"BUT I'M DENNY CRANE!": AGE DISCRIMINATION IN THE LEGAL PROFESSION AFTER *SIDLEY*

*Donald J. Labriola**

I. "TRUST ME. I CAN FIX THIS. I'M DENNY CRANE."

Art doesn't always imitate life when it comes to the law. *Boston Legal*'s aging TV lawyer Denny Crane may manage week after week to weasel out of predicaments that would cost younger men their jobs.[1] But real-world law firms have no sense of humor when an older worker's productivity begins to slip. When does the decision to discipline or terminate an employee because of perceived age-related debility violate the law? And what rights does an older worker have when faced with outright age discrimination?

The answers to these questions are moving targets. As post-War America continues to gray,[2] its attitude toward older workers is becoming more tolerant.[3] Modern employment law has begun to challenge long-held practices in the legal profession,[4] where, unlike on TV, age-related dismissals are not limited to lawyers who shoot their clients.[5] When a veteran contributor begins to show signs of

* Mr. Labriola is a nationally known author and lecturer who has written hundreds of articles and several books about the role of technology in project and business management. He possesses degrees in math, physics, and computer science and is a 2009 J.D. candidate at Albany Law School.

[1] William Shatner portrays the seventy-something Crane as a fading courtroom superstar who prefers to tell colleagues that his early-stage Alzheimer's diagnosis is actually mad cow disease. *See* Denny Crane, http://abc.go.com/primetime/bostonlegal/index?pn=bios#t=character&d=30236 (last visited Oct. 11, 2008).

[2] The number of workers over the age of fifty-five will grow from 18.4 million in 2000 to a record 31.9 million in 2015. Robert G. Knechtel, Productive Aging in the 21st Century, http://www.go60.com/go60work.htm (last visited Oct. 11, 2008).

[3] Bertha Coombs, *Demand Grows for Older Workers: Firms Focus on Hiring and Retaining Baby Boomers*, CNBC, May 7, 2004, http://www.msnbc.msn.com/id/4916661/.

[4] James Podgers, *Age Shouldn't Matter: ABA Urges Firms to Nix Mandatory Retirement Policies*, A.B.A.J., Oct. 2007, *available at* http://www.abajournal.com/magazine/age_shouldnt_matter/.

[5] Yes, in one *Boston Legal* episode, Denny Crane smuggled a pistol into court to kneecap a manacled pro bono client he did not want to represent. He then wheedled an appearance on

wear, many partners find themselves pressured to dismiss or demote a colleague who was once a skilled practitioner, a rainmaker, or even a mentor.[6] Such decisions may be difficult on a personal level, but the legal consequences can be worse. Competent older attorneys have long been harassed, terminated, passed over, or coerced into retirement for reasons rooted in greed, unthinking adherence to tradition, or stereotyping.[7] But today, any business decision that raises the specter of age discrimination is potentially actionable in federal and state courts.[8] Recent cases like *Smith v. City of Jackson, Mississippi*[9] and *EEOC v. Sidley Austin Brown & Wood*[10] have greatly extended the scope of legal protections against age bias[11] and made it plain that the profession will no longer tolerate age discrimination within its own ranks.[12] The result has been a new legal standard that has produced eight-figure consent decrees for practices that just a few decades ago might not have raised an eyebrow.[13]

II. FEDERAL AND STATE PROTECTIONS

A. Statutory Overview

The most important federal protections against workplace age discrimination are found in the Age Discrimination in Employment Act of 1967 ("ADEA").[14] Enacted during the heady days following

The Larry King Show, where he eloquently argued self-defense. *Boston Legal: Truly, Madly, Deeply* (ABC television broadcast Nov. 8, 2005).

[6] *See* Martha Neil, *Who is a Partner?: The EEOC Looks Beyond Titles in its Age Discrimination Case Against a Law Firm*, A.B.A.J., June 2005, *available at* http://abajournal.com/magazine/who_is_a_partner.

[7] *See* David B. Wilkins, *Partner, Shmartner!:* EEOC v. Sidley Austin Brown & Wood, 120 HARV. L. REV. 1264, 1265–66, 1270 (2007).

[8] *See infra* Part II.A.

[9] 544 U.S. 228, 240 (2005) (ruling that disparate-impact claims can be brought under federal age-discrimination law).

[10] 315 F.3d 696, 703 (7th Cir. 2002) (holding that equity partners in a law firm may claim employee status in order to sue under federal age-discrimination law).

[11] *See Smith*, 544 U.S. at 240; EEOC v. Sidley Austin LLP, 437 F.3d 695, 695 (7th Cir. 2006).

[12] *See* Anna P. Stern, *Heeding the Call for the End of Mandatory Retirement*, 21 GEO. J. LEGAL ETHICS 1095, 1095, 1104 (2008).

[13] *See, e.g.*, Press Release, EEOC, $27.5 Million Consent Decree Resolves EEOC Age Bias Suit Against Sidley Austin, (Oct. 5, 2007), *available at* http://www.eeoc.gov/press/10-5-07.html.

[14] 29 U.S.C. §§ 621–634 (2000).

the 1964 Civil Rights Act,[15] the ADEA bars a broad range of discriminatory practices against employees who are at least forty years old.[16]

Congress passed the ADEA because it found older workers to be at an increasing disadvantage in the workplace, facing inequities like unfair mandatory retirement policies, disproportionately high unemployment, and on-the-job discrimination.[17] In an introductory statement of purpose, it urged employers to base management decisions on merit, to adopt formal anti-discrimination policies, and to seek compromise solutions to age-related controversies.[18]

The ADEA is effected by the Equal Employment Opportunity Commission,[19] a federal agency created by Title VII of the 1964 Civil Rights Act[20] that today has jurisdiction over most types of federal employment-discrimination claims.[21] Aggrieved employees normally must file a claim with the EEOC before they can open a civil case in federal district court.[22] If the agency fails to negotiate a conciliation, it issues a "right to sue" letter to the charging party[23] and may also file its own claim on the employee's behalf.[24]

Procedures are slightly different[25] in states that complement ADEA protections with their own (generally more comprehensive) anti-discrimination laws and enforcement agencies.[26] New York is one such "deferral" state,[27] where the New York State Division of

---

[15] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 1981–2000 (2000)).

[16] 29 U.S.C. §§ 631(a), (b) (2000).

[17] 29 U.S.C. §§ 621(a)(1)–(4) (2000).

[18] 29 U.S.C. § 621(b) (2000).

[19] *See* EEOC, Federal Equal Employment Opportunity (EEO) Laws (Apr. 20, 2994), http://www.eeoc.gov/abouteeo/overview_laws.html.

[20] *See* 42 U.S.C. § 2000e-4 (2000).

[21] *See* EEOC, Federal Equal Employment Opportunity (EEO) Laws, *supra* note 19.

[22] *See infra* Part III.A; EEOC, Federal Laws Prohibiting Job Discrimination: Questions and Answers (May 24, 2002), http://www.eeoc.gov/facts/qanda.html. Federal employees follow a slightly different procedure. *See* 29 C.F.R. §§ 1614.101–110 (2008); EEOC, Facts About Federal Sector Equal Employment Opportunity Complaint Processing Regulations (Apr. 21, 2003), http://www.eeoc.gov/facts/fs-fed.html.

[23] *See* EEOC, Federal Laws Prohibiting Job Discrimination: Questions and Answers, *supra* note 22.

[24] *See, e.g.*, EEOC v. Sidley Austin LLP, 437 F.3d 695, 696 (7th Cir. 2006) (affirming district court decision that allowed EEOC to sue on behalf of former employees who were now time-barred from doing so themselves).

[25] *See infra* Part III.A.

[26] Such entities are designated "FEP [fair employment practice] agencies" and must be qualified under 29 C.F.R. § 1601.70–80 (2008).

[27] *See* Brodsky v. City Univ. of N.Y., 56 F.3d 8, 9 (2d Cir. 1995) ("A deferral jurisdiction is a state, like New York, that has a law prohibiting age discrimination and an administrative agency empowered to remedy it.").

Human Rights[28] implements the New York State Human Rights Law (NYSHRL).[29] The NYSHRL grants New York residents legal recourse to a wide range of discriminatory activities.[30] Its workplace age-discrimination protections are similar to those of the ADEA, but extend to employees as young as eighteen and to employers with as few as four workers.[31] Many municipalities also create their own anti-discrimination statutes and enforcement entities, such as New York City's Human Rights Law[32] and Commission on Human Rights.[33]

The ADEA, New York State Human Rights Law, and New York City Human Rights Law are especially important in "employment-at-will" states like New York, where employees can be terminated "at any time for any reason."[34] Without the at-will exceptions carved out by statutes like these, employees would have no legal defense against the most abusive employment practices.

B. Who is Protected?

The ADEA bars age discrimination against nearly all types of employees who are at least forty years old,[35] including job applicants and U.S. citizens employed overseas.[36]

The ADEA does not, however, define the term "employee" with specificity. The circular statutory definition—an "individual employed by any employer"—is broad enough to be almost meaningless without interpretation by regulation or case law.[37]

---

[28] N.Y. EXEC. LAW § 293 (McKinney 2005).

[29] *Id.* §§ 290–301.

[30] *Id.* § 296.

[31] *See id.* §§ 296(3-a)(a), 292(5).

[32] NEW YORK CITY, N.Y., ADMIN. CODE §§ 8-101–131 (1996 & Supp. 2007).

[33] *See* NEW YORK CITY, N.Y., ADMIN. CODE § 8-103 (Supp. 2007).

[34] *See* New York State Department of Labor, Wages and Hours: Frequently Asked Questions, http://www.labor.state.ny.us/workerprotection/laborstandards/faq.shtm#14 (last visited Oct. 14, 2008) ("New York State is an 'employment-at-will' state. Without a contract restricting termination . . . an employer has the right to discharge an employee at any time for any reason.").

[35] 29 U.S.C. § 631(a) (2000).

[36] EEOC, Facts About Age Discrimination (Sept. 8, 2008), http://www.eeoc.gov/facts/age.html; 29 U.S.C. § 630(f) (2000). Some exceptions do exist. *See infra* Part III.F, notes 127–130, and accompanying text.

[37] 29 U.S.C. § 630(f) (2000). *See* Rachel M. Milazzo, *Circular Definitions of What Constitutes an Employee: Determining Whether the Partners of Sidley Austin Brown & Wood Qualify as Employers or Employees Under Federal Law*, 51 ST. LOUIS UNIV. L.J. 1329, 1330 (2007) ("[S]uch vague definitions leave many questions as to what factors actually determine one's status as an employee."). The Supreme Court agreed, remarking that identical ERISA language in 29 U.S.C. § 1002(6) "is completely circular and explains nothing." Nationwide

Guidance can be found in the 2002 case *EEOC v. Sidley & Austin*,[38] where the EEOC alleged that a prominent Chicago law firm had unfairly used age as the basis for summarily demoting thirty-two partners to non-equity positions.[39] In that case, Sidley argued that, by definition, a partner is an employer, not an employee, and thus not within the ADEA.[40] But the District Court disagreed, using the EEOC's multi-factor "common law agency" test (which looks to the actual nature of a job, rather than to an arbitrary title) to determine that most of Sidley's hundreds of "partners" lack sufficient control over the business to be considered employers.[41] The court thus refused to bar the partners from asserting rights under the ADEA for lack of standing.[42]

The Seventh Circuit chose the same test upon appeal,[43] as did the Supreme Court one year later in *Clackamas Gastroenterology Associates, P.C. v. Wells*[44] to determine the employment status of disabled plaintiffs under the similarly worded Americans with Disabilities Act.[45] By the time Sidley petitioned the Supreme Court in 2006 to reconsider the Seventh Circuit's decision, the firm no longer even attempted to raise the issue of employer/employee status.[46]

The implications of these decisions are profound, and especially so for the legal profession, where limited partnerships are common. After *Sidley*, it is clear that the ADEA bans discrimination against workers who hold merely nominal equity positions. If Denny Crane were fired by his fellow partners because of ostensibly age-related problems, he could still claim standing under the ADEA if he could show that he no longer held enough control over the business to be considered an employer under the common law agency test.

Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992).

[38] No. 01 C 9635, 2002 WL 206485, at *1 (N.D. Ill. Feb. 11, 2002) (mem.).

[39] *Id.*

[40] *Id.* at *2.

[41] *Id.* at *3.

[42] *Id.* at *4.

[43] EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 705 (7th Cir. 2002) (citing Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323–24, (1992)).

[44] 538 U.S. 440, 448–49 (2003).

[45] *Id.* at 444 (proclaiming that the ADA's definition of "employee" (which is identical to that of the ADEA) is "completely circular and explains nothing." (citing *Darden*, 503 U.S. at 323)).

[46] *See* Petition for a Writ of Certiorari, Sidley Austin LLP v. U.S. EEOC, 127 S. Ct. 76 (2006) (No. 05-1481), 2006 WL 4833631.

C. Who is an "Employer"?

The ADEA exerts jurisdiction over a broad spectrum of employers that include the federal government[47] (other than self-administering agencies like the Social Security Administration),[48] local municipalities,[49] and almost any type of private business entity (including employment agencies and labor organizations) with at least twenty employees.[50]

It ostensibly bans discrimination by state governments,[51] but the Eleventh Amendment normally bars individuals from suing state agencies under federal law.[52] Congress can use its Fourteenth Amendment powers to abrogate this Eleventh Amendment immunity, but only when there is a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[53]

The Supreme Court applied this test to the ADEA in the 2000 age-discrimination case *Kimel v. Florida Board of Regents*.[54] Because age is not a suspect classification that would trigger heightened scrutiny, state employers may use it as a basis for classification schemes that are merely rationally related to a legitimate state interest.[55] The *Kimel* Court found that the ADEA prohibited state employment decisions and practices that are constitutional under this lenient "rational basis" equal-protection test.[56] The ADEA, the Court concluded, thus failed the "congruence

---

[47] Some special procedures apply to federal government employers. *See* 29 U.S.C.A. § 633a (West 1999 & Supp. 2008).

[48] *See* Maloney v. Soc. Sec. Admin., 517 F.3d 70, 75–76 (2d Cir. 2008) (holding the ADEA inapplicable to the SSA).

[49] 29 U.S.C. § 630(b) (2000) ("The term ['employer'] also means . . . a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State . . . .").

[50] 29 U.S.C. §§ 630(a), (b) (2000) (defining "person[s]" as "individuals, partnerships, associations, labor organizations, corporations, business trust[s], legal representatives, or any organized groups of persons" and "employer[s]" as "person[s] engaged in an industry affecting commerce [who employ] twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . .").

[51] 29 U.S.C. § 623(a)(1) (2000).

[52] U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit . . . against one of the United States by Citizens of another State . . . .").

[53] City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

[54] 528 U.S. 62, 81–83 (2000).

[55] *Id.* at 83.

[56] It found, for example, that the ADEA's "bona fide occupational qualification" exception permits discriminatory employment actions that are "reasonably necessary to the normal operation of the particular business," but not those that are merely "reasonable," as would be required to pass the rational basis test. *Id.* at 86–87. This made the ADEA too restrictive to

and proportionality" test[57] and could not be applied to the states under the authority of the Fourteenth Amendment.[58]

There are several exceptions to this rule. First, although limited in application, the Supreme Court has held that a private individual may under certain conditions bring suit to enjoin a public official from enforcing unconstitutional state regulations.[59] Furthermore, the Eleventh Amendment does not preclude an instrumentality of the federal government—such as the EEOC—from itself bringing suit against a state.[60]

D. Scope of Protection

The ADEA's ban against workplace age discrimination is similar to Title VII's expansive prohibitions against other types of employment bias, differing primarily in the basis of the discrimination it forbids.[61] It extends to every type of "term, condition, or privilege of employment" from recruitment through retirement, banning discriminatory practices in "hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training."[62]

The ADEA specifically prohibits job notices that state an age preference,[63] discriminatory entry requirements for apprenticeship programs,[64] and benefit plans that afford preferential treatment to younger workers (unless they do so merely to equalize costs across age groups).[65] It forbids retaliation against employees who have

qualify for Fourteenth Amendment immunity from the Eleventh Amendment. *Id.*; *see also* 29 U.S.C. § 623(f)(1) (2000).

[57] *Kimel*, 528 U.S. at 82–83.

[58] *Id.* This restriction applies only to state governments, and not to local municipalities, which do not enjoy the Eleventh Amendment immunity available to the states. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 368–69 (2001).

[59] *Ex parte* Young, 209 U.S. 123, 159–160 (1908) (holding that state officers who enforce an unconstitutional statute do so without the authority of the state and so act as a private individuals, without immunity from federal suit).

[60] *See* U.S. CONST. amend. XI.

[61] THOMAS R. HAGGARD ET AL., UNDERSTANDING EMPLOYMENT DISCRIMINATION 4 (2d ed. 2008) ("[T]he substantive prohibitions of the ADEA and Title VII are so similar . . . [and] recent amendments now make the [ADEA's] enforcement procedures almost identical to those of Title VII.").

[62] *See* Guidance: Age Discrimination, http://www.eeoc.com/guidance/discrimination/age-discrimination (last visited Oct. 14, 2008).

[63] *Id.* The sole exception to this rule is when age can be shown to be a bona fide occupational qualification "reasonably necessary to the normal operation of the business." *Id. See also* 29 U.S.C. § 623(f)(1) (2000); *infra* notes 108–11 and accompanying text.

[64] Guidance: Age Discrimination, *supra* note 62.

[65] *Id.*; 29 U.S.C. § 623(f)(2)(B)(i) (2000).

asserted their rights under the statute by filing a claim, participating in an investigation, or overtly opposing discriminatory practices.[66] The statute also requires employers to conspicuously post EEOC-approved notices that inform employees of these rights.[67]

III. THE MECHANICS OF AN AGE-DISCRIMINATION CLAIM

A. Making a Claim

An ADEA case is normally initiated by filing a claim with the EEOC between 60 and 180 days after the date of an alleged offense.[68] But in a deferral state like New York, the federal claim cannot be filed until sixty days after proceedings have commenced under state law.[69] The ADEA accommodates claimants in such states by extending the federal filing deadline to the earlier of 300 days after the offense or thirty days after notification that the state FEP agency (here, the New York State Division of Human Rights) has terminated its jurisdiction.[70] Procedures, notice requirements, and statutes of limitation vary somewhat for deferral-state claimants employed by the federal government.[71]

A New York State claimant seeking a jury trial may initiate a private civil action no sooner than sixty days after filing with the EEOC or the New York State Division of Human Rights (whichever is later) and not more than ninety days after receiving "right to sue" notice that the claimant's EEOC charge has been dismissed or the proceedings otherwise terminated.[72] This right to sue terminates immediately if the EEOC decides to file a civil suit on the claimant's behalf, but any cases already underway will be allowed to

---

[66] Guidance: Age Discrimination, *supra* note 62.

[67] 29 U.S.C. § 627 (2000).

[68] 29 U.S.C. § 626(d)(1) (2000).

[69] 29 U.S.C. § 633(b) (2000).

[70] 29 U.S.C. § 626(d)(2) (2000); *see also* EEOC, Federal Laws Prohibiting Job Discrimination: Questions and Answers, *supra* note 22.

[71] *See* 29 C.F.R. § 1614.105(a)(1) (2007). *See also* Rossiter v. Potter, 357 F.3d 26, 29 (1st Cir. 2004) (discussing ADEA statutory limitations periods for federal workers); Tapia-Tapia v. Potter, 322 F.3d 742, 744 (1st Cir. 2003) (describing ADEA notice requirements for postal workers); EEOC, Facts About Federal Sector Equal Employment Opportunity Complaint Processing Regulations, *supra* note 22; EEOC, Federal EEO Complaint Processing Procedures (Apr. 21, 2003), http://www.eeoc.gov/federal/fedprocess.html.

[72] 29 U.S.C. §§ 626(d), (e) (2000).

continue.[73]

B. The General Model of Proof

Two general classes of anti-discrimination claims can be brought under federal and state employment law.[74] In disparate treatment cases, the plaintiff alleges that an employer *intentionally* treated a worker in a protected class less favorably than an unprotected peer because of the injured worker's protected characteristic.[75] Causes of action here can include harassment, discriminatory benefit plans, and unfair hiring and firing policies.[76] Disparate impact claims, on the other hand, assert that workers in a protected class suffer a statistically significant adverse effect—regardless of the employer's intent—from an employment policy or practice that may appear to be neutral on its face.[77]

Both types of age discrimination cases are adjudicated under a general model established by the Supreme Court in *McDonnell Douglas Corp. v. Green*,[78] as revised by the holding of *Reeves v. Sanderson Plumbing Products, Inc*:[79]

(1) the plaintiff bears the initial burden of presenting a prima facie case that the employer more likely than not took some action that, because of the employee's membership in a protected age class, was detrimental to the employee;[80]

(2) the burden of persuasion then shifts to the employer, which must present a nondiscriminatory explanation for its action or justify it as reasonable or necessary;[81]

(3) the employee must then discredit the defendant's defense as pretext.[82] In disparate treatment age discrimination cases, the plaintiff must also persuade the trier of fact that the employer's true motivation was discriminatory.[83]

---

[73] 29 U.S.C. § 626(c)(1) (2000).

[74] *See* EEOC, Employment Tests and Selection Procedures (June 23, 2008), http://www.eeoc.gov/policy/docs/factemployment_procedures.html.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] 411 U.S. 792, 802–03 (1973) (setting out a general framework for adjudicating employment-discrimination cases).

[79] 530 U.S. 133, 146 (2000) (modifying the *McDonnell Douglas* framework in an ADEA unlawful discharge case by assigning the plaintiff a more stringent burden of persuasion).

[80] *McDonnell Douglas*, 411 U.S. at 802.

[81] *Id.* at 802–03.

[82] *Id.* at 804.

[83] *Reeves*, 530 U.S. at 146 (modifying the *McDonnell Douglas* framework by holding that it

C. Disparate Treatment

Establishing a prima facie case of age discrimination under either federal or New York State law[84] requires a plaintiff to show by clear and convincing evidence that it is more likely than not that:

(1) the injured employee belongs to the protected class of individuals at least forty years old (under the ADEA) or eighteen years old (for New York State Human Rights Law claims);[85]

(2) the employee was qualified to hold the job she held, applied for, or retired from and, if employed, was performing satisfactorily;[86]

(3) in spite of this, the employer took some prejudicial action against the employee, such as a failure to hire, termination, demotion, or denial of fringe benefits;[87] and

(4) the employer afforded more favorable treatment to younger comparator employees not in the protected class.[88]

In federal unlawful discharge cases, ancillary evidence of unfair termination may be sufficient to satisfy this fourth element even when a younger comparator is in the protected class.[89] Furthermore, in failure-to-hire cases, there is no requirement to prove that the injured employee was better qualified for the job than

---

is insufficient for a plaintiff in an ADEA disparate treatment case to show merely that an employer's proffered motivation is pretext).

[84] Meacham v. Knolls Atomic Power Lab., 461 F.3d 134, 146 (2d Cir. 2006), *vacated on other grounds*, 128 S. Ct. 2395 (2008) ("'[C]laims under the [New York State Human Rights Law] are analyzed identically to claims under the ADEA . . . .'" (quoting Smith v. Xerox Corp., 196 F.3d 358, 363 n.1 (2d Cir. 1999))).

[85] 29 U.S.C. § 631(a), (b) (2000); N.Y. EXEC. LAW § 296(3-a)(a) (McKinney 2005). An employee under the ADEA can be a job applicant or retiree if the alleged discriminatory action is related to his employment status. 29 U.S.C. 631(b) (2000), 29 U.S.C. §§ 623 (f)(2)(A) (2000).

[86] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[87] *See id.* Plaintiffs must satisfy a somewhat different set of elements when claiming that an employer has taken retaliatory action against an employee for asserting rights under the ADEA. *See* EEOC, EEOC DIRECTIVES TRANSMITTAL NO. 915.003, EEOC COMPLIANCE MANUAL 8-3–8-9 (1998), *available at* http://www.eeoc.gov/policy/docs/retal.pdf.

[88] Sailor v. Hubbell, Inc., 4 F.3d 323, 326 (4th Cir. 1993) (citing Herold v. Hajoca Corp., 864 F.2d 317, 319 (4th Cir. 1988), *cert. denied*, 490 U.S. 1107 (1989)).

[89] *See* O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 308 (1996) (holding that the ADEA "prohibits discrimination . . . on the basis of age, not class membership" and that age discrimination "is more reliably indicated by the fact that [the] replacement [is] substantially younger than by the fact that [the] replacement was not a member of the protected class."); *see also* EEOC, EEOC NOTICE NO. 915.002, ENFORCEMENT GUIDANCE ON O'CONNOR V. CONSOL. COIN CATERERS CORP. (1996), *available at* http://www.eeoc.gov/policy/docs/oconnor.html ("[A] prima facie showing of age discrimination in discharge does not require the plaintiff's replacement to be outside the protected age group.").

the comparator.[90]

Unlike some other classifications protected by federal equal protection law,[91] discrimination in favor of a traditionally disadvantaged group remains legal under the ADEA. In other words, a younger, unprotected worker cannot bring federal charges against an employer who unfairly gives preferential treatment to older, protected counterparts.[92]

Once a disparate treatment plaintiff has presented his or her prima facie case, the defendant-employer may rebut by "articulat[ing] some legitimate, nondiscriminatory reason" for its injurious decision,[93] which often takes the form of evidence that the comparator was objectively better-qualified.[94] "This burden is one of production, not persuasion"[95] and can be satisfied by even an arguably *illegitimate* reason.[96] Here, courts usually defer to employers' right to make their own business decisions, accepting all but the most implausible rationales and passing the issue to the trier of fact.[97]

The plaintiff then assumes the burden of persuasion to demonstrate by a preponderance of the evidence that the defendant's explanation is mere pretext[98] and to then convince a

---

[90] *See* Patterson v. McLean Credit Union, 491 U.S. 164, 187–88 (1989) (holding that the black petitioner in a Title VII case could carry her burden of persuasion without showing that she was better qualified for a job than the white applicant hired in her stead).

[91] The Equal Protection Clause of the Fourteenth Amendment, e.g., protects whites from racial discrimination and men from gender bias. *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 733 (1982) (holding that gender could not be used as a basis to exclude male students from a state-sponsored nursing program); Gratz v. Bollinger, 539 U.S. 244, 270–72 (2003) (barring the University of Michigan from using a system that virtually guaranteed admission to black students).

[92] *See* 29 U.S.C. § 631(a) (2000) (affording no protection to employees under the age of forty).

[93] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[94] *See, e.g.*, *id.* at 802–03 (stating that the employer's justification for not rehiring the employee was reasonable because the employee had engaged in illegal activities against the employer).

[95] Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000).

[96] A stated purpose that does not discriminate on the basis of age can be sufficient even if it illegally discriminates on some other basis. *See*, *e.g.*, Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993) (finding that, although a defendant's stated motivation violated ERISA guidelines, it generated "no disparate treatment under the ADEA [because] the factor motivating the employer [was] some feature other than the employee's age").

[97] *See* Purkett v. Elem, 514 U.S. 765, 768 (1995) (noting that this stage of the inquiry "does not demand an explanation that is persuasive, or even plausible" and that the persuasiveness of a defendant's explanation will ultimately be evaluated when brought before the trier of fact).

[98] *Reeves*, 530 U.S. at 143.

jury that the employer was instead motivated by age bias.[99]

D. Disparate Impact After City of Jackson

Disparate impact claims require a plaintiff to show by a preponderance of the evidence that a facially neutral employment policy or practice disproportionately harms older workers because the characteristic by which it differentiates individuals (such as length of tenure, vesting status, or lack of minor dependents) is in reality a proxy for age.[100] Unlike disparate-treatment claims, the defendant cannot defend itself against a disparate-impact charge by showing that it did not *intend* to discriminate on the basis of age.[101]

The courts have long been divided over whether disparate impact claims may be brought under the ADEA,[102] but a divided Supreme Court tentatively settled the issue in the 2005 *Smith v. City of Jackson* decision, where it unequivocally allowed an ADEA claim to be made under the disparate impact theory.[103] This holding expanded the reach of the statute enormously by relieving claimants of the need to prove discriminatory motive in age-discrimination suits.[104]

A prima facie case of workplace age discrimination under the disparate-impact model requires the plaintiff to:

(1) identify the employment practice or selection criteria being challenged;

(2) demonstrate that the practice has a disparate impact on older employees; and

---

[99] Saint Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 ("It is not enough . . . to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination.").

[100] *See* EEOC, Employment Tests and Selection Procedures, *supra* note 74. *See also* Caron v. Scott Paper Co., 834 F. Supp. 33, 38–39 (D. Me. 1993) (stating that the plaintiff must demonstrate in a disparate-impact case that the employee's justifications for the employment practice are a mere pretext for discrimination).

[101] *See* Raytheon Co. v. Hernandez, 540 U.S. 44, 52–53 (2003) ("Under a disparate-impact theory of discrimination, 'a facially neutral employment practice may be deemed [illegally discriminatory] without evidence of the employer's subjective intent to discriminate that is required in a "disparate-treatment" case.'" (alteration in original) (quoting Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 645–46 (1989)).

[102] Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993) ("[W]e have never decided whether a disparate impact theory of liability is available under the ADEA . . . and we need not do so here.").

[103] 544 U.S. 228, 240, 242–43 (2005) (holding that the ADEA authorizes recovery in a disparate impact case where police officers alleged that their employer illegally tied pay raises to their lengths of service).

[104] *See id.* at 250–51 (O'Connor, J., concurring) (stating that permitting disparate impact claims under the ADEA is an expansive reading of the statute).

(3) show that the practice has harmed employees or applicants because of their age.[105]

Such proof generally involves presenting statistical evidence sufficient to "raise an inference of causation."[106]

Prior to *City of Jackson*, the defendant would then have assumed the burden of either producing rebuttal statistics or asserting that its actions were "based on legitimate business reasons, such as job-relatedness or *business necessity*."[107] If the defendant met this burden, the plaintiff could prevail only by showing the employer's explanation to be pretextual or by establishing the existence of less discriminatory alternatives.[108]

After *City of Jackson*, these final prongs may no longer apply to disparate impact ADEA cases. Citing the *Jackson* holding, the Supreme Court in 2005 vacated the Second Circuit's *Meacham v. Knolls Atomic Power Laboratory* decision to uphold a $5 million award to older employees adversely affected by a workforce reduction.[109] Upon remand, the circuit court rejected the pre-*Jackson* "business necessity" test, which would have required the plaintiff to persuade the fact-finder either that the discriminatory aspect of the defendant's RIF served no legitimate business goal or that a nondiscriminatory alternative existed.[110] The court instead used *City of Jackson*'s "reasonableness" test, which requires plaintiffs to show that a challenged action is not "a *reasonable means* to the employer's legitimate goals."[111] It concluded that, in cases where employees can be distinguished by "reasonable factors other than age," a plaintiff can no longer win a disparate-impact case by merely finding a less-discriminatory alternative to the employer's actions.[112] Because the plaintiffs could not discharge this burden, the court ruled against them under both the ADEA and the New York State Human Rights Law.[113]

When the Supreme Court heard the case again in June 2008, the

---

[105] *See* Caron v. Scott Paper Co., 834 F. Supp. 33, 38 (D. Me. 1993).

[106] *Id.*

[107] *Id.* (emphasis added).

[108] *Id.* at 38–39.

[109] Knolls Atomic Power Lab., Inc. v. Meacham, 544 U.S. 957 (2005) (mem.), *vacating* Meacham v. Knolls Atomic Power Lab., Inc., 381 F.3d 56 (2d Cir. 2004).

[110] Meacham v. Knolls Atomic Power Lab., 461 F.3d 134, 140–41 (2d Cir. 2006), *vacated*, 128 S. Ct. 2395 (2008).

[111] *Id.* at 140 (emphasis added).

[112] *Id.* (citing Smith v. City of Jackson, 544 U.S. 228, 233 (2005)); *see also* 29 U.S.C. § 623(f)(1) (2000).

[113] *Meacham*, 461 F.3d at 146.

Court affirmed its support for *City of Jackson*,[114] finding for Knolls Atomic Power Laboratory and noting that an employer bears "both the burden of production and the burden of persuasion" to assert the affirmative defense that its actions were based on reasonable factors other than age.[115]

E. Standards of Proof

A plaintiff can certainly build a disparate treatment case around circumstantial evidence, but offering direct proof of motive in the form of ageist slurs or other incriminating behavior is a more common approach, and one that is likely to be more effective.[116] Such evidence must, however, be evaluated on a case-by-case basis and courts have not found every type of insult determinative, tending to be skeptical of general comments or remarks that were not contemporaneous with the alleged discriminatory action.[117]

In disparate impact cases, statistical proof is commonly offered to show that a reduction in (work)force (RIF) or other business decision had a disproportionate adverse effect on older employees.[118] But the courts, aware of how misleading such figures can be, tend to scrutinize them closely.[119]

F. Affirmative Defenses

The ADEA allows defendants to defend themselves by claiming that age (or, more likely, some job-related characteristic that correlates closely with age), is a "bona fide occupational qualification" (BFOQ) that is "reasonably necessary to the normal operation of the particular business."[120] This requires establishing either that the employer reasonably believed that substantially all

---

[114] Meacham v. Knolls Atomic Power Lab., 128 S. Ct. 2395, 2405 (2008).

[115] *Id.* at 2395.

[116] *See, e.g.*, Normand v. Research Inst. of Am., Inc., 927 F.2d 857, 863, (5th Cir. 1991) (citing evidence that defendants referred to older employees as "old buzzard[s]" and "old geezers").

[117] *See, e.g.*, EEOC v. Clay Printing Co., 955 F.2d 936, 938, 942 (4th Cir. 1992) (refusing to consider an employer's stated desire for "young blood" sufficient to establish a discriminatory motive for later firings).

[118] *See, e.g.*, Walther v. Lone Star Gas Co., 952 F.2d 119, 124 (5th Cir. 1992).

[119] *See, e.g.*, *id.* ("[I]n age discrimination cases . . . statistics are easily manipulated . . . ."). *See generally* Paul Grossman et al., *"Lies, Damned Lies, and Statistics": How the Peter Principle Warps Statistical Analysis of Age Discrimination Claims*, 22 LAB. LAW. 251, 251–68 (2007) (detailing the ways that statistical findings can be deceptive in age discrimination cases).

[120] 29 U.S.C. § 623(f)(1) (2000).

protected employees possess some job-related characteristic that prevents them from performing "'safely and efficiently,'"[121] or that it would have been impracticable to determine which protected individuals actually do possess such a characteristic.[122] The employer need establish only a rational basis for such a claim, but even this lenient requirement usually involves medical evidence and expert testimony about job-related risks and safety.[123] A similar defense can be mounted by asserting that an employer distinguishes between protected and unprotected employees by using some "reasonable factor[] other than age" (RFOA), a determination that "must be decided on the basis of all the particular facts and circumstances surrounding each individual situation."[124]

The ADEA establishes other safe harbors for employer actions taken in compliance with statutory "bona fide seniority system[s],"[125] "bona fide employee benefit plan[s],"[126] and certain types of "early retirement incentive plan[s]."[127] A defendant can also claim a statutory exemption for forcing the retirement of an employee in a "bona fide executive or a high policymaking position" who is at least sixty-five years old and who will receive aggregate retirement benefits of "at least $44,000" per year.[128] Finally, the ADEA and EEOC regulations expressly exempt elected state and local public officials and certain members of their staffs,[129] contract employees "serving under a contract of unlimited tenure,"[130] and police officers and firefighters.[131]

Employers who compel a terminated employee, with or without consideration, to waive the right to sue under the ADEA are not always able to use that waiver as a defense, much less to dismiss a case. In addition to statutory requirements for "knowing and voluntary" consent,[132] courts add stringent constraints that make

---

[121] W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 414 (1985) (quoting Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 235 (5th Cir. 1976)).

[122] *Id.* at 414–15.

[123] *See, e.g.*, *Usery*, 531 F.2d at 228, 238.

[124] *See* 29 C.F.R. § 1625.7 (2007).

[125] 29 U.S.C. § 623(f)(2)(A) (2000).

[126] 29 U.S.C.A. § 623(f)(2)(B) (West 1999).

[127] 29 U.S.C.A. § 623(f)(2)(B)(ii).

[128] 29 U.S.C. § 631(c)(1) (2000); 29 C.F.R. § 1625.12.

[129] 29 U.S.C. § 630(f).

[130] 29 C.F.R. § 1625.11.

[131] 29 U.S.C.A. § 623(j) (West 1999 & Supp. 2008).

[132] 29 U.S.C. § 626(f)(1); 29 C.F.R. §§ 1625.22–23; *see, e.g.*, Blakeney v. Lomas Info. Sys., Inc., 65 F.3d 482, 484–85 (5th Cir. 1995) (characterizing waivers as "voidable contract[s]" because of doubts about whether discharged employees signed them with knowing and

waivers difficult to enforce.[133] A plaintiff may never, however, bring suit to challenge a signed agreement arrived at through valid arbitration procedures.[134]

G. Remedies

A successful ADEA or New York State Human Rights Law claim entitles a plaintiff to a broad variety of equitable remedies that include injunctive relief, reinstatement, hiring, and promotion.[135] Legal remedies include back pay, front pay (income that an employee would be earning in the future had she been retained), and attorney's fees.[136] Unlike Title VII, the ADEA does not authorize punitive or compensatory damages,[137] but it does provide for liquidated (doubled) damages in cases of "willful violations[,]"[138] and the New York State Human Rights Law does allow compensatory damages for emotional distress.[139] Also unlike Title VII and the American With Disabilities Act, neither statute places caps on damage awards.[140]

IV. TAKING CARE OF BUSINESS IN A POST-*SIDLEY* WORLD

With the law now less willing to tolerate egregious behavior in its

voluntary consent).

[133] Bennett v. Coors Brewing Co., 189 F.3d 1221, 1228–29 (10th Cir. 1999) ("[T]he listed statutory requirements are a *minimum* for determining whether a waiver is knowing and voluntary.").

[134] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) ("[H]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue" (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

[135] 29 U.S.C. § 626(b).

[136] *See, e.g.*, 29 U.S.C. 633a(c); *see also* Employment Law Information Network, Age Discrimination in Employment Act, http://www.elinfonet.com/ADEAsum.php (last visited Oct. 14, 2008).

[137] *See* STATE OF WISCONSIN, DEP'T OF WORKFORCE DEV., EQUAL RIGHTS DIV., CIVIL RIGHTS BUREAU, ERD-11055-P, FAIR EMPLOYMENT LAW AND FAMILY MEDICAL LEAVE ACT, http://dwd.wisconsin.gov/dwd/publications/erd/pdf/erd_11055_pweb.pdf (last visited Oct. 14, 2008).

[138] § 626(b).

[139] *See* 18A N.Y. JUR. 2D *Civil Rights* § 197 (1999).

[140] Robert E. Dinardo, Legal Issues in the Workplace, http://www.jacobowitz.com/workplace.htm ("[T]here is a 'cap' or maximum award permitted, exclusive of attorneys fees, under Title VII and the ADA, [but not the ADEA,] based upon the number of employees, ranging from $50,000 to $300,000. On the other hand, [the] New York State statute has no caps."); EEOC, Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms (July 6, 2000), http://www.eeoc.gov/policy/docs/conting.html ("ADEA . . . damages . . . are not subject to statutory caps . . . .").

own back yard, there is greater danger that even good-faith employers will wind up in litigation because they neglected to take simple steps necessary to insulate themselves from liability. So what can a law firm do when it finds itself saddled with a Denny Crane willing and savvy enough to challenge any employment decision or policy he considers discriminatory? Few definitive answers exist in today's transitionary environment, but there are certainly plenty of general common-sense guidelines that can minimize a firm's risk of litigation.

A. Put Everything in Writing.

As in any lawsuit, your defense against an age-discrimination claim will be bolstered by your ability to back up your assertions in black-and-white.[141] Document everything you do during potentially litigious actions and be able to demonstrate in your writing that your corporate culture does not foster an attitude of discrimination.[142] Implement formal anti-discrimination policies and take steps to ensure that they are enforced in accordance with state and federal law.[143] Give every employee printed copies of your materials, be sure to comply with ADEA informational-posting requirements, and insist that each employee periodically sign a statement that they have read and understand the latest version of your anti-discrimination literature.[144] None of this may be enough to ward off litigation, but failure to take these basic steps to

---

[141] Unlike recollected conversation, a properly drafted document is not subject to the whims of a plaintiff's memory and may not generally be characterized as hearsay. *See* FED. R. EVID. 803. *See also* Eric J. Sidebotham, *How to Use Documentation to Decrease the Likelihood of Litigation*, 8 PSYCHOLOGIST-MANAGER J. 131, 131 (2005) ("Discrimination lawsuits can be a plague to employers [and] [p]roper documentation of the employment relationship is an important means of avoiding these lawsuits or defending against them.").

[142] *See*, *e.g.*, MARK H. ALCOTT, AM. BAR ASS'N, REPORT 10A 11 (2007), http://www.abanet.org/leadership/2007/annual/docs/tena.doc (detailing the recommendations of the New York State Bar Association's Special Committee on Age Discrimination in the profession and noting that that employers may lodge affirmative defenses where, *inter alia*, they show that presumptively discriminatory actions are in line with a documented non-discriminatory seniority system or benefit plan, or where age is "a bona fide occupational qualification reasonably necessary to the normal operation of the particular business); s*ee also* 29 U.S.C. §623(f) (2000) (describing age-related lawful practices).

[143] *See* What You Need to Know about Age Discrimination, http://www.expresspros.com/us/exchange/2008/05/ (last visited Oct. 14, 2008) ("Having a company policy prohibiting all forms of harassment and discrimination based on any protected class, like age, race, sex, religion, and disability is important to protect your company and employees. Also remember to ensure that your policy is compliant with federal and state laws.").

[144] *See id.; see also* 29 U.S.C. § 627 (2000) (describing notice requirements).

document your actions and intent will work against you in court.

B. Educate Your People.

Mandate sensitivity training for managers and supervisors, and schedule sessions for new hires as soon as possible.[145] Don't merely try to avoid litigation. Strive to create an educated atmosphere of reasonable accommodation for the special needs of older workers where supervisors are comfortable offering employees options like flexible scheduling, part-time workloads, and assignment to non-billable tasks like mentoring and marketing.[146]

Understanding the legal technicalities of age discrimination will also facilitate your firm's ability to comply and increase its flexibility in sticky situations. Every person on your team should know which types of behavior and which employees are within the law and be aware of statutory immunities available for actions taken against certain classes of employees or pursuant to qualified seniority systems or benefit plans.[147] You should also understand and document the procedural rules that apply to your specific type of business.[148]

C. Terminate with Skill.

Don't simply fire an aging employee on pretext the first time she makes a mistake. If you concoct a phony reason for a discharge (or for any other potentially actionable decision), you'll pay a steep price when the truth comes out at trial.[149]

---

[145] *See* What You Need to Know about Age Discrimination, *supra* note 143 ("Train all employees who have responsibilities that fall under the ADEA's protections—hiring, compensation, benefits, promotions and training—to be compliant with the law. Your organization can be held liable for their actions, particularly if no effort is made to train them.").

[146] *Cf. id.* (suggesting ways to create a work environment without discrimination); More Ideas to Prevent Age Discrimination, http://www.workforce.com/archive/article/22/00/47.php (describing implications of a 1999 settlement between Bull NH Information Systems Inc. and the Massachusetts Commission against Discrimination on employer policies and procedures).

[147] More Ideas to Prevent Age Discrimination, *supra* note 147 ("Train supervisors on age discrimination law and require them to report suspected violations to the company's EEO officer.").

[148] *See id.*

[149] *See* Posting of Richard Tuschman to Florida Employment & Information Law Blog, http://www.flemploymentlawblog.com/articles/age-discrimination-1 (July 17, 2008, 19:41 EST), (warning employers to "[s]elect factors to be used for layoff decisions with great care and review their potential defensibility with experienced counsel," "make such factors turn as much as possible on more objective or measurable indicia," and [t]horoughly train managers . . . to make their decisions as objective as possible . . . .").

Harassing a worker into quitting does not improve your position; it merely changes the cause of action to unlawful *constructive* discharge.[150] Paying a discharged employee to waive his right to sue can backfire when a court later voids the release and neglects to order the worker to repay the consideration he received for his signature.[151] Nor do New York's at-will employment rules provide an escape hatch. Anti-discrimination laws like the ADEA and New York State Human Rights Law create express exceptions to the at-will rules under which almost every employee can claim some sort of protected characteristic.[152]

So, think strategically. Justify a decision to demote or discharge with a paper trail of escalating disciplinary responses to earlier infractions.[153] Craft nondiscriminatory performance standards and retirement guidelines that show your actions to be fair and objective.[154] Old-school forced-retirement policies are today an endangered species,[155] but a good starting point for any firm hoping to bring its personnel procedures into the twenty-first century is the American Bar Association's 2007 Report 10A, which proposes age-neutral criteria for evaluating older lawyers and describes ways to extend their productivity into their senior years.[156]

D. Respond with Grace.

Pay attention when a worker accuses you or one of your employees of discrimination. Respond promptly and let the aggrieved employee know that you take the charge seriously and plan to right the situation before it winds up in court.[157] If emotions

---

[150] *See* Pa. State Police v. Suders, 542 U.S. 129, 141 (2004) ("[U]nder the constructive discharge doctrine, an employee's reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes."); BLACK'S LAW DICTIONARY 495 (8th ed. 2004) (defining "constructive discharge" as a "termination of employment brought about by making the employee's working conditions so intolerable that the employee feels compelled to leave.").

[151] *See* 29 U.S.C. § 626(f)(1) (2000); 29 C.F.R. § 1625.22–23 (2008).

[152] *See* EEOC, Discriminatory Practices (Sept. 2, 2004), http://www.eeoc.gov/abouteeo/overview_practices.html (listing bases upon which federal employment-discrimination actions can be brought in New York despite the state's at will rules).

[153] *See supra* notes 141–44 and accompanying text.

[154] *See* Posting of Richard Tuschman, *supra* note 149.

[155] *See* BARBARA J. FICK, THE AMERICAN BAR ASSOCIATION GUIDE TO WORKPLACE LAW 88 (1997) ("The ADEA has outlawed mandatory retirement.").

[156] *See* ALCOTT, *supra* note 142, at 12.

[157] *See* What You Need to Know about Age Discrimination, *supra* note 143 ("Investigate complaints immediately. It's critical to create a formal process to serve as a guide to

are running high, consider alternative dispute resolution. Quick response and a willingness to give the aggrieved party a chance to present her side of story can sometimes be enough to resolve an issue at this point.[158]

Most importantly, do not even think about retaliating.[159] If the worker has no case, a jury will figure that out. But no matter how solid your position, if you try to strong-arm an employee, you will wind up on the wrong side of the gavel.[160]

All of this is merely an introduction to the pitfalls that a sloppy law firm can face when it runs afoul of today's rapidly evolving age-discrimination law. With influential cases like *Meacham* only recently decided and others surely waiting in the wings, this branch of employment law is sure to remain a wild card for the foreseeable future. The firms that manage to emerge unscathed will be those that take the time to educate themselves, scrupulously document their compliance efforts, and place the highest priority on always treating their employees in good faith.

investigate complaints of harassment and discrimination and to investigate all complaints immediately. Employers who ignore complaints or do not respond in a timely manner make themselves more vulnerable to paying large settlements . . . .")

[158] *Id.*

[159] *See* EEOC, Facts About Age Discrimination, *supra* note 36 ("It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on age or for filing an age discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under the ADEA.").

[160] *See id.*