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Age Discrimination in Employment Suits: A Practical Guide

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AGE DISCRIMINATION IN EMPLOYMENT SUITS: A PRACTICAL GUIDE

Age discrimination occurs in numerous forms but is rarely overt and unconcealed. The elderly often suffer discrimination in employment without the appearance of blatant violations on the part of the employer. For the most part, the aggrieved party must look to the total surrounding circumstances in order to determine if some form of discrimination has taken place. It is therefore important that the attorney become sensitive to the intricacies of the law of age discrimination in employment in order to protect the rights of his clients.

This Note is written in the hope of providing the attorney with the practical information that may be of use in the preparation of an age discrimination suit. In surveying recent federal decisions in the area of age discrimination, this article will focus upon those elements of an age discrimination suit which have traditionally presented the most difficulty for attorneys. West Virginia law, where available and relevant, will also be explored.

I. DETERMINING IF AGE DISCRIMINATION EXISTS

One of the most important tasks for the attorney is to aid his client in the initial determination of whether the potential for an age discrimination claim exists. To aid in this initial determination, it is helpful to have prepared a series of questions to ask the elderly client. The basis of these questions is: given the person’s work record and qualifications, would he have been treated differently if he were younger? A detailed questionnaire designed to elicit further indications of age discrimination has been provided by the Northwestern Illinois Area Agency on Aging.¹ The following questions from that publication are recommended for use in the initial stages of an age discrimination investigation.

For use in representing a dismissed employee:

(1) Does the employer have a young work force? Are older workers encouraged to stay long enough to become eligible for

pension benefits or, rather, urged to take early retirement?
(2) Was the employee replaced by a person who was younger, less qualified, or needed training to carry out the job?
(3) Was the employee transferred or promoted to a position where he could no longer meet job requirements? Was he passed over for a promotion or a training program for which he was eligible?
(4) Did the employee suddenly begin receiving bad evaluations or warnings or citations for imaginary or generally overlooked mistakes?

For use in representing a job applicant:

(1) Did the employer state specific qualifications or include a job description?²
(2) Did the employer state why the applicant was not hired? If the hiring was based on a point system or oral interview, did the employer explain in what areas the applicant was deficient? If the hiring was based on a test, did it test only those skills which are actually needed on the job?
(3) Was the applicant told he or she was overqualified for the job or might not fit in with the younger work force?
(4) If the applicant was asked to state his age was there a statement or notice that age would not be a basis of discrimination?³
(5) Did a younger, less qualified applicant get the job?⁴

II. COVERAGE OF THE ADEA AND THE WEST VIRGINIA HUMAN RIGHTS ACT

The Age Discrimination in Employment Act is designed to "promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."⁵ The ADEA thus establishes the aged as a specifically protected class of persons. Protection was originally given only to those employees and labor union members aged 40 through 64.⁶ In 1978, however, Congress extended protection to include all employees and labor

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² If the necessary qualifications for the job are vague, the vagueness may be purposeful, allowing the employer or employment agency to discriminate.
³ Federal law requires that notice of the Age Discrimination in Employment Act be posted in all personnel or hiring offices. 29 U.S.C. § 627 (1976).
⁴ Northwestern Illinois Area Agency on Aging, supra note 1, at 1-2.
union members aged 40 through 69.7 The ADEA acts as a shelter against discrimination by three main groups: employment agencies,8 labor organizations,9 and employers with 20 or more employees.10

The activities which are prohibited by the ADEA vary according to the respective group which is being regulated. The primary restriction placed upon employment agencies prohibits their refusal, based solely upon the age of the applicant, to refer an elderly employee to a job opening.11 Labor organizations are prohibited from discriminating against older workers in membership, classification, or referral for employment, and from causing an employer to discriminate against his employees.12 Finally, an employer may not discriminate based upon age in the hiring or discharge of a covered employee, or with respect to the covered employee’s compensation, terms, conditions, or privileges of employment.13 It is

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1. [As a matter of basic civil rights people should be treated in employment on the basis of their individual ability to perform a job rather than on the basis of stereotypes about race, sex, or age.]

2. In fact, the evidence clearly establishes the continued productivity of workers who are 65 years of age and older.

3. Mandatory retirement works severe injustices against the aged. For many, retirement income from public and private sources is unavailable or inadequate to support a comfortable existence.

4. Substantial evidence exists that mandatory retirement may have a severe deteriorative impact on the physical and psychological health of older individuals.

5. Society as a whole suffers from mandatory retirement . . . . [M]andatory retirement costs the nation three-tenths of one percent of its annual gross national product."


8 29 U.S.C. § 630(c) (1976); 29 C.F.R. § 860.36 (b), (c) (1978).


10 29 U.S.C. § 630(b) (1976), (amending 29 U.S.C. § 630(b) (1970)). Also included as an employer under this section is (1) any agent of such employer, and (2) a state or political subdivision of a state, and any interstate agency; but the term employer does not include the United States government or any corporation wholly owned by the United States government.


13 29 U.S.C. § 623(a) (1976). "Compensation" includes all types and methods of remuneration paid to or on behalf of or received by an employee for his employ-
important to recognize that these restrictions bar all discrimination against anyone within the protected class. Thus an employer may not show preference to one individual within the age group at the expense of discrimination against another within the group; that is, an employer could not promote a 42 year old employee instead of a 50 year old employee solely on the basis of age. This proscription, however, does not prevent an employer from setting up benefit plans for older workers which will subsequently apply to younger workers once they reach a certain age.

In 1967, the same year the ADEA was enacted, West Virginia enacted the West Virginia Human Rights Act, bringing West Virginia essentially in accord with federal guidelines. West Virginia employers, labor organizations, and employment agencies are now prohibited under state law from engaging in age-based discriminatory practices. Employment agencies are prohibited from discriminating in referral for employment, and employers and labor organizations are prohibited from discrimination with respect to compensation, hire, tenure and conditions of employment.

Although conforming to the ADEA in most respects, the West Virginia Human Rights Act falls short of its federal counterpart in one important area: the age of the protected class. The Human Rights Act continues to give protection to a smaller number of our state's elderly, covering only those ages 40 through 65. With the recent extension of federal protection under the 1978 Amendments...
to the ADEA, it seems appropriate that the West Virginia Legislature similarly extend the coverage of the West Virginia Act.22

III. BURDEN OF PROOF AND THE PRIMA FACIE CASE

While there has been some speculation as to whether the standard allocation of burdens used in civil suits would be applied to age discrimination cases, case law, primarily originating from the Fifth Circuit, suggests that such use is appropriate. In 1972, the Fifth Circuit in Hodgson v. First Federal Savings & Loan Association indicated that the initial burden is on the plaintiff to produce enough evidence to establish a prima facie case of age discrimination, and upon such a showing the court would then look to the defendant for an explanation.23 In 1975, in Bittar v. Canada, the same court reiterated that once the plaintiff has established a prima facie case the burden shifts to the defendant to produce evidence sufficient to rebut the plaintiff's claims.24 This allocation of burdens conforms with the standards ordinarily applied in civil actions.25

The requirements of a prima facie showing of age discrimination vary among the federal courts.26 Thus, the discussion to follow will not attempt to define a standard prima facie case. Rather it will review the recent developments of judicial thought in order to provide a workable formulation which should be helpful in establishing a prima facie case of age discrimination.

Because of the similarity between the ADEA and Title VII of the 1964 Civil Rights Act,27 federal courts originally looked for

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22 For a discussion of the relationship between state coverage and federal coverage, see text accompanying notes 68-80, infra.
23 455 F.2d 818 (5th Cir. 1972).
24 512 F.2d 582 (5th Cir. 1975); Price v. Casualty Co., 561 F.2d 609 (5th Cir. 1977).
27 "It shall be an unlawful employment practice for an employer... to fail or
guidance to previous cases brought under Title VII in order to construct by analogy the prima facie elements in an age discrimination suit. In the Title VII decision of \textit{McDonnell Douglas Corp. v. Green}, the United States Supreme Court held that in order for a Title VII plaintiff to establish a prima facie case he must show:

(i) that he belongs to a racial minority;
(ii) that he applied and was qualified for a job for which the employer was seeking applicants;
(iii) that, despite his qualifications, he was rejected; and
(iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of the complainant’s qualifications.\textsuperscript{28}

In 1977, however, the Fifth Circuit Court of Appeals decided two cases which serve to confuse a prospective ADEA plaintiff in his determination of whether he must meet the requirements set forth in \textit{McDonnell}. In \textit{Price v. Maryland Casualty Co.}, the Fifth Circuit adopted the \textit{McDonnell} test, thus holding an ADEA plaintiff to the same standards as a Title VII plaintiff.\textsuperscript{29} In \textit{Marshall v. Goodyear Tire & Rubber Co.}, however, the Fifth Circuit indicated that there need not be a “stagnant adoption” by the courts in ADEA suits of the parallel guidelines established in \textit{McDonnell}, but rather that the court is free, based upon language from \textit{McDonnell} itself, to change the requirements as factual situations require.\textsuperscript{30} Thus the appropriate and more stringent test to be applied following \textit{Goodyear Tire} becomes: (1) the plaintiff must prove that he is within the protected group; (2) the plaintiff must prove that he was not hired or that he was discharged; and (3) the plaintiff must prove that the defendant sought to and did replace the plaintiff with a younger person.\textsuperscript{31}

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\textsuperscript{28} 554 F.2d 735 (5th Cir. 1977).
\textsuperscript{29} 561 F.2d 609, 612 (5th Cir. 1977).
\textsuperscript{30} 411 U.S. 792, 802 (1972).
\textsuperscript{31} 554 F.2d at 735-36.
\end{flushright}
To add to these confusing standards, in 1977 the Northern District of California, in Marshall v. Hills Bros., made a total break from the Title VII line of cases and stated that "age discrimination is sufficiently different from race and sex discrimination that the lenient requirements for establishing a prima facie case under Title VII may not be applicable to suits under the Age Discrimination Act." In Marshall, the court found that the plaintiffs had not established a prima facie case of age discrimination despite their having shown that: (1) eleven employees had been fired, nine of whom were in the protected class; (2) of the nine in the protected class, eight were replaced with younger workers; (3) when given a choice, the defendant fired the older worker; and (4) the defendant had on numerous occasions mentioned its firing of older workers. Noting the intent of Congress to have ADEA actions interpreted on a case by case basis, the court found that the defendant was in a grave financial crisis and had used a permissible method of determining which employees would be dismissed.

This deviation from prior judicial thinking is of major significance to the prospective ADEA plaintiff. If the courts continue the pattern begun in Goodyear Tire and Hills Bros., ADEA plaintiffs will be faced with two hurdles: (1) compliance with strict guidelines requiring the plaintiff to show that he was in fact replaced by a younger person, and (2) the possibility that despite the clarity of the discrimination, the court will nevertheless view the employer's actions as justified based upon the totality of the circumstances and the supposedly equitable methods available to the employer to determine which employees will be discharged.

IV. BONA FIDE OCCUPATIONAL QUALIFICATIONS

Not all actions by an employer which may appear to be discriminatory are prohibited by the ADEA. The most frequently used exception to the ADEA is the "bona fide occupational qualification" defense. Any action by an employer which may otherwise

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34 Id.
be prohibited by the ADEA is not considered unlawful where age is "a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." As would be expected, the BFOQ defense has been the subject of numerous interpretations. Nevertheless a definite pattern of interpretation has evolved, one which, if viewed in its historical context, will allow a fairly conclusive determination of the requirements of proof employers must meet in order to establish the BFOQ defense.

In an attempt to define the elements needed to establish a BFOQ defense, the courts once again looked for guidance to previous Title VII actions. Thus two important and totally divergent Title VII actions—sex discrimination cases—became the basis for interpreting the BFOQ defense: Weeks v. Southern Bell Telephone & Telegraph Co. and Diaz v. Pan American World Airlines, Inc. Weeks held that in order to maintain a BFOQ defense an employer "has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." In taking a more stringent view of the BFOQ defense, the court in Diaz stated: "we apply a business necessity test, not a business convenience test. That is to say, discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively." Thus, under Diaz, for an employer to qualify for use of the BFOQ defense, the basis of the job discrimination must be related to the purpose of the business involved. This requirement is best seen in the Diaz holding that the employer's refusal to hire male cabin attendants was invalid because such discrimination was not related to the employer's primary business function — safe transportation.

The first attempt by the courts to interpret the BFOQ defense in an age discrimination suit came in 1974 in the decision of Hodgson v. Greyhound Lines. Upholding an intercity bus prac-

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27 408 F.2d 228 (5th Cir. 1969).
28 442 F.2d 385 (5th Cir. 1971), cert. denied, 404 U.S. 950 (1971).
29 408 F.2d at 235. The court held that an employer's refusal to hire women for a job that required occasional strenuous activity violated the Title VII prohibition against employment discrimination.
30 442 F.2d at 385.
31 499 F.2d 859 (7th Cir. 1974), cert. denied, 419 U.S. 1122 (1975). For further discussion of this case see Employment Discrimination - Age Discrimination in
riage of refusing applications for drivers from individuals thirty-five years of age or older, the court in Hodgson chose to adopt the Diaz test and held that an employer need only demonstrate a "minimal increase in risk of harm for it is enough to show that elimination of the hiring policy might jeopardize the life of one more person than might otherwise occur under the present hiring practice." Thus the court in an employer-oriented decision chose to give a broad interpretation to the BFOQ exception.

In 1976 an entirely different approach was taken by the Fifth Circuit. In Usery v. Tamiami Trail Lines the court indicated that the Seventh Circuit in Hodgson had misinterpreted both Weeks and Diaz. The court felt that rather than being forced to choose between the two available tests that the two tests should be used in conjunction; with a satisfaction of the Diaz test being a condition precedent to the application of the Weeks test. Thus a two-pronged test evolved for use in determining whether the BFOQ defense has been satisfied:

(1) Apply Diaz: determine if the justification for the discrimination relates to the business purpose. Employers cannot discriminate for reasons unrelated to the essence of the employer's business.
(2) Apply Weeks: determine if there is any reasonable factual basis to indicate that the excluded class of persons cannot do the job involved. An employer must show that such a factual basis does exist.

The most recent pronouncement by the federal courts relating to the BFOQ defense comes from the Fourth Circuit in the 1977 case of Arritt v. Grisell. The plaintiff had applied for employment as a police officer in Moundsville, West Virginia. The plaintiff's application was denied on the grounds that he was forty years old and thus ineligible to take the required physical and mental exams in accordance with West Virginia law limiting original applicants to ages between eighteen and thirty-five. The plaintiff sought relief under the ADEA and the defendant raised the BFOQ defense. In ordering the case remanded, the court took an extensive


[1] 499 F.2d at 863.
[5] Remand was based upon the lower court's refusal to allow the plaintiff to
look at the decisions in Hodgson and Tamiami Trail. After careful consideration, the Fourth Circuit adopted the two-pronged test promulgated in Tamiami Trail.

The majority of courts now appear to be more inclined to apply the two-pronged test combining Weeks and Diaz in determining whether the employer has established a BFOQ defense. Therefore, in any attempt to rely upon a BFOQ defense it can be stated with some certainty that an employer will be required to show two things: (1) that the discriminatory job description is related to the purpose of his business, and (2) that a factual basis exists which indicates that the class of people excluded from that job cannot handle the duties required.

V. PROCEDURAL REQUIREMENTS UNDER THE ADEA

A. The Form of Notice

Perhaps the most confusing and misunderstood aspect of the ADEA is the procedure that ADEA plaintiffs must follow in order to bring a claim in federal court, for it is a rare instance where the federal courts have been in agreement regarding the interpretation to be given to the ADEA's procedural requirements. The ADEA requires that prior to the commencement of any civil action an individual must give the Secretary of Labor not less than sixty days notice of an intent to sue. In addition to dispute over the form of notice that is required, another issue raised by § 626(d) is whether the ADEA plaintiff must actually wait sixty days after he has filed his notice of intent to sue prior to instituting a civil action. Surprisingly enough, the federal courts have been in virtual agreement that this sixty-day waiting period is a jurisdictional prerequisite to a private suit under the ADEA. See Hatfield v. Mitre Corp., 562 F.2d 84 (1st Cir. 1977); Rucker v. Great Scott Supermarkets, 528 F.2d 393 (6th Cir. 1976). Even though the plaintiff files his civil action prior to the expiration of the sixty-day period, therefore resulting in dismissal, the plaintiff may still wait until the filing date matures and re-file his action. See Mizuguchi v. Molokai Electric Co., 411 F. Supp. 590 (D. Haw. 1976). It is important to realize that the sixty-day waiting period is also applicable to actions brought under § 633(b), where the alleged unlawful practice occurs in a state which has an age discrimination law and an agency to enforce that law.

As a practical matter, to save time and to assure that notice requirements are met, an attorney should file on the same day both his complaint with the relevant state agency (if required to file in the state first) and his notice of intent to sue with the Secretary of Labor.
type of notice that is required. Authority exists for finding that the notice could be in any one of the following forms: (1) written notice of the grievance, with an express statement of intent to sue;48 (2) written notice of the grievance, with no express statement of intent to sue;49 (3) oral notice of the grievance, with an express statement of intent to sue;50 and (4) oral notice of the grievance, without an express statement of intent to sue.51

The arguments in favor of requiring either written notice or a statement of express intent to sue are predicated on the theory that both forms will allow the Secretary of Labor to better perform his conciliation duties as required by the ADEA.52 It is believed that any other form of notice is incomplete, lacking the necessary information to justify action by the secretary.53

The most convincing argument in favor of the allowance of oral notice lies in the ambiguity of the statutory section itself, for nowhere within the ADEA is written notice specifically required.54 The 1976 decision of Smith v. Jos. Schlitz Brewing Co. provides justification for the assertion that grievance, either written or oral, filed with the Secretary of Labor should suffice as adequate notice.55 The nature of the ADEA suggests that no statement of express intent to sue is required. The ADEA, as Smith indicates, is remedial and humanitarian legislation and thus should be liberally construed to achieve its purpose of protecting older workers from discrimination. Additionally, Smith reminds us that in a majority of the ADEA cases the complaints will be filed by nonlawyers and therefore it would be inequitable to hold them to such stringent, inflexible rules.

B. The 180-Day Period: A "Jurisdictional" or "Procedural" Requirement?

Where an action is brought pursuant to § 626(d)(1) (where the plaintiff's claim arises in a state not having an age discrimination act), the sixty-day notice of intent to sue must be filed within 180

days after the alleged discriminatory practice occurs. If the action is brought pursuant to § 633(b) (where the plaintiff's claim arises in a state which has an age discrimination law and an agency charged with enforcement of that law) the time limit is extended to 300 days after the alleged discriminatory practice or to thirty days after receipt by the individual of notice that proceedings under state law have been terminated, whichever is earlier.

Once again a review of case law reveals disagreement among the federal courts in their interpretations. The disagreement is centered upon the degree of importance to be given the 180-day requirement. One position is that the 180-day period is a "jurisdictional" prerequisite to any federal civil action under the ADEA and therefore, when not complied with, the federal courts are without jurisdiction to hear the case. The opposing view is that no such jurisdictional prerequisite exists, but rather that the 180-day period is a "procedural" requirement. This second theory provides for the tolling or extension of the 180-day period for equitable reasons. Thus, where reasonable justification exists as to why the notice of intent to sue was not filed within 180 days of the alleged discriminatory practice, the action is not barred.

The first judicial determination of § 626(d) as a jurisdictional prerequisite occurred in 1974 with the Fifth Circuit decision in

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56 Two totally divergent views have been offered by the courts for determining exactly when the discriminatory practice took place so as to know when the 180-day period begins to run. The first approach, that taken by the Fifth Circuit, embodies a pro-employer attitude. The Fifth Circuit has held that the discriminatory practice has occurred for the purposes of beginning the 180-day period when the employer, by acts or words, shows a clear intention to dispense with the services of an employee or, at the latest, as of the date after which the employee's services are no longer accepted. Payne v. Crane Co., 560 F.2d 198 (5th Cir. 1977). The Eighth Circuit has adopted a more lenient attitude, stating that the 180-day period begins at the time the employee is terminated for administrative purposes (i.e., taken off the payroll, disability insurance is ended, etc.), rather than when the employee is told that he no longer has a job. Moses v. Falstaff Brewing Corp., 525 F.2d 92 (8th Cir. 1975). For a discussion of both the Fifth and Eighth Circuits' views and an innovative method whereby the plaintiff may extend the 180-day period, see Thomas v. E. I. Dupont de Nemours and Co., 574 F.2d 1324 (5th Cir. 1978).


Powell v. Southwestern Bell Telephone Co. Rejecting the plaintiff's argument that § 626(d) should be treated in similar fashion to a statute of limitations and thus be subject to equitable tolling, the Fifth Circuit adopted the narrow view that any failure to file the notice of intent to sue within the specified time limits would be fatal to an ADEA claim.

In Edwards v. Kaiser Aluminum & Chemical Sales, Inc., however, the Fifth Circuit indicated that reasons may exist which would allow postponing the beginning of the 180-day period. While technically following Powell in holding § 626(d) to be a jurisdictional prerequisite, Edwards did leave the door open. The court suggests that the 180-day period would not begin until the ADEA plaintiff has been discharged and he either retains counsel or acquires actual knowledge of his ADEA rights.

Other jurisdictions, specifically the Tenth and Third Circuits, share the view that the 180-day requirement is only a procedural provision. The Tenth Circuit confronted this issue in the 1976 case of Dartt v. Shell Oil Co. and held that no absolute bar to an ADEA action exists where the plaintiff fails to file his notice of intent to sue within 180 days. As justification for allowing equitable modifications of the 180-day period, the court cited the following: (1) the ADEA provision is similar to the Title VII provision interpreted by the Fifth Circuit to allow equitable tolling; (2) the Fifth Circuit in Edwards indicated that equitable tolling may apply to the 180 period; (3) the ADEA is remedial in nature and should be liberally construed in favor of the plaintiff; and (4) justice and equity require that the lack of legal training of most ADEA plaintiffs be given some consideration. Is should be remembered, however, that the court's use of this equitable power is limited to circumstances where the tolling allowance will serve the purposes

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494 F.2d 485 (5th Cir. 1974).

The Fifth Circuit reiterated its hardline approach to § 626(d) when it held that sickness and hospitalization of the plaintiff was not sufficient to toll the 180-day period. Hays v. Republic Steel Corp., 531 F.2d 1307 (5th Cir. 1976).

515 F.2d 1195 (5th Cir. 1975). See also Adams v. Federal Signal Corp., 559 F.2d 433 (5th Cir. 1977).

This method of tolling the time period differs from the cases to be discussed which hold § 626(d) to be only a procedural requirement. In Edwards, the method used to extend the time period focuses on the time prior to the beginning of the 180-day period. Edwards does not allow for a tolling of the 180-day period based upon events which might occur after the 180-day period begins.

539 F.2d 1256 (10th Cir. 1976).

Id. at 1260.
of the notice requirement, that is, where tolling will allow the Secretary sufficient opportunity to conciliate the dispute and will assure the employer adequate notice.\textsuperscript{65}

The Third Circuit chose the more liberal view in \textit{Bonham v. Dresser Industries, Inc.}\textsuperscript{66} After reviewing both \textit{Powell} and \textit{Dartt}, the Third Circuit found \textit{Dartt} to be the sounder rule and held that the 180-day period merely existed in the nature of a statute of limitations and could therefore be tolled for equitable reasons.\textsuperscript{67}

\textbf{C. \textsection 633: Federal/State Relationship}

In passing the ADEA, Congress did not intend to strip the states of their power to act in the area of age discrimination in employment.\textsuperscript{68} Yet despite the agreement that states are to retain power to adjudicate age discrimination claims, an intensely debated issue has arisen over whether the ADEA requires an aggrieved individual to seek redress from a state agency before he may properly institute a federal action. This debate is the product of \textsection 633(b) which states:

\begin{quote}
In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under Section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law.
\end{quote}

Initial federal court decisions held that \textsection 633(b) requires an individual to resort to the available state remedies prior to filing federal suit. The principal justification is drawn from the similarity between \textsection 633(b) of the ADEA and \textsection 2000e-5(b) of the 1964 Civil Rights Act.\textsuperscript{69} Since \textsection 2000e-5(b) has been construed to require

\begin{quote}
\textsuperscript{65} \textit{Id.} at 1261.
\textsuperscript{66} 569 F.2d 187 (3rd Cir. 1977) (appeal pending).
\textsuperscript{69} In the case of an alleged unlawful employment practice occurring in a State . . . which has a . . . law prohibiting the unlawful employ-
an attempt of state resolution prior to seeking federal relief, numerous courts have held that § 633(b) also requires such an interpretation. This “state relief first” theory has been carried to such extremes that in one instance the Third Circuit held that where the state filing requirement is less than the 180-day ADEA requirement, the aggrieved individual is still required to file a futile state complaint within the 180-day period even though the state time period has elapsed.

During the period when most of the federal circuit courts were holding steadfastly to the “state relief first” rule, a few of the federal district courts were laying the ground for the presently prevailing attitude among the circuits. Vazquez v. Eastern Airlines, Inc. first represented the view that Congress did not intend to place the same delay producing restrictions upon the ADEA that it had placed upon Title VII actions. Only where the plaintiff chooses to seek redress in the state first would section 633(b) require that the state be given sixty days to conciliate the grievance. In Bertrand v. Orkin Exterminating Co., Inc. an even more persuasive argument was presented. In Bertrand the court reasoned that, when considering section 626 as the jurisdictional section and section 633 as the federal/state relationship section, it would not make sense for Congress to have required state relief first when section 633(a) states that once the federal suit is instituted it supercedes any state action.

Finally, in 1978 the Sixth and Third Circuits officially accepted the reasoning offered by the lower courts in Vazquez and Bertrand and held that section 633(b) does not require an aggrieved party to seek state relief first. The most complete discussion for not requiring state relief first is found in the Third Circuit

74 Holliday v. Ketchum, McLeod, & Grove, Inc., 584 F.2d 1221 (3rd Cir. 1978); Gabriele v. Chrysler Corp., 573 F.2d 949 (6th Cir. 1978).
decision in \textit{Holliday v. Ketchum, McLeod & Grove, Inc.}\textsuperscript{55} Dispel-
ling the \textit{Goger} analogy between the ADEA and Title VII, \textit{Holliday}
related that not only have numerous scholars rejected such com-
parisons\textsuperscript{56} but that the United States Supreme Court early in 1978
had laid the issue to rest in \textit{Lorillard v. Pons}.\textsuperscript{57} Holding that a
plaintiff has a right to a jury trial in ADEA suits, the Court specifi-
cally rejected the relevance of Title VII procedures to lawsuits
which allege age discrimination: "[R]ather than adopting the
procedures of Title VII for ADEA actions, Congress rejected that
course in favor of incorporating the Fair Labor Standards Act pro-
cedures even while adopting Title VII substantive prohibitions."\textsuperscript{58}
Thus since the FLSA does not require any resort to state proceed-
ings in order to gain redress for FLSA violations, no such require-
ments should exist in ADEA actions.

The court in \textit{Holliday} offered several other compelling justifi-
cations for its rejection of the requirement of state relief first. Not-
ing the absence of any requirement on the face of the ADEA, the
court recognized that it would indeed be incongruous to attribute
such an intent to Congress to mandate resort to state proceedings
when those same proceedings would be terminated by the initia-
tion of a federal suit under the ADEA. The Congressional Confer-
ence Report issued in conjunction with the 1978 Amendments indi-
cates an even stronger disapproval for the state relief first proposi-
tion:

\begin{quote}
It is the committee's view that an individual who has been
discriminated against because of age is free to proceed either
under State law or under federal law. The choice is up to the
individual. However, as Section 14(b) makes clear if the indi-
vidual does choose to proceed initially under State law, he must
give the State agency at least 60 days to take remedial action
before he may commence a federal action.\textsuperscript{59}
\end{quote}

Finally, \textit{Holliday} sets forth the most logical basis for not adhering
to a requirement of state relief first. The court states that any such

\textsuperscript{55} 584 F.2d 1221 (3rd Cir. 1978).
\textsuperscript{56} See, Note, \textit{The Age Discrimination in Employment Act of 1967}, 90 \textit{Harv. L. Rev.} 380, 411 (1976); Note, \textit{State Deferral of Complaints Under the Age Discrimina-
tion in Employment Act}, 51 \textit{Notre Dame L. Rev.} 462 (1976); Note, \textit{Procedural Prerequisites to Private Suit Under the Age Discrimina-
\textsuperscript{57} 434 U.S. 575 (1978).
\textsuperscript{58} \textit{Id.} at 584-85.
requirement would not serve to effectuate but would instead frustrate the purposes of the ADEA:

[I]t seems anomolous to us that deference must be accorded to state agency procedures when it is a federal right that is sought to be vindicated . . . —[T]he ADEA's purposes would be frustrated rather than fulfilled if we were to perpetuate a procedural requirement which in many instances would prevent an otherwise meritorious age discrimination claim from being considered. 80

It may be safely said that adequate justifications now exist which may be relied upon by the ADEA plaintiff and attorney in support of his choice of forums. However, it should be kept in mind that despite the opinion in Holliday, it is not inconceivable that other federal courts will adhere to the Goger line of "state relief first" decisions. Therefore caution should be exercised before filing a federal claim without seeking prior state relief.

VI. AVAILABLE REMEDIES IN AGE DISCRIMINATION CASES

A. Under the ADEA

The federal courts continue their divergent interpretations of the ADEA in applying the remedies available under the act. While the recovery of attorney's fees in ADEA actions is well settled, 81 there is no such agreement on whether the ADEA allows for the recovery of either punitive damages or damages for pain and suffering. Punitive damages have been allowed by some courts on the theory that such an allowance is needed to act as a deterrent to any further violations by discriminating employers. 82 Other courts, however, hold that punitive damages are not recoverable because of the absence in the language of the ADEA of any mention of punitive damages. 83 It can at least be argued that if the recovery

80 584 F.2d at 1230.
of punitive damages had been intended, Congress would have specifically stated so as it did when it sanctioned the recovery of punitive damages in Title VIII actions under the 1968 Civil Rights Act.84

The federal courts are similarly divided regarding the recovery of damages for pain and suffering. Those jurisdictions which have found such damages nonrecoverable have based their rationale on the absence of any language in the ADEA providing for recovery of damages for pain and suffering. It has been argued that the ADEA requires the use of administrative remedies first and that if Congress had intended to grant the administrative agency the power to award such damages, it would have specifically provided for this power.85 Additionally it is argued that to grant such power to the Secretary of Labor would serve no purpose but would impair his conciliatory function by requiring him to become an arbitrator in money suits.86

A combination of the above justifications for the nonrecovery of damages for pain and suffering is found in the 1979 Fourth Circuit case of Slatin v. Stanford Research Institute.87 Upon review of the defendant’s motion to strike the plaintiff’s request for pain and suffering damages, Slatin extensively discussed, and found itself in agreement with, the only three circuit court decisions on this issue.88 The justification offered by the court in Slatin for the disallowance of pain and suffering damages in ADEA suits may best be summarized as follows:

(1) The Congressional intent as reflected by legislative his-

87 No. 77-1223 (4th Cir. Jan. 15, 1979).
tory and judicial expression clearly indicates that the ADEA is to be enforced through the procedures of the Fair Labor Standards Act.

(2) By reference to Vasquez v. Eastern Airlines, one is reminded that those decisions construing the FLSA have specifically limited any recovery under that Act to those damages enumerated therein.

(3) The only damages specifically recoverable under the ADEA or the pertinent provision of the FLSA are "unpaid minimum wages," "unpaid overtime compensation," and "liquidated damages."

(4) It is reasonable to assume that Congress was aware of the limited recovery allowed under the FLSA and therefore acquiesced in applying such a limited recovery to ADEA suits.

The Fourth Circuit also rendered the view that the allowance of pain and suffering damages would have the effect of impairing the Secretary's conciliatory duties. Quoting from Dean v. American Security Ins. Co., the court stated:

The silence of the Act with respect to general damages is entirely consistent with legislative intent to abstain from introducing a violative ingredient into the tripartite negotiations involving Secretary, employee and employer which might well be calculated to frustrate rather than to "effectuate the purposes" of the Act.

On the other hand, a compelling discussion in favor of the recoverability of damages for pain and suffering is found in the 1977 decision in Coates v. National Cash Register Company. Although it concerned all phases of recoverable ADEA damages,

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57 579 F.2d at 109-110.
60 559 F.2d at 1038-39.
61 No. 77-1223, slip op. at 10.
63 The court summarized the measure of back pay damages to be the difference between the salary an employee would have received but for the violation of the Act and the salary actually received from other employment. . . . The back pay amount [is] reduced by severance pay received, unemployment compensation collected, and any amounts earnable with reasonable diligence. Finally, the back pay amount should be increased by the value of any pension benefits, health insurance, seniority, leavetime, or other fringe benefits which the employee would have accrued during the back pay period but for the violation of the Act.
Coates cites the following reasons for allowing the recovery of damages for pain and suffering:

(1) the ADEA, like Title VIII of the Civil Rights Act of 1968 (42 U.S.C. § 3612) creates a new statutory tort, and the existence of such a statutory right implies the existence of necessary and appropriate remedies;

(2) the ADEA shares the 'make whole' purpose of Title VII of the Civil Rights Act of 1964 and the emotional and psychological losses occasioned by age discrimination were clearly recognized by the Congress in its deliberations on the Act;

(3) compensatory awards for pain and suffering have been found appropriate in other discrimination contexts, including employment and housing;

(4) the cases denying damage awards for pain and suffering in Title VII actions have been premised on that statute's express limitation of relief to equitable remedies, whereas the ADEA contains a specific allowance of legal relief.  

B. Under the West Virginia Human Rights Act

"If our society and government seriously desire to stamp out the evil of unlawful discrimination which is symptomatic of unbridled bigotry, and we believe they do, then it is imperative that the duty of enforcement be accompanied by an effective and meaningful means of enforcement." The West Virginia supreme court thus indicated the importance of providing the State Human Rights Commission with the remedial force necessary to effectively perform its functions. Although the West Virginia supreme court has not yet decided an age discrimination case under the West Virginia statute, its decisions dealing with other forms of discrimination define the powers granted to the Human Rights Commission regardless of the type of discrimination case it is considering.

In 1975, in State Human Rights Commission v. Pauley, the West Virginia supreme court considered whether the Human Rights Commission held the power to grant monetary awards to aggrieved parties. The commission had awarded $480 for compensatory damages, $100 for pain and suffering, and $100 in exemplary

Id. at 663. See also, Bucholz v. Symons Mfg. Co., 445 F. Supp. 706 (E.D. Wis. 1978) (holding that back pay may include the loss of the plaintiff's earnings from commission sales where the commission earnings can reasonably be determined by looking at the plaintiff's past record).

433 F. Supp. at 664.

damages. The court held that although the Human Rights Act impliedly confers the power to grant monetary awards, it only confers such powers as are reasonably and necessarily required to accomplish the purposes of the act. Thus the court upheld the award of compensatory damages for out-of-pocket expenses, but rejected both the award of damages for pain and suffering and the award of exemplary damages.

In the 1977 decision of *State Human Rights Commission v. Pearlman Realty Agency*, the court reconsidered the issues raised in *Pauley* and expanded the extent to which the commission could compensate those who have been subjected to unlawful discrimination. Overruling *Pauley*'s refusal to allow damages for pain and suffering, *Pearlman* held that damages are recoverable for humiliation, embarrassment, emotional and mental distress, and loss of personal dignity resulting from the unlawful discrimination. The court, however, intimated that there existed a ceiling upon the granting of such awards when it indicated that money damages of this nature are recoverable only when incidental to the commission's broad powers of enforcement.

The court in *Pearlman* took an additional step in the furtherance of the public's right to be free from discrimination. The court stated that in those cases where the amount of monetary damages would exceed the commission's jurisdiction, discrimination victims may instead have access to the courts. The court based its position upon a reading of West Virginia Code section 5-11-9, which sets out those unlawful discriminatory practices, and West Virginia Constitution article 3, section 17, which provides that the courts shall be open to all those who have been injured.

A combined view of *Pauley* and *Pearlman* would indicate that the West Virginia supreme court will look upon any discriminatory practices with grave displeasure and will attempt to provide West Virginia citizens with the fullest protection possible. The Human Rights Commission is now empowered to grant compensatory damages, and, within limits, damages for pain and suffering. Finally, in those instances where the monetary award that is sought

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100 Id. at 80.
101 Id.
103 Id. at 146.
104 Id. at 148.
105 Id.
would be beyond the commission’s power, aggrieved parties will have the right to a private remedy through the state court system.

VII. CONCLUSION

Age discrimination is one of the least understood areas of civil rights. The ADEA is a confusing and complex statute which has lent itself to divergent court interpretation on almost every aspect of its coverage. We should not allow this difficulty to act as a barricade to progress in protecting the rights of the elderly. Hopefully this article will provide a practical tool which may be used to further these important societal goals.

J. Michael McDonald