilar Treatment.** The employee or applicant must show that he was treated differently than other employees who are not in the protected class. This requirement has presented the most difficulty for courts, but the split in courts was resolved by the United States Supreme Court in *O’Connor v. Consolidated Coin Caterers*.

a. Under *O’Connor*, the older worker would have to have been “replaced” by an individual who is substantially younger than the plaintiff. The Court stated that this “was a far more reliable indicator of age discrimination under the ADEA than was the fact that the plaintiff was replaced by someone outside the protected class.” [116 S.Ct 1307].

6. The Fourth Circuit found that in determining whether an advertisement had a discriminatory affect on older individuals, “the discriminatory effect of an advertisement is determined not be ‘trigger words’ but rather by its context.” The ad is not considered discriminatory because of word or words but rather whether the intent of the ad is to discriminate against older individuals.

a. Section 4(e) makes it unlawful to "print or publish or cause to be printed or published, any notice or advertisement . . . indicating any preference, limitation, specification, or discrimination, based on age."

b. See Box 12-3.

**Lecture Note:** Discuss: While the use of certain "trigger" words like "girl" or "young" does not establish a *per se* ADEA violation, the context of the statement is important determining its discriminatory effect. For instance, use of "recent college graduate" is not discriminatory if a personnel agency merely intended to identify those services which it offered to that specific class of individuals.

D. **Employers' Defenses**

1. Once the employee has presented evidence relating to the employer's actions, the burden of proof shifts to the employer to present a legitimate and nondiscriminatory reason for its actions.

2. See Box 12-4.

3. **Bona Fide Occupational Qualification**

a. If an employer is sued for age discrimination, the defense of BFOQ is available.

 b. The employer's proof of a bona fide occupational qualification BFOQ under the ADEA is slightly different and less exacting than under Title VII.

1) Title VII requires that the employer demonstrate that

a) the essence of the business requires the exclusion of the members of a protected class; and

b) all or substantially all of the members of that class are unable to perform adequately in the position in question.

2) The EEOC follows the requirements of Title VII in connection with the ADEA but adds one further possibility for the employer's proof. The EEOC identifies that which the employer must prove in an age discrimination case brought under the ADEA as:

a) The age limit is reasonably necessary to the essence of the employer's business; and ***either***

b) all or substantially all of the individuals over that age are unable to perform the job's requirements adequately; ***or***

c) Some of the individuals over that age possess a disqualifying trait that cannot be ascertained except by reference to age.

1 - The third element of the proof allows an employer to exclude an older worker from a position which may be unsafe to *some* older workers. This defense would only be accepted by a court where there is no way to individually assess the safety potential of a given applicant or employee.

c. When Congress passed the 1986 amendments to the Age Discrimination in Employment Act (ADEA) of 1967, prohibiting mandatory retirement on the basis of age for most workers, it included several temporary exemptions, notably one for tenured faculty in higher education. That exemption expired Dec. 31, 1993. Mandatory retirement has been limited to two circumstances.

1. A small number of high‑level employees with substantial executive authority can be subjected to compulsory retirement at age 70. This exception is a very narrow one and does not allow for compulsory retirement policies for mid‑level managers.

2) Persons in selected occupations, such as police and firefighters, in which age is a bona fide occupational qualification have been subject to mandatory retirement.

1. Regarding tenured faculty members, until recently, ADEA did not prohibit compulsory retirement at age 70 for tenured faculty members at institutions of higher learning. This exception expired on December 31, 1993, making compulsory retirement ages for tenured faculty no longer permissible. However, some educators are pushing for reinstatement of the ADEA exemptions.

4. **Reasonable Factor Other Than Age**

a. The employer's defense that the adverse action was taken as a result of "reasonable factors other than age" to allow employers to discriminate against protected persons for reasons which may have an adverse *effect* on older workers, such as dexterity or strength.

b. The EEOC regulations require that the factor be job-related if the distinction has a disparate impact on employees over forty.

c. Reasonable factors may therefore include any requirement which does not have an adverse impact on older workers, as well as those factors which do adversely affect this protected class, but are shown to be job-related.

**Lecture Note:** What if the requirement is "to fit in with the style of the place" such as a trendy rock bar? It is arguable that this "fit" is the requirement, not the age requirement, (because there may be some over 40 who would fit in like Warhol-types, and so on).

**Case Example:**

***Parrish v. Immanuel Medical Center, 92 F.3d 727 (8th Cir. 1996)***

**Issue:** Whether there was insufficient evidence to support a finding of age discrimination.

**Facts:** Although Mary Ruth Parrish received satisfactory performance reviews during her registrar position and learned new technology during her nine years at Immanuel Medical Center Immanuel (Immanuel) she was reassigned to a new “auditing position.” Conflicting stories regarding the responsibilities of the auditing position were given to the court. Immanuel stated the duties would include auditing other registrars’ work; Parrish claimed the responsibilities included stapling packets of information together. The parties agree that Mary was not given the option of returning to her position as a part‑time registrar and was presented the offer to transfer as an all‑or‑nothing proposition. The following day Mary did not report to work but called her supervisor to ask her to reconsider her decision to transfer Mary. The supervisor refused so Mary, at the age of sixty-six, resigned. Mary sued Immanuel, alleging that she was constructively discharged because of her age, prohibited by the ADEA, and her disability. Immanuel contended that it legitimately sought to transfer Mary because of her inefficiency and her difficulties with the new computer system. The jury rejected Immanuel's explanation and found that Immanuel had discriminated against Mary due to her age and disability. A jury awarded Mary $21,218.15 in compensatory damages. Based on the jury's finding that Immanuel willfully violated the ADEA, the district court determined that Parrish was entitled to liquidated damages and accordingly entered final judgment for Parrish in the amount of $42,436.30.

**Decision:** The Court of Appeals, Beam, Circuit Judge, held that: evidence was sufficient to support finding that employer discriminated against employee because of her age based on the fact that she had previously received satisfactory reviews and the supervisor’s comment that even “younger workers” were having problems learning the new computer system.

**Case Questions**

1. *Should employers be able to terminate or transfer older workers when they can not grasp new technology? What can employers do to protect themselves?*

An employer may terminate *any* worker that is not performing satisfactory with their job responsibilities however, age can not be the determining factor. The decision to terminate an individual must be based on performance or other factors not pertaining the stereotypes of age.

1. *What do you think the purpose of the ADEA is? What do you think the purpose should be?*

Class decision

1. *Do you believe that there is an age after which most people should not be allowed in certain positions? What type of positions? What age would you decide to appropriate for removing these people from the position? How would you decide?*

Class discussion will be full of perceptions and biases; make sure to question each response in order to determine whether age is actually the deciding factor here, or health, or eyesight, and so on.

**Case Example:**

***Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985)***

**Issue:** Whether age is a BFOQ for the position of flight engineer?

**Facts:** Western Air Lines requires that its flight engineers, who are members of the cockpit crew but do not operate flight controls unless both the pilot and co-pilot become incapacitated, retire at age 60. The Federal Aviation Administration prohibits anyone form acting as a pilot or copilot after they have reached the age of 60. The respondents in this case include both pilots who were denied reassignment to the position of flight engineers at age 60 and flight engineers who were forced to retire at that age. The airline argued that the age-60 retirement requirement is a BFOQ reasonably necessary to the safe operation of the business. The lower court instructed the jury as follows: the airline could only establish age as a BFOQ if "it was highly impractical for [petitioner] to deal with each [flight engineer] over age 60 on an individualized basis to determine his particular ability to perform his job safely" and that some flight engineers "over 60 possess traits of a physiological, psychological or other nature which preclude safe and efficient job performance that cannot be ascertained by means other than knowing their age." The Supreme Court evaluated whether this instruction was appropriate and determined that it correctly stated the law.

**Decision:** The actual capabilities of persons over age 60, and the ability to detect diseases or a precipitous decline in their faculties, were the subject of conflicting medical testimony. Throughout the legislative history of the ADEA, one empirical facts is repeatedly emphasized: the process of psychological and physiological degeneration caused by aging varies with each individual. As a result, many older workers perform at levels equal or superior to their younger colleagues. In fact, in 1965, the Secretary of Labor reported to Congress that despite these well-established medical facts, "there is persistent and widespread use of age limits in hiring that in a great many cases can be attributed only to arbitrary discrimination against older workers on the basis of age and regardless of ability." The court discusses *Usery v. Tamiami Trail Tours* where the Fifth Circuit held that "the job qualifications which the employer invokes to justify his discrimination must be *reasonably necessary* to the essence of his business - here, the safe transportation of bus passengers from one point to another. The greater the safety factor, measured by the likelihood of harm and the probably severity of that harm in case of an accident, the more stringent may be the job qualifications designed to insure safe driving."

The BFOQ standard adopted in the statute is one of "reasonable necessity," not reasonableness. When an employer establishes that a job qualification has been carefully formulated to respond to documented concerns for public safety, it will not be overly burdensome to persuade a trier of fact that the qualification is "reasonably necessary" to safe operation of the business. Thus, the court held that the instructions to the trial court were correct.

**Case Questions**

*1. What is the difference between the two cases cited in full above? What is the basis for the determination that an employer should or should not be required to test applicants on an individual basis?*

The *TWA* case addressed the specific issue of TWA's policy of exclusion based on a seniority system while the *Western* case addressed the proper standard for determining whether age was a BFOQ for a specific position. In order to determine whether the employer should have to test applicants on an individualized basis is whether the abilities or decline in faculties are able to be tested on an individual basis and the level of public safety at risk.

*2. Should an employer have available as a defense that the cost of the tests would impose a great burden on the employer? Why or why not?*

Discuss with the class where the burden should fall; if we allow the employer not test and hire older workers because the tests are too expensive and the risks too great if they hire the worker without the tests, then the burden of maintaining this individual falls on society instead of the employer. It is a balancing of costs to society issue.

*3. What is the distinction the Criswell opinion makes between "reasonable necessity" and "reasonableness?"*

Plenty of things may seem reasonable but not necessary.

**Lecture Note:** We are talking here about whether there exist generally accepted qualities of an older person. Can I say that the eyesight of all older workers is poor? Not really, but if eyesight is critical, wouldn't I have a better chance for good eyes if I hired younger workers, and then I could save on eye exams?

 **LECTURE NOTES**

# 5. Economic Concerns

a. There is a problem in connection with the decision to terminate older workers: it is likely to be more expensive under certain circumstances to maintain older workers than younger; so cutting the numbers of older workers may reduce costs in some firms. In that situation, discharging workers in order to cut costs would generally result in the termination of more older workers than others.

b. This issue is unique to ADEA discrimination claims as it is not more costly, for instance, to hire an Asian employee than a Caucasian employee.

c. Courts disfavor this justification for the termination of older workers.

1) As stated by the Illinois District Court in *Vilcins v. City of Chicago, 1991 WL 74610 (N.D.Il. 1991)*, "nothing in the ADEA prohibits elimination of a protected employee's position for budgetary reasons. In fact, the case law establishes that economic or budgetary factors may provide valid reasons for discharging a protected employee. A termination allegedly based on economic factors may constitute impermissible discrimination, however, when the economic reasons proffered serve merely to obscure the fact that age was the true determinant."

2) From *Metz v. Transit Mix*, where salary is tied directly to seniority (and therefore age), seniority then serves as a "proxy" for age, supporting a claim of age discrimination.

a) The court of appeals noted that one possible solution to the high pay quandary for the continued employment of older workers is to offer the older worker the option of accepting a pay cut in lieu of termination.

b) The pay cut, of course, must be warranted by business necessity such as economic difficulties, but at least the older worker would be retained and not replaced by a younger worker who was willing to accept the lower salary offered.

c) Such an offer to the older worker would be evidence of the intent to reduce costs, as opposed to relieve the firm of its older work force.

d. In addition, terminations pursuant to bona fide reductions in force, bankruptcy, or other legitimate business reasons are generally legal, even if the economic considerations which have necessitated the reduction in force require the termination of more older workers than younger employees.

**Case Example:**

[this case is in ***question - Hazen Paper Co. v. Biggins, 113 S.Ct.1701 (1993)***

**Issue:** Did Hazen Paper Co. fire Biggins to prevent his pension benefits from vesting? If so, was it a violation of ADEA and/or ERISA?

**Facts:** Hazen Paper hired Walter Biggins as their technical director in 1977 and fired him in 1986 at the age of 62. Biggins claims that he was fired in violation of the ADEA and in an effort to prevent his pension benefits from vesting. Defendant claims that Biggins was fired for doing business with its competitors. A jury found for Biggins and specifically found that Defendant had acted willfully, giving rise to an increased damage award. The appellate court upheld the decision for plaintiff but reversed the verdict as to willfulness.

Decision:

**Decision:** Judgment forBiggins. Justice O’Connor held that firing someone to prevent his pension from vesting is not an ADEA violation, and violation of ADEA is willful if the employee either knew of showed reckless disregard for whether its conduct was prohibited by the statute. Firing someone to prevent his pension benefits from vesting is an ERISA violation. The Chief Justice and Justices Kennedy and Thomas concurred.

**Case Questions:**

*1. Do you agree with the court that age and years of service are sufficiently distinct to allow for terminations based on years of service and to find no violation of the ADEA where the terminations result in a greater proportion of older workers being fired?*

This might be seen as a proxy for age.

*2. Aren’t workers close to vesting more likely to be older workers? And, if so, then do you believe that an employer can use the category “close to vesting” to avoid liability under the ADEA?*

Discuss*.*

*3. If an employer did terminate a group of individuals on the basis of their being “close to vesting” with the intention to get rid of older workers, what type of evidence would the employees/plaintiffs be able to use to prove the unlawful intent?*

Discuss*.*

5. There is no consensus in the federal courts on the question of whether there is a "high correlation" between compensation and age generally, so that compensation based decisions would have a disparate impact on older workers generally.

1. An employer's decision based on salary which disproportionately affected older workers because of the high correlation between age and salary would be actionable age discrimination under a number of relatively earlier federal circuit court decisions as well as a few later ones. [see *Caron v. Scott Paper Co.* (D.Me.1993) 834 F.Supp. 33; *Camacho v. Sears, Roebuck de Puerto Rico*, 939 F.Supp. 113.]
2. On the other hand, federal courts which have examined the issue more recently, particularly in the wake of the *Hazen Paper Co. v. Biggins*, have tended to hold that economic decisions do not give rise to liability for age discrimination, despite the disparate impact of such decisions on older workers. [See *Ellis v. United Airlines, Inc.* (10th Cir.1996) 73 F.3d 999, 1009 ("of those courts that have considered the issue since Hazen, there is a clear trend toward concluding that the ADEA does not support a disparate impact claim.")]

6. The core of the split may be traced to two fundamentally differing views about the goal of the age discrimination statutes.

1. If the goal of the age discrimination statutes is to preclude decisions based on generalities about older workers which may have no basis as to individuals, then they certainly do not extend to decisions based on relative compensation rates between individual workers. In this view, age discrimination statutes were enacted to prevent employers from assuming that just because an individual attained a certain age, he or she no longer could do the job, or do it as well. This view was best articulated by the dissent in *Metz v. Transit Mix Inc.*, 828 F.2d 1202 (7th Cir. 1987), which stated, "The Act prohibits adverse personnel actions based on myths, stereotypes, and group averages, as well as lackadaisical decisions in which employers use age as a proxy for something that matters (such as gumption) without troubling to decide employee‑by‑employee who can still do the work and who can't."
2. The other view is that age‑discrimination statutes were enacted to protect older workers because of their status as older workers, since older workers, generally speaking, face unique obstacles late in their careers. Age discrimination law is thus seen as a kind of protective legislation designed to improve the lot of a people who are vulnerable as a class. If this view is correct, then holding that decisions based solely on salary may contravene laws precluding discrimination based on age makes sense.

 **LECTURE NOTES**

**Benefit Plans and Seniority Systems**

a. The ADEA specifically excludes bona fide retirement plans which distinguish based on age, but are "not a subterfuge to evade the purpose of [the] Act."

1) "Subterfuge" in this definition denotes those plans which are mere schemes for the purpose of evading the ADEA or the Older Workers' Benefit Protection Act (discussed below).

b. The effect of the 1978 and 1986 amendments to the ADEA was to prohibit involuntary retirement plans completely when they are imposed on the sole basis of an employee's age.

c. **"Voluntariness" of Plan.** In order to qualify as a bona fide, *voluntary* retirement plan allowed by the Act, the plan must be truly voluntary. The determination of what qualifies as a bona fide plan must be made on a case-by-case basis.

1) It has been held that early retirement plans offered by employers are not bona fide pursuant to the Act if a reasonable person would have felt compelled to resign under similar circumstances.

2) However, even after several court decisions relating to the issues of voluntariness, and whether a plan was a subterfuge, employers are left without much direction in terms of the formulation of early retirement programs and other means of providing benefits.

d. **The Older Workers Benefit Protection Act of 1990.**

1) In 1990, Congress enacted the Older Workers Benefit Protection Act ("OWBPA"), amending section 4(f) of the ADEA.

2) The OWBPA concerns the legality and enforceability of early retirement incentive programs (called "exit incentive programs" in the Act), and of waivers of rights under the ADEA, and prohibits age discrimination in the provision of employee benefits.

3) What this Act really deals with are those situations where employees are offered amounts of money through retirement plans as incentives for leaving a company. In that way, the company is not terminating an older worker, and thereby cannot, in theory, be held liable under the ADEA.

4) The OWBPA codifies the EEOC's **"equal cost principal",** requiring that firms provide benefits to older workers which are at least equal to those provided to younger workers, unless the cost of their provision to older workers *greatly* exceeds the cost of provision to younger workers.

a) Therefore, a firm may only offer different benefits to older and younger workers if it costs a significant amount more to provide those benefits to older workers.

b) This section amends section 4 of the ADEA which provides that adverse employment actions taken in observance of the terms of a bona fide employee benefit plan are partially exempt from question.

5) In connection with employee waivers of their rights to file discrimination actions under the ADEA, the OWBPA requires that every waiver must be “knowing and voluntary” to be valid. In order to satisfy this requirement, the waiver must meet all of the following requirements:

a) The waiver must be written in a manner calculated to be understood by an average employee;

b) The waiver must specifically refer to ADEA rights or claims (but may refer to additional acts such as Title VII or applicable state acts);

c) The waiver only affects those claims or rights which have arisen prior to the date of the waiver, i.e. the employee is not waiving any rights acquired after he date of execution;

d) The waiver of rights of claims may only be offered in exchange for some consideration in addition to anything to which the individual is already entitled (this usually involves inclusion in early retirement program);

e) The employee must be advised in writing to consult with an attorney prior to execution of the waiver (this does not mean that the employee must consult with an attorney, but must merely be advised of the suggestion.);

f) The employee must be given a period of 21 days in which to consider signing a waiver, and an additional seven days in which to revoke the signature. Note that where a waiver is offered in exchange for an early retirement plan as opposed to some other consideration, the individual must have 45 days in which to consider signing the agreement;

g) If the waiver is executed in connection with an exit incentive (early retirement) or other employment termination program, the employer must inform the employee in writing of the exact terms and inclusions of the program.

6) The purpose of these provisions is basically to insure that the employee entered into the agreement which waived her or his rights knowingly and voluntarily based on the "totality of the circumstances".

7) Even if the employee could have disputed the employer's enforcement of the waiver because of this provision, the employee cannot do so **if she retains the additional benefits she received when she agreed to sign the waiver.** Note that, if an employee signs a defective waiver, the employee is NOT required to return any benefits received under the defective waiver.

8) In addition, if the employer offers to individually negotiate the waiver (as opposed to offering a standard form to the employee on a take-it-or-leave-it basis), this may be able to serve as proof to the court that the employee knew what he was doing when he signed the document.

1. Employers who attempt to use general waivers to avoid all employment-related liability in contexts other than layoffs should be mindful of the potential consequences under ADEA.

**Lecture Note**

The Allstate case mentioned in the text offers students good insight into the impact of organizational restructuring on the rights of older workers’ Further, this case offers a good review of the distinction between employees and independent contractors. Monitor the progress and outcomes of this case, and the related actions brought by the older workers to provide students updated information: however, whatever the outcome, remind students of the costs of litigation as well as the adverse effects on stock prices and employee relations that Allstate suffered as a result of the claims.

**Case Example:**

***Oubre v. Entergy Operations, Inc., 118 S.Ct. 838 (1998)***

**Issue:** Whether the receipt of any consideration given in exchange for the waiver must be returned in order to pursue a valid claim under the ADEA and whether the waiver, signed by the employer was valid under the OWBPA to prevent a claim under the ADEA.

**Facts:**Oubre who, as part of termination agreement, signed release of all claims against employer in exchange for severance pay, subsequently sued employer for age discrimination in violation of the Age Discrimination in Employment Act (ADEA). Entergy moved for summary judgment, claiming Oubre had ratified the defective release by failing to return or offer to return the monies she had received. The United States District Court for the Eastern District of Louisiana, granted summary judgment in favor of employer, and employee appealed. The Court of Appeals for the Fifth Circuit affirmed, and certiorari was granted.

**Decision:** As the release did not comply with the OWBPA's requirements, it cannot bar Oubre's ADEA claim. The OWBPA provides: "An individual may not waive any [ADEA] claim ... unless the waiver is knowing and voluntary .... [A] waiver may not be considered knowing and voluntary unless at a minimum" it satisfies certain enumerated requirements, including the three listed above. Thus, the OWBPA implements Congress' policy of protecting older workers' rights and benefits via a strict, unqualified statutory stricture on waivers, and this Court is bound to take Congress at its word. By imposing specific duties on employers seeking releases of ADEA claims and delineating these duties with precision and without exception or qualification, the statute makes its command clear: An employee "may not waive" an ADEA claim unless the waiver or release satisfies the OWBPA's requirements. Oubre's release does not do so. Nor did her mere retention of monies amount to a ratification equivalent to a valid release of her ADEA claims, since the retention did not comply with the OWBPA any more than the original release did. Accordingly, even if Entergy has correctly stated the contract ratification and equitable estoppel principles on which it relies, its argument is unavailing because the authorities it cites do not consider the OWBPA's commands. Moreover, Entergy's proposed rule would frustrate the statute's practical operation as well as its formal command. A discharged employee often will have spent the monies received and will lack the means to tender their return. These realities might tempt employers to risk noncompliance with the OWBPA's waiver provisions, knowing that it will be difficult to repay the monies and relying on ratification.

**Case Questions**

*1. Do you think the fact that an attorney was consulted before the acceptance of the offer is relevant in this case to determine whether the waiver was knowing and voluntary?*

Typically, in contract situations, an attorney can be determinative as to whether the contract was entered into knowingly and voluntarily. However, because OWBPA requires more than an attorney consultation, that fact alone is not determinative of a valid waiver.

*2. As an employer, what should you do to ensure the waiver an individual will be signing is valid?*

Be sure to follow the guidelines, at a minimum. If they are not followed, it could be fatal to an employer.

*3. Why do you think an employer must follow such strict guidelines when creating a waiver? Do you think the guidelines are correct? How would you change them?*

Class discussion

**Lecture Note**

The EEOC’s regulations that became effective on January 10, 2001 make clear that employees cannot be required to “tender back” consideration the consideration received under an ADEA waiver agreement before being permitted to challenge the waiver in court. Further, the acceptance of such consideration did not “ratify” the invalid waiver.

You may note that the proposed regulations circulated for public comment contained a prohibition of general covenants not to sue. However, after considering public comments, the EEOC decided to simply apply OWBPA’s requirements to these general covenants not to sue to ensure fairness.

9) **Early Retirement Plans:** The OWBPA also contains the following provisions in connection with early retirement plans, 29 U.S.C. '623:

a) Employers may set a minimum age as a condition of eligibility for normal or early retirement benefits;

b) A benefit plan may provide a subsidized benefit for early retirement;

c) A benefit plan may provide for social security supplements in order to cover the time period between the time when the employee leaves the firm and the time when the employee is eligible for social security benefits;

d) While severance pay cannot vary based on the employee's age, the employer may offset the payments made by the value of any retiree health benefits received by an individual eligible for immediate pension.

1. Note that no provision of OWBPA prohibits an employer from revoking retirement offer *while* the employer is considering it.

e. **ERISA.** In 1974, Congress passed the Employment Retirement Income Security Act which regulates private employee benefit plans.

1) While ERISA specifically governs the operation of retirement plan provisions, among other benefits, and is therefore relevant to the issue of age discrimination, a complete discussion of its implications is found in Chapter 20, devoted entirely to ERISA.

2) ERISA's purpose is to protect employees from wrongful denial of all types of benefits, including retirement or pension benefits.

3) ERISA prevents problems through its regulation of the determination of who must be covered by pension plans, vesting requirements, and the amount which the employer must invest for the benefit of its employees.

4) In an effort to encourage compliance with this provision, ERISA also requires complete disclosure of the administration of the plan.

5) ERISA stipulates that an employee may not be excluded from a plan on account of age, as long as she or he is at least 21 years of age and is a full-time employee with at least one year of service.

6) ERISA does have some negative side effects.

a) It has made the provision of benefit plans more costly for employers.

b) No Federal law requires employers to offer retirement plans.

f. **Distinctions Among Benefit Plans.**

1) Can an employer simply decide to lower the amounts of benefits it offers its employees?

2) Yes, as long as it is in line with requirements of ERISA. However, those reductions must be made across the board; the OWBPA limits the distinctions that an employer may make on the basis of age to only those which are justified by "age-based cost differences".

E. **Employee's Response: Proof of Pretext**

1. An ADEA case begins as the employee proves the elements of the prima facie claim, then the employer has the chance to justify its decision using any of the above defenses. Now it is again the employee's turn; **the employee must show that those reasons or that defense is pretextual.**

2. When a claim is pretextual, it means that it is not the true reason for the action, that there is some **underlying motivation** to which the employer has not admitted.

a. To prove that the offered reason is pretext for an actual case of age discrimination, the employee need not show that age was the *only* factor motivating the employment decision, but only that age was a determining factor.

**Lecture Note:** Given the case Supreme Court case of *St. Mary's v. Hicks*, the employer and employee are left with little guidance as to what constitutes pretext. It is almost as if once again the employee needs a smoking gun, or direct evidence, of discrimination. As we are yet unclear, it is wise to investigate the subsequent rulings interpreting this case (or call Dawn or Laura for an update).

3. Where there is direct evidence of discrimination, proof of pretext is not required. This may occur where the employer admits to having based the employment decision on employee's age, or when a representative of the employer states that the employee is "too old" or that it would be cheaper to hire younger applicants.

4. An employee can also show pretext by proving that

a. the offered reasons for the adverse employment action have no basis in fact;

b. the offered reasons did not actually motivate the adverse employment action; or

c. the offered reasons are insufficient to motivate the adverse action taken.

**Case Example:**

***Wilson v. AM General Corporation, 1999 WL 50271 (7th Cir. 1999)***

**Issue:** Whether Wilson provided a sufficient evidentiary basis for a reasonable jury to find that AM General's "poor working relationships" justification was a pretext for discrimination.

**Facts:** Sixty year old William Wilson was employed for thirteen years at AM General (AM). AM began a company-wide reduction in force (IF) at which time Wilson was terminated. When he asked whether it was due to poor performance, his supervisor responded, “absolutely not.” He brought suit against AM under the ADEA alleging he was discharged because of his age. In depositions taken before trial, the same supervisor indicated the discharge was due to poor working relations with former supervisors and customers of AM. AM argued that he lost his job because of the IF and because of his poor relationships with fellow employees and customers. At trial, testimony was given regarding the supervisors Wilson had poor working relations, evidence demonstrated that these supervisors gave him excellent and outstanding performance ratings. With regard to the poor relationship with customers, contradictory testimony was given by both sides. A jury returned a verdict in favor of Wilson. AM appealed.

**Decision:** The court ruled that a reasonable jury could find for Wilson based on the testimony given at trial. Although the burden of proof shifts from the plaintiff (employee) to the defendant (employer) then back to the plaintiff (employee), plaintiff met its burden in this case. Generally, the employee has the burden of demonstrating that each proffered nondiscriminatory reason is pretextual. However, "[t]here may be cases in which the multiple grounds offered by the defendant ... are so intertwined, or the pretextual character of one of them so fishy and suspicious, that the plaintiff may [prevail.]" If the employee produces evidence from which a reasonable jury could conclude that each reason is pretextual, the employee is entitled to a jury determination on that issue.

**Case Questions**

1. *Do you think the reasons offered by the employer were pretextual? Why or why not?*

Class discussion

1. *Do you think that the burden shifting from employee to employer than back again to the employee is a good system? Why or why not?*

Class discussion

1. *What can an employer due to insulate itself from terminating individuals that can be* *perceived to be pretextual?*

Documentation is the key to termination decisions. (if of course, the documentation is non-discriminatory). Rationales for terminations should be documented so that the valid reasons for termination can be given. Furthermore, employers should be caution in giving feedback to employees that are contradictory, that is good performance evaluations but termination is do to poor performance.

**Lecture Note:**

You may note that the *Reeves* decision discussed in the text was important not only for the ADEA, but for the proof of disparate treatment cases under other anti-discrimination statutes. Reeves’ circumstantial evidence of the employer’s pretextual reasons for the adverse employment action was adequate to support a finding of discriminatory intent: “pretext-plus” burden of proof, which would have required the plaintiff to show direct evidence of discriminatory intent, was rejected.

 **LECTURE NOTES**

F. **Employee's Prima Facie Case: Disparate Impact**

1. Disparate impact exists where a policy or rule of an employer, though not discriminatory on its face, has a different effect on one group than on another.

 a. For example, a rule which required that all bus drivers have 20/20 vision may have the effect of limiting the number of older workers who can be bus drivers.

b. Now, this rule is indeed discriminatory in that it distinguishes between those who have good vision and those who do not. The question is whether the rule is wrongful. In the example, perhaps it is justified by business reasons, and perfectly acceptable.

2. In proving a claim of disparate impact, the employee's initial burden is heavier than it is when disparate treatment is alleged.

a. To prove its case, the employee must show that the employer's policy had a "significant discriminatory impact" on members of the protected class.

b. Proof of discriminatory *motive* is not required; the focus in a determination of disparate impact is on the *effect or consequences* of the policy.

1) This can be shown through "statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group."

3. Once an employee has established a case, the employer can show evidence that the employment practice is **justified by business necessity** and is **significantly related to successful performance of the job** to which the policy or practice relates.

a. It may do this by either discrediting the employee's statistics or offering statistics of its own which show no disparity.

4. Similar to a disparate treatment case, the employee then has the opportunity to show that the justification is mere **pretext** for discrimination.

a. This may be shown by evidence of a less discriminatory alternative practice or policy.

5. The U.S. Supreme Court has declined to resolve the issue of whether disparate impact claims may be brought under the ADEA. In March 2002, the Court dismissed *Adams v. Florida Power Corp.* The Court had granted review to the case involving a group of workers over the age of 40 who had lost their jobs in a series of layoffs. The lower courts had ruled that the disparate impact claims were not available under the ADEA.

**Lecture Note**: You may discuss with students the rarity of the Court’s decision to dismiss a case for which it had already granted review. You may also discuss with students what might be underlying the judicial resistance to disparate impact claims: Has age discrimination, since the passage of the ADEA, been given “fair treatment?”

G. **The Use of Statistical Evidence**

1. Courts allow the use of statistical evidence in order to prove discrimination on the basis of age, though it is generally more useful in disparate impact cases than it is in disparate treatment cases.

2. "The significance of company-wide statistics is heightened in disparate *impact* cases because plaintiffs need only demonstrate statistically that particular company-wide practices in actuality operate or have the effect of excluding members of the protected class. However, even in a disparate *treatment* class action or `pattern and practice' suit, only gross statistical disparities make out a prima facie case of discrimination." Cited from *Heward v. Western Electric Co.*

3. There is a great deal of skepticism relating to statistical evidence in age discrimination cases precisely because of the fact that older workers are likely to be replaced by younger workers, merely as a result of attrition of the work force.

a. This is not true in cases brought under Title VII based on race or gender discrimination; therefore, statistics may be slightly more relevant to a determination under Title VII because they may represent something *more* than pure discrimination when based on the age variance of employees.

4. Where statistics are used in order to prove discriminatory effect, the Supreme Court has offered some **guidance** as to their use.

a. The Supreme Court has considered percentage comparisons and standard deviation analysis of those comparisons.

1) "As a general rule, . . . if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the [selection process] was random would be suspect."

b. In addition, the court cautioned that the usefulness or weight of statistical evidence depends on all of the surrounding facts and circumstances, and specifically, "when special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value."

III. **Remedies**

A. Where money damages, such as back pay (what the employee would have received but for the violation) or front pay ( which includes a reasonable and expected amount of compensation for work that the employee would have performed until the time of her expected retirement, are ascertainable and adequately compensate the employee for damages incurred, the court may not grant other, equitable relief.

B. Five circuits have ruled that compensation for pain and suffering is not available under the ADEA.

C. Forms of equitable relief include:

1. Reinstatement.

2. Promotions or injunctions.

D. Where it has been proven that the employer has acted with knowledge that its actions violate the ADEA, or in conscious disregard for compliance or consequences, the Act allows the court discretion to award **liquidated damages** equal to double the amount owed.

1. Some courts, however, require that the violation be intentional, as well as knowing in order to award increased damages.

2. A successful employee may recover reasonable attorneys' fees and costs.

IV. **Unique Problems Associated With A Reduction in Force**

A. A reduction in force ("RIF") may occur where a company is forced to downscale its operations in order to address rising costs or the effects of a recession.

1. A RIF is an intentional premeditated termination of one or more positions within a company caused by economic considerations.

2. When management reaches the determination to conduct a RIF, discrimination issues abound to the arbitrariness of the terminations.

3. It is crucial that the discharges be made on the basis of an objective standard, both in purpose and effect.

B. Where an individual is terminated pursuant to a **bona fide RIF,** the employer's actions are protected.

1. Courts generally absolve the employer from responsibility where:

a. The employer follows a specified procedure for the terminations,

 b. Objective criteria are used in order to determine which individuals shall be discharged,

c. The entire position is eliminated and/or the work of the discharged older employee is not given to a retained younger employee.

C. In stating a case of age discrimination where a RIF has occurred, the fourth prong of the traditional prima facie case no longer appropriately fits the factual situation: where a RIF has occurred, no one replaces the discharged employee. Therefore, in the event of a RIF, age discrimination may be proven where:

1. The employer refuses to allow a discharged (or demoted) employee to bump others with less seniority, **and**

2. the employer hires younger workers when jobs became available after the employee was discharged (or demoted).

3. As long as the plaintiff is able to produce circumstantial or direct evidence of the employer's intention to discriminate in connection with the adverse action, the fourth prong has been satisfied.

a. However, in *Leichihman v. Pickwick Int'l*, the court said:

"in a reduction in force case, there is no adverse inference to be drawn from an employee's discharge if his position and duties are completely eliminated . . . If the [discharged] employee cannot show that [his employer] had some continuing need for his skills and services in that his various duties were still being performed, then the basis of his claim collapses."

D. Section 4(a)(3) of the ADEA states that "it is unlawful for any employer to reduce the wage rate of any employee in order to comply with this Act." Where an employer reduces the wage rate of an older worker in order to avoid terminating that employee, it is unclear whether the employer defenses cited under other provisions of the Act apply to this section. There is no clear conclusion on this issue as of yet.

1. Several courts, including the First, Fourth, Sixth, and Seventh Circuits have stated that age discrimination may be avoided by offering older workers the opportunity to work at the same job for reduced pay.

**Case Example:**

***Marks v. Loral Corporation et al., 57 Cal.App.4th 30 (1997)***

**Issue:** Whether the employer’s use of salary to differentiate between employees can be considered age discrimination.

**Facts:** Discharged 49‑year‑old employee brought action against his former employer for age discrimination in violation of federal and state age discrimination laws, alleging that his age was a factor in his not being able to secure another position with employer after positions in his department were eliminated. The Superior Court of Orange County entered judgment for employer, and employee appealed.

**Decision:** The Court of Appeal held that employer's use of salary to differentiate between employees was not age discrimination. The court found no error with the jury instruction allowing employers to make decisions based on salary differentials. The key words in the salary instruction were "based on salary." As worded, there is no question that the instruction was correct: An employer is entitled to chose employees with lower salaries, even though this may result in choosing younger employees, if the choice is indeed based on salary.

On the other hand, we must also make it clear that the age discrimination laws, as Judge Easterbrook noted in his dissenting opinion in Metz, forbid using salary as a pretext or "euphemism" for a decision really based on age. Furthermore, consistent with the rationale of this opinion, evidence that an older worker was willing to work for the same or substantially equal pay as a younger replacement would indeed constitute substantial evidence of age discrimination. After all, experience and seniority necessarily count for something‑all else being equal, an employer may be presumed to prefer an employee with experience over an employee without it because the employer would be getting, in effect, greater value for the money.

Here, however, the jury rejected Marks' evidence supporting pretext. They believed the substantial evidence in the record that Marks simply was not all that good an accountant and that was the reason the company laid himoff and did not bend over backwards to place him elsewhere in the organization. We have no power to reweigh the jury's evaluation.

Neither Congress nor the state Legislature ever intended the age discrimination laws to inhibit the very process by which a free market economy‑decision‑ making on the basis of cost‑is conducted and by which, ultimately, real jobs and wealth are created.

**Case Questions**

1. *It can be stated that employees who grow with a company, increase their earnings throughout the years. In addition, while their earnings grow, so does their age. Do you think it is fair for an employer to use salary as a basis for layoffs, knowing that there is a connection between age and earnings? Why or why not?*

Class discussion

1. *What are the arguments for and against the court’s decision?*

Class discussion. Be sure that the students see both sides, the older workers view and the new graduate. As the court stated, “[w]e are also not unmindful of the pain attendant with the loss of any job, particularly when the loss is sustained by an older worker for whom, as Labor Secretary Wirtz noted in his 1965 report, retraining may be more difficult. There is a poignancy in such situations, such that the Metz court was moved to quote Arthur Miller's Death of a Salesman ("You can't eat the orange and throw the peel away‑a man is not a piece of fruit!") and Secretary Wirtz to quote Robert Frost's The Death of the Hired Man ("nothing to look backward to with pride, nothing to look forward to with hope"). Conversely, we are not unmindful that the image of some newly‑minted whippersnapper MBA who tries to increase corporate profits‑and his or her own compensation‑by across‑the‑board layoffs is not a pretty one.”

1. *At this point, do older employees have a claim when arguing their layoffs were indirectly based on their age due to their salary?*

As the case indicates, the circuits are split on this issue and the Supreme Court has not decided a case directly on point. This is an important issue but has not been determined as of yet.

**Chapter-End Questions**

1. Paul Schwager was discharged by Sun Oil Company of Pennsylvania after having worked for them for 19.5 years. Schwager claims that he was fired because of his age, but Sun Oil rebuts by stating that Schwager's discharge was a necessary action in the company's overall reorganizing process. Schwager introduced statistics that the average age of the employees retained was 35 and the average age of employees discharged was 45.7 to demonstrate that the reorganization was aimed at firing the older workers. Schwager also admitted as evidence a letter from the Sun Oil's Chairman of the Board in which the Chairman stated that the reorganization plan would provide "a better age distribution of executive personnel." After the reorganization scheme, the company's pension retirement fund liabilities decreased significantly because of the reduction of older workers. Sun Oil maintains that Schwager's age had nothing to do with his discharge because he was the poorest performer of the district's sales personnel, and his position was eliminated as part of the reorganization structure. ***Schwager v. Sun Oil Company of Pennsylvania, 591 F.2d 58 (1979)***

[The court found that the company did have legitimate reasons for discharging Schwager based on his past performance figures. Age discrimination was not a factor in the discharge decision.]

2. Byrl Prichard and James Johnson were two men over fifty who applied for positions as truck drivers with Ace Hardware Corporation. Neither of these men were selected for the available positions. They claim they were not hired due to their age, and the company claims that age was not a factor in their decisions. During the application evaluating process, Dallas Howell, the traffic manager, made a notation of "Age?" on both of these applications. A "NO" was written next to this notation on each of these applications after the interview. The company claims that "age" did not mean the employee's age, but the qualification level of the applicant. Howell claimed that Prichard was not qualified for the job in addition to having a "bad attitude," and Johnson had failed the Department of Transportation tests. During this hiring period, every applicant over 50 had the same notation of "Age?" with a "NO" next to it. ***Brennan v. Ace Hardware Corporation, 495 F.2d 368 (1974)***

[The district court ruled that Howell had in fact violated the ADEA because he favored hiring men who were under 50 years of age, and this was a direct violation of the ADEA's foundation of encouraging non-discrimination of older workers. The court did say that if Howell had not been able to fill all the positions with workers under 50, he may have hired the older applicants.]

3. Charles Grubb, 64 years old, was terminated from his laundry manager position at Foote Memorial Hospital. Foote Memorial Hospital had recently purchased the Sisters of Mercy Hospital and was in the process of reorganization when Grubb received his notice. When the hospital decided to eliminate Grubb's position, it made no attempt to determine whether Grubb possessed the skills necessary for other in-house positions and offered him instead the position of a truck driver. In addition, when Grubb was informed that his position was eliminated, he was told by his supervisor, "You can call this fired, kicked out, or whatever you want, but old man you're through." In addition, Grubb's supervisor had told him earlier that he was "too old and set in his ways" and that he ought to retire. Grubb's responsibilities were given to a woman who was 63 years old. Grubb claims that he was terminated as a result of age discrimination. *Grubb v. Foote Memorial Hospital, 533 F. Supp. 671 (E.D.Mi. 1981) (mod’d 741 F.2d 1486)*.

[The court held that the various remarks regarding age did not show that age was a causal factor in the action taken, particularly when his replacement's age is considered.]

4. Howard Berkowitz, 57 years old, worked for Pomeroy's, a retail outlet in Pennsylvania. He was a hard-working, competent employee who was qualified for his position as a merchandising manager. When he was fired, his responsibilities were divided among the other three merchandising managers. All three of these managers were younger than Berkowitz (34, 44, and 36). In addition, at the time the company was considering the termination decision, Berkowitz' supervisor said to him, "Howard Berkowitz, you've been around since the dinosaurs roamed the earth." Pomeroy's claims that Berkowitz was replaced because of the lackluster performance of the departments under his supervision. Berkowitz's departments, however, were those that were most likely to suffer during difficult times, and Pomeroy's had just been through one of its worst seasons ever. *Berkowitz v. Allied Stores of Penn-Ohio, Inc., 541 F.Supp. 1209 (E.D.Pa. 1982)*

[The court held that, while Pomeroy's decision may well have been an error in business judgment, the law does not prohibit a company making errors in personnel decisions, as long as discrimination has not played a role. While Berkowitz established his prima facie case, the court found that there was no showing of pretext in connection with Pomeroy's articulated, legitimate, non-discriminatory reason for the termination.]

5. Stanford Downey was demoted from a position as Director of Safety and Counseling for Southern Natural Gas Company to Security Manager in 1974 at the age of fifty-eight. He had been working at the company in the safety area since 1949. In addition to his demotion, he also suffered an effective freeze on his salary which allowed him only one pay raise from 1974 to his retirement in 1978 in the amount of $85.00. In 1977 he requested a transfer to the position of Director of Safety and training at another facility, and was recommended for the position by the personnel director. However, this request was denied and the position was given to a thirty-three year old employee with three years experience. The personnel director told him that he was not selected because he would only be there a couple of years before the replacement would have to undergo costly training due to Downey's advanced age. Downey files an age discrimination charge; what result? *Downey v. Southern Natural Gas Company, 649 F.2d 302 (1981)*

[The court held that there was sufficient reason to believe that Downey's age was a causal factor in his demotion and denial of promotion and therefore would not grant summary judgment.]

6. Lyle Ver Planck was the postmaster in Costa Mesa. In 1976, while he was temporarily assigned out of the area, a supervisor position became available. Vincent Limongelli, age 49 and a postal employee since 1944, and five others applied for the position. A three member advisory panel briefly interviewed each of the applicants. Limongelli was asked about his age and the number of years before he planned to retire. While the panel claims that age and retirement plans had no bearing on their decision, they unanimously voted to appoint Nathan Ver Planck, Lyle's 39 year old nephew, as supervisor. Does Limongelli have a basis for a claim? *Limongelli v. Postmaster General of The United States, 707 F.2d 368 (1983)*

[Because Ver Planck's nephew had an A.A. degree in business management, and productivity increased while he was supervisor, the court would not sustain Limongelli's claim of age discrimination.]

7. Forty-three year old Lawrence Jackson lost his job as a sales representative in Shell Oil's animal health business when Shell sold the business to Diamond Shamrock in 1979. When the animal health employees were informed of the sale, they were also told that Shell had contacted those employees it wished to retain, and the others would become Diamond employees. During that same meeting, when asked about transfers within Shell for those who were not already contacted, the General Manager said, "The reason we cannot transfer you into other departments in Shell is because we can go out and hire younger people, better qualified, from college, and pay them $16,000 rather than $30,000." Jackson did not meet with Diamond about a position and, when the sale was completed, he was fired. Shell claims that its legitimate non-discriminatory reason for Jackson's termination was Diamond's desire to purchase the entity as a going concern, with all of the personnel force intact. To have transferred a sales person upon request would have encouraged others to do so, which may have precluded the sale. However, one employee, less qualified but younger than Jackson, was allowed to transfer. Does Jackson have a claim for age discrimination? *Jackson v. Shell Oil Co., 702 F.2d 197 (9th Cir., 1983)*

[The court held that (1) there is substantial evidence of pretext given the other, younger, less qualified employee's transfer; and (2) the General Manager's statements provided evidence of pretext going to the likelihood that Shell's actions were motivated by age.]

8. Can an employer be liable for refusing to hire someone who the employer thinks is overqualified? ***Taggart v. Time, Inc., 924 F.2d 43 (2d Cir. 1991)***

[The court said yes.]

9. Kipper, who had been employed as an engineer at Doron Precision Systems since 1973, was promoted in 1988 to senior designer and began work on the development of one of Doron's products. When that project was substantially completed in 1990, Kipper's supervisor was directed to terminate one electronics person in her engineering unit in order to reduce costs; Kipper, the oldest member of the unit, was chosen. Throughout the rest of the company, it appeared that the oldest or nearly oldest in each department happened to be the individual chosen by each unit supervisor. When Kipper filed suit, Doron defended claiming that (1) it had the right to terminate the oldest employees because they cost the most to the company and (2) there was no discrimination or intent to do so because each unit supervisor made her or his own decisions, so there was no concerted effort or decision to get rid of older employees. Are you persuaded by Doron's defense?

[Based loosely on *Kipper v. Doron Precision Systems, 598 N.Y.S.2d 399 (1993)*. Defense no. 1 depends on the jurisdiction but one should discuss the ability of a firm to use economic conditions as a defense to firing based on cost to the company. Defense no. 2 fails because intent is not needed for adverse impact, which one could argue here (the policy is to terminate someone in each department) or adverse treatment could be argued, but then the defense may fail again because there may have been intent on the part of each supervisor. There need not be a company-wide decision; the supervisors are agents of the company.]

10. Since 1975, Featherly had been the production supervisor of the crankshaft department at Teledyne. As a result of a reduction in force in 1987, the crankshaft department and the gears department were combined and Featherly's supervisors determined that he should be laid off because he did not have the versatility to supervise both departments. Consequently, Featherly's duties were given to Gilbert, production manager of the Gears Department. At the time of his termination, Featherly was 58 years old with 25 years seniority; Gilbert was 41 years old with 12 years of supervisory experience. What does Featherly need to show in order to be successful on a claim of age discrimination against Teledyne? *Featherly v. Teledyne Industries, 486 N.W.2d 361 (Mi. 1992)*

[Featherly would have to prove that he was more qualified that Gilbert for the position. Additional information regarding other terminations pursuant to the reduction in force would be beneficial.]

11. Fifty-five-year-old Merriweather had worked for 14 years as a benefits coordinator before he was laid off by his employer. The employer contended that it eliminated Merriweather’s job for economic reasons. To support its strategic goals, the employer had decided to hire new workers instead of training Merriweather to handle projected additional tasks. The employer chose not to retain an employee who is seven months older than Merriweather as the only full-time benefits coordinator. Two new workers, age 42 and 50, were hired to divide their time between benefits coordination and the added tasks. Merriweather claimed that he was qualified to handle the added responsibilities but he did not offer evidence to support this claim. You be the judge. Do the employer’s actions violate the ADEA? Explain. [*Merriweather v. Philadelphia Federation of Teachers Health & Welfare Fund*,

(E.D.Pa. 2001).

[The Court granted defendant’s motion for summary judgment as Merriweather was not able to make a case of age discrimination.]