Office of Congressional Workplace Rights

OCWR BROWN BAG LUNCH SERIES
AGE DISCRIMINATION IN EMPLOYMENT ACT
OCTOBER 23, 2019

I. Overview

The Congressional Accountability Act of 1995 (CAA), 2 U.S.C. §§ 1301 *et seq.*, applies thirteen federal labor and employment law statutes to all legislative branch employing offices and employees.

Under section 201 of the CAA, "All personnel actions affecting covered employees shall be made free from any discrimination based on… age, within the meaning of section 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a)[.]" In turn, section 15 of the ADEA, which applies specifically to federal government employment, provides that "All personnel actions affecting employees or applicants for employment who are at least 40 years of age… shall be made free from any discrimination based on age." 29 U.S.C. § 633a(a).

The OCWR Board and the federal courts analyze ADEA claims in much the same way as claims brought under Title VII of the Civil Rights Act of 1964. However, it is important to note one key distinction: whereas Title VII applies to all covered employees regardless of their race, color, religion, sex, or national origin, the ADEA protects only those employees age 40 or older. Employees who were younger than 40 at the time of the alleged discrimination cannot bring claims under the ADEA. The Supreme Court explained the reason for this: "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. … Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

Types of Claims

Age discrimination claims can take several forms. In disparate treatment cases, plaintiffs allege that they have suffered adverse employment actions because of their age. "To establish a disparate treatment claim under the ADEA, a plaintiff can rely on direct evidence of discriminatory intent, as well as indirect evidence from which a discriminatory motive for the employment decision could be inferred." *Steele v. Mattis*, 899 F.3d 943, 945 (D.C. Cir. 2018).

Where no direct evidence of age-based animus is available, plaintiffs must produce sufficient circumstantial evidence to survive a *McDonnell Douglas* burden-shifting analysis.

In disparate impact claims, rather than alleging intentional discrimination against individuals based on their age, plaintiffs allege that employers have adopted facially neutral policies or practices that nevertheless have a significantly disproportionate and negative impact on older workers. Employers may assert an affirmative defense justifying their practices based on reasonable factors other than age.

The Supreme Court has never explicitly held whether hostile work environment claims are cognizable under the ADEA, but the lower courts have been open to considering such claims.

The ADEA contains its own anti-retaliation provision, which – along with section 207 of the CAA – protects legislative branch employees from reprisal for opposing unlawful practices or participating in ADEA-related proceedings.

Standard of Causation

One important issue currently pending before the Supreme Court in the case of *Babb v. Wilkie*, docket no. 18-882, is whether the standard of causation for federal-sector ADEA cases should be a "motivating factor" standard as in Title VII cases, or a "but-for" standard – i.e., that the adverse action would not have taken place if not for the employee's age. The dispute centers around the difference in language between 29 U.S.C. § 623(a), which makes it unlawful for a private-sector employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's age*" (emphasis added), and 29 U.S.C. § 633a(a), which applies specifically to federal government employment and requires that "All personnel actions affecting employees or applicants for employment who are at least 40 years of age… shall be made *free from any discrimination based on age*" (emphasis added).

Most courts have applied the "but-for" standard in ADEA cases regardless of whether the employer is a federal entity, so most of the cases discussed below analyze the cases in terms of "but-for" causation.[1] Depending on the Supreme Court's decision in *Babb*, that analysis might have to change moving forward.

[1] The Court of Appeals for the D.C. Circuit, in *Ford v. Mabus*, held that in federal-sector ADEA cases, "but-for" causation must be established in order to merit reinstatement, backpay, and similar relief, but that "plaintiffs may also prevail by proving that age was *a* factor in the employer's decision" and thereby obtain declaratory and possibly injunctive relief. 629 F.3d 198, 206 (D.C. Cir. 2010). If an employment decision is motivated both by age and by other non-discriminatory factors, age is not necessarily the but-for cause, but the decision has not been made "free from" discrimination based on age. "Limiting plaintiffs to proving liability only by establishing that consideration of age was the but-for cause of the personnel action… would thus divorce the phrase 'free from any discrimination' from its plain meaning… [b]ecause any amount of discrimination tainting a personnel action, even if not substantial, means that the action was not 'free from any discrimination based on age.' 'Any,' after all, means any." *Id*.

II. Disparate Treatment – Direct Evidence

One way to establish a claim for age discrimination is to provide direct evidence that a personnel action was motivated by discriminatory intent. That evidence usually takes the form of statements regarding the plaintiff's age or regarding older workers generally, made by an individual with decision-making power or other influence over the personnel action. Plaintiffs who produce sufficient direct evidence – i.e., evidence that would permit a fact finder to conclude that the personnel action was motivated by age bias – can skip the burden-shifting process described below and proceed straight to trial.

1) Direct evidence of age-based discrimination

   a) *Steele v. Mattis*, 899 F.3d 943 (D.C. Cir. 2018) – A professor alleged that his termination was the result of age discrimination, based in part on "direct evidence of age discrimination on the part of a potentially influential participant in the termination decision" – specifically, a series of remarks made by his first-line supervisor, which disparaged older workers and favored younger ones. According to the plaintiff's testimony, the supervisor opined that older employees were "stubborn," "difficult to work with," and "cantankerous," and that "it's not good to have lots of older employees at [the College]"; she also stated that "young people are such a breath of fresh air," "eager to please," "work hard," are "enthusiastic," and are the "kind of young people who are making [the College] marvelous," and that the College was "much better" because "all these younger people" had been hired. The court rejected the employer's argument that these were "stray" and immaterial comments; on the contrary, the court described these as "the very type of 'arbitrary' stereotypes and prejudices about older workers' abilities that congress enacted the ADEA to halt. … Crediting Dr. Steele's evidence as true, [the supervisor's] open hostility to older workers should have been recognized for what it is – direct evidence of illegal discrimination, not harmless 'stray remarks.'"

   b) *Wilson v. Cox*, 753 F.3d 244 (D.C. Cir. 2014) – A military retiree was hired as a security guard in an Armed Forces Resident Home with a resident employee program, and eventually went to live there as well. Subsequently, the new COO terminated the program, and as a result the plaintiff lost his job. The plaintiff produced evidence of two statements by the COO – one statement made directly to the residents that "you didn't come here to work, you came here to retire," and another made to the plaintiff's EEO counselor that the older security guards "were not doing their jobs properly, as from time to time they would be found asleep, which was not safe for a government agency in DC, what with all the threats since 9/11" – which, the plaintiff argued, showed that the termination of the resident employee program was motivated by discrimination against older workers. The district court granted summary judgment for the employer, but the D.C. Circuit reversed, holding that these two statements, both made by the individual who made the decision to terminate the program and thus caused the plaintiff's discharge, "constitute direct evidence of age discrimination, entitling him to proceed to trial." A reasonable fact finder could conclude that these statements exhibit the type of discriminatory stereotype that the

ADEA was meant to address: "Interpreted in the light most favorable to Wilson, the statement is indicative of an inaccurate and discriminatory assumption that older residents should not want to work or would prefer not to work." Likewise, "Even if Cox in fact knew of one instance in which a guard fell asleep on the job, a statement indicating a generalized concern about older guards as a group, based on one incident alone, is suggestive of impermissible, inaccurate stereotyping. A reasonable factfinder could conclude that Cox attributed sleepiness to all older guards as a class and terminated the resident employee program on that discriminatory basis."

c) *Stone v. Landis Constr. Corp.*, 442 F. App'x 568 (D.C. Cir. 2011) – A 55-year-old applicant interviewed with the company's CEO and alleged that, following the interview, the CEO told him that although he was competent to perform the administrative functions of the position, the CEO had concerns about whether the applicant could perform the physical labor because, in the CEO's words, "you're old." The district court engaged in the *McDonnell Douglas* burden shifting analysis and granted summary judgment to the employer, but the D.C. Circuit reversed, holding that the "you're old" comment was sufficient direct evidence for the plaintiff to survive summary judgment and proceed to trial, so the district court erred in applying the *McDonnell Douglas* framework.

d) *Leal v. McHugh*, 731 F.3d 405 (5th Cir. 2013) – The court found that the plaintiffs stated a claim for relief which may be granted under section 633a of the ADEA based in part on their allegation that a hiring manager had made comments that the employees' department needed "new blood." Such comments can constitute direct evidence of intentional age discrimination.

e) *Van Voorhis v. Hillsborough Cty. Bd. Of Cty. Comm'rs*, 512 F.3d 1296 (11th Cir. 2008) – Direct evidence of discrimination is evidence that reflects a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee. Only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age, constitute such evidence of discrimination. Here, a local government posted a job opening for a helicopter pilot, and of the applications submitted over a four-month period, nine were qualified for the position and all nine were over forty. Two of the nine applicants, including the plaintiff, had licensures that would have permitted them to immediately begin working. The hiring manager told another reviewing manager that he did not want to interview any of the nine qualified applicants "because he didn't want to hire an old pilot." This was direct evidence of age discrimination, as the intent of the statement "could be nothing other than to discriminate on the basis of age."

2) Insufficient direct evidence of age-based discrimination

a) *Palmer v. Britton Indus., Inc.*, 662 F. App'x 147 (3d Cir. 2016) – A single alleged remark that the plaintiff was "too old to change industries" was not legally sufficient direct evidence of age discrimination. "Direct evidence must be sufficient on its own to allow a factfinder to determine that age was the but-for cause of the termination

decision. This is a high hurdle; the evidence must demonstrate '*without inference or presumption*' that age discrimination was the but-for cause of termination." In this case, the evidence indicated that the primary reason for the plaintiff's termination was his poor sales performance, and the comment about the plaintiff being too old to change industries was intended to suggest one possible reason underlying that poor performance. This statement, taken in context, was not direct evidence of discriminatory intent, because even viewed in the light most favorable to the plaintiff, it could not stand alone as evidence that age was the but-for cause of his termination.

b) *Richardson v. Wal-Mart Stores, Inc.*, 836 F.3d 698 (6th Cir. 2016) – Following a safety hazard incident, a 62year–old worker – whose position included, among other duties, "ensuring a safe work environment" – was terminated, and filed suit alleging age discrimination. Among the evidence she put forward to support her claim, she alleged that a management official remarked that the plaintiff was too old to be working, and asked the plaintiff when she was going to quit or leave Walmart. The court did not find these statements to be direct evidence of age discrimination because the official making the comments was not involved in the decision to terminate the plaintiff and in fact was not even working at that particular Walmart when the plaintiff was terminated. The plaintiff further attempted to establish direct evidence of age discrimination based on a "pervasive pattern of discriminatory conduct" allegedly exhibited by the management official who did make the decision to terminate the plaintiff. The alleged conduct included disparate treatment such as not greeting the plaintiff in the mornings and embarrassing the plaintiff in front of colleagues and outside vendors, while younger associates were treated more favorably. The court found that although the facts demonstrated that the management official probably did not like the plaintiff, none of the facts evidenced discrimination based on age.

c) *Geiger v. Tower Auto.*, 579 F.3d 614 (6th Cir. 2009) – Actions taken and statements made by non-decision makers, or actions and statements of decision-makers that are not related to the decisional process itself, typically do not constitute direct evidence of discriminatory animus. Here, a 62-year-old plaintiff was terminated as part of a reduction in force; he interviewed for a new position with the company but was not selected, and the company selected a younger employee for the position. In support of his age discrimination claim, the plaintiff presented evidence that his supervisor had arranged for a younger employee to take training pertinent to his job while suggesting that the plaintiff take a voluntary layoff during the training period, and he also testified that "word got back to him" that his supervisor assumed he was considering retirement, so the company would be better suited having a younger employee in the new position. The court did not consider this to be direct evidence of age discrimination, because there was no evidence that his supervisor was involved in the decision to hire a younger candidate, and because there was no allegation that the statement regarding the plaintiff's retirement occurred in relation to the decision to terminate his employment. Moreover, there was no evidence that the supervisor's allegedly discriminatory mindset resulted in an adverse employment action because the plaintiff was eventually allowed to attend training and the younger employee was instead temporarily laid off.

d) *King v. United States*, 553 F.3d 1156 (8th Cir. 2009) – Plaintiff alleged that the government violated the ADEA when a younger employee (25 years old) was hired over the plaintiff (55 years old). The Eighth Circuit remanded for further fact finding by the lower court. In its analysis, the court defined direct evidence as "evidence showing a specific link between the discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action." (citing *Ramlet v. E.F. Johnson Co.,* 507 F.3d 1149, 1152 (8th Cir. 2007)). The court clarified that stray remarks in the workplace, statements by non-decision makers, and statements by decision makers unrelated to the process are not held to be direct evidence of age discrimination. By contrast, direct evidence might include: evidence of actions or remarks by an employer reflecting a discriminatory attitude; comments demonstrating a discriminatory animus in the decisional process; or comments by individuals closely involved in employment decisions. Here, the court found that statements made by selection committee members, such as wanting to bring on "educated young blood," a member's comment that he hired "a skinny, young blonde," and "has-beens need to listen to the newbies" did not constitute direct evidence of discrimination because the plaintiff did not establish a specific link between the alleged animus and the decision not to select him for the position. Notably, the statements were made months before the vacancy position was announced and months before the younger employee was selected.

e) *Eskra v. Provident Life & Accident Ins. Co.*, 125 F.3d 1406 (11th Cir. 1997) – A statement by a person who plays no part in an adverse personnel decision is not direct evidence of discrimination. Here, an insurance company closed its Miami branch office and requested that the plaintiff, aged 61 and a 30-year veteran manager at the branch, to accept a transfer to its Pittsburgh branch or be fired. The plaintiff refused the transfer and was terminated. He then sued the company. As to his ADEA claim, the plaintiff argued that direct evidence could be shown based on a senior official's written comment that it was "to the company's advantage" to have a manager older than age 65 retire, since "the incentive compensation normally paid to him reverts to the company." He also relied on evidence that another official had noted "economic incentive to get rid of older managers" on his copy of a proposal to eliminate renewal commissions as part of a branch manager's incentive compensation. Because there was no evidence apparent in the record that either official had been involved in the decision to close the Miami office, the court determined that these comments were not direct evidence of discrimination.

III. Disparate Treatment – Circumstantial Evidence/Burden Shifting

In the absence of direct evidence of age-based discrimination, a plaintiff may establish a prima facie case by producing evidence that he:

> (i) was 40 or older, and so falls within the ADEA's protective reach; (ii) was otherwise qualified for the position in which he was working; (iii) was terminated; and (iv) was replaced by someone younger.

Steele v. Mattis, 899 F.3d 943, 945 (D.C. Cir. 2018). The second, third, and fourth elements will change somewhat depending on the nature of the claim. In a non-selection case, for example, the plaintiff must show that (i) she belongs to a protected class (i.e., is 40 or older), (ii) she applied and was qualified for a job for which the employer was seeking applicants, (iii) despite her qualifications, she was rejected, and (iv) after her rejection, the position remained open and the employer continued to seek applicants from persons of her qualifications. *Carter v. George Washington Univ.*, 387 F.3d 872, 878 (D.C. Cir. 2004). The fourth element of the prima facie case for termination is modified in cases involving workforce reductions, where the plaintiff was not replaced at all but may still be able to show that the elimination of his position was motivated by age discrimination. *See*, *e.g.*, *Geiger v. Tower Auto.*, 579 F.3d 614, 623 (6th Cir. 2009). And for other types of adverse actions, the fourth element requires a plaintiff to show that he was treated differently from similarly situated younger employees. *See*, *e.g.*, *Brown v. Metro. Gov't of Nashville & Davidson Cty.*, 722 F. App'x 520, 527 (6th Cir. 2018).

If the plaintiff successfully establishes a prima facie case, courts employ the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973),

> under which the employer, once the plaintiff has made out a prima facie case, bears the burden of producing a non-discriminatory explanation for the challenged personnel action. The plaintiff, however, bears the ultimate burden of proving that discriminatory animus was the determining or but-for cause of the personnel action. The plaintiff may satisfy this burden either indirectly by showing the employer's reason is pretextual or directly by showing that it was more likely than not that the employer was motivated by discrimination.

Ford v. Mabus, 629 F.3d 198, 201 (D.C. Cir. 2010) (quotations and citations omitted).

1) Qualifications for position

    a) *Rollins v. Office of the Clerk of the House of Representatives*, No. 03-HS-105 (CV, AG), 2004 WL 5658962 (OOC Board Dec. 23, 2004) – In a non-selection case, the Board affirmed the Hearing Officer's determination that the complainant had failed to establish a prima facie case of discrimination because, among other things, she did not show that she was as qualified as the successful applicant. "Complainant's resume was extremely brief and failed to present a detailed description of her qualifications or experience. Comparatively, all applicants called for interview including the selectee… submitted detailed multi-page resumes demonstrating their qualifications via specific listings of educational and professional experiences and their publications by title and name of publication."

    b) *McMichael v. Transocean Offshore Deepwater Drilling, Inc.*, 934 F.3d 447 (5th Cir. 2019) – A plaintiff can show pretext through evidence that the employer replaced the plaintiff with a younger, "clearly less qualified" employee. The burden for this showing is heavy and is not satisfied by showing a large discrepancy in age standing alone or by showing that the plaintiff is "merely better than or as qualified" as his replacement. Here, the employee who replaced the plaintiff had a performance rating

that was higher than the plaintiff's. The plaintiff failed to challenge this rating, and thus could not show that the replacement employee was clearly less qualified. The court noted that even if the plaintiff had attempted to challenge the higher rating, he was terminated as part of a reduction-in-force (RIF), in which case his own qualifications are less relevant. This is because employees may have to be let go as part of a RIF despite competent performance; indeed, in this case there were numerous other employees who were terminated as part of the RIF who were younger and more qualified than the plaintiff.

c) *Valentine v. Nat'l Oilwell Varco*, 712 F. App'x 347 (5th Cir. 2017) – A machine operator was injured on the job and was granted a medical leave of absence. Under company policy, the plaintiff could not take leave for longer than one year, and would be allowed back only after submitting a physician letter certifying that he was physically able to return to work. The plaintiff failed to provide such a letter to his employer; the employer notified him two weeks before the one-year period ended that he would be terminated, but he still did not provide a release. He was terminated after the one-year period ended, and the employer subsequently eliminated his position. Approximately one month after his termination, another doctor wrote him a full work release, but because the note was untimely, the employer told the plaintiff that he would have to reapply for his old job. His ADEA claim that he had been unlawfully terminated based on age failed under these circumstances, because in the absence of a medical release the plaintiff could not show that he was qualified for his position at the time of his termination. Further, his failure-to-rehire ADEA claim failed because the employer did not rehire anyone for the plaintiff's former position; rather, the position was eliminated. The plaintiff claimed that the company hired "younger, non-disabled" men for a position that was "almost identical" to his former position, but the court found that he could not rely on "similar, but different positions" to make out his prima facie failure-to-rehire case.

d) *Liebman v. Metro. Life Ins. Co.*, 808 F.3d 1294 (11th Cir. 2015) – To assess a plaintiff's qualification for a position, a court must examine his skills and background, but "if a plaintiff has enjoyed a long tenure at a certain position, [it] can [be inferred] that he or she is qualified to hold that particular position." Further, a position may encompass more than a person's present title – if a person performed substantially similar duties under a different title, their time working under that other title may be included in their total tenure. Here, the plaintiff had worked under his current title for three years, and immediately prior to that he had worked in another position performing substantially similar duties for six years. This nine-year total tenure was long enough to support the inference that he was qualified for his job. The court also considered that he had received many leadership awards during his employment and that the branch he managed was a top branch for the three consecutive years prior to his termination.

e) *Provenzano v. LCI Holdings, Inc.*, 663 F.3d 806 (6th Cir. 2011) – In this failure-to-promote case, a 33-year-old employee was promoted instead of the 50-year-old plaintiff, and the court examined the two employees' qualifications to determine whether the plaintiff had made out a prima facie case of age discrimination. At the

outset of its analysis, the court noted that the important function of a prima facie case is to eliminate the most common nondiscriminatory reasons for the employer's action. For a plaintiff to establish a prima facie case, she must show that her qualifications were similar to those of the person ultimately promoted. In this case, the plaintiff presented sufficient evidence to permit a reasonable trier of fact to conclude that she and the employee ultimately promoted were similarly qualified for the position. The plaintiff had more experience and education, had been a supervisor longer, and had helped in other stores, while the younger employee had a stronger performance record and lacked written or verbal warnings. The two were therefore similarly qualified for the position.

f) *Carter v. George Washington Univ.*, 387 F.3d 872 (D.C. Cir. 2004) – In the D.C. Circuit, in order to establish the qualification element of the prima facie case, the plaintiff alleging discriminatory non-selection need not show that she was as qualified as the successful applicant, only that she was qualified relative to the entire pool from which applications are welcome. However, in order to establish pretext based on relative qualifications, the plaintiff must show that she was significantly better qualified for the position than the younger applicant who was ultimately selected. In this case, the plaintiff was passed over for several promotions. In one instance, she failed to show that she met the minimum qualifications for the position and therefore could not establish a prima facie case; in another, she demonstrated that she was qualified for the position, but she could not show that the candidate selected for the position was significantly less qualified. The plaintiff held a master's degree while the successful candidate's highest degree was a bachelor's, but the successful candidate had "far more extensive and intensive fundraising experience" than the plaintiff, and because fundraising was the main responsibility of the position, no reasonable factfinder could have found the plaintiff significantly better qualified.

2) Similarly situated comparators

a) *Brown v. Metro. Gov't of Nashville & Davidson Cty.*, 722 F. App'x 520 (6th Cir. 2018) – A police officer alleged age discrimination based on suspension and work restrictions culminating in constructive discharge. The court found that although it was undisputed that the plaintiff was over 40 years old and was qualified for the position he held, he was unable to show that he was treated differently from a similarly situated, significantly younger employee. He could not show that he was "similarly situated" in the disciplinary context because he could not show that all relevant aspects of his employment situation were nearly identical to those of a non-protected employee's situation. To raise an inference of disparate treatment in the context of discipline, a plaintiff must show that they and their comparator dealt with the same supervisor, had been subject to the same standards, and had engaged in the same conduct without differentiating or mitigating circumstances to distinguish them. In this case, the plaintiff was not similarly situated to the proffered comparator because they had not engaged in the same underlying misconduct, there was a significant difference in rank and experience, and the penalties were recommended by different supervisors.

b) *Skiba v. Ill. Cent. R.R. Co.*, 884 F.3d 708 (7th Cir. 2018) – The Plaintiff was hired at the age of 55 as an entry-level management trainee. After completing a training program, the plaintiff served in multiple management-level positions.. Following a series of events, including documented performance issues and a company-wide consolidation, the plaintiff was placed in a non-managerial, clerical position at the age of 60. The plaintiff filed an age discrimination claim, alleging that younger employees were systematically given preferential treatment, and citing as evidence a list of 37 younger employees who were offered management positions for which he had applied. The court found that the plaintiff did not meet his burden of establishing that those younger employees were similarly situated, because his comparator evidence consisted solely of a table listing their names and ages and the positions for which they were hired, without any additional details to demonstrate that any of them were directly comparable to the plaintiff in all material respects, or that there were enough common factors to allow for meaningful comparison to determine whether discrimination was at play.

c) *Brasher v. Thomas Jefferson Univ. Hosp. Inc*, 676 F. App'x 122 (3d Cir. 2017) – The plaintiff, a nurse who was fired based on her handling of a diabetic patient's insulin therapy, offered as evidence of pretext that a nurse in her 20s who had also made a serious medication error was not fired. However, the court found that the younger nurse was not similarly situated to the plaintiff, because there was no evidence that the younger nurse had the plaintiff's history of documentation errors, which had been a factor in the termination decision.

d) *Baron v. Abbott Labs.*, 672 F. App'x 158 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 2138 (2017) – When a plaintiff is terminated as the result of a reduction in force, "he need not show that he was replaced by a younger person but can instead show that he was terminated while younger, similarly situated employees were retained." In this case, although the company eliminated the position of the 60-year-old plaintiff while retaining and promoting two employees who were, respectively, 6 years younger and 21 years younger than the plaintiff, the court held that those employees were not "similarly situated" to the plaintiff. The plaintiff had managed the company's global operations, whereas the two retained employees were promoted to regional management positions.

3) Replacement by younger employee

a) *O'Connor v. v. Consol. Coin Caterers Corp.*, 517 U.S. 308 (1996) – Replacement by someone outside of the protected class – i.e., under the age of 40 – is not a proper element of the prima facie case under the ADEA. Rather, the relevant information is whether the plaintiff was replaced by someone significantly younger. The ADEA "does not ban discrimination against employees because they are aged 40 or older; it bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older. The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age.* Or to put the point more concretely, there can be no

greater inference of *age* discrimination (as opposed to '40 or over' discrimination) when a 40-year-old is replaced by a 39-year-old than when a 56-year-old is replaced by a 40-year-old."

b) *Ramos-Santiago v. WHM Carib, LLC*, 919 F.3d 66 (1st Cir. 2019) – The plaintiff had been fired for taking an unauthorized cut of prize money awarded by his employer in a golf tournament. The employer did not replace him, but rather distributed his duties among three existing employees, all of whom were younger than the plaintiff. The court held that this reassignment of duties did not allow for an inference of pretext, because the employer "has never argued that Ramos-Santiago's dismissal was the result of a lay-off or that his functions had become unnecessary. Indeed, [the employer] has asserted consistently that Ramos-Santiago was fired because of misconduct. It is therefore unsurprising that his functions were redistributed after his dismissal, and evidence of a continuing need for Ramos-Santiago's job services is of limited relevance."

c) *Breaux v. Rosemont Realty*, 768 F. App'x 275 (5th Cir. 2019) – An employee has not "replaced" an ADEA claimant for purposes of a prima facie case if he or she was hired before the plaintiff was terminated. Here, two maintenance employees over age 50 were terminated by their employer and claimed that they were replaced by a 25-year-old employee. "Fatal" to their claim was uncontroverted evidence that the 25-year-old had been hired before either plaintiff was terminated.

d) *Baron v. Abbott Labs.*, 672 F. App'x 158 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 2138 (2017) – In termination cases, one element of the prima facie case is that the plaintiff was replaced by a sufficiently younger person to create an inference of age discrimination. In this case, the plaintiff's evidence failed to raise such an inference of age discrimination, because he was eventually replaced by an individual who was 59 years old, only one year younger than the plaintiff at the time of his termination, and therefore not "substantially younger."

e) *Liebman v. Metro. Life Ins. Co*., 808 F.3d 1294 (11th Cir. 2015) – The plaintiff, aged 49, was terminated and replaced by a 42-year-old, and sued his former employer for violation of the ADEA. The court of appeals reversed the district court's determination that he had failed to state an ADEA claim because 1) his replacement was 42 years old and also a member of the protected class and 2) he failed to show he was qualified for his position. Under *O'Connor v. Consolidated Coin Caterers Corporation*, 517 U.S. 308 (1996), "[t]he fact that one person in the protected class has lost out to another person in the protected class is... irrelevant, so long as he has lost out because of his age." For the *McDonnell Douglas* prima facie case, the proper inquiry is not whether the plaintiff was replaced by someone outside the protected class, but whether the plaintiff's replacement was substantially younger than the plaintiff. Here, the seven-year age difference between the plaintiff and his replacement was considered substantial.

f) *Geiger v. Tower Auto.*, 579 F.3d 614 (6th Cir. 2009) – If a termination occurs as part of a workforce reduction, the replacement element of the prima facie case may be modified to require the plaintiff to provide additional direct, circumstantial, or

statistical evidence tending to indicate that the employer singled out the plaintiff for discharge based on the plaintiff's age. An employee is not considered to have been "replaced" when his duties are absorbed by or redistributed among existing employees.

g) *Bennington v. Caterpillar Inc.*, 275 F.3d 654 (7th Cir. 2001) – In addressing whether a plaintiff made out a prima facie case for age discrimination, the court found that the plaintiff only offered evidence of one other similarly situated younger employee who received preferential treatment, and that employee was only five years younger than the plaintiff. The court explained that when both the plaintiff an alleged similarly situated employee receiving preferential treatment are in the same protected class, the plaintiff must show a "significant disparity in ages." The Seventh Circuit considers a 10-year age difference to be "presumptively substantial," but a 7-year age difference has been held not to be significant enough to make out a prima facie case under the ADEA. However, the court noted that in cases where the age difference between the plaintiff and the individual treated more favorably is less than 10 years, the plaintiff might still be able to present a triable claim under the ADEA if he can produce evidence that the employer considered his age to be "significant."

4) Pretext

a) *Rollins v. Office of the Clerk of the House of Representatives*, No. 03-HS-105 (CV, AG), 2004 WL 5658962 (OOC Board Dec. 23, 2004) – "It is not enough to disbelieve the employer's articulated reason. In addition, the fact finder must believe the Complainant's explanation of intentional discrimination. The ultimate burden of persuading the trier of fact that the Agency discriminated against the Complainant always remains with the Complainant. However, a prima facie case and sufficient evidence of the Agency's pretext may permit a finding of discrimination, even without additional, independent evidence of discrimination." (citations omitted)

b) *Rodríguez-Cardi v. MMM Holdings, Inc.*, 936 F.3d 40 (1st Cir. 2019) – A showing of business error is not sufficient to demonstrate pretext, as long as the employer reasonably believed that an adverse action was warranted for non-discriminatory reasons. In this case, a salesperson with a history of disciplinary and performance problems was ultimately terminated for impermissibly conducting door-to-door solicitation in violation of company policy. The plaintiff alleged that the employer's proffered reason for the termination was pretext because the investigation was flawed and she had not in fact violated company policy. However, the court explained that the relevant inquiry is not whether the employer was right, but whether it reasonably believed its stated reason to be credible. Here, there was no evidence "from which a reasonable jury might infer that [the] investigation was cloaked in age-based animus," nor was there any evidence to undermine the decision-maker's testimony that she "honestly believed the veracity of both the Compliance Investigation Report and Rodríguez-Cardi's documented history of poor performance, and that she relied on that belief in making her decision to recommend Rodríguez-Cardi's termination."

c) *Kopko v. Lehigh Valley Health Network*, 776 F. App'x 768 (3d Cir. 2019) – A hospital employee alleged that she was terminated in violation of the ADEA, and the employer produced evidence that it fired her because she violated HIPAA. The plaintiff argued that this reason was pretext because she had not actually disclosed confidential information and therefore had not violated HIPAA. However, according to the court, this factual dispute "is immaterial because the critical question at this stage is not whether Kopko actually violated the HIPAA confidentiality policy; rather, it is whether LVH honestly and reasonably believed that Kopko violated the policy." The evidence in the record showed that the employer honestly and reasonably believed Kopko violated its HIPAA confidentiality policy, and thus the Third Circuit affirmed the district court's grant of summary judgment in favor of the employer.

d) *Westmoreland v. TWC Admin. LLC*, 924 F.3d 718 (4th Cir. 2019) – A 30-year employee with no history of major disciplinary problems was terminated shortly before she turned 61, and was replaced by a 37-year-old. The employer asserted that the plaintiff was fired for violating company policy: after meeting one-on-one with a subordinate, the plaintiff neglected to complete the required form to document the meeting, and when she and her subordinate completed the form six days later, she requested that the subordinate backdate the form to reflect the date of the meeting, which the company deemed to be a violation of its policy on making false statements. The court found that that a reasonable jury could find that the employer's stated reason for termination was pretextual: The plaintiff's supervisor had initially assured her that the form issue was not serious, and there were lesser sanctions available for a 30-year veteran employee with an otherwise stellar performance record. Additionally, the court noted that a deciding official's comment to the plaintiff as she was being walked out – that she had nothing to worry about and should just "go home and take care of those grandbabies" – "was not the sort of innocuous 'reflection' with 'no disparaging undertones' that we have deemed insufficient, as a matter of law, to suggest age bias." The court rejected the defendant's argument that the plaintiff's pretext evidence was insufficient under a "pretext plus" standard, under which she would have been required to introduce new evidence separate from her prima facie case showing a specific and discriminatory motive. This standard was abrogated by the Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000): "although 'the factfinder's rejection of the employer's legitimate, nondiscriminatory reason for its action does not compel judgment for the plaintiff[,] ... it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation.'"

e) *McMichael v. Transocean Offshore Deepwater Drilling, Inc.*, 934 F.3d 447 (5th Cir. 2019) – A plaintiff may show pretext through evidence that an employer departed from or misapplied policy based on a discriminatory motive. "[M]ere deviations from policy, or a disagreement about how to apply company policy" are not enough. Here, there was a discrepancy in a rating chart used by the employer in deciding which employees would be terminated as part of a reduction in force. The fact of the discrepancy alone was not enough to show pretext because the plaintiff failed to give any reason to doubt that the discrepancy was anything more than an accident.

f) *Steele v. Mattis*, 899 F.3d 943 (D.C. Cir. 2018) – An employer's inconsistent explanations for an adverse action can be evidence of pretext. In this case, the court described the college's proffered non-discriminatory reason for terminating the plaintiff as "a moving target, evolving from unexplained silence, to performance-based complaints, to an insistence that the budget and definitely not Dr. Steele's performance issues drove the decision, even though the budget cuts alone cannot explain why Dr. Steele himself was fired. Those inconsistencies and insufficiencies, especially when combined with Dr. Steele's replacement by a younger worker, could spark reasonable disbelief."

g) *Benjamin v. Felder Servs., L.L.C.*, 753 F. App'x 298 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 1622 (2019) – A former dietary manager at a nursing home was terminated for deficient job performance when her employer hired new management. She filed suit against her employer under the ADEA, but failed to show that the employer's stated legitimate non- discriminatory reason for her termination was pretext. The plaintiff claimed that her prior positive performance reviews from previous management showed that the employer's stated reason was not the real reason, but the court noted that the previous reviews from a different management company did not render the current management company's concerns about her performance uncredible. The court also rejected the plaintiff's argument that her employer's expectations for her job performance were unreasonably high, as "the ADEA cannot protect older employees from erroneous or even arbitrary personnel decisions, but only from decisions which are unlawfully motivated." Additionally, the court noted that some of the plaintiff's pretext arguments had been undermined by conflicting evidence in the record: the plaintiff argued that under the new management company, there were fewer employees who were older than 40 and that two of the three employees who had their hourly pay decreased were over 40, but the evidence showed that the company had hired a 55-year-old employee during the period in question and that several older employees had actually received a pay increase under the new management company.

h) *Rosenthal v. Faygo Beverages, Inc.*, 701 F. App'x 472 (6th Cir. 2017) – The plaintiff was the exclusive advertising and marketing provider to the defendant company. Beginning around 2008 or 2009, the company's vice president, to whom plaintiff reported directly, began asking plaintiff about retirement plans and sending him articles on conditions associated with age, such as urinary incontinence, advanced age macular degeneration, and advanced age cognitive impairment. In November 2011, the plaintiff was informed that the company had posted a job announcement for a newly-created "Brand Manager" position, and in July 2012 the company terminated the plaintiff's services. The company asserted that the position was created to bring on a full-time marketing person to improve the quality and quantity of marketing, perform a wider variety of functions than the plaintiff could perform, and remedy some of plaintiff's deficiencies. The plaintiff claimed age discrimination, citing the vice president's comments and articles as evidence, but the court held that this evidence was insufficient to demonstrate that the company's reasoning for the termination was pretextual. There was plenty of evidence in the record of the company's dissatisfaction with the plaintiff's services, which was a legitimate non-

discriminatory justification for the termination. The vice president's inquiries about the plaintiff's retirement plans, without evidence of any pressure on the plaintiff to retire or suggestion that he do so, were not sufficient to establish an inference of discrimination, and the plaintiff's subjective interpretations of or feelings about the age-related emails sent to him also did not establish pretext. Finally, although there was evidence of other individuals commenting that the plaintiff was "traditional" or "set in his ways," or had an "inability to evolve," were not attributed to a decision maker and were made well after the termination decision was made, and thus could not support a jury finding that the company's proffered reasons for the termination were intended to mask unlawful discrimination.

i) *Alsobrook v. Fannin Cty., Ga.*, 698 F. App'x 1010 (11th Cir. 2017) – Two employees, aged 47 and 52 respectively, were terminated as part of a reduction-in-force (RIF), and sued their employer under the ADEA. To counter the employer's legitimate nondiscriminatory reason for firing them – that budgetary concerns necessitated a RIF – the plaintiffs produced evidence that shortly before the RIF, a supervisor had told a 71-year-old employee that he should consider retiring because of his age and health, that a foreman had repeatedly asked that same employee and a coworker when they were retiring, and that the supervisor had stated that a 61-year-old employee was included in the RIF because he was getting ready to retire. The court determined that these comments were not relevant to show that the supervisor and foreman took the plaintiffs' ages into account when deciding to terminate them, because although both were over 40, neither was close to either the standard or early retirement age.

j) *Goudeau v. Nat'l Oilwell Varco, L.P.*, 793 F.3d 470 (5th Cir. 2015) – A company presented four written warnings to the plaintiff on the same day it terminated his employment, and cited poor job performance and insubordination as the basis for the termination. The plaintiff argued that this proffered reason was pretextual because the warnings were for infractions related to tasks outside of his job duties. Further, he was not given the warnings until the day he was fired, even though they related to events occurring on different dates before the termination date. These circumstances, combined with earlier comments from the plaintiff's supervisor about "old farts" and "old man clothes," as well as the firing of employees who had been called "old farts," could support a jury finding that the employer's proffered reason was pretextual and that the plaintiff had been terminated because of his age. The employer argued that it was not required to give warnings in the first place before terminating an at-will employee such as the plaintiff, but the court rejected this argument, noting that "when an employer opts to have a disciplinary system that involves warnings, failure to follow that system may give rise to inferences of pretext" (citation omitted). Further, the problem with the warnings here was not so much the failure to follow progressive discipline steps, but the employer's "manufactur[ing] [of] steps in the policy" by including warnings in the plaintiff's file after it had decided to fire him.

k) *Blizzard v. Marion Tech. Coll.*, 698 F.3d 275 (6th Cir. 2012), *cert. denied*, 569 U.S. 975 (2013) – A 57-year-old college employee was terminated and filed suit alleging age discrimination. The Sixth Circuit accepted the district court's finding that the plaintiff made out a prima facie case of age discrimination, and that the defendant

articulated a legitimate, non-discriminatory reason for the termination: that the plaintiff failed to follow proper procedures in using a new software system, was unaccountably absent from her work area, failed to perform necessary job functions, and exhibited a general unwillingness to cooperate with other employees or attend training on new software systems. Although the Sixth Circuit found that the district court erred in failing to consider the plaintiff's own testimony contesting the facts behind the school's stated reasons for terminating her, it noted that the school was still entitled to a modified "honest belief" rule, which provides that "for an employer to avoid a finding that its claimed nondiscriminatory reason was pretextual, the employer must be able to establish its reasonable reliance on the particularized facts that were before it at the time the decision was made." To overcome the employer's reliance on the honest belief rule, the employee must "allege more than a dispute over the facts upon which [the] discharge was based. He must put for evidence which demonstrates that the employer did not 'honestly believe' in the proffered nondiscriminatory reason for the adverse action." In this case, the court concluded that the plaintiff failed to produce any evidence demonstrating that the defendant's reliance on the facts before it at the time of her termination was unreasonable. Disagreement with the defendant's "honest belief" does not in itself create sufficient evidence of pretext.

l) *Provenzano v. LCI Holdings, Inc.*, 663 F.3d 806 (6th Cir. 2011) – A plaintiff alleged that she was not selected for a promotion because of unlawful age discrimination. The company produced evidence that its decision not to promote the plaintiff was based on her deficient performance record and the existence of a more qualified candidate. In describing the concept of pretext under the *McDonnell Douglas* burden-shifting framework, the court explained that a plaintiff can refute a legitimate, non-discriminatory reason by showing that the proffered reason (1) has no basis in fact, (2) did not actually motivate the defendant's challenged conduct, or (3) was insufficient to warrant the challenged conduct. In a failure-to-promote case, the focus is on the relative qualifications of the plaintiff and the candidate selected for the promotion. In this case, the plaintiff presented evidence that she had more education than the selected candidate, as well as experience assisting in other stores; she also produced a corporate email referencing the target customer's age group, and evidence that she argued demonstrated a pattern of discrimination against older employees. The court found that the plaintiff's higher level of education and experience in assisting in other stores did not conclusively establish that she should have been promoted over the other candidate, especially given that the job description listed over forty items under "Knowledge, Skills and Abilities," and thus did not establish that no reasonable employer would have chosen the selectee over the plaintiff. The email indicating the company's desire to attract a new customer base did not indicate that the ages of employees needed to match the age of the customers, and the plaintiff produced only the fact of a management structure change without any further proof of age discrimination tied to specific employment changes. Therefore, the court found that the plaintiff did not produce sufficient additional probative evidence of discrimination to establish a triable dispute of material fact regarding pretext.

m) *Rahlf v. Mo-Tech Corp.*, 642 F.3d 633 (8th Cir. 2011) – In this case three older mold-makers brought an age discrimination claim after being laid off. All of the company's mold-makers had been ranked on several factors, including Computer Numerical Control (CNC) technology proficiency, general mold making efficiency, and observations of each employee's work. The company proffered a legitimate, nondiscriminatory reason for the layoffs, including reduced workload and concerns about profitability, and a resulting goal to shift the remaining work to the more efficient and less labor-intensive CNC mold making process while reducing the total number of Class A manual mold makers employed. The plaintiffs argued that this reason was pretextual, based on five grounds: (1) there was no need for a reduction in force; (2) the company failed to review the plaintiffs' performance evaluations; (3) the company did not follow its own termination criteria; (4) the company destroyed the evidence it relied upon to make the decision; and (5) the company changed its reasons for the termination. The court rejected the plaintiffs' pretext arguments, concluding that: (1) businesses need not prove financial distress to make a RIF "legitimate"; (2) the company was not required to base its RIF decision on positive performance reviews; (3) additional factors not included in the handbook were appropriate given the nature of the RIF; (4) objective data used was easily accessible or reproducible, and managers testified about how they reached their decision; and (5) there was no evidence of any inconsistency in the reasons the company offered for the RIF.

IV. Disparate Impact

In contrast to disparate treatment claims, which are based on allegations that an employer intentionally treated some people less favorably than others because of their age, "in a disparate impact claim, plaintiffs challenge employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Aliotta v. Bair*, 614 F.3d 556, 561 (D.C. Cir. 2010) (quotations and citations omitted). Importantly, a plaintiff alleging disparate impact does not need to prove that the employer had a discriminatory motive. *Id*. at 562.

It is worth noting that, although the ADEA was enacted in 1967, it was not until 2005 that the Supreme Court held disparate impact claims to be cognizable under the ADEA, resolving a split among the Circuit Courts of Appeal.

Some courts have held that the disparate impact theory is not available to outside job applicants, because the language of 29 U.S.C. § 623(a)(2) makes it unlawful for an employer "to limit, segregate, or classify *his employees* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age" (emphasis added). *See Kleber v. Carefusion Corp.*, 914 F.3d 480 (7th Cir. 2019) (en banc), *cert. denied*, 2019 WL 4923464 (U.S. Oct. 7, 2019) (No. 18-1346); *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958 (11th Cir. 2016) (en banc). The Supreme Court recently denied a petition to review the Seventh Circuit's en banc decision in *Kleber*.

Meanwhile, there is a divide among some federal district courts as to whether the disparate impact theory is available under the federal sector provision of the ADEA. Some judges – including several within the D.C. District Court – have held that it is not. *See*, *e.g.*, *Anderson v. Duncan*, 20 F. Supp. 3d 42 (D.D.C. 2013), *amended,* No. CV 06-1565 (RMC), 2013 WL 12328768 (D.D.C. Nov. 15, 2013) (Collyer, J.) (disparate impact claims are not available in the federal sector because the federal government did not waive sovereign immunity with respect to disparate impact claims under the ADEA). Other judges – including at least one within the D.C. District Court – have rejected this reasoning and allowed disparate impact claims to proceed. *See*, *e.g.*, *Breen v. Peters*, 474 F. Supp. 2d 1, 6 (D.D.C. 2007) (Roberts, J.) ("By prohibiting 'any discrimination based on age,' the statute encompasses both disparate treatment and disparate impact cases, as both methods of proof seek redress for illegal discrimination."); *Carpe v. Chao*, No. 18-cv-2521 DMS (NLS), 2019 WL 2642650, at *3 (S.D. Cal. June 27, 2019) ("Simply put, Congress elected not to enumerate forbidden age-based practices in the federal-sector provision, nor to parse between permitted and unpermitted theories of liability for age discrimination such as disparate treatment and disparate impact, but instead to broadly ban 'any' form of age discrimination arising from 'all' personnel actions that affect such employees.").

The OCWR Board has not had occasion to weigh in on this issue, but to the extent that such claims have been brought in the federal courts, the two primary considerations are (1) whether the plaintiff has identified a facially neutral practice that disproportionately affects older workers, and (2) whether the employer has identified reasonable factors other than age that justify the practice.

a) *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005) – This case arose out of a pay plan adopted by the city of Jackson, Mississippi, which included salary increases for police and public safety officers. The plaintiffs alleged that the raises were less generous to officers over the age of 40 than to younger officers. Part of the motivation behind the new plan was to bring the starting salaries of police officers up to the regional average, and so those officers with less than five years on the force received a disproportionately higher increase than more senior officers. A group of older officers sued the city, alleging both disparate treatment and disparate impact. The Court of Appeals for the Fifth Circuit held that disparate impact claims were categorically unavailable under the ADEA, but the Supreme Court disagreed. Relying heavily on its earlier decision in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), in which it had held that disparate impact claims are available under Title VII, the Court held that disparate impact claims are likewise available under the ADEA, although the "reasonable factors other than age" (RFOA) provision in the ADEA narrows the scope of liability for facially neutral practices with a disparate impact on older workers. However, in this particular case, the Court affirmed the decision below because the city's pay plan was based on rank and seniority, not on age, and was "unquestionably reasonable": "[T]he City's decision to grant a larger raise to lower echelon employees for the purpose of bringing salaries in line with that of surrounding police forces was a decision based on a 'reasonable facto[r] other than age' that responded to the City's legitimate goal of retaining police officers."

b) *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84 (2008) – Three years after it held that the ADEA allows for disparate impact claims, the Supreme Court clarified that an employer asserting a "reasonable factors other than age" (RFOA) defense "must not only produce evidence raising the defense, but also persuade the factfinder of its merit." A group of former employees who were laid off as part of an involuntary reduction in force alleged that the workforce reduction process was designed and implemented to eliminate older employees. The Court of Appeals for the Second Circuit found in favor of the employer because the employee had not carried the burden of persuasion to show that the employer's decision was based on an RFOA; the Supreme Court vacated and remanded the decision because RFOA is an affirmative defense, and the burden therefore should have been on the employer to show that its decision was reasonable, not on the employee to show that it wasn't.

c) *O'Brien v. Caterpillar Inc.*, 900 F.3d 923 (7th Cir. 2018) – The company and the union representing its employees had previously agreed to a series of collective bargaining agreements, including a supplemental unemployment plan under which the company made monthly contributions. Eventually the company and the union agreed to eliminate the unemployment plan and to liquidate the funds in equal shares to (1) unemployment plan participants who were eligible to retire and agreed to retire, and (2) unemployment plan participants not eligible to retire. Of the 269 employees participating in the unemployment plan, 184 were eligible to retire; 136 of those retirement-eligible employees opted to retire, and received their pro rata share of the distribution. The 48 employees who were retirement-eligible but opted not to retire sued, alleging that the trust liquidation had a disparate impact on older workers. The company asserted an affirmative defense that the liquidation plan was based on a reasonable factor other than age. Quoting the EEOC regulations, the court explained that to establish its RFOA defense the company was required to meet the relatively light burden of showing that its less favorable treatment of retirement-eligible employees was "reasonably designed to further or achieve a legitimate business purpose and administered in a way that reasonably achieves that purpose in light of the particular facts and circumstances that were known, or should have been known, to the employer." The court held that the company had identified several reasonable factors other than age, including proposals legitimately designed to achieve cost-cutting measures. The court noted that in conducting a reasonableness inquiry, the courts do not consider whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class.

d) *Katz v. Regents of the Univ. of Cal.*, 229 F.3d 831 (9th Cir. 2000), *cert. denied*, 532 U.S. 1033 (2001) – In analyzing a voluntary early retirement incentive program (VERIP III), the court indicated that in order to prevail on a disparate impact claim of age discrimination, the plaintiff must prove that the challenged policy, while facially neutral, has a disparate impact on certain employees due to their membership in a protected group, which for purposes of the ADEA is employees at least 40 years of age. To state a prima facie case under a disparate impact theory, a plaintiff must demonstrate (1) the occurrence of certain outwardly neutral employment practices, and (2) a significantly adverse or disproportionate impact on persons of a particular [age] produced by the employer's facially neutral acts or practices. In this case,

plaintiffs who were eligible for a different retirement program (PERS) alleged they were treated differently than those eligible for the new VERIP III program. The court looked to statistical evidence that showed only about 27 percent of eligible employees were adversely impacted by the company's decision. In balancing the percentage of employees affected with the company's legitimate reason for its decision, the court found the statistical evidence insufficient to raise an inference of disparate impact.

V. Hostile Work Environment

Claims that an employee has suffered an actionable hostile work environment as a result of their age are analyzed in the same manner as hostile work environment claims under Title VII. Interestingly, many Circuit Courts of Appeal – like the Supreme Court – have never had occasion to decide whether the ADEA permits hostile work environment claims; they simply assume without deciding that such claims would be cognizable but that the plaintiff has failed to establish the necessary elements. *See*, *e.g.*, *Howell v. Millersville Univ. of Penn.*, 749 F. App'x 130 (3d Cir. 2018). Others have explicitly held that such claims are recognized within their Circuits. *See*, *e.g.*, *Dediol v. Best Chevrolet, Inc.*, 655 F.3d 435 (5th Cir. 2011); *Crawford v. Medina Gen. Hosp.*, 96 F.3d 830 (6th Cir. 1996).

The courts apply the same analytical framework to hostile work environment claims under Title VII and the ADEA. To prevail on a hostile work environment claim,

> a plaintiff must show that his employer subjected him to discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. To determine whether a hostile work environment exists, the court looks to the totality of the circumstances, including the frequency of the discriminatory conduct, its severity, its offensiveness, and whether it interferes with an employee's work performance.

Baloch v. Kempthorne, 550 F.3d 1191, 1201 (D.C. Cir. 2008) (quotations and citations omitted). To establish a hostile work environment under the ADEA, a plaintiff must show that the alleged hostile conduct was actually related to his or her age, or for engaging in activity protected by the ADEA: "Assuming that the ADEA provides a cause of action for workplace harassment, it would still only protect against harassment that could be linked to age discrimination or retaliation." *Sewell v. Chao*, 532 F. Supp. 2d 126, 142-43 (D.D.C. 2008), *aff'd sub nom. Sewell v. Hugler*, No. 08-5079, 2009 WL 585660 (D.C. Cir. Feb. 25, 2009).

a) *Davis-Garett v. Urban Outfitters, Inc.*, 921 F.3d 30 (2d Cir. 2019) – Hostile work environment claims involve both objective and subjective components: "a work environment will be considered hostile if a reasonable person would have found it to be so and if the plaintiff subjectively so perceived it because of conduct based on the plaintiff's over-40 age." (internal quotations omitted) The discrete acts that make up a hostile work environment claim may not each be actionable on their own, but "[s]uch claims are based on the cumulative effect of individual acts." In this case, the

plaintiff was hired as a sales associate at Anthropologie when she was 54 years old, much older than the other sales associates, who were in their 20s, as was the store manager. The plaintiff produced evidence that she was denied rotations and training opportunities that were part of the company's policies and were provided to all of the younger associates; was reassigned to an undesirable location because of the "demographic" there, which was made up of older shoppers; was more often assigned the least desirable chores like cleaning up trash, as well as the least desirable shifts and hours, compared to her younger coworkers; was excluded from meetings that her younger coworkers attended; and was berated frequently, including with insults about her "speed" and "pace." The court considered the entirety of the plaintiff's hostile work environment claim and concluded that it should have survived summary judgment, as she had produced evidence that she was, "from the start of her employment at Anthropologie, denied the training given to younger sales associates and relegated to work almost exclusively in the fitting room, and later [was] assigned the most unpleasant and arduous duties and subjected to age-disparaging criticisms daily[.]"

b) *Rivera-Rivera v. Medina & Medina, Inc.*, 898 F.3d 77 (1st Cir. 2018) – In support of her age-based hostile work environment claim, the plaintiff submitted a sworn declaration stating that three of the company's officers harassed her because of her age nearly every single day, calling her "vieja," "old," "useless," "slow," "worthless," and in need of "social security benefits." The district court granted summary judgment in favor of the employer because it found the declaration to be too imprecise, but the First Circuit Court of Appeals reversed, explaining that, "While it is true that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment to establish an objectively hostile or abusive work environment, we have also made clear that frequent incidents of harassment, though not severe, can reach the level of 'pervasive,' thereby altering the terms, conditions, or privileges of employment such that a hostile work environment exists." (quotations and citations omitted) In this case, the plaintiff produced "evidence that she was taunted about her age nearly every single day for over two years," including the names of the specific individuals who taunted her and the derogatory comments they taunted her with. The court held that the plaintiff's declaration included "enough detail to allow a factfinder to potentially rule in her favor."

c) *Howell v. Millersville Univ. of Penn.*, 283 F. Supp. 3d 309 (E.D. Pa. 2017), *aff'd,* 749 F. App'x 130 (3d Cir. 2018) – A music education teacher alleged, among other things, a hostile work environment based on age. In support of his claim, he cited several comments made by a colleague over the course of two years about wanting "young and energetic" or "young and charismatic" people in certain directorial positions for student recruiting purposes, as well as several other incidents or comments that were age-neutral, along with declarations of two colleagues who believed their department suffered from an "ageist atmosphere" but failed to link the complained-of negative treatment to age. Explaining that the ADEA does not endorse a cause of action for mere unpleasantness in the workplace, the district court held that a handful of isolated statements and conjecture by the plaintiff's coworkers

that they had suffered adverse treatment because of their age did not constitute severe or pervasive age-related discrimination. The Third Circuit affirmed the district court's grant of summary judgment because, assuming without deciding that the ADEA permits hostile work environment claims, the plaintiff nevertheless failed to produce sufficient evidence supporting such a claim.

d) *Sellers v. Deere & Co.*, 791 F.3d 938 (8th Cir. 2015) – A longtime employee filed suit alleging, among other things, a hostile work environment under the ADEA. In support of his claim the plaintiff identified two occasions of offensive conduct, during which a management official yelled at and berated him and engaged in extreme behavior such as spitting, pushing furniture, and pounding his fists. However, although these were potentially severe incidents, the court described them as too "isolated" to support a hostile work environment claim. The plaintiff also argued that he was given too much work, not allowed to use conference rooms, wrongfully blamed for a failed audit, and generally mistreated; the court found that while these incidents were unpleasant, they were not severe enough to affect a term, condition, or privilege of employment.

e) *Dediol v. Best Chevrolet, Inc.*, 655 F.3d 435 (5th Cir. 2011) – The plaintiff, aged 65, was employed at a car dealership for approximately three months. Due to a tumultuous relationship with his immediate supervisor, he stopped working at his job and later filed suit for hostile work environment based on age. The Fifth Circuit held for the first time that hostile work environment claims were cognizable under the ADEA and held that, based on the following facts, the plaintiff had established a genuine issue of material fact on his claim. The plaintiff had requested and was denied leave to take off work to volunteer at a church event on the morning of July 4th, and thereafter, his relationship with his direct supervisor was strained. The supervisor never again called the plaintiff by his first name, but instead only referred to him by names such as "old mother*****, "old man", and "pops." There were also incidents of physical intimidation and/or violence. When the plaintiff requested a transfer to the new car department, the supervisor overrode another manager's temporary approval of the transfer and stated "Get your old f*****g a** over here. You are not going to work with new cars." In the last incident before the plaintiff stopped coming to work, the supervisor said "I am going to the beat the f*** out of you," and charged at the plaintiff.

VI. Retaliation

The ADEA contains its own protection against retaliation, 29 U.S.C. § 623(d), which provides that "It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter."

Additionally, section 207(a) of the CAA, 2 U.S.C. § 1317(a), prohibits reprisal against covered employees: "It shall be unlawful for an employing office to intimidate, take reprisal against, or otherwise discriminate against, any covered employee because the covered employee has opposed any practice made unlawful by this chapter, or because the covered employee has initiated proceedings, made a charge, or testified, assisted, or participated in any manner in a hearing or other proceeding under this chapter." This includes claimants, witnesses, and any covered employees who raise good-faith concerns to their employers or to the OCWR about potential violations of the ADEA.

It is important to note that, although the analytical framework for retaliation cases is similar to that for discrimination cases – including the *McDonnell Douglas* burden-shifting analysis – a major difference between the two types of claims is that in discrimination cases plaintiffs must show that they suffered some kind of adverse personnel action, whereas in retaliation cases they must show that the employing office took action or created a working environment that would be reasonably likely to deter protected activity.

a) *Frazier v. U.S. Capitol Police*, No. 12-CP-63 (CV, AG, RP), 2014 WL 793367 (OOC Board Feb. 11, 2014) – "To establish a claim for retaliation under the CAA, an employee is required to demonstrate that: (1) he engaged in activity protected by Section 207(a) of the CAA; (2) the employing office took action against him that is 'reasonably likely to deter' protected activity; and (3) a causal connection existed between the two." In this case, a police officer objected to a change in his days off and to a lowering of one rating in his performance evaluation, alleging that these actions were taken by management in retaliation for his opposition to what he perceived as age- and race-based discrimination. The Board upheld the Hearing Officer's finding that there was no evidence of retaliatory animus or a causal connection between the alleged protected activity and the challenged actions, and that the USCP had provided credible evidence of legitimate reasons for its actions.

b) *Lackey v. Heart of Lancaster Reg'l Med. Ctr.*, 704 F. App'x 41 (3d Cir. 2017) – A hospital employee complained to Human Resources that her supervisor had asked her how old she was and when she was planning to retire. She was terminated 19 months later, and alleged that her termination was in retaliation for her complaint. The hospital did not dispute that her complaint was protected activity under the ADEA but argued that her retaliation claim failed because she could not establish a causal connection between her complaint and her termination, which were separated by more than a year and a half. The court noted that a plaintiff can overcome such a lack of temporal proximity if she can establish a "pattern of antagonism" during the intervening period. However, in this case the only evidence the plaintiff offered in support of such a pattern of antagonism were negative comments in her annual review and write-ups for performance issues, which were similar to the feedback she had received consistently for several years before she engaged in the protected activity, and the assignment of a younger coworkers to help her and review her work after her negative review. The court was not persuaded that these circumstances established a causal link between the protected activity and the plaintiff's termination, and affirmed the district court's grant of summary judgment on the retaliation claim.

c) *Smith v. Lafayette Bank & Trust Co.*, 674 F.3d 655 (7th Cir. 2012) – A 44-year-old bank branch manager was terminated after the bank received a complaint about her unprofessional behavior towards another employee, in violation of her written commitment letter to improve her poor performance. The plaintiff claimed that her termination was in retaliation for protected activity under the ADEA. The court described the two avenues – direct or indirect – that the plaintiff could establish such a claim. Under the direct method, the plaintiff would have to establish that: (1) she engaged in statutorily protected activity; (2) she suffered an adverse employment action; and (3) there was a causal connection between the two. Under the indirect method, the plaintiff would have to show that: (1) she engaged in statutorily protected activity; (2) she met the employer's legitimate expectations; (3) she suffered an adverse employment action; and (4) she was treated less favorably than similarly situated employees who did not engage in statutorily protected activity. In this case, the plaintiff's claim failed under either method because she failed to show that she engaged in activity protected by the ADEA. To constitute a protected activity, the plaintiff's complaints must include an objection to discrimination based on age; here, the alleged protected activity that preceded her termination – complaints about a formula used to calculate contributions to her pension plan, complaints about cutbacks to her branch staff, and a complaint regarding issues with 401(k) contributions – was more general in nature and not tied to age discrimination. The Seventh Circuit therefore affirmed the lower court's grant of summary judgment in favor of the bank.

d) *Stone v. Geico Gen. Ins. Co.*, 279 F. App'x 821 (11th Cir. 2008) – To establish that she engaged in protected activity, a plaintiff alleging retaliation must show that she had a good faith, objectively reasonable belief that the employer was engaged in unlawful employment practices. In this case the plaintiff reported to human resources that her supervisor had instructed her to scrutinize three employees over the age of 55, and told her that he wanted one of the employees "gone" because she was "too slow." About a month after her supervisor learned that she had made this report, the plaintiff was terminated. The employer argued that the plaintiff could not demonstrate causation because eight months passed between when she made the report and when she was terminated, but the court rejected this argument because the actual decision-maker who terminated the plaintiff – her supervisor, who was himself the subject of the report – had only learned of her protected activity approximately one month prior to the termination, thus demonstrating close temporal proximity.

e) *Holtzclaw v. DSC Commc'ns. Corp.*, 255 F.3d 254 (5th Cir. 2001) – Qualification for the job the plaintiff seeks is a necessary element of a prima facie retaliation case under the ADEA. Here, the plaintiff had to take short-term disability leave following his hospitalization for an illness. He was later approved for long-term disability benefits based on his certifications that "he was unable to work at all," "that he would never be able to return to work," and "that his condition could not be reasonably accommodated by an employer." He also received Social Security benefits based on similar statements. Approximately six months after he was approved for long-term disability benefits, he reapplied for a job with his employer, but was rejected due to several low ratings on previous performance reviews. Two months after he reapplied,

he verified to his long-term disability insurer that he had been "completely and continuously unable to work for the previous twenty-four months," which included the time period during which he was re-applying for a job. The plaintiff later filed suit alleging that the company had retaliated against him under the ADEA, but was unsuccessful because the evidence showed he could not perform the essential functions of the position. The court reasoned that it is necessary to include qualification as an element of the prima facie retaliation case because any other holding would lead to inconsistent results. "For example," the court explained, "a plaintiff's discrimination suit could be dismissed because he was unqualified for the position applied for, even though there was some direct evidence of age discrimination on the part of the employer. However, under the same facts, the plaintiff could survive summary judgment if his complaint were that he was discriminated against because he complained of age discrimination." Such an outcome would be inconsistent with Congressional intent.

VII. Damages and Settlements

Section 201(b)(2) of the CAA addresses damages available to covered employees alleging ADEA violations, providing that "The remedy for a violation of subsection (a)(2) shall be–

> (A) such remedy as would be appropriate if awarded under section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)); and
>
> (B) such liquidated damages as would be appropriate if awarded under section 7(b) of such Act (29 U.S.C. 626(b)).

2 U.S.C. § 1311(b)(2). In turn, those provisions of the ADEA allow for "such legal or equitable relief as will effectuate the purposes of this chapter," 29 U.S.C. § 633a(c), and for liquidated damages "payable only in cases of willful violations of this chapter," 29 U.S.C. § 626(b).

1) Damages

   a) *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) – In addressing whether the respondents were entitled to liquidated damages under the ADEA, the Court noted that the ADEA only allows for liquidated damages in cases of "willful violations" and that such damages were intended by Congress to be punitive in nature. The Court found reasonable and upheld the definition applied by the lower court, that a violation was "willful" if "the employer… knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." However, the Supreme Court disagreed with the Court of Appeals that the petitioner in this case willfully violated the ADEA in implementing a new transfer policy for airline pilots and co-pilots who reached the age of 60. The airline had sought advice regarding the plan's compliance with the ADEA, but the Court reasoned that an employer simply knowing of the potential applicability of the ADEA does not constitute a willful violation of the ADEA. Rather, the Court found that in this case, the petitioner did not know that its conduct violated the ADEA, nor did it adopt a policy with "reckless disregard" for the

ADEA. On the contrary, the record showed that management officials acted "reasonably and in good faith in attempting to determine whether their plan would violate the ADEA" and in attempting to ensure compliance. Thus, it was reasonable to believe that the parties "in focusing on the larger overall problem, simply overlooked the challenged aspect of the new plan." Therefore, liquidated damages were not appropriate.

b) *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) – In keeping with its holding in *Thurston*, the Court noted that the ADEA only provides for liquidated damages where the violation of the ADEA was "willful." The Court reaffirmed the definition of willfulness in *Thurston*, stating that a willful violation was one in which "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." Once a willful violation is shown, the employee "need not additionally demonstrate that the employer's conduct was outrageous, provide direct evidence of the employer's motivation, or prove that age was the predominant, rather than a determinative, factor in the employment decision."

c) *Loveless v. John's Ford, Inc*., 232 F. App'x 229 (4th Cir. 2007) – A jury properly determined that the plaintiff, Alton Loveless, had proved through direct evidence that his termination was motivated by age. His supervisor told Loveless that he was being "retired" and further explained that he was "replacing all his department heads. That he need[ed] younger, more aggressive Managers, people that he [could] groom to the way that he does business." During this conversation, the supervisor referred to another older coworker as "an F'n dinosaur" who was "next" and commented that this coworker "should have been gone a long time ago." The Fourth Circuit determined that there was a sufficient nexus between these comments and Loveless's termination: one of the comments was made when Loveless was terminated and in direct response to Loveless's question of "why me?" Concerning damages, the evidence was sufficient to support the jury's finding of a willful violation of the ADEA – the supervisor knew that Loveless was over 40 and terminated Loveless on the basis of his age. Based on this finding of willfulness, the court determined that an award of liquidated damages was mandatory in this case under the ADEA.

d) *Starceski v. Westinghouse Elec. Corp.,* 54 F.3d 1089 (3d Cir. 1995) – A 63-year-old senior engineer was laid off, and alleged that he was targeted because of his age in violation of the ADEA. At trial, he produced evidence that the management official with decision-making authority had specifically targeted the plaintiff's department because it was made up of senior engineers, and that the same decision-maker had specifically directed the plaintiff's supervisor to artificially lower the plaintiff's performance evaluation. The jury found in favor of the plaintiff and awarded liquidated damages for a willful violation. The employer appealed the jury's finding of willfulness, arguing that any ADEA violation resulted from no more than "accident, inadvertence or ordinary negligence," but the Third Circuit found that a reasonable jury could conclude that the defendant "'knew or showed reckless disregard' for its statutory duty to avoid discriminating against [plaintiff] because of his age."

2) Settlements

The ADEA expressly requires that waivers be "knowing and voluntary" to be valid and enforceable, and lists certain requirements for determining whether a waiver is knowing and voluntary. 29 U.S.C. §§ 626(f)(1), (f)(2). Included in this list are requirements that an individual must be given a period of at least 21 days within which to consider the agreement, or 45 days in cases of waivers sought in connection with an exit incentive or other employment termination program offered to a group or class of employees. Additionally, a waiver must provide that for a period of at least 7 days following the execution of the waiver, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired.

For settlement agreements arising out of ADEA claims filed in the OCWR, the OCWR Executive Director will not approve such settlements until after the applicable waiver period has expired.