

The 7 Age Discrimination Cases That Every Employment Attorney Should Know and Understand

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The 7 Age Discrimination Cases That Every Employment Attorney Should Know and Understand

I. A Short History of the Age Discrimination in Employment Act (ADEA)

When crafting Title VII of the Civil Rights Act of 1964, Congress did not include age discrimination in its list of prohibited types of employment discrimination, only race, color, religion, sex, and national origin. Three years later, however, Congress passed the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* [hereinafter “ADEA”]. Almost immediately after passage of Title VII, Congress directed the Secretary of Labor to report on age discrimination, who found substantial evidence of widespread discrimination against older workers. Employers barred workers over 65 from almost all jobs in the private sector, barred workers over 55 from half of all jobs, and barred workers over 45 from a fourth of all jobs. More and more of the unemployed were older workers. State bans on age discrimination were inconsistent or nonexistent, and states were diverting resources to tackle the forms of discrimination that Title VII had just proscribed.

Congress passed the ADEA in December 1967. In pertinent part, it provides:

It shall be unlawful for an employer (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual’s age . . . [or] (2) to limit, segregate, or classify his [or her] employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his [or her] status as an employee, because of such individual’s age.

29 U.S.C. § 623(a). By 1986, over one fourth of all discrimination charges filed with the Equal Employment Opportunity Commission (EEOC) were age charges.

Congress determined that older workers were denied equal employment opportunities as a result of invalid stereotypes. Initially, the ADEA protected only workers between 40 and 70 years of age. In 1986, Congress removed the upper age cap. In part, this was not seen as a substantial change to the impact of the law, as few individuals filing claims under state law were over age 70.

In 1990, Congress again amended the ADEA by passing the Older Workers Benefit Protection Act [hereinafter “OWBPA”]. The OWBPA added certain statutory restrictions relating to the release of ADEA claims, hoping to prevent involuntary or ill-

informed waivers of age claims, with greater restrictions yet in the context of releases in layoff situations. The OWBPA also permits employers to operate “bona fide employee benefit plans” that contain age-based distinctions if those distinctions are justified by cost.

Just as society came to believe that employees should not have to retire involuntarily at any age (leading to the removal of the upper age cap), this author is not the only person who believes that 40 is “young” and finds it difficult to understand how employers ever could conclude that workers in their 40s are too old and in need of replacement. More than once, this author has thought a worker was too young because he was only in his 40s and had not yet been around the block enough times. It remains to be seen whether Congress will adjust the lower threshold for ADEA coverage. The Minnesota Human Rights Act (MHRA), by contrast, prohibits age discrimination against workers at least 18 years of age. Minn. Stat. § 363A.03, subd. 2.

II. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)

I know. I know. You are thinking the author got confused on the very first case because McDonnell Douglas Corp. v. Green is definitely not an age discrimination case. However, this case is vital to any understanding of the ADEA, as most courts have adopted the McDonnell Douglas “three-part test” to analyze disparate treatment (intentional) age discrimination claims. Most importantly, McDonnell Douglas created a way for plaintiffs to establish a violation of the anti-discrimination laws without any “smoking gun” or direct evidence. Such direct evidence was and is not always easy to find, particularly with sophisticated discriminators who know enough, for example, to paper the file and keep their prejudices unspoken. McDonnell Douglas articulated a way for plaintiffs to prevail using “indirect” evidence. Given that most discrimination claims allege intentional discrimination and few have strong evidence of direct or obvious bias, McDonnell Douglas is applicable in most discrimination lawsuits in one way or another. As courts have by and large adopted McDonnell Douglas for age cases, see, e.g., Goins v. West Grp., 635 N.W.2d 717, 722-24 (Minn. 2001) (MHRA uses McDonnell Douglas in Minnesota Human Rights Act cases when no direct evidence of discrimination exists), this case definitely is an opinion that every employment attorney should know and understand.

A. Facts of McDonnell Douglas

The plaintiff in this case, Percy Green, was a civil rights activist whom McDonnell Douglas terminated as part of a broader reduction in force. After his termination, he protested that his discharge and McDonnell Douglas’ general hiring practices were racially motivated. He and others stalled cars on the main roads leading to the company’s plant in an effort to disrupt a shift change. Green refused the police’s request to move his

car and he was arrested and pleaded guilty to the charge of obstructing traffic. Later, protesters locked a door on a plant door, preventing certain employees from leaving the building. Green apparently knew about this later incident in advance but his role in it was unclear. Shortly thereafter, Green applied for reemployment at McDonnell Douglas, and the company not surprisingly refused to rehire him. Green brought an action under Title VII alleging McDonnell Douglas did not rehire him because of his race and involvement in civil rights activities. The trial court dismissed Green's discrimination claim.

B. Holding of McDonnell Douglas

The Court addressed the "critical issue" of the "order and allocation of proof in a private, non-class action challenging employment discrimination." 411 U.S. at 800. The Court's ruling later famously became the McDonnell Douglas three-part test or "judicial minuet."

At the first step, the plaintiff must carry the initial burden of "establishing" a prima face case of discrimination. This may be done by showing (i) he belongs to a protected class, (ii) he applied and was qualified for a job for which the employer was seeking applicants, (iii) despite his qualifications, he was rejected, and (iv) after his rejection, the employer continued to seek applicants. Later courts have modified this prima face case depending upon the adverse action alleged and the specific facts of the case. 411 U.S. at 802 n.13 (foreseeing the need for this). Whether this was intended as a burden of proof or a burden of production, courts have held this initial burden is typically easy for plaintiffs to "establish."

At the second step, the burden shifts to the employer to "articulate" some legitimate, nondiscriminatory reason for the employee's rejection. Again, the Court calls this a "burden of proof" but later courts again typically discuss this as a burden of production that is easy to "articulate."

Title VII does not allow employers to use an employee's conduct as a "pretext" for discrimination, so at the third step, employees must be "afforded a fair opportunity to show the employer's stated reason" for the employee's rejection "was in fact pretext." Id. at 804. Especially relevant would be evidence that employees of a different race were involved in acts against the employer "of comparable seriousness" to the stall-in were retained or rehired. McDonnell Douglas had the right to refuse to rehire someone engaged in unlawful, disruptive acts, but "only if the criterion is applied alike to members of all races." Id. This is the origin of the "similarly situated" argument plaintiffs make to establish pretext. The Court noted other evidence that might be relevant to pretext, such as the employee's treatment of the employee during his prior term of employment, the employer's reaction to the employee's legitimate civil rights activities, or the employer's

general policy and practice with regard to minority employment. Id. “In short, on the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision.” Id. at 805.

C. Subsequent Case Law

1. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981)

A few years after McDonnell Douglas, the Supreme Court revisited its holdings in that case. Also a Title VII case, Burdine involves a female plaintiff who claimed gender discrimination when her employer failed to promote her and then terminated her.

Burdine describes the McDonnell Douglas “basic allocation of burdens and order of presentation of proof” in Title VII cases. 450 U.S. at 252. The division of “intermediate evidentiary burdens” serves to bring the litigants and the court expeditiously to the plaintiff’s ultimate burden of persuasion that intentional discrimination occurred. Id. at 253.

The burden of establishing a prima facie case is not an onerous one. It eliminates the most common nondiscriminatory reasons for the adverse employment action and creates a presumption of discrimination that, if believed and un rebutted, requires judgment for the plaintiff. The employer’s burden is a burden of production, not proof, of a legally sufficient explanation for its actions. This rebuts the plaintiff’s presumption, and the proof moves to a “new level of specificity.” This also allows the plaintiff a full and fair opportunity to demonstrate pretext. The plaintiff then must demonstrate that the employer’s proffered reason was not the true reason for its action. Ultimately, the plaintiff must prove she was the victim of intentional discrimination, either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence. 450 U.S. at 253-56.

Burdine overruled the lower court and made clear that the employer’s burden is a burden to produce evidence and not a burden of proof. The employer must, however, produce evidence that is clear and reasonably specific so as to allow the plaintiff an opportunity to discredit it. The Court stated its confidence that a plaintiff would not find it particularly difficult to prove that a proffered explanation lacking a factual basis is a pretext. 450 U.S. at 257-58. 35 years later, the Court might not be quite as confident.

2. St. Mary’s Honor Center v. Hicks, 509 U.S. 502 (1993)

In yet another Title VII case, the Court further clarified the final pretext step of McDonnell Douglas. In this case, the black plaintiff alleged a violation of Title VII when his employer demoted and then discharged him. Again, the Court clarified that the employer’s burden is one of production only and does not shift the plaintiff’s burden of proving intentional discrimination. 509 U.S. at 506-07. If this burden of production is

met, the presumption of discrimination raised by the prima facie case “drops out” and the plaintiff retains the ultimate burden of proving he was the victim of intentional discrimination. If the defendant meets its burden of production, the entire McDonnell Douglas framework is no longer relevant.

On the other hand, if any rational trier of fact would believe plaintiff’s prima facie case and the defendant did not meet its burden of producing evidence of a legitimate, nondiscriminatory motive, the plaintiff should prevail as a matter of law. 509 U.S. 509-10.

Thus, in a case in which the employer has met its burden of production but the factfinder disbelieves the employer’s proffered explanation, this disbelief, particularly when accompanied by a suspicion of mendacity, may, together with the prima facie case, permit the trier of fact to infer the ultimate fact of intentional discrimination. On the other hand, rejection of the employer’s proffered reasons does not compel judgment for the plaintiff. 509 U.S. at 511.

The Court did not explain the circumstances in which disbelief of the employer’s explanation would be sufficient to justify a finding of discrimination or how strong the accompanying prima facie case needs to be in order to, combined with disbelief of the employer’s explanation, allow a finding of discrimination.

3. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000)

Reeves is actually an ADEA case! Reeves, like several earlier Court cases, assumes but does not decide that McDonnell Douglas is applicable to ADEA cases.

Reeves continues the evolution of the McDonnell Douglas doctrine, particularly with the question arising from Hicks: when can a plaintiff establish pretext and therefore intentional discrimination merely by showing that the employer’s explanation for its actions is false? If the employer’s explanation is false, in other words, does that necessarily mean its real reason was discriminatory? When is a factfinder permitted to infer a discriminatory motive when all that has been proved is that the employer’s explanation is unworthy of credence?

The first point the Court makes is that, even when the McDonnell Douglas framework drops out of the picture, the factfinder still may examine the strength of the plaintiff’s prima facie case in order to determine whether pretext exists. 530 U.S. at 143. The lower court erred when it concluded that the plaintiff had failed to show that age motivated the employer because the court had failed to review the plaintiff’s prima facie case or the evidence challenging the employer’s explanation for its decision. The Court

reiterated its ruling in Hicks: rejection of the employer's explanation does not compel but allows a finding of discrimination. Indeed, proof that the employer's explanation is unworthy of credence is one form of circumstantial evidence that is probative of intentional discrimination. 530 U.S. at 147.

"In appropriate circumstances," then, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. This is not to say that such a showing by the plaintiff will always be adequate. There will be some situations where the plaintiff has established a prima facie and set forth sufficient evidence to reject the employer's explanation, yet no rational factfinder could conclude that the action was discriminatory. "Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law." 530 U.S. at 148-49.

4. O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996)

This case addresses an unrelated point about the prima facie case under McDonnell Douglas. In this case, a 56-year-old plaintiff was fired and replaced by a 40-year old. Until this case, the prima facie case normally was articulated as requiring the plaintiff to show he or she was replaced by someone outside of the protected group, i.e., under 40 years of age. The Court made clear that the ADEA protects workers because of their age and they suffer discrimination if replaced by a younger worker, regardless of whether that younger worker also is in the protected class. "The fact that one person in the protected class has lost out to another worker in the protected class is thus irrelevant, so long as he has lost out *because of his age*." 517 U.S. at 312.

Notwithstanding the O'Connor case, employers have had great success making two slightly different arguments. First, numerous cases hold that if the same decisionmaker hires a person and then within a short period of time takes an adverse employment action against them, this cannot be age discrimination. For example, if an employer hires someone when they are 52 and then terminates that person when she is 53, it makes little sense to argue that the termination involved an age bias because that age bias should have led to the decisionmaker not hiring the person in the first place.

Second, and similarly, if the employer terminates the plaintiff and then replaces him with another employee only a year or two younger than the plaintiff, courts will not draw an inference of age bias. The replacement must be significantly younger to support a prima facie case of age discrimination. O'Connor, 517 U.S. at 312-13 ("the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of

age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class”).

D. The Law of Pretext

We are left with little guidance from the Supreme Court as to when disproving the employer’s proffered explanation for its adverse action toward the plaintiff is sufficient to create at least a triable question of fact with regard to “pretext.” Numerous federal and Minnesota courts have addressed this thorny issue, and it is fair to say the cases are very fact specific, and generally trending toward making it increasingly difficult to establish pretext. In 2015, this author’s article at the UMELI related exclusively to this topic of establishing pretext. Suffice it to say that plaintiffs point to a wide variety of factual situations as part of their claim of pretext, but with mixed success.

In Phillips v. Mathews, 547 F.3d 905 (8th Cir. 2008), for example, the Eighth Circuit noted:

An employee may prove pretext by demonstrating that the employer’s proffered reason has no basis in fact, that the employee received a favorable review shortly before he was terminated, that similarly situated employees who did not engage in the protected activity were treated more leniently, that the employer changed its explanation for why it fired the employee, or that the employer deviated from its policies.

Plaintiffs should review the case law and assert as many of the types of pretext as it can, and argue that individually and collectively the evidence of pretext is sufficient to allow a factfinder to conclude that a prohibited characteristic was the real reason for the adverse employment action in question.

III. Lorillard v. Pons, 434 U.S. 575 (1978)

Pons is one of several Supreme Court cases resolving procedural disputes or issues under the ADEA. Although these procedural issues are now well-settled, their resolution was important to litigants during the early years of the ADEA. The author has lumped several procedural cases together and cheated by calling them “one” of the cases that every employment lawyer should know. In fact, of course, knowing the procedural rules is critical to the plaintiff getting heard on the substance of his or her claim.

A. Facts of Pons

In this case, the plaintiff brought an ADEA claim and demanded a jury trial. The district disallowed a jury trial but the Fourth Circuit allowed an interlocutory appeal and

ruled that the plaintiff had a right to a jury trial under the seventh amendment and the ADEA. 434 U.S. at 576-77.

B. Holding of Pons

The Supreme Court affirmed, establishing that plaintiffs in ADEA cases have a right to a jury trial. The statutory history of the ADEA is complicated, in part because Congress attempted to model the ADEA after existing statutes including the National Labor Relations Act (NLRA), the Fair Labor Standards Act (FLSA), and Title VII, creating “something of a hybrid.” 434 U.S. at 578. Ultimately, violations of the ADEA were to be treated as violations of the FLSA. As with the FLSA, the Secretary of Labor may file suit on behalf of an aggrieved individual for injunctive and monetary relief. Additionally, the ADEA authorizes private civil actions for legal and equitable relief. 29 U.S.C. § 626(b), (c).

It had been long established that the FLSA provides a right to jury trial. Congress intended that the ADEA be enforced in accordance with the “powers, remedies, and procedures” of the FLSA. 29 U.S.C. § 626(b). When enacting the ADEA, Congress was aware of and made a number of changes to the FLSA remedies and procedures. Congress made clear it intended to incorporate fully the remedies and procedures of the FLSA except for the changes it expressly made. 434 U.S. at 581-83. Congress provided for “legal” relief under the ADEA; when legal relief is available and legal rights are determined, the seventh amendment provides a right to jury trial. Id. at 583.

C. Other ADEA Procedural Cases

1. Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979)

The procedural rules related to ADEA claims are a bit more complicated than those under Title VII. Section 14(b) of the ADEA requires that, in those states like Minnesota that have a state equivalent of the ADEA, a plaintiff may not bring an ADEA claim before the expiration of 60 days after commencing proceedings under state law, unless those proceedings already have been terminated. 29 U.S.C. § 633(b). Evans simply reaffirms the requirement of this statute, holding that the ADEA requires an aggrieved person to resort to appropriate state administrative proceedings. 441 U.S. at 754-58. In Minnesota, this means ADEA plaintiffs must file a charge of age discrimination with the Minnesota Department of Human Rights, and wait at least 60 days before starting an ADEA lawsuit. Unlike in Title VII cases, however, an individual does not need to obtain a Right to Sue Letter prior to an ADEA suit.

Evans also holds that the state proceedings that must be commenced do not have to be filed within whatever time limits are specified by state law. In other words, an

ADEA plaintiff may file an untimely charge of discrimination with a state agency and still bring suit under the ADEA as long as the plaintiff has waited at least 60 days. 441 U.S. at 759-762. State procedural defaults and limitations periods cannot govern the efficacy of the federal remedy. *Id.* at 762.

2. Astoria Federal Savings and Loan Ass'n v. Solimino, 501 U.S. 104 (1991)

In this case, the plaintiff had filed a charge of age discrimination with the EEOC. Under a worksharing agreement, the EEOC referred his claim to the New York state agency responsible for claims under that state's equivalent of the MHRA. That agency found no probable cause under state law to believe that age discrimination had occurred, and its decision was upheld on administrative review. Rather than appealing that decision to state court, the employee sued under the ADEA in federal court on the same factual allegations. The district court dismissed the plaintiff's lawsuit, but the court of appeals reversed, ruling that the ADEA denies preclusive (collateral estoppel) effect to such state administrative proceedings.

This case involves the application of the doctrine of administrative estoppel, where an administrative agency has made determinations of potentially preclusive effect. Here, the appropriateness of this doctrine depends upon legislative intent. The Court found that the procedural requirements of the ADEA, discussed in Evans above, demonstrate that Congress did not intend state agency findings to have preclusive effect. The ADEA allows employees to file a federal court lawsuit if he or she has waited at least 60 days before commencing state proceedings. Such federal proceedings would be *pro forma* if state administrative findings were to be given preclusive effect. After considering a number of other issues relating to legislative intent, the Court concluded that Congress did not intend for state agencies to prevent federal courts from making their own determinations about whether the ADEA has been violated. 501 U.S. at 110-14.

IV. Trans World Airlines v. Thurston, 469 U.S. 111 (1985)

A. Facts of Thurston

After the ADEA prohibited mandatory retirement in 1978, 29 U.S.C. § 623(f)(2), TWA adopted a policy that did not require pilots to retire at age 60 but did require they move to a flight engineer position. Under the policy, if an employee was still a captain/pilot when he or she turned 60, the captain/pilot could remain an employee only if he or she was able to move to a flight engineer position through the bidding procedure in the collective bargaining agreement. If there was no flight engineer vacancy before the captain's 60th birthday or if the captain lacked sufficient seniority to bid successfully for a vacancy, the captain was retired. Captains were allowed to bump less senior flight

engineers in general, but were not allowed to bump less senior flight engineers when they turned 60. 469 U.S. at 115-17.

B. Holding of Thurston

The Court found that TWA's policy discriminated on the basis of age. The ADEA does not require TWA to grant transfer privileges to disqualified captains. But if it does grant some disqualified captains the privilege of bumping less senior flight engineers, it may not deny this opportunity to others because of their age. 469 U.S. at 120-21.

The Court found McDonnell Douglas inapplicable because TWA's policy was discriminatory on its face and constituted direct evidence of discrimination. 469 U.S. at 121.

The Court then examined two of TWA's affirmative defenses. TWA first argued that the discharge was lawful because age is a "bona fide occupational qualification" (BFOQ) for the position of captain. 29 U.S.C. § 623(f)(1). However, the plaintiffs did not challenge TWA's rule that captains are not allowed to serve in that capacity after reaching the age of 60. The transfer rule was a separate policy, preventing qualified 60-year-olds from working as flight engineers, and age under 60 is not a BFOQ for a flight engineer. 469 U.S. at 122-23.

TWA next argued the discharge was lawful because it was part of a "bona fide seniority system." 29 U.S.C. § 623(f)(2). The Court's response demonstrates the circular logic of this defense, holding that any seniority system that includes the challenged practice is not bona fide because it may not require or permit the involuntary retirement of a protected individual because of his age. Because captains disqualified for reasons other than age are allowed to bump less senior flight engineers, the mandatory retirement was age-based and thus not bona fide. 469 U.S. at 124.

Separately, the Court addressed the finding that TWA's discrimination was "willful," entitling the plaintiff to double damages. The Court approved the standard enunciated by the court of appeals: a violation is willful if the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA. The Court rejected a lower burden for the plaintiff, that a violation is willful if the employer simply knew of the potential applicability of the ADEA, in part because this would lead to an award of double damages in almost every case. Instead, Congress intended a two-tiered liability scheme. 469 U.S. at 127-28. There was no evidence in this case that TWA was advised by counsel that its new transfer policy discriminated against captains on the basis of age. TWA simply could have overlooked the challenged aspect of the new plan. Id. at 129-30.

V. Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993)

A. Facts of Biggins

The employer fired Biggins when he was 62 years old and only a few weeks short of the years of service he needed for his pension to vest. A jury found a willful violation of the ADEA under Thurston, as discussed above. The employer's pension plan had a 10-year vesting period, and Biggins would have hit the 10-year mark a few weeks after his termination.

B. Holding of Biggins

This case discusses a fact pattern that arises frequently: the employer frequently claims it is acting on the basis of a factor, such as an employee's pension status or seniority, that is empirically correlated with age. Biggins clarifies that there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age. 507 U.S. at 608-09. A disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence upon the outcome. Id. at 610.

Although there is a correlation between age and pension status or seniority, age and years of service are "analytically distinct," an employer can take account of one while ignoring the other. In Biggins' case, for example, the decision to terminate would not be the result of an inaccurate and denigrating generalization about age, but an accurate judgment about the employee, that he is close to vesting. Separately, an employer cannot lawfully fire an employee in order to prevent his pension benefits from vesting, as such conduct is actionable under ERISA as the court of appeals correctly found in affirming judgment for the plaintiff under that statute. 507 U.S. at 612.

Moreover, there may be circumstances in which an employer targets employees with a particular pension status on the assumption that these employees are likely to be older or in which an employer is motivated both by the employee's age and his pension status. However, the employer does not violate the ADEA solely by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service. 507 U.S. at 612-13.

In this case, the plaintiff had some other evidence of ADEA liability. The Court remanded the case to reconsider whether the jury had sufficient evidence to find an ADEA violation.

Separately, the Court affirmed its ruling in Thurston regarding the willfulness standard for liquidated or double damages under the ADEA: whether the employer knew

or showed reckless disregard for the matter of whether its conduct was prohibited by the statute. Once a willful violation has been 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. 507 U.S. at 617. The Court added this last point in response to a number of cases interpreting Thurston with which it disagreed.

VI. McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995)

A. Facts of McKennon

McKennon addresses the doctrine of “after-acquired evidence,” as that term has evolved. The plaintiff in this case was 62 when she was terminated as part of a reduction in force after 30 years working for her employer. During the plaintiff's deposition, she revealed that during her last year of employment, she had copied several confidential company financial documents and shown them to her husband. After the deposition, the employer wrote the plaintiff and told her that removal and copying of the documents was a violation of company policy and had it known of this misconduct it would have discharged her at once. 513 U.S. at 354-55.

B. Holding of McKennon

The district court granted summary judgment for the employer, holding that the plaintiff's misconduct was a complete bar to her ADEA claim and that she had no remedy even if discrimination occurred. The Sixth Circuit affirmed. The Supreme Court reversed.

The Court assumed that the plaintiff was discharged solely because of her age and the misconduct was so grave that she would have been immediately discharged following any disclosure of the misconduct. The Court reiterated the public policy reasons supporting the ADEA's anti-discrimination provisions, and indicated that the lower courts' ruling would allow illegal discrimination to go completely unpunished. The court distinguished mixed motives cases, because in this situation the employer could not have been motivated by knowledge it did not have at the time of the employment decision.

The Court ruled, however, that the plaintiff's misconduct did affect the remedies available to her. The remedies available must take into account the lawful prerogatives of the employer and the equities it has arising from the employee's wrongdoing. 513 U.S. at 360-61. The Court then noted that, as a general rule, neither reinstatement nor front pay is an appropriate remedy as it would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds. Id. at 361-62.

With respect to backpay, the Court noted the object is to restore the employee to the position he or she would have been in absent the discrimination. The Court cannot require the employer to ignore the information even if acquired during discovery and even if the information might have gone undiscovered absent the lawsuit. The beginning point of a remedy should be “calculation of backpay from the date of the unlawful discharge to the date the new information was discovered.” 513 U.S. at 362. Courts should take into further account extraordinary equitable interests that affect the legitimate interests of either party, but an absolute rule barring any recovery of backpay would undermine the ADEA’s objectives. Id.

To rely upon this after-acquired evidence doctrine, the employer must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge. Id. at 363.

C. Practice Tips

In discovery, employer should look for any evidence of the plaintiff’s wrongdoing before (e.g., lies on the employment application) and during her employment. If the employer finds such wrongdoing, it then must determine if it can establish it would have terminated the plaintiff upon discovering such wrongdoing had it not already done so. The best way to accomplish this is review its past practices when it previously has determined that its employees have engaged in similar wrongdoing. Without a consistent approach of terminating such employees for similar behavior, the employer might not have any luck asserting this defense.

VII. Smith v. City of Jackson, 544 U.S. 228 (2005)

Thus far, our cases have discussed disparate treatment or intentional discrimination. Employers also can violate the anti-discrimination laws unintentionally. This body of law is known as disparate impact discrimination. That is, the employer has not necessarily intended to discriminate, but it has adopted a policy or practice that, neutral on its face, negatively affects a protected group of people disproportionately.

The United States Supreme Court recognized this disparate impact theory in the context of Title VII cases in 1971, not long after the passage of the Civil Rights Act. Griggs v. Duke Power Co., 401 U.S. 424 (1971). However, it was not until 2005 that the Court ruled that the ADEA also permits such claims.

A. Facts of City of Jackson

Plaintiffs were police and public safety officers of the City of Jackson, Mississippi. The City adopted a pay plan in 1998 designed to make officer pay more competitive and improve recruitment and retention of officers. The design of the plan provided officers with less than five years tenure a proportionally greater salary increase than those officers with greater seniority. And, of course, officers with greater tenure tended to be older.

B. Holding of City of Jackson

The Fifth Circuit Court of Appeals categorically held that the plaintiffs could not bring a disparate impact claim under the ADEA.

The Supreme Court affirmed, holding that plaintiffs may bring disparate impact claims under the ADEA, but that these plaintiffs specifically did not have a valid claim. Initially, the Court noted that the basic anti-discrimination provision of the ADEA is virtually identical as Title VII's provision. 544 U.S. at 233. Noting its presumption that the ADEA was derived from Title VII, the Court looked to its unanimous ruling in Griggs. Griggs analyzed high school education and standardized testing that were a condition of employment and transfers, which disproportionately disqualified blacks.

However, the ADEA contains language not a part of Title VII, that the Court had to address. The ADEA states that it is not unlawful for an employer to take an action otherwise prohibited under the ADEA when the action is upon reasonable factors other than age. This provision supports the conclusion that the ADEA authorizes disparate impact claims because it is in disparate impact cases where the "reasonable factors other than age" question arises. The policy or practice is facially neutral and so the question is whether the basis for the policy or practice has some reasonable basis. 544 U.S. at 238-39. The Court also noted that the EEOC via regulations has recognized that the ADEA authorizes disparate impact claims. Id. at 239-40.

The Court then held that the scope of ADEA disparate impact claims is narrower than those under Title VII in two regards. First, the "reasonable factors other than age" provision in the ADEA does not exist under Title VII and recognizes that age, unlike the Title VII categories, has some relevance to an employee's abilities in certain circumstances. Second, the Court noted that when Congress passed the Civil Rights Act of 1991, it overruled several of the Court's opinions regarding Title VII disparate impact cases, but did not amend the ADEA to overrule those same decisions. In Ward's Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), and Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988), the Court narrowed the scope of Title VII's protection against disparate impact discrimination. When Congress overruled these cases and restored a

broader scope to Title VII's protection for disparate impact discrimination, Congress did not indicate this expansion also applied to the ADEA. In essence, City of Jackson concluded this was intentional, and thus held that the Ward's Cove and Watson cases still applied to the ADEA (although they never did). Leaving us with the ADEA disparate impact cases governed by two Title VII cases that Congress sought to overrule. 544 U.S. at 240.

Given these rulings, the Court ruled that the plaintiffs could not prevail. First, the plaintiffs had not met the Ward's Cove requirement that they identify the specific employment practices that had an adverse impact on older workers. Second, the City's plan was based upon reasonable factors other than age. The City was trying to raise the salaries of junior officers to make them competitive with comparable positions in the market. Reliance upon seniority and rank was unquestionably reasonable to respond to the legitimate goal of retaining officers. 544 U.S. at 241-42. The City was not required to establish the business necessity of its pay plan or that there were other ways for it to meet its goal that do not result in a disparate impact. Id.

On March 30, 2012, the EEOC amended its regulations relating to this "reasonable factors other than age" defense to disparate impact claims. Disparate Impact and Reasonable Factors Other Than Age Under the Age Discrimination in Employment Act, 77 Fed. Reg. 19080 (Mar. 30, 2012) (29 C.F.R. § 1625). The EEOC concluded that employers can use this defense if they can show the challenged practice was objectively reasonable when viewed from the position of a reasonably prudent employer mindful of its ADEA obligations. The employer must show that the employment practice 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 circumstances the employer knew or should have known.

VIII. Gross v. FBL Financial Servs., Inc., 557 U.S. 167 (2009)

A. Facts of Gross

In Gross, the Supreme Court addressed the question of whether a plaintiff must present direct evidence of age discrimination in order to obtain a mixed-motives jury instruction under the ADEA. The Court ruled that such a jury instruction is never proper in an ADEA case.

The plaintiff in Gross was reassigned. The plaintiff considered this a demotion and contended the reassignment was at least in part based upon his age. The district court instructed the jury that it must find for the plaintiff if his age was "a motivating factor" in the demotion decision, but that it must find for the employer if it proved that it would

have demoted the plaintiff regardless of his age. The jury found for the plaintiff. 557 U.S. at 170-71.

The Eighth Circuit remanded and held that the instruction was improper under Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). There, six justices agreed that if a Title VII plaintiff shows that discrimination was a “motivating” or “substantial” factor in the employer’s action, the burden of persuasion should shift to the employer to show that it would have taken the same action regardless of that impermissible consideration. 490 U.S. at 258, 259-60, 276. Three justices (O’Connor’s concurrence) found that to shift the burden of persuasion to the employer, the employee must present “direct evidence” that an illegitimate criterion was a substantial factor in the decision. Id. at 276.

Of course, the Civil Rights Act of 1991 amended Title VII by authorizing discrimination claims when an improper consideration is “a motivating factor” for an adverse employment decision, even if other factors also motivated the decision. 42 U.S.C. § 2000e-2(m). At the same time, the statute restricts the remedies available to plaintiffs if the employer proves it would have made the same decision in the absence of a discriminatory motive. 42 U.S.C. § 2000e-5(g)(2)(B).

However, when Congress passed the Civil Rights Act of 1991, it did not amend the ADEA with respect to this issue. After an analysis of the text of the ADEA, Gross concluded that the ADEA does not authorize a mixed-motives age discrimination claim. The ADEA provides that an employer may not take an adverse employment action “because of” an individual’s age. 29 U.S.C. § 623(a)(1). The Court equated this language with a “but-for” requirement: the protected category (age) must have a “determinative influence” on the outcome and age is “the reason” the employer decided to act. 557 U.S. at 176. The plaintiff retains this “but-for” burden at all times:

Hence, the burden of persuasion necessary to establish employer liability is the same in alleged mixed-motives cases as in any other ADEA disparate-treatment claim. A plaintiff must prove by a preponderance of the evidence (which may be direct or circumstantial) that age was the “but-for” cause of the challenged employer decision.

B. Subsequent Case Law

We now have a divergence in the law between Title VII and the ADEA in classic disparate treatment cases. Subsequently, the United States Supreme Court has ruled that in Title VII retaliation cases, the same “but-for” requirement of Gross is the standard rather than the standard in plain Title VII discrimination cases. University of Texas Southwestern Medical Center v. Nassar, 570 U.S. ___, 133 S. Ct. 2517 (2013).

C. Comparison with Minnesota Human Rights Act; Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619 (Minn. 1988)

Long before the Gross case, Minnesota addressed this same discrimination litigation issue in Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619 (Minn. 1988). Anderson remains good law in Minnesota. Essentially, Anderson rejects the position of Gross in relation to the Minnesota Human Rights Act (MHRA).

The plaintiff in Anderson brought a claim under the MHRA for sex, marital status, and pregnancy discrimination. The trial court found unlawful discrimination, awarded damages, awarded Anderson her attorneys' fees, and enjoined the employer from discriminating against employees because of pregnancy. The Minnesota Supreme Court affirmed, except reversed the attorneys' fees award for reasons unrelated to the topic of this article. 417 N.W.2d at 621.

The plaintiff produced several pieces of evidence suggesting a discriminatory bias, including concealing the fact that the employer was looking for a permanent replacement for her instead of a temporary one. The employer contended it terminated the plaintiff as a result of performance problems. The trial court concluded the employer had "mixed motives" for firing the plaintiff, motives generated by permissible and impermissible reasons, but ultimately found discrimination. The question in Anderson is whether the Minnesota Supreme Court should follow the federal courts' interpretation of McDonnell Douglas in "mixed motive" situations.

At this point in history, federal courts in mixed motive cases proceeded to determine whether the employer would have made the "same decision" in the complete absence of any unlawful discriminatory motive. E.g., Bibbs v. Block, 778 F.2d 1318, 1323-24 (8th Cir. 1985). The plaintiff could obtain attorneys' fees, costs, and injunctive relief, but the employer could avoid an award of reinstatement, back pay, and other consequential damages if it could prove that the "same decision" would have been made absent the unlawful reason. 417 N.W.2d at 625. Anderson rejected Bibbs' approach because it did not provide plaintiffs the "full panoply" of civil remedies granted in the statute.

Similarly, Anderson rejected the other approach some federal courts followed, which was to deny any recovery to the plaintiff if the employer could meet its burden of proving the discharge would have occurred in the absence of discrimination. See Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977).

Instead, Anderson stated that courts should simply follow McDonnell Douglas in all cases, because all cases to a certain extent involve mixed motives because the employer always offers a legitimate business reason for its action. Once the employer

has met this burden of production, the issue is simply the ultimate factual question of whether the plaintiff was the victim of intentional discrimination. 417 N.W.2d at 626. Although Gross agrees with this proposition, a plaintiff under Anderson need show only that discrimination was a “discernible, discriminatory, and causative factor” in the employer’s decision, whereas a plaintiff under Gross must prove discrimination was the “but-for” cause of the employer’s decision.

D. Practice Tips

Sue under the MHRA whenever possible, as the plaintiff wins under the MHRA but loses under the ADEA if he or she can show that discrimination motivated the employer’s decision but is unable to show the employer would not have taken adverse action in the absence of discrimination.

IX. Conclusion

We have discussed a lot more than seven cases, but a strong knowledge of these age discrimination cases will provide a strong foundation for analyzing and litigating age discrimination claims in Minnesota and under the ADEA.