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111 No One is Getting Any Younger: Avoiding Age Discrimination in the Workplace

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Mr. Beyer is currently an adjunct professor of law at IIT Chicago-Kent College of Law, where he teaches privacy in employment law and international employment law. Mr. Beyer is also a fellow to the College of Labor and Employment, and has chaired the Accenture Legal group's pro bono program since its inception.

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Vincent A. Cino is a senior partner with the national law firm of Jackson Lewis LLP, which represents management in all areas of labor and employment law, in Morristown, NJ. He is the national director of litigation, serves on the firm's executive committee, and is counsel to the firm. Mr. Cino is also an elected member of the firm's compensation committee.

Prior to joining Jackson Lewis, Mr. Cino was chief of litigation in the Office of the Essex County Counsel. In this role, Mr. Cino supervised a staff of attorneys as well as outside counsel. Prior to that, he was an assistant prosecutor for Union County. Additionally, Mr. Cino was engaged in private practice in Hackensack, NJ, concentrating on civil litigation, and has personally tried over 100 cases.

Mr. Cino is a member of the American and New Jersey Bar Associations and their litigation sections, and has also been appointed to the employment law arbitration and mediation panels for the American Arbitration Association.

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Margaret M. Madden is vice president and assistant general counsel in Pfizer's Employment Law Center of Emphasis in New York. She has been employed at Pfizer for several years and has held the position of vice president and assistant general counsel since May 2007. Ms. Madden also serves on a number of Pfizer corporate leadership teams to provide advice and input to the company from an employment law perspective.

Prior to joining Pfizer, Ms. Madden was a partner at Epstein, Becker and Green. She practiced in both its New York and New Jersey offices, primarily focusing her practice in employment litigation.

Ms. Madden serves on the board of trustees for The Benedictine Foundation and on the board of directors for MFY Legal Services, Inc. She is also a former editor of the Editorial Board of the New Jersey State Bar Association Labor and Employment Quarterly.

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MANAGING AN AGING WORKFORCE

JACKSON LEWIS LLP

INTRODUCTION

Sometimes referred to as the "graying of America," the United States is in the midst of a large scale demographic shift as the so-called baby boomers come of retirement age in record numbers. According to information from the Bureau of Labor Statistics (the "BLS") recounted in a report issued by the Taskforce on the Aging of the American Workforce, "[b]etween 2004 and 2014, the number of people in the labor force ages 55-64 is projected to increase by 42.3 percent, and the number of labor force participants age 65 and older is expected to grow by nearly 74 percent." REPORT OF THE TASKFORCE ON THE AGING OF THE AMERICAN WORKFORCE, at 9 (Feb. 2008). BLS also estimates that by 2012, workers under the age of forty will comprise only 46.8% of the civilian labor force. Mitra Toossi, *Labor Force Projections to 2012: The Graying of the U.S. Workforce,* MONTHLY LAB. REV., Feb. 2004, at 37, 55 tbl. 8, *cited in* Aida M. Alaka, *Corporate Reorganizations, Job Layoffs and Age Discrimination,* 70 ALB. L. REV. 143 (2006).

The implications of this shift are profound. In the years to come, employers will need to be creative in developing ways to fill gaps in experience and knowledge which will arise as senior level employees enter into retirement. At the same time, employers will need to craft policies which take into account the large number of workers who choose to remain in the job market after retirement age.

I. LEGAL OVERVIEW: STATUTORY PROTECTIONS FOR OLDER WORKERS[1]

A. Age Discrimination in Employment Act of 1967("ADEA")

The ADEA prohibits age discrimination in employment and employee benefits against persons age 40 and older.[2]

[1] This report does not address the principal laws and regulations governing retirement and other benefits (*i.e.*, the Social Security Act of 1935, Medicare, the Employee Retirement Income Security Act ("ERISA") and the Internal Revenue Code). We note, however, that many of the federal laws governing retirement create disincentives for continued employment or prohibit flexibility in adopting phased or working retirement programs. This is largely due to the fact that the current legal framework dates back to the mid-20th century when government policy favored complete retirement at earlier ages in order to move workers through the workforce and make room for the large number of baby boomers.

[2] Although this report does not address retirement benefits, we note that the ADEA provides for several narrowly construed exceptions from the general prohibition against age-based discrimination in employee benefits. Specifically, the ADEA allows for certain: age-based cost-justified benefit reductions; voluntary early retirement plans; early retirement benefit subsidies in defined benefit pension plans; payment of social security supplements under defined benefit pension plans; reductions from severance benefits; and deductions or offsets for long-term disability benefits.

1. Disparate Treatment

Disparate treatment occurs when an employer intentionally treats an employee differently because of his or her age. In disparate treatment age discrimination cases, the plaintiff must first establish a *prima facie* case of discrimination. The burden then shifts to the defendant to offer evidence of a legitimate, nondiscriminatory reason for its decision or action. If the defendant meets this burden of production, the burden then shifts back to the plaintiff to prove that the defendant's explanation is pretext for actual age discrimination.

2. Disparate Impact

a. *Background*

Disparate impact cases, unlike disparate treatment cases, do not require proof of discriminatory intent. Rather, under a disparate impact theory of discrimination, an employee may challenge an employer's policy or practice which appears neutral on its face but disproportionately affects one group in application. Disparate impact age discrimination claims often arise in the context of a reduction in force ("RIF"). As one commentator explained: "[S]o many factors, on which many RIFs are routinely based, are associated with age. Consider, for example, the correlation of age with pension, benefits, and salary. The high costs associated with these factors are often motivating forces in designing a RIF." Kelli A. Webb, *Learning How to Stand On Its Own: Will the Supreme Court's Attempt to Distinguish the ADEA from Title VII Save Employers from Increased Litigation?,* 66 OHIO ST. L.J. 1375, 1407-08 (2005).

Two recent Supreme Court cases helped clarify the law on disparate impact claims under the ADEA. In the first case, *Smith v. City of Jackson*, No. 03-1160, 544 U.S. 228 (2005), senior police officers in Jackson, Mississippi claimed the city's pay plan had a disparate impact on older workers because, under the plan, newer officers received proportionately bigger salary increases than more senior officers, who tended to be older. The U.S. Court of Appeals for the Fifth Circuit dismissed the plaintiffs' claim, finding that disparate impact claims were "categorically unavailable" under the ADEA. The Supreme Court disagreed and, consistent with the Equal Employment Opportunity Commission's ("EEOC") longstanding position, held that the ADEA does allow recovery for disparate impact claims of discrimination. *Smith*, 544 U.S. at 233-40.

In *Smith*, the Supreme Court also ruled that the scope of disparate impact liability under the ADEA is narrower than that under Title VII of the Civil Rights Acts ("Title VII"), which prohibits discrimination based on race, color, religion, gender and national origin. Pointing to textual differences between the ADEA and Title VII, the Court held the appropriate standard for determining the lawfulness of a practice which disproportionately affects older employees is the "reasonable factors other than age" ("RFOA") test, rather than the business necessity test. In a typical Title VII disparate impact case, the plaintiff first must identify a specific policy or practice with a statistically significant adverse impact on a protected group. Once the plaintiff has made this showing, the burden then shifts to the employer to produce evidence that the policy or action was backed by a legitimate business justification. Ultimately, the plaintiff bears the burden of proving that the employer failed to satisfy the "business necessity" test because the

policy or action either did not conform with the employer's legitimate employment goals, or the employer could have adopted an equally effective and less discriminatory alternative. (This is often referred to as the *Wards Cove* analysis, which was established by the Supreme Court in *Wards Cove Packing Co. v. Antonio*.) In *City of Jackson*, the Court ruled that an employer need not prove "business necessity" in order to rebut a plaintiff's prima facie case of age discrimination, but instead only needs to demonstrate that the employer's decision was based on "reasonable factors other than age."

The *Smith* Court also emphasized that a plaintiff seeking to assert a disparate impact age discrimination claim must identify "the specific employment practices that are allegedly responsible for any observed statistical disparities." *Smith*, 544 U.S. at 241.

In the second case, *Meacham v. Knolls Atomic Power Laboratory*, 06-1505 (June 19, 2008), the Supreme Court ruled that an employer must not only produce evidence of, but also bear the burden of proving, a "reasonable factor other than age" for its employment policy or action which has a disparate impact on workers over the age of 40, in order to establish its freedom from unlawful bias. The *Meacham* decision is discussed in further detail in Section **II.A**, along with other age discrimination rulings issued by the high court this past term.

b. *How is Adverse Impact Measured?*

The two methods typically used to measure adverse impact are: (1) the 80% (or four-fifths) Rule; and (2) the two standard deviation analysis.

1. 80% Rule

The general rule of thumb for determining whether a "substantially different rate of selection," *i.e.*, adverse impact, exists is the 80% Rule, which measures the difference in how two groups are being treated. Under the 80% Rule, as applied to negative personnel decisions, such as terminations or layoffs, adverse impact is inferred if members of a non-protected class (*e.g.*, people less than 40 years of age) are selected for termination at a rate that is less than 80% of the rate at which members of the protected class (*e.g.*, people 40 years of age and older) are selected.

To illustrate, let's presume that a company of 100 employees had a RIF. Of this company of 100 employees, 50 employees are female and 50 are male. Our hypothetical company selected for termination 35 of the 50 female employees and 15 of the 50 male applicants. To determine whether the procedure used by company to identify employees to be laid off adversely affected the protected group, *i.e.*, females, we again first must determine the selection rate of females and the selection rate of males. To determine the selection rate of males, we divide the number of males selected for layoff (15) by the total number of males in the "pool" of potential candidates (50). Here, the selection rate of males is .30 or 30% (15 ÷ 50 = .30). We determine the selection rate of females the same way by dividing the number of females selected for layoff (35) by the total number of females in the "pool" of potential candidates (50). Here, the selection rate of females is .70 or 70% (35 ÷ 50 = .70).

Because a negative employment decision (termination) is under review, we determine whether our protected group (females) is being adversely affected by the layoff procedure by measuring whether males are being treated equally "badly" as females. In other words, we look to see whether we are selecting males (our non-protected group) at rate that is at least 80% of the rate at which we are selecting females (our protected group). We do this by dividing the selection rate for males (30%) by the selection rate for females (70%). Here, the selection rate for males is 42.9% of our selection rate for females (30% ÷ 70% = 42.9%). In other words, our hypothetical company selected males for termination at a rate that was less than 80% of the rate at which it selected females. Because the selection rate of males is less than 80% of the selection rate of females (58.8% is less than 80%), there is an indication that females were adversely affected by our hypothetical company's selection (*i.e.*, layoff) procedure.

If the selection rate of males had been greater than 80% of the selection rate of females, as it pertains to negative employment decisions, there would be no inference that females were adversely affected (*i.e.*, discriminated against).

2. Standard Deviation Analysis

In some cases where there is a showing of adverse impact under the 80% Rule, the courts and federal enforcement agencies have required a second statistical test to support an inference of discrimination. The method typically used in these cases to determine whether adverse impact under the 80% Rule is statistically significant is the standard deviation analysis, which involves measuring the probability that the representation of protected class members among those actually selected from the pool of similarly situated candidates occurred by chance. The probability is typically measured in standard deviations. A standard deviation measures how far from the norm the result varies. The greater the standard deviation, the less likely the actions being reviewed occurred purely by chance.

Normally, two or more standard deviations will raise an inference of discrimination. A finding of two standard deviations means there is about one chance in 20 (or five percent) that the observed disparity in selection rates occurred by chance. In other words, any difference of two or more standard deviations statistically is too unlikely to be a result of chance. Statistical evidence of differences less than two standard deviations alone will not raise an inference of discrimination but may raise an inference in conjunction with other evidence of discrimination.

3. Methods Used by the Federal Circuit Courts

Federal enforcement agencies normally will use only the 80% rule of thumb, except where large numbers of selections are made. None of the federal circuit courts, however, have definitively adopted a bright line test for establishing adverse impact. Rather, the different circuit courts, and even lower courts within each circuit, have determined on a case-by-case basis whether to rely on the 80% Rule alone or to require an additional test of statistical significance under the standard deviation analysis. There does not appear to be any consistency among or

within the circuits as to when the courts will rely solely on the 80% rule and when it will require additional testing for statistical significance.

B. Older Worker Benefit Protection Act ("OWBPA")

The OWBPA amends the ADEA to "clarify the protections given to older individuals in regard to employee benefit plans." The statute also sets forth specific requirements which must be met in order for a release of ADEA claims to be valid. Again, OWBPA often comes up in the context of a RIF, as well as in connection with other group termination programs and individual terminations. The statute provides that a waiver of an individual's rights under the ADEA must be "knowing and voluntary," and specifies that, at a minimum, a release must:

- be "written in a manner calculated to be understood" by the employee;
- refer specifically to rights and claims available under the statute;
- not waive prospective claims;
- provide consideration in exchange for the release beyond something of value the employee is already entitled to;
- advise the employee, in writing, to consult with an attorney;
- give the employee at least 21 days to consider the agreement (or at least 45 days in the case of an exit incentive or other group termination program);
- give the employee at least seven days to revoke the agreement; and
- in the case of an exit incentive or other group termination program, contain information regarding: (1) the "job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program;" (2) any eligibility factors for the program; and (3) any time limits applicable to the program.

The U.S. Supreme Court has interpreted the statute as requiring "'strict, unqualified statutory stricture on waivers'" executed by workers in exchange for compensation and benefits.

A recent decision from a district court in Minnesota emphasizes that group termination release provisions and OWBPA exhibits must be completely accurate and explicit to have their intended effect. In *Peterson, et al. v. Seagate U.S. LLC*, 2008 U.S. Dist. LEXIS 42179 (May 28, 2008, the court invalidated releases signed by plaintiffs in a putative age discrimination class action, finding the releases did not constitute a "knowing and voluntary" waiver of the former employees' right to sue. Plaintiffs, who signed releases when they were terminated during a RIF, alleged the company violated the ADEA by disproportionately terminating older workers during the RIF.

The court held that the party defending a release's validity bears the burden of proving compliance with the OWBPA's statutory prerequisites. Emphasizing that "substantial compliance" is not enough under the statute, the judge ruled that some of the waivers were legally invalid because they inaccurately stated that 154 employees were separated at one RIF location when, in fact, only 152 employees at the location were terminated. The judge also ruled that the company's listing in its disclosure of four different job codes for engineers, which were not grouped together and did not include any definitions or explanations for the codes, was too confusing and failed to "provide information in a manner calculated to be understood by the individual employees."

The court also held that a provision prohibiting employees from filing an EEOC charge or participating in an EEOC investigation was unlawful, although it was not so misleading as to render the releases entirely invalid. Because the prohibition on EEOC waivers is not expressed in the OWBPA, "the inclusion of a restriction to communicate with the EEOC does not automatically invalidate [a] release in its entirety," the judge said. Instead, he said, when there is a restriction on filing EEOC charges, the court must look at the totality of the circumstances to determine, as directed by a federal regulation, whether the restriction has "the effect of misleading, misinforming, or failing to inform participants and affected individuals" to such an extent as to render the entire agreement invalid.

C. Disability and Leave Laws May Apply

As the number of workers who remain in the workforce well into their 60's and 70's increases, so, too, will employers' responsibilities for providing medical leave and reasonable accommodations.[3]

1. Family and Medical Leave Act of 1993 ("FMLA")

The FMLA provides certain employees with up to 12 weeks of unpaid, job-protected leave per year. It also requires that group health benefits be maintained during the leave.

a. *Eligibility*

The FMLA provides the following rights to "eligible" employees:

- Up to 12 weeks of job protected leave in a 12-month period for the birth, adoption, or foster care of a child, to care for a child, spouse,

[3] According to the Taskforce on the Aging of the American Workforce, "most Americans wish to continue their ties to the work world even after they reach retirement age for a variety of reasons, including the need to build and maintain financial security and the desire to stay productive and socially engaged." REPORT OF THE TASKFORCE ON THE AGING OF THE AMERICAN WORKFORCE, at 2 (Feb. 2008).

or parent with a serious health problem, or for the employee's own serious health condition that renders the employee unable to perform the functions of his or her job;

- Continued medical insurance benefits while on leave, provided the employee pays any portion of the premium he or she would ordinarily be responsible for; and

- Return to the position held prior to leave, or an equivalent position, at the same or an equivalent rate of pay and benefits.

In order to be eligible for these benefits, employees must have worked at least 12 months and have at least 1,250 hours of service. Only employers with 50 employees within a 75 mile radius are subject to the FMLA.

b. *Notice*

When the need for leave is foreseeable, the FMLA requires employees to provide the employer with 30 days advance notice before the FMLA leave is to begin, or, if 30 days is not practicable, then as soon as practicable. "As soon as practicable" ordinarily means within one to two business days of when the employee knows of the need for leave, except in extraordinary circumstances.[4] At a minimum, the employee must orally notify the employer of the need for leave as well as the anticipated timing and duration of the leave. However, the employee need not expressly assert FMLA rights in giving notice. Instead, "the employer's duties are triggered when the employee provides enough information to put the employer on notice that the employee may be in need of FMLA leave." 29 U.S.C. § 2601 *et seq.*

c. *Medical Certifications and Serious Health Conditions*

The FMLA allows employers to require medical certification to prove the employee's need for leave is for his or her own serious health condition or to care for a covered relative with a serious health condition. An employer with reason to doubt an employee's medical certification may require the employee to obtain the second opinion of a health care provider selected by the employer, at the employer's expense. What "reason to doubt" means is not spelled out by the FMLA regulations, and there are various parameters on obtaining the subsequent opinions. In addition, employers may require subsequent recertification of a medical condition on a "reasonable basis." FMLA regulations define "reasonable basis" as requesting recertification no more frequently than every 30 days, unless: (1) the employee requests an extension of leave; (2) circumstances in the original certification changed significantly; (3) the employer receives information to doubt the continuing validity of the original certification; or (4) the employee is unable to return to work at the end of the leave because of the continuation, recurrence, or onset of a serious health condition.

[4] In February 2008, the Department of Labor ("DOL") released long-awaited proposed revisions to FMLA regulations. If adopted, some of these changes would alter current FMLA procedures, including the notice and medical certification provisions.

d. *Intermittent Leave and Reduced Work Schedules*

The DOL has characterized intermittent leave as "the single most serious area of friction between employers and employees seeking to use FMLA leave." Although the FMLA requires employees to schedule intermittent and reduced schedule leaves that are foreseeable in a manner that does not unduly disrupt the employer's operations, perhaps what bothers employers most about this portion of the FMLA is that some employees fail over and over again to provide adequate notice, which can complicate business planning.

2. Americans with Disabilities Act of 1990 ("ADA")

The ADA prohibits discrimination based on a disability in employment, public accommodations, and other areas. Title I of the Act prohibits private employers, state and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. The ADA covers employers with 15 or more employees, including state and local governments. It also applies to employment agencies and to labor organizations.

According to the U. S. Supreme Court in *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401 (2002), the ADA's primary purpose is "to diminish or to eliminate the stereotypical thought processes, the thoughtless actions, and the hostile reactions that far too often bar those with disabilities from participating fully in the Nation's life, including the workplace."

The ADA is a purposely vague law with few bright line rules. This makes determining whether many medical conditions prompting medical leaves are protected "disabilities" a challenge. The ADA also includes "job protected leave" as a potential "reasonable accommodation" for disabled workers but offers no guidance on how much leave must be provided.

Changes to the ADA may be implemented in the near future. The ADA Amendments Act of 2008, H.R. 3195, is currently under consideration in the U.S. Congress and already passed in the House of Representatives by a vote of 402-17. If passed, the ADA Amendments Act would:

- Clarify the current requirement that an impairment substantially limit a major life activity in order to be considered a disability. However, the Amendments would redefine "substantially limits" as "materially restricts," a term for which the legislation fails to provide a precise meaning;

- Prohibit consideration of mitigating measures in determining whether an individual has a disability. The only exceptions would be ordinary eyeglasses and contact lenses; and

- Provide that an individual is "regarded as" having a disability if the employee establishes that he or she has been discriminated against because of an actual or perceived physical or mental impairment. The "regarded as" prong would not apply to transitory and minor impairments where the impairment is expected to last less than six months. The legislation would also clarify that employers are not required to provide a reasonable accommodation to individuals who are regarded as disabled.

II. A Record Number of Age Discrimination Decisions from the U.S. Supreme Court

Age discrimination cases featured prominently on the Supreme Court's docket this year. A brief summary of five decisions issued by the high court during the October Term 2007 (from October 1, 2007 to September 30, 2008) follows.

A. Disparate Impact—*Meacham v. Knolls Atomic Power Laboratory*, 06-1505 (June 19, 2008) (Supreme Court ruled that an employer must not only produce evidence of, but also bear the burden of proving, a "reasonable factor other than age" for its employment policy or action which has a disparate impact on workers over the age of 40, in order to establish its freedom from unlawful bias.)

1. Background

As part of an involuntary RIF, Knolls Atomic Power Laboratory ("KAPL") instructed its managers to rate employees from zero to ten on "performance, flexibility, and criticality of…skills," and to add up to ten points for "company service." The company also asked managers to identify which employees had the lowest scores. These employees were slated for layoff. The company then conducted a disparate impact analysis to determine if the proposed layoffs would have an adverse impact on protected groups. KAPL subsequently reviewed the managers' selections to "assure adherence to downsizing principles." Ultimately, 30 of the 31 laid-off employees were over 40 years old.

Many of the terminated workers joined in bringing a lawsuit alleging the company violated the ADEA because the RIF had a disparate impact on older workers. A jury awarded over $6 million in damages to plaintiffs. A federal district court upheld the damages award. In 2004, the United States Court of Appeals for the Second Circuit affirmed the lower court's decision, and the company appealed to the U.S. Supreme Court. The Supreme Court vacated and remanded the case back to the Second Circuit for further consideration in light of *Smith v. City of Jackson*. (See Section **I.A.2** for a detailed discussion of *Smith*.)

On remand, the Second Circuit concluded that even though the Supreme Court altered the *Wards Cove* analysis to allow for a RFOA standard, the Court intended for the burden of persuasion to remain with the plaintiff. In other words, instead of coming forward with evidence of business justification, under *City of Jackson*, the defendant only had to come forward with evidence of a RFOA. Then, according to the Second Circuit, the burden shifts to the plaintiff to prove "unreasonableness."

The employees appealed the Second Circuit's decision to the Supreme Court, asserting that principles of statutory construction require the RFOA to be considered an affirmative defense for which the defendant bears the burden of proof.

2. Holding

On June 19, 2008, the Supreme Court ruled that the employer must not only produce evidence supporting the reasonable factors other than age defense, but also must persuade the factfinder of its merit. The Court's holding was based on several factors. First, the Court noted that the RFOA exemption appears alongside the bona fide occupational qualifications ("BFOQ") exemption in the text of the ADEA, a part of the statute that is separate from the general prohibitions. Using principles of statutory construction, the Court reasoned that the RFOA should be deemed an affirmative defense for an employer in an ADEA case, as is the BFOQ. On this basis then, the Court concluded that Congress intended the RFOA exemption to be treated differently than the general prohibitions of the ADEA, which placed the burden of proof squarely on the employee.

Next, the Court rejected KAPL's argument that the RFOA should be treated simply as an elaboration on an element of liability, where the burden of proof lies with the employee. Instead, the Court held that City of Jackson clearly defined a non-age factor as a premise for disparate impact, not a defense to it. Therefore, the Court reasoned that the focus of a RFOA defense is not to merely assert a non-age factor, but to prove its reasonableness.

3. Bottom Line

While it will be up to the lower federal courts to develop and outline the parameters of this new decision, the Supreme Court acknowledged that "putting employers to the work of persuading factfinders that their choices are reasonable makes it harder and costlier to defend than if employers merely bore the burden of production" and recognized that this will sometimes affect the way employers make employment decisions. No longer may employers simply proffer a non-age factor for the employment practice in question; now, they must also be prepared to produce evidence proving the non-age factor is reasonable under the circumstances.

B. Regulatory Requirements—*Federal Express Corp. v. Holowecki*, No. 06-1322 (Feb. 27, 2008) (Supreme Court held by a 7-2 vote that a formal "charge" of discrimination to the Equal Employment Opportunity Commission ("EEOC") is not essential to satisfy regulatory requirements under the ADEA where a filing generally alleges discriminatory acts and can be construed as a request for the agency to act.)

1. Background

In December 2001, Patricia Kennedy submitted to the EEOC the agency's Intake Questionnaire (Form 283), rather than the Charge of Discrimination (Form 5), along with a six-

page affidavit alleging age discrimination. Although the ADEA specifies that the EEOC must provide prompt notice of a charge, the agency did not notify Ms. Kennedy's employer. Several months later, Ms. Kennedy and other employees brought a lawsuit against the company under the ADEA.

The ADEA requires that complainants file an EEOC charge 60 days in advance of filing a lawsuit. "Charge" is not defined. The district court held Ms. Kennedy's Intake Questionnaire was not a charge and dismissed the lawsuit as untimely. The plaintiffs appealed and the Second Circuit Court of Appeals reversed. Judge Pooler, on behalf of the appeals court, reasoned, "[A] writing submitted to the EEOC containing the information required by the EEOC interpreting regulations is an EEOC 'charge'… when the writing demonstrates that an individual seeks to activate the administrative investigatory and conciliatory process." *Holowecki v. Federal Express Corporation*, 440 F.3d 558 (2nd Cir. 2006).

2. Holding

Seven Justices of the Supreme Court agreed with the EEOC's position that a filing constitutes a "charge" when, "taken as a whole, [it] should be construed as a request by the employee for the agency to take whatever action is necessary to vindicate her rights." (The submission must also meet the EEOC's other requirement for a charge — naming the respondent and generally alleging the discriminatory acts.) Writing for the majority, Justice Kennedy asserted that the EEOC's definition "reflects 'a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'"

In establishing this standard, the Court did not adopt either party's position in its entirety. The Court rejected Ms. Kennedy's argument that a writing containing the employer's name and an allegation of discrimination constitutes a charge. It also rejected the employer's argument that a charge should hinge on whether the EEOC notified the charged party and initiated a conciliation process.

Justice Kennedy made clear that while not every Intake Questionnaire would constitute a charge, Ms. Kennedy's Intake Questionnaire — in conjunction with her six-page affidavit — met the test. Indeed, in her affidavit, Ms. Kennedy specifically asked the EEOC to do something on her behalf. The Court also found it significant that Ms. Kennedy checked the "consent" box on the Intake Questionnaire, allowing the EEOC to disclose her identity to her employer.

Justice Kennedy reiterated Supreme Court precedent holding that Title VII (and, in this case, the ADEA) "sets up a remedial scheme in which lay persons, rather than lawyers, are expected to initiate the process." He conceded that the employer's interests in this case were given "short shrift," but the result was "unavoidable." On remand, Justice Kennedy said, the District Court might be able to correct this by staying the proceedings to allow for the conciliation process that should have occurred at the agency level. He also urged the EEOC to revise its forms and processes to avoid future misunderstandings.

3. Bottom Line

This decision favors a looser interpretation of the formal requirements for filing EEOC charges.

C. <u>"Me, Too" Evidence</u>—*Sprint/United Management Company v. Mendelsohn*, No. 06-1221 (Feb. 26, 2008) (Supreme Court reversed a decision from the Tenth Circuit Court of Appeals addressing the admissibility of testimony of non-party former employees alleging discrimination by supervisors who played no role in the action challenged by the plaintiff to show that discrimination against older workers pervaded the workplace and to persuade jurors that plaintiff's layoff also was discriminatory. The Court held that the admissibility of "me, too" evidence of discrimination involving other supervisors is a fact-based determination which is not "per se admissible or per se inadmissible.")

1. Background

Ellen Mendelsohn was a manager in Sprint/United Management Company's ("Sprint") Overland Park, Kansas business development and support group operations. She was 51 years old when she was terminated as a part of a company-wide RIF that affected nearly 15,000 employees during an 18-month period. Ms. Mendelsohn sued Sprint for violation of the ADEA, alleging her inclusion in the RIF was because of her age. At trial, Ms. Mendelsohn sought to present the testimony of five other former Sprint employees over the age of 40 who had also lost their jobs pursuant to the RIF. These former workers also thought they were victims of discrimination. None of these other employees, however, had the same supervisor as Ms. Mendelsohn.

Before the start of Ms. Mendelsohn's ADEA trial, Sprint moved to bar the testimony of these other former Sprint employees. The trial court agreed with Sprint and limited the testimony at trial to include only those employees who had the same supervisor as Ms. Mendelsohn and had been terminated in the same period. The jury returned a verdict for Sprint and the district court judge denied Ms. Mendelsohn's motion for a new trial.

Ms. Mendelsohn appealed the District Court's exclusion of testimony. In a 2-1 decision overruling the District Court, the Tenth Circuit held that the lower court had improperly applied the "same supervisor" rule set forth in *Aramburu v. Boeing Co*., 112 F.3d 1398 (10th Cir. 1997), to justify a per se bar on "me, too" evidence in the context of a company-wide RIF. While the Tenth Circuit considered *Aramburu's* "same supervisor" rule appropriate in the context of discriminatory disciplinary actions because divergent treatment by a single supervisor is relevant to show the discriminatory intent of the supervisor, a company-wide RIF "is not about individual conduct but about a company-wide policy of which all Sprint's supervisors were allegedly aware." In this vein, the Tenth Circuit remarked, "Applying *Aramburu's* 'same supervisor' rule in the context of an alleged discriminatory company-wide RIF would, in many circumstances, make it exceedingly difficult, if not impossible, for a plaintiff to prove a case of discrimination based on circumstantial evidence."

In finding that the District Court had abused its discretion in applying a per se bar in this case, the Tenth Circuit assessed the relevance of the evidence itself and conducted its own

balancing of probative value and potential prejudicial effect to find the evidence both relevant and not unduly prejudicial.

2. Holding

The Supreme Court reversed the Tenth Circuit's holding and highlighted the wide discretion and deference courts of appeals must grant district courts because of the lower courts' familiarity with case details and greater experience in evidentiary matters. Because it was not clear that the District Court was in fact applying a per se bar to "me, too" evidence in this case, the Tenth Circuit erred by not respecting the deference typically given district courts in evidentiary matters and not giving the lower court the opportunity to clarify its ruling before the Tenth Circuit took matters into its own hands.

3. Bottom Line

While remanding the case to the District Court for clarification, the Supreme Court noted that had the District Court applied a per se rule excluding the evidence, the Tenth Circuit would have been correct to conclude that the District Court had abused its discretion. The Supreme Court noted that issues of relevance and prejudice are more appropriately determined in the context of the facts and arguments in a particular case, and thus are generally not amenable to broad per se rules.

Employers are left with some definitive guidance from the Supreme Court regarding the admissibility of "me, too" evidence: the relevancy and prejudicial effect of such evidence is and will continue to be properly within the domain of the district court to determine on a case-by-case basis. This case appears to be part of a broader pattern of providing significant discretion to trial judges regarding the admissibility of evidence.

The Supreme Court's refusal to apply a broad per se rule should alert employers to the panoply of ways plaintiff's counsel will attempt to utilize such evidence in cases. Even though the Court's decision does not provide employers relief or preventive guidance with respect to "me, too" evidence in a non-disciplinary action setting, it certainly highlights the continued importance of preventive employment practices such as effective workplace investigations and employee training. By demonstrating an employer's commitment to investigations and training, employers will be in a position to contradict any "me too" testimony.

D. Public Sector ADEA Cases

1. Retaliation—*Gómez-Pérez v. Potter*, No. 06-1321 (May 27, 2008)

In *Gómez-Pérez v. Potter*, the Court ruled by a 6-3 vote that federal employees who complain about age discrimination are protected from retaliation by their employers under the ADEA even though the laws makes no mention of a retaliation cause of action for these employees. The key issue was whether the ADEA's federal sector provision, 29 U.S.C. § 633a(a), which—unlike the Act's private sector provision—does not explicitly mention retaliation, permits federal employees to bring retaliation claims.

Only three years ago, the Court issued a 5-4 decision authored by now-retired Justice Sandra Day O'Connor holding that the broad prohibition on gender discrimination in Title IX of the Education Amendments of 1972 ("Title IX") encompasses retaliation claims even though the statute does not specifically provide for a retaliation cause of action. *Jackson v. Birmingham Bd. of Educ*., 544 U.S. 167 (2005). Jackson relied on an earlier case in which the Court ruled that another post-Civil War statute, 42 U.S.C. §1982, prohibiting discrimination in property transfers allows for retaliation claims. *Sullivan v. Little Hunting Park, Inc*., 396 U.S. 229 (1969). Justices Thomas and Scalia, who both dissented in *Jackson*, filed dissenting opinions in *Potter*.

Justice Alito, writing for the majority of the Court, concluded that §633a(a), which requires that "[a]ll personnel actions affecting employees… at least 40 years of age… be made free from any discrimination based on age," encompasses retaliation claims. As Justice Alito made clear, the Government—the defendant in this case arguing against a retaliation cause of action in the federal sector ADEA provision—urged the Court to follow *Sullivan* in *Jackson*.

The Court found it of little consequence that the federal sector provision is silent on a retaliation cause of action. "Respondent places too much reliance on the presence of an ADEA provision specifically prohibiting retaliation against individuals complaining about private-sector age discrimination… and the absence of a similar provision in §633a(a)," explained Justice Alito. Among other things, he pointed out that the two statutes were enacted seven years apart and structured differently, with the private sector provision specifically listing prohibited practices.

In dissent, Chief Justice Roberts, joined by Justices Thomas and Scalia, maintained that the statutory language and structure of the federal sector provision demonstrate that Congress did not intend to create a cause of action for retaliation. "Congress was not sloppy in creating this distinction; it did so for good reason: because the federal workplace is governed by comprehensive regulation, of which Congress was well aware, while the private sector is not," Chief Justice Roberts concluded.

2. Retirement Benefits—*Kentucky Retirement Systems, et al. v. Equal Employment Opportunity Commission*, No. 06-1037 (June 19, 2008)

The Supreme Court ruled in a 5-to-4 decision that using age as a potential factor in determining disability retirement benefits does not automatically constitute disparate treatment age discrimination in violation of the ADEA. *Kentucky Retirement Systems, et al. v. Equal Employment Opportunity Commission*, No. 06-1037 (June 19, 2008).

Charles Lickteig, a 61-year-old man employed by the Jefferson County Sheriff's Department ("Sheriff's Department"), filed an age discrimination charge with the EEOC after the Kentucky Retirement Systems ("KRS") denied his request for disability retirement benefits because Mr. Lickteig was already of retirement age. The EEOC subsequently brought charges against KRS, the Commonwealth of Kentucky and the Sheriff's Department, alleging that the state disability retirement system violates the ADEA by denying or paying lower benefits to disabled employees old enough to retire.

Under the state's disability retirement plan, state and county employees who work in hazardous jobs and become disabled are only entitled to normal retirement benefits—or 2.5 percent of their final salary multiplied by the number of years of service—after: (a) reaching 55, with at least five years of service; or (b) at least 20 years of service. The state plan, on the other hand, credits younger workers with the number of years of service required for the worker to reach 55 years of age or 20 years of service, up to the number of years the employee actually worked.

Thus, in Mr. Lickteig's case, his retirement benefits—based on 18 years of service—would be less than the retirement benefits of an employee under age 55 with 18 years of service. As the EEOC explained in its brief to the Supreme Court, "If a 54-year-old employee with ten years of service becomes disabled, KRS will impute one additional year and will calculate the worker's disability retirement benefits as though he had served for 11 years. A 45-year-old disabled worker with ten years of service, by contrast, would be credited with ten imputed years, and his benefits would be calculated on the basis of 20 years of service."

The district court granted summary judgment in favor of defendants and a panel of the Sixth Circuit Court of Appeals affirmed the decision. However, the full Sixth Circuit reversed, finding in favor of the EEOC. It ruled that the state's disability retirement plan is "facially discriminatory" on the basis of age because: (1) it denies employees over age 55 disability benefits which are available to similarly situated younger employees; and (2) "employees who become disabled when they are still 'young enough' to be eligible for disability-retirement benefits receive reduced benefits compared to otherwise-similar but even younger disabled employees for no reason other than their age." Thus, the EEOC need not demonstrate discriminatory intent in order to establish a prima facie case of disparate treatment age discrimination in violation of the ADEA, the court ruled.

Holding that the disparity in pension eligibility and benefits inherent in Kentucky's retirement system is not "actually motivated" by age, the Supreme Court reversed. While pension benefits and age often go "hand in hand," the high court explained, an employer could "easily 'take account of one while ignoring the other.'"

Writing for the majority, Justice Breyer articulated the proper test as follows: "Where an employer adopts a pension plan that includes age as a factor, and that employer then treats employees differently based on pension status, a plaintiff, to state a disparate treatment claim under the ADEA, must adduce sufficient evidence to show that the differential treatment was 'actually motivated' by age, not pension status." According to a slim majority of the Court, the EEOC did not meet this test.

The Court pointed to the following six factors which guided its determination that Kentucky did not use pension benefits impermissibly as a proxy for age:

- Age and pension status are "'analytically distinct' concepts";
- The benefits are offered to all employees in similar positions on the same terms, and Congress has approved systems, such as Social Security Disability Insurance, which, like Kentucky's plan, calculate permanent disability benefits with a formula that takes age into account;
- There is a non-discriminatory reason for the discrepancy: "[T]he whole purpose of the disability rules is… to treat a disabled worker as though he had become disabled after, rather than before, he had become eligible for normal retirement benefits. Age factors into the disability calculation only because the normal retirement rules themselves permissibly include age as a consideration";
- In some cases, an older worker could have more additional years of service imputed than a younger worker;
- Kentucky's system does not rest on improper stereotypes which the ADEA was designed to stop; and
- Practical issues would make it difficult for the state to correct the plan short of cutting the benefits available to disabled workers who are not pension-eligible.

The Court made clear that its holding did not displace the legal principle that a facially discriminatory statute or policy suffices to show disparate treatment without any proof of discriminatory intent.

Justice Kennedy dissented, along with Justices Scalia, Ginsburg and Alito, arguing that the majority's decision puts the "[ADEA] and its enforcement on a wrong course." According to the dissent, "When it treats these employees differently on the basis of pension eligibility, Kentucky facially discriminates on the basis of age.

III. PUTTING IT ALL TOGETHER: CONDUCTING REDUCTIONS IN FORCE

A. Introduction

Given the rulings in *Smith* and *Meacham*, employers need to be mindful of the risk of disparate impact age discrimination claims inherent in RIFs, which are often used by companies looking to reduce labor costs. If not carefully planned in advance, RIFs can result in substantial liability which may offset any initial savings the employer achieves through the reduction itself. As one commentator noted after the *Smith* decision, "A perfect storm is on the horizon. If the steady front of an aging workforce meets a cyclical gust of unemployment on a jet stream provided by the Supreme Court in *Smith v. City of Jackson* the EEOC may have to brace for an ADEA tempest, the likes of which it has never seen." Dennison Keller, *Older, Wiser and More Dispensable: ADEA Options Available Under Smith v. Jackson: Desperate Times Call for Disparate Impact*, 33 N. KY. L. REV. 259, 261 (2006).

The following discussion provides an overview of relevant considerations—pertaining to both age discrimination claims and more general best practices—when conducting a RIF. Employers should, however, consult with legal counsel in the event of a RIF.

B. Proper Planning May Reduce Litigation Risk

Before planning a RIF, employers should consider whether other options are available, including: (1) hiring freezes; (2) wage and bonus freezes; (3) postponing wage increases; (4) reducing bonuses and fringe benefits, including employee sharing of insurance premiums, increased insurance deductibles and limited benefit eligibility for newer employees; (5) work furloughs of limited duration; (6) reducing work hours with proportionate pay cuts; (7) assessing expected job attrition; (8) allowing affected employees to transfer to other vacant positions within the organization; (9) job sharing; (10) terminating employees with substantial performance problems; (11) terminating recent hires within their introductory periods; and (12) discontinuing the use of temporary and part-time employees and redistributing their work. Some employers also look to early retirement programs, while others ask for volunteers by offering enhanced severance benefits. While less severe than involuntary layoffs, these measures still require sensitivity to the manner in which they are communicated and their effect on employee morale.

Once a company determines a RIF is necessary, the task generally falls to operations, human resources and legal counsel to devise a plan which minimizes the risks of litigation.

1. Planning the RIF

a. Document the financial or other conditions necessitating the RIF.

b. Identify the goals of the staff reduction, in terms of labor costs to be eliminated and/or the number of employees by which the organization is overstaffed.

c. Identify the job functions and/or skills that will be essential to successful operations after the RIF.

d. Eliminate and/or consolidate unnecessary jobs.

e. Set a timetable for carrying out the RIF. (Unless business conditions require a series of reductions, attempt to act quickly and decisively in an effort to minimize morale problems.)

f. Be aware of situations where an employee can argue that he or she was laid off close to the time he would have qualified for a benefit (*e.g.*, pension vesting rights, retirement eligibility). Even if technically lawful, these situations may appear so unfair that a judge or other trier of fact might stretch the law.

g. Try not to use a layoff as a substitute for terminating an employee who exhibits poor performance.

h. Check state laws regarding: payment of wages, insurance benefits continuation, severance benefits, letters of recommendation, personnel record access, plant closings, layoffs, and the like. Many states have specific requirements applicable to involuntary terminations.

i. Investigate whether the layoff will trigger vesting in pension or benefit plans for employees laid off. Also determine whether the layoff is a partial termination of a pension or benefit plan, requiring a reportable event under ERISA.

j. Check to be sure that the terminations do not constitute withdrawal from a multi-employer pension plan, which can result in substantial liability.

k. Check to determine if the termination has any impact on stock options.

l. Avoid the use of form letters when denying benefits to benefit plan participants.

m. Take steps to deliver news of layoff decision to the affected and non-affected employees. Inappropriate or poorly communicated notification can result in claims of emotional distress or other litigation.

n. Be prepared when notifying employees about a layoff. Have answers ready for potential inquiries and avoid the appearance that the decision was poorly or hastily made.

o. Consider the timing of the layoffs under the federal plant closing law ("WARN") or under applicable state laws. (See Section **III.B.5**.)

p. Determine what notices are required under ERISA (*e.g.*, Summary Annual Reports, Summary Plan Descriptions) and ensure that the employees receive all notices required.

q. Assess limitations and/or liabilities created by collective bargaining agreements, employment contracts, and the like.

r. Establish clear eligibility criteria for severance benefits. Be wary of giving extra credits for employees age 40 or older, since such

treatment can violate state discrimination laws. Do not preclude retiring employees from severance pay eligibility.

s. Determine whether a *de facto* severance pay plan already exists for employees involuntarily terminated. Such plans may require compliance with ERISA reporting requirements and may already bind the employer to provide certain benefits to all affected employees.

t. Avoid discriminatory transfer policies. Workers should have the same transfer opportunities regardless of age or other protected categories.

u. Do not use age as a distinction in early retirement benefits provided as a result of a workforce reduction. For example, do not offer different benefits to employees under age 60 than those age 60 or older.

v. Do not make layoff decisions solely on the basis of payroll dollars saved. Such decisions may be evidence of age discrimination.

2. Making Key Policy Decisions

In any layoff, the most significant decision may be the criteria by which employees will be selected for termination. In the easiest cases, an employer may make a decision by the nature and necessity of the work performed (*e.g.*, where a particular position or product line is being eliminated). Where the decision is not so easily made, employers may utilize other criteria in making selection decisions. Examples of such criteria include:

a. By length of service/seniority.

b. By identifying and eliminating unnecessary job classifications.

c. By classes of employees, *e.g.,* eliminating all temporary, part-time or contract workers initially.

d. By strict use of pre-existing job appraisal data.

i. Initially select employees who have been disciplined for severe or persistent performance problems.

ii. Thereafter, select from remaining employees by evaluating and comparing their ability to perform the essential job duties that will remain *after* the RIF is completed.

Employers should strive for an objective comparison of employees where job qualifications and skills are considered in making reductions and should consider the use of a RIF Committee and outside legal review.

3. Consider Factors Militating Against Selection of Certain Employees

a. Can employees be transferred into or post for existing vacancies?

b. Is special high-level management review warranted for certain highly-paid or long-term employees?

c. Are older, minority or female employees disproportionately affected by the company's initial selection procedures?

d. Prior to implementation, initial selection decisions should be evaluated to see whether individuals in protected classes are disproportionately affected by the proposed RIF. (See Section **I.A.2**.)

e. If a disparate impact exists on the basis of membership in protected classes such as gender, race or age, alternate selections should be considered.

i. If minority or female employees are disproportionately affected by the company's initial selection procedures, can the selection of these individuals be justified by *business necessity*?

ii. If not, alternative selections of individuals outside such protected classifications should be considered.

iii. If older employees are disproportionately affected by the company's initial selection procedures, can the selection of these individuals be justified by *reasonable factors other than age*? (See Section **I.A.2** and **II.A**.)

iv. If not, alternative selections of younger individuals should be considered.

4. Releases

Employers can attempt to limit their potential liability by obtaining general releases from employees affected by a RIF, in return for enhanced severance benefits or other valuable consideration. Under the OWBPA, many procedural requirements must be satisfied before an employee's release or waiver of age discrimination claims under federal law will be considered enforceable. (See Section **I.B**.)

5. Notice Requirements Under The Worker Adjustment And Retraining Notification Act

The number of employees to be laid off also may trigger the notice requirements under the WARN Act, 29 U.S.C. Sections 2101-2109, or possibly a state plant closing statute.

a. WARN applies to employers that have, nationwide:

i. 100 or more employees (excluding part-timers); or

ii. 100 or more employees (including part-timers) whose total weekly work hours (excluding overtime) are at least 4,000 hours per week.

b. WARN requires an employer to give 60 days advance written notice, as described by the Act and DOL regulations, of a "plant closing" or "mass layoff" to:

i. All affected employees (including supervisors and part-time employees), OR if the employees are represented by a labor organization, the international body of the union; AND

ii. The State dislocated workers unit and the chief elected official of the local governmental unit where the affected facility is located.

c. A “plant closing” is defined as:

i. A permanent or temporary shutdown of a single site of employment, or of one or more facilities or operating units within a single site of employment; IF

ii. The shutdown results in an employment loss at the single site of employment during any 30-day period (this period is extended by WARN and the DOL Regulations to 90 days) for 50 or more employees (excluding any part-timers and employees who have not suffered an employment loss).

iii. An "employment loss” is defined as:

- An employment termination, other than a discharge for cause, voluntary departure, or retirement;
- A layoff exceeding 6 months; OR
- A reduction in an individual's working hours of more than 50% during each month of any 6-month period.

d. A "mass layoff" is defined as a reduction in workforce which is not the result of a plant closing, AND:

i. Which results in an employment loss at a single site of employment during any 30-day period (this period is extended by WARN and the DOL Regulations to 90 days), for at least 50 employees (excluding part-timers and employees who have not suffered an employment loss), if they comprise at least 33% of the workforce at the single site of employment; OR

ii. Which results in an employment loss at a single site of employment during any 30-day period (this period is extended by WARN and the DOL Regulations to 90 days), for at least 500 employees (excluding part-timers and employees who have not suffered an employment loss).

e. The Act provides limited exceptions which may permit employers to provide less than 60 days notice of a plant closing or mass layoff if the failure to provide the requisite 60 days notice is due to:

i. Unforeseeable business circumstances.

- Caused by sudden, dramatic, unexpected action or condition beyond employer’s control; or
- Termination of major contract, major economic downturn, government-ordered closing.

ii. A faltering company (in plant closing situations only).

- Employer is actively seeking capital or business when WARN notice is due;
- Realistic opportunity exists to obtain financing;
- If obtained, financing will enable business to avoid or reasonably postpone shutdown; and
- Good faith belief that notice would preclude employer from obtaining financing.

iii. A natural disaster.

- Floods, earthquakes, storms, droughts, tidal waves;
- Closing or layoff is a direct result of natural disaster; and
- Notice must be provided in advance or after employment loss.

f. State and local notice requirements: The requirements of WARN supplement those contained in personnel policies, employment contracts, collective bargaining agreements or any other statute. Some states have enacted statutes which may impact on plant closings or relocations include: Hawaii, Maine, Maryland, Massachusetts, Oregon, South Carolina, Tennessee, Wisconsin and the U.S. Virgin Islands. In addition, some cities and municipalities have enacted plant closing ordinances.

IV. CONCLUSION

In the last decade, the number of age discrimination claims has continued to grow, increasing from 19.6 percent to 23.2 percent of the total number of charges filed with the EEOC. This growth will no doubt continue as the number of workers over 40 begins to outweigh those under 40. In addition to classic disparate treatment ADEA claims, employers need to be mindful of disparate impact claims and an increased likelihood of lawsuits under the ADA and FMLA. Proactively developing policies which reflect the increase in older workers and training supervisors on best practices for avoiding such lawsuits should be a top priority for employers.

"ME, TOO" EVIDENCE

What Is It?

In the context of age discrimination litigation under the Age Discrimination in Employment Act (the "ADEA"), "me, too" evidence refers to testimony from a non-party, current or former employee of the defendant company who believes he or she was also discriminated against based on age.

In order to prevail in an age discrimination lawsuit, a plaintiff must prove that the employer's legitimate, nondiscriminatory explanation for an adverse employment action is pretext for actual age discrimination. "Me, too" evidence can make it easier for a plaintiff with no direct evidence of an employer's discriminatory intent to demonstrate that the employer has a propensity toward discrimination or harassment.

When should it be admissible? Should "me, too" evidence be allowed in only when the non-party employee had the same supervisor as the plaintiff? When the adverse employment actions occurred close in time?

Supreme Court Says "Me, Too" Evidence Neither *Per Se* Admissible Nor *Per Se* Inadmissible

In *Sprint/United Management Company v. Mendelsohn*, No. 06-1221 (Feb. 26, 2008), the United States Supreme Court held that the admissibility of "me, too" evidence of age discrimination against non-parties by supervisors who played no role in the challenged action is a fact-based determination without a *per se* rule.

Plaintiff Ellen Mendelsohn, a 51 years old female terminated in a company-wide RIF, sued her former employer, Sprint/United Management Company ("Sprint"), alleging the company included her in the RIF based on her age. At trial, Ms. Mendelsohn sought to present

the testimony of five other former Sprint employees over the age of 40 who also lost their jobs pursuant to the RIF and believed the company discriminated against them based on their age. None of these other employees, however, had the same supervisor as Ms. Mendelsohn. Sprint moved to bar their testimony, and the trial court ruled that only "similarly situated" employees—those who had the same supervisor as Ms. Mendelsohn and had been terminated in the same period—could testify. The jury returned a verdict for Sprint and the district court judge denied Ms. Mendelsohn's motion for a new trial.

On appeal, the Tenth Circuit Court of Appeals ruled in a 2-1 decision that the lower court improperly applied the "same supervisor" rule set forth in *Aramburu v. Boeing Co*., 112 F.3d 1398 (10th Cir. 1997) to justify a *per se* bar on "me, too" evidence in the context of a company-wide RIF. While the Tenth Circuit considered *Aramburu's* "same supervisor" rule appropriate in cases involving discriminatory disciplinary actions, the court did not think it should apply to a company-wide RIF which "is not about individual conduct but about a company-wide policy of which all Sprint's supervisors were allegedly aware." After assessing the relevance of the evidence itself and considering both its probative value and potential prejudicial effect, the court ruled that the evidence was both relevant and not unduly prejudicial.

Although the Supreme Court reversed the Tenth Circuit's holding, Justice Clarence Thomas, writing on behalf of a unanimous Court, said that the district court would have erred if it applied a *per se* rule barring "me, too" testimony regarding other supervisors. Because it was not clear that the district court was, in fact, applying a *per se* bar, the Court ruled that the Tenth Circuit should have respected the deference typically given district courts in evidentiary matters. According to the Supreme Court's holding, "The question whether evidence of discrimination by other supervisors is relevant in an individual ADEA case is fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case. Applying Rule 403 to determine if evidence is prejudicial also requires a fact-intensive, context-specific inquiry."

In light of the Court's decision, trial courts retain discretion to determine on a case-by-case basis whether "me, too" evidence is relevant and whether its probative value outweighs any prejudicial effect.

Applicable Federal Rules Governing Admission of Evidence

- **FED. R. EVID. 401. Definition of "Relevant Evidence"**

  "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

  * * *

- **FED. R. EVID. 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible**

  All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

  * * *

- **FED. R. EVID. 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time**

  Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Post-Mendelsohn Rulings

It is unclear whether the Supreme Court's decision will make it easier for plaintiffs to introduce "me, too" evidence.

- *Sgro v. Bloomberg L.P.*, 2008 U.S. Dist. LEXIS 27175 (D.N.J. March 31, 2008)

Defendants moved for summary judgment in a lawsuit involving age discrimination and other claims. Plaintiffs argued summary judgment should not be granted, relying in part on evidence that a company manager made offensive comments regarding age. The Court granted summary judgment stating, "[T]here is nothing in the record to show that [the manager] was involved in any of the hiring decisions or transfer decisions involving Plaintiffs. Without any such showing, [the manager's] alleged discriminatory practice is simply immaterial to the Court's determination whether Defendant's proffered reasons were a pretext for discrimination."

Vs.

- *Elion v. Jackson*, 2008 U.S. Dist. LEXIS 27520 (D.D.C. April 7, 2008)

Plaintiff alleged race and gender discrimination in violation of Title VII of the Civil Rights Act of 1964. Both plaintiff and defendant sought to introduce "me, too" evidence at trial. The Court denied plaintiff's request to exclude testimony from two non-party employees offered by defendant to demonstrate the company's favorable treatment of minority and female employees "with respect to career progression and promotion." The Court allowed testimony from one of the employees—without any indication she had the same supervisor as plaintiff—because she was promoted and given increased responsibility around the same time plaintiff alleged the company discriminated against her. The Court allowed the other witness to testify—even though she was promoted *four months* after the alleged discrimination against plaintiff—because she was also an African-American female. The Court could not "perceive any danger of unfair prejudice, confusion or waste of time in permitting this testimony."

It may be more difficult for employers to win *in limine* motions in advance of trial, particularly where plaintiffs allege a company-wide pattern of discrimination.

- *Miller v. Love's Travel Stops & Country Stores, Inc.*, 2008 U.S. Dist. LEXIS 38024 (W.D. Ok. May 9, 2008)

Plaintiff alleged a company-wide practice of terminating older workers and sought to introduce evidence of employment discrimination claims and administrative charges filed by non-party former employees. The court denied defendant's *in limine* motion to exclude this evidence, stating:

> To assess the probative value of Plaintiff's proposed evidence in this case, this Court must know more about the circumstances surrounding the witnesses' alleged age-based terminations in order to determine whether there is a logical or reasonable relationship between those terminations and Plaintiff's…. [P]erforming a Rule 403 balancing of probative force against prejudicial effect will require the Court to evaluate the proposed testimony within the context of other trial evidence, which remains largely unknown to the Court…. Plaintiff is directed to inform the Court during the trial before he calls a former employee to testify about the witness' alleged discriminatory termination by Defendant….At that time, the Court will conduct an inquiry outside the presence of the jury into facts necessary to determine the admissibility of the witness' anticipated testimony…. The Court will expect Plaintiff to make a particularized showing as to the relevance of the witness' proposed testimony, and then will permit the parties to present their arguments regarding Rule 403 considerations.

- *Jones v. UPS, Inc.*, 2008 U.S. Dist. LEXIS 24772 (D. Ks. March 27, 2008)

The Court overruled defendant's *in limine* motion to preclude plaintiff from introducing "me, too" evidence to show "corporate-wide policy of targeting and terminating injured employees and employees who file workers' compensation claims," deferring a decision until the court can make a determination "in context of evidence presented at trial."

Employers can also use "me, too" evidence.

- *Elion v. Jackson,* 2008 U.S. Dist. LEXIS 27520 (D.D.C. April 7, 2008)

Court allowed "me, too" evidence from non-party employees to *negate* inference of discrimination, explaining:

> "Me too" evidence of an employer's past non-discriminatory and non-retaliatory behavior may be relevant…, because "an employer's favorable treatment of other members of a protected class can create an inference that the employer lacks discriminatory intent"…. To the extent that [the witness'] "me too" testimony is offered to negate the inference that defendant harbored discriminatory or retaliatory intent, the Court concludes that it is relevant and admissible.

CONDUCTING REDUCTIONS IN FORCE WHILE MINIMIZING THE RISK OF LITIGATION

In light of recent Supreme Court rulings, employers need to be mindful of the risk of disparate impact age discrimination lawsuits when planning a reduction in force ("RIF"). Although used to reduce labor costs, if not carefully planned in advance, RIFs can result in substantial liability which may offset any initial savings the employer achieves through the reduction itself. The following discussion provides an overview of relevant considerations—pertaining to both age discrimination claims and more general best practices—when conducting a RIF.

Alternatives to Layoffs May Reduce the Risk of Claims

Although employers are capable of realizing short-term savings through RIFs, large layoffs can cause companies to incur hidden costs. For example, economically-driven RlFs may require the involuntary termination of good workers. Such adverse employment actions impact negatively on morale, affecting both the employees who leave the company and those who remain. In addition, large scale terminations can eliminate disproportionate numbers of older, female and minority employees. This result creates the potential for class actions and individual wrongful discharge lawsuits. In the absence of proper documentation, an employer may find it difficult to convince a court, administrative agency or other third party of the true reasons for its actions.

Therefore, before planning a reduction in force, employers should consider whether other options are available, including: (1) hiring freezes; (2) wage and bonus freezes; (3) postponement of wage increases; (4) reducing bonuses and fringe benefits, including employee sharing of insurance premiums, increased insurance deductibles and limited benefit eligibility for newer employees; (5) work furloughs of limited duration; (6) reducing work hours with proportionate pay cuts; (7) assessing expected job attrition; (8) allowing affected employees to transfer to other vacant positions within the organization; (9) job sharing; (10) terminating employees with substantial performance problems; (11) terminating recent hires within their introductory periods; and (12) discontinuing the use of temporary and part-time employees and redistributing their work. Some employers look to early retirement programs, while others ask for volunteers by offering enhanced severance benefits. While less severe than involuntary layoffs, these measures still require sensitivity to the manner in which they are communicated and the effect on employee morale. Moreover, explaining the company's financial position may enlist employee support rather than resentment. Management should seek a team approach to problem solving and increasing productivity, without making unrealistic promises of job security.

When Layoffs Are Unavoidable, Proper Planning May Reduce Risk of Employment Disputes

Once a determination is made that a reduction in force is necessary, the task generally falls to operations, human resources and legal counsel to devise a plan which

minimizes the risks of litigation. To be effective, a reduction in force requires advance planning. The following outline summarizes some of the steps that should be considered before any adverse employment actions are taken:

1. **Planning the RIF.**

   a. Document the financial or other conditions necessitating the RIF.

   b. Identify the goals of the staff reduction, in terms of labor costs to be eliminated and/or the number of employees by which the organization is overstaffed.

   c. Identify the job functions and/or skills that will be essential to successful operations after the RIF.

   d. Eliminate and/or consolidate unnecessary jobs.

   e. Set a timetable for carrying out the RIF. (Unless business conditions require a series of reductions, attempt to act quickly and decisively in an effort to minimize morale problems.)

   f. Be aware of situations where an employee can argue that he or she was laid off close to the time he would have qualified for a benefit (e.g., pension vesting rights, retirement eligibility). Even if technically lawful, these situations may appear so unfair that a judge or other trier of fact might stretch the law.

   g. Try not to use a layoff as a substitute for terminating an employee who exhibits poor performance.

   h. Check state laws regarding: payment of wages, insurance benefits continuation, severance benefits, letters of recommendation, personnel record access, plant closings, layoffs, and the like. Many states have specific requirements applicable to involuntary terminations.

   i. Investigate whether the layoff will trigger vesting in pension or benefit plans for employees laid off. Also determine whether the layoff is a partial termination of a pension or benefit plan, requiring a reportable event under ERISA.

   j. Check to be sure that the terminations do not constitute withdrawal from a multi-employer pension plan, which can result in substantial liability.

   k. Check to determine if the termination has any impact on stock options.

   l. Avoid the use of form letters when denying benefits to benefit plan participants.

   m. Take steps to deliver news of layoff decision to the affected and non-affected employees. Inappropriate or poorly communicated notification can result in claims of emotional distress or other litigation.

   n. Be prepared when notifying employees about a layoff. Have answers ready for potential inquiries and avoid the appearance that the decision was poorly or hastily made.

   o. Consider the timing of the layoffs under the federal plant closing law ("WARN") or under applicable state laws (see below).

   p. Determine what notices are required under ERISA (e.g., Summary Annual Reports, Summary Plan Descriptions) and ensure that the employees receive all notices required.

   q. Assess limitations and/or liabilities created by collective bargaining agreements, employment contracts, and the like.

   r. Establish clear eligibility criteria for severance benefits. Be wary of giving extra credits for employees age 40 or older, since such treatment can violate state discrimination laws. Do not preclude retiring employees from severance pay eligibility.

   s. Determine whether a de facto severance pay plan already exists for employees involuntarily terminated. Such plans may require compliance with ERISA reporting requirements and may already bind the employer to provide certain benefits to all affected employees.

   t. Avoid discriminatory transfer policies. Workers should have the same transfer opportunities regardless of age, sex or other protected categories.

   u. Do not use age as a distinction in early retirement benefits provided as a result of a workforce reduction. For example, do not offer different benefits to employees under age 60 than those age 60 or older.

   v. Do not make layoff decisions solely on the basis of payroll dollars saved. Such decisions may be evidence of age discrimination.

2. **Making key policy decisions - How to select among employees – Some possible scenarios.**

In any layoff, the most significant decision may be the criteria by which employees will be selected for termination. In the easiest cases, an employer may make a decision by the nature and necessity of the work performed (e.g., where a particular position or product line is being eliminated). Where the decision is not so easily made, employers may utilize other criteria in making selection decisions. Examples of such criteria include:

a. By length of service/seniority.

b. By identifying and eliminating unnecessary job classifications.

c. By classes of employees, e.g., eliminating all temporary, part-time or contract workers initially.

d. By strict use of pre-existing job appraisal data.

i. Initially select employees who have been disciplined for severe or persistent performance problems.

ii. Thereafter, select from remaining employees by evaluating and comparing their ability to perform the essential job duties that will remain after the RIF is completed.

3. **Strive for an objective comparison of employees where job qualifications and skills are considered in making reductions.**

a. Consider the use of a RIF Committee and outside legal review.

b. In analyzing the comparative performance of employees, emphasis should be placed on comparing the job functions and skills that will remain to be performed after the RIF is completed.

i. When possible, performance comparisons should be made on the basis of ratings given on current or prior performance appraisals.

ii. New performance appraisals should be conducted for any employee who has not been evaluated within a reasonable period of time preceding the RIF.

4. **Prior to implementing a RIF, factors militating against the selection of certain employees should be considered.**

a. Can employees be transferred into or post for existing vacancies?

b. Is special high-level management review warranted for certain highly-paid or long-term employees?

c. Are older, minority or female employees disproportionately affected by the company's initial selection procedures?

d. Prior to implementation, initial selection decisions should be evaluated to see whether individuals in protected classes are disproportionately affected by the proposed RIF.

e. If a disparate impact exists on the basis of membership in protected classes such as gender, race or age, alternate selections should be considered.

i. If minority or female employees are disproportionately affected by the company's initial selection procedures, can the selection of these individuals be justified by business necessity?

ii. If not, alternative selections of individuals outside such protected classifications should be considered.

iii. If older employees are disproportionately affected by the company's initial selection procedures, can the selection of these individuals be justified by reasonable factors other than age?

iv. If not, alternative selections of younger individuals should be considered.

5. **Employers can attempt to limit their potential liability by obtaining general releases from employees affected by a RIF, in return for enhanced severance benefits or other valuable consideration.**

a. Under the Older Workers' Benefit Protection Act (“OWBPA”), many procedural requirements must be satisfied before an employee's release or waiver of age discrimination claims under federal law will be considered enforceable.

b. Like all releases of employment claims, releases waiving claims or rights inuring to individuals age 40 and older under the federal Age Discrimination in Employment Act ("ADEA") must be knowingly and voluntarily executed.

i. The waiver must be written in easily understandable terms.

ii. The waiver must specifically refer to rights and claims existing under the ADEA.

iii. The waiver cannot extend to rights or claims that may arise

after the date the release is executed.

iv. The consideration offered in return for the waiver must be unrelated and in addition to whatever the individual is entitled to receive upon termination under existing company policies. (e.g., If company policy provides for the payment of accrued but unused vacation days upon termination, such sums are not additional consideration capable of supporting a waiver of ADEA rights and claims.)

v. The individual must be advised in writing of his or her right to consult with legal counsel prior to executing the release.

c. If the individual considering the waiver has not filed any administrative charges of age discrimination with the EEOC, or a lawsuit alleging a violation of the ADEA, the following notice requirements must be observed:

i. In a group situation, each employee age 40 and older must be given at least 45 days to consider the release. (Note: In individual termination situations where no EEOC charge or ADEA lawsuit has been filed, the employee must be allowed to consider the release for at least 21 days), and afforded an additional 7 days after execution to revoke the agreement if desired.

ii. The company must notify the individual, in easily understandable written terms, of any eligibility requirements for being selected to participate in the employment termination program and all time limits applicable to the program.

iii. The individual must also be informed, in easily understandable written terms, of the job titles and ages of all individuals who are eligible or being selected for the termination program, and the ages of all individuals in the same job classification or organizational unit ("decisional unit") who are ineligible or not being selected for the program.

d. If the individual has filed an age discrimination charge with the EEOC, or a lawsuit alleging a violation of the ADEA, the company must provide him or her with a "reasonable" period of time to consider the execution of a waiver of ADEA rights and claims.

e. An individual cannot waive his or her right to file a discrimination charge with the EEOC, or to participate in an EEOC investigation.

6. Wherever possible, outplacement services should be offered to assist displaced individuals in obtaining subsequent employment.

7. Employees affected by a staff reduction should be advised of the RIF in as professional and supportive a manner as possible.

a. If possible, two members of management and/or human resources should meet with affected employees individually;

b. The communicators should be brief, direct and firm as to the company's decision;

c. The communicators should be able to briefly explain the basis for the decision, if asked;

d. The communicators should also explain:

i. Recall/rehire rights, if any;

ii. Severance benefits (if any), health insurance conversion rights and other monetary issues; and

iii. Outplacement or other transitional services being offered, if any.

e. The communicators should be prepared to cope with employee shock, surprise and inability to absorb the information being imparted.

8. After the implementation of a RIF, remaining employees must be enlisted as partners committed to future growth.

a. Often, RIFs are not isolated events. Business conditions may require a series of RIFs before budgetary or manpower goals are satisfied.

b. To the extent possible, consecutive RIFs should be scheduled in close proximity to each other.

c. Remaining employees should be provided with prompt and accurate information about the desired goals and anticipated timetables associated with the RIF(s).

d. If possible, remaining employees can be provided with modest economic, or non-economic incentives for increased productivity.

9. Workforce reductions provide unique opportunities for reorganizing

and streamlining operations.

a. To maximize the cost savings effected through staff reductions, existing workflows and/or operating procedures should be redesigned to improve efficiency and to eliminate the duplication of effort and expense.

i. Cross-training allows fewer individuals to perform a greater number of job functions.

ii. Reporting relationships can be restructured to avoid unnecessary layers of supervision or management.

b. Existing business practices should also be re-evaluated with an eye toward reducing hidden costs.

i. Travel and entertainment expenses and/or budgets can be scaled back.

ii. Recruitment efforts and expenses can be curtailed if not eliminated. Wherever possible, post-RIF job vacancies which occur should be filled by transferring or promoting qualified individuals from within the company.

Notice Requirements under the Worker Adjustment and Retraining Notification Act

The number of employees to be laid off also may trigger the notice requirements under the Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. Sections 2101-2109, or possibly a state plant closing statute. The following outline summarizes the general requirements of the WARN act:

1. **WARN applies to employers that have, nationwide:**

a. 100 or more employees (excluding part-timers); or

b. 100 or more employees (including part-timers) whose total weekly work hours (excluding overtime) are at least 4,000 hours per week.

2. **WARN requires an employer to give 60 days advance written notice, as described by the Act and U.S. Department of Labor's regulations, of a "plant closing" or "mass layoff" to:**

a. All affected employees (including supervisors and part-time employees), OR if the employees are represented by a labor organization, the international body of the union; AND

b. The State dislocated workers unit and the chief elected official of the local governmental unit where the affected facility is located.

3. **A "plant closing" is defined as:**

a. A permanent or temporary shutdown of a single site of employment, or of one or more facilities or operating units within a single site of employment; IF

b. The shutdown results in an employment loss at the single site of employment during any 30-day period (this period is extended by WARN and the Department of Labor Regulations to 90 days) for 50 or more employees (excluding any part-timers and employees who have not suffered an employment loss);

c. An "employment loss" is defined as:

i. An employment termination, other than a discharge for cause, voluntary departure, or retirement;

ii. A layoff exceeding 6 months; OR

iii. A reduction in an individual's working hours of more than 50% during each month of any 6-month period.

4. **A "mass layoff" is defined as a reduction in workforce which is not the result of a plant closing; AND**

a. Which results in an employment loss at a single site of employment during any 30-day period (this period is extended by WARN and the Department of Labor Regulations to 90 days), for at least 50 employees (excluding part-timers and employees who have not suffered an employment loss), if they comprise at least 33% of the workforce at the single site of employment; OR

b. Which results in an employment loss at a single site of employment during any 30-day period (this period is extended by WARN and the Department of Labor Regulations to 90 days), for at least 500 employees (excluding part-timers and employees who have not suffered an employment loss).

5. **The Act provides limited exceptions which may permit employers to provide less than 60 days notice of a plant closing or mass layoff if the failure to provide the requisite 60 days notice is due to:**

a. Unforeseeable business circumstances.

i. Caused by sudden, dramatic, unexpected action or condition beyond employer's control; or

ii. Termination of major contract, major economic downturn, government-ordered closing.

b. A faltering company (in plant closing situations only).

i. Employer is actively seeking capital or business when WARN notice is due;

ii. Realistic opportunity exists to obtain financing;

iii. If obtained, financing will enable business to avoid or reasonably postpone shutdown; and

iv. Good faith belief that notice would preclude employer from obtaining financing.

c. A natural disaster.

i. Floods, earthquakes, storms, droughts, tidal waves;

ii. Closing or layoff is a direct result of natural disaster; and

iii. Notice must be provided in advance or after employment loss.

6. State and local notice requirements

The requirements of WARN supplement those contained in personnel policies, employment contracts, collective bargaining agreements or any other statute. Some states have enacted statutes which may impact on plant closings or relocations include: Hawaii, Maine, Maryland, Massachusetts, Oregon, South Carolina, Tennessee, Wisconsin and the U.S. Virgin Islands. In addition, some cities and municipalities have enacted plant closing ordinances.

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Unfortunately, it appears that the business community's recent wave of workforce reductions will continue into the foreseeable future. However, a wide range of options exist for employers who wish to reduce labor costs without sacrificing operational efficiency. If the option selected is a reduction in force, significant litigation costs can be avoided with proper advance planning and legal advice.