

Price Waterhouse: Alive and Well Under the Age Discrimination in Employment Act

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INTRODUCTION

Judicial application of the Age Discrimination in Employment Act of 1967¹ (“ADEA”) may be the most divergent of the employment discrimination laws because the ADEA is a hybrid of two statutes: Title VII of the Civil Rights Act of 1964² (“Title VII”) and the Fair Labor Standards Act of 1938³ (“FLSA”). The ADEA incorporates only selected portions of each of these statutes.⁴ For example, the general prohibition against age discrimination contained in the ADEA parallels the substantive provisions of Title VII, while the remedial provisions mirror, at least in part, the FLSA. Courts, however, have generally approached the ADEA in the same way as they approach Title VII because of the statutes’ shared goal of prohibiting discrimination.

However, this similarity of approach changed when Congress passed the Civil Rights Act of 1991,⁵ amending Title VII and other civil rights laws. Although the Amendments to Title VII were broad, Congress made only one express change to the ADEA’s procedural provisions. The courts, therefore, have been left to interpret congressional silence with respect to the ADEA’s substantive provisions, such as the applicability of *Price Waterhouse v. Hopkins*,⁶ a Supreme Court case overruled in part by the 1991 amendments to Title VII, in “mixed-motive” discrimination cases.

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¹ 29 U.S.C.A. §§ 621-634 (West 1999 & Supp. 1999).

² 42 U.S.C.A. §§ 2000e to 2000e-17 (West 1994 & Supp. 1999).

³ 29 U.S.C.A. §§ 201-219 (West 1998 & Supp. 1999).

⁴ See 42 U.S.C.A. § 2000e; 29 U.S.C.A. §§ 209-219.

⁵ Pub. L. No. 102-166, 105 Stat. 1071 (1992).

⁶ 490 U.S. 228 (1989).

The authors of this article argue that *Price Waterhouse* still applies to ADEA cases despite the fact that the Civil Rights Act of 1991 overruled parts of that decision as applied to Title VII. The narrower purpose of the ADEA itself, as described by the Supreme Court in *Hazen Paper Co. v. Biggins*,⁷ and the ADEA's origins in the FLSA, differentiate the ADEA from Title VII, especially with respect to attorney fees, and support the continued vitality of *Price Waterhouse* in ADEA cases. Part II describes the changing demographics in the United States and how a growing pool of older workers necessarily increases the importance of the ADEA. This section also focuses on the number of ADEA charges filed with the Equal Employment Opportunity Commission ("EEOC"). Part III analyzes the origin of the specific provisions of the ADEA and discusses the differences between the ADEA and Title VII resulting from the ADEA's hybrid construction and origins in the FLSA. Part IV reviews the evidentiary burdens of proof in ADEA cases and examines the mixed-motive analysis in particular. This article concludes with the authors' contention that *Price Waterhouse*, as applied to the ADEA, survives the 1991 amendments to Title VII because of Congress's silence as to the role of mixed-motive analysis under the ADEA, the differing structures of the remedies provisions under the ADEA and FLSA in contrast to Title VII's construction, and the different remedial goals of the ADEA.

THE CHANGING DEMOGRAPHICS OF THE UNITED STATES WORKFORCE

A. *An Aging Workforce*

The recent tightening of the labor market in the United States has encouraged many employers to recruit older workers. As a result, workers in their fifties and sixties are finding jobs more easily. Moreover, older workers are expected to continue to participate in the workforce in growing numbers.⁸ This older workforce is a result of the large baby-boom generation which completed its entry into the workforce in the late 1970s and early 1980s. Because the workforce will have an ever-increasing pool of ADEA-protected employees as potential plaintiffs, the ADEA is certain to continue to figure prominently in equal employment law litigation.

Despite the current boom in the U.S. labor market and the strength of the economy, however, restructuring and reorganization continue to impact many employers.⁹ During the first

⁷ 507 U.S. 604 (1993).

⁸ In 1987 the Hudson Institute published a study that predicted the extent to which the workforce would age by the beginning of the next century. For example, in 1970 the median age of employees was 28, but by 2000 the median age is predicted to be nearly 40. At the turn of the century, workers aged 35 to 44 will dominate the labor force. Blue Wooldridge et al., *Changing Demographics of the Work Force: Implications for the Design of Productive Work Environments—An Exploratory Analysis*, 15 REV. OF PUB. PERSONNEL ADMIN. 3, Summer 1995, at 60-72. In addition, the Bureau of Labor Statistics estimates the 55-and-older population will substantially grow by the end of 2005. Howard N. Fullerton, Jr., *Labor Force Projections: The Baby Boom Moves On*, MONTHLY LAB. REV., Nov. 1995, at 3. By 2005, over 56.7 million workers aged 45 and older will be in the workforce, an increase of 41.77% from 1994. Moreover, the number of workers aged 55 and over is expected to increase to 22.1 million in 2005, an increase of 36% from 1994. *Id.*

⁹ Over three million layoffs have occurred over the past five years, and more than 45% of American companies have reduced their workforce every year since 1990. PRICE PRITCHETT & RON POUND, *THE EMPLOYEE HANDBOOK FOR ORGANIZATIONAL CHANGE* 2 (3d ed. 1996). Another recent study reports that while only 12% of

two months of 1999, there were more job-cut announcements than there were during a comparable period in 1998.¹⁰ Because many employers will continue to experience restructuring and reductions in force, the ADEA will continue to figure into these workforce changes.

B. EEOC Statistics

Despite the aging of the American workforce, the ADEA represents a declining percentage of the total employment discrimination charges filed with the EEOC.¹¹ For example, charges alleging race discrimination and sex discrimination have consistently exceeded those filed under the ADEA.

	<u>Total Number of Individual Charge Filings—All Types</u>	<u>Number of Individual ADEA Charge Filings</u>	<u>% of Total Charges</u>
1991	63,898	17,550	27.5
1992	72,302	19,573	27.1
1993	87,942	19,809	22.5
1994	91,189	19,618	21.5
1995	87,529	17,416	19.9
1996	77,990	15,719	20.2
1997	80,680	15,785	19.6
1998	79,591	15,191	19.1
1999	77,444	14,141	18.3 ¹²

While EEOC statistics do not yet reflect the impact of the aging workforce, employers have started to feel the monetary effect of ADEA claims. In 1996, for example, employers paid \$40.9 million in reported settlements of ADEA claims, an increase of \$13.6 million since 1990.¹³

U.S. workers feared job loss in 1981 when the country was in the middle of a recession, 37% of the current workforce is concerned about job security even with the tightest job market in two generations. Susan McInerney, *Greenspan Says Job Insecurity Still High; Data Show More Dissatisfaction with Pay*, DAILY LAB. REP. (BNA) No. 31, Feb. 17, 1999, at AA-I. According to the National Institute for Occupational Safety and Health (NIOSH), longer work hours and fears of downsizing are contributing factors that prompt new concerns over workplace stress and its association with adverse health effects such as heart disease. Dean Scott, *Longer Hours, Growth in Service Jobs Stressing Workforce, NIOSH Head Says*, DAILY LAB. REP. (BNA) No. 50, Mar. 16, 1999, at A-4.

¹⁰ *Companies Announced 61,870 Layoffs in February; Up From Same Period in 1998*, DAILY LAB. REP. (BNA) No. 45, Mar. 9, 1999, at A-2.

¹¹ Charge Statistics, (last modified Jan. 12, 2000) <<http://www.eeoc.gov/stats/charges.html>>.

¹² *Id.*

¹³ *Graying Baby Boomers Raise Issues of Discrimination, Management Styles*, DAILY LAB. REP. (BNA) No. 62, Apr. 1, 1997, at C-1.

ELEMENTS OF THE ADEA

A. *Substantive Provisions*

The ADEA applies to private sector employers with twenty or more employees,¹⁴ labor unions, employment agencies, and the federal government.¹⁵ The law also protects U.S. citizens aged forty and above employed overseas by American corporations or by foreign corporations controlled by an American employer.¹⁶

The ADEA prohibits discrimination against individuals forty years of age or older.¹⁷ In that sense, the ADEA mirrors Title VII in prohibiting discrimination in employment.¹⁸ Reverse age discrimination is not barred by the ADEA because employees are not protected until they reach age forty. A person forty years of age or older, however, can allege age discrimination against an employer who gives preferential treatment because of age to younger employees also within the protected age category.¹⁹

¹⁴ For the purpose of counting employees, the employer must look to whether an employer-employee relationship exists, even though the employee may not have actually worked or received compensation on a particular day. *Walters v. Metropolitan Educ. Enters., Inc.*, 519 U.S. 202, 206-08 (1997) (adopting the “payroll method,” which determines the existence of an employment relationship by looking for an individual’s appearance on the employer’s payroll).

¹⁵ 29 U.S.C.A. §§ 630(b)-(d), 633a(a). The Supreme Court recently held that although Congress made a clear statement of its intent to abrogate the States’ immunity under the ADEA, Congress did not have authority under section 5 of the Fourteenth Amendment to make that abrogation. *See Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 640, 650 (2000).

¹⁶ 29 U.S.C.A. § 630(f).

¹⁷ *Id.* § 631. When originally enacted, the ADEA only protected individuals 40 to 65 years of age. Congress raised the age ceiling to 70 in 1978 and in 1986 removed the upper age limit entirely.

¹⁸ Title VII prohibits employers from discriminating against any individual “with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C.A. § 2000e-2(a)(2). It further provides that an employer may not “limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.” *Id.*

¹⁹ 29 C.F.R. § 1625.2(a) (1999); *see also O’Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996); *Showalter v. University of Pittsburgh Med. Ctr.*, 190 F.3d 231, 235-36 (3d Cir. 1999) (61-year-old laid-off employee could establish prima facie case of age discrimination because the retained-over-40 employees, at ages 45 and 52 were “sufficiently younger” than the plaintiff).

In the Title VII context, the issue of whether it is essential to the plaintiff’s prima facie case that he must have been replaced by an employee outside the protected class is not so clearly established. *See Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 155 (1st Cir. 1990) (“[I]n a case where an employee claims to have been discharged in violation of Title VII, she can make out the fourth element of her prima facie case without proving that her job was filled by a person not possessing the protected attribute.”); *Meiri v. Dacon*, 759 F.2d 989, 995-96 (2d Cir. 1985) (holding that a standard requiring plaintiff to demonstrate he was replaced by person outside of protected class is ‘inappropriate and at odds with the policies underlying Title VII.’). Other circuits conclude only that a plaintiff is not precluded from establishing a prima facie case if he or she cannot prove the replacement employee is not from the protected class. *See Pivrotto v. Innovative Sys., Inc.*, 191 F.3d 344, 352-54 (3d Cir. 1999) (holding that plaintiff was not foreclosed from “proving that the employer was motivated by her gender (or other protected characteristic) when it discharged her” when she was replaced by another woman); *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 159 (7th Cir. 1996) (per curiam) (“That one’s replacement is of another race, sex, or age may help to raise an inference of discrimination, but it is neither a sufficient nor a necessary condition.”); *see also Nieto v. L & H*

The ADEA's prohibition of discrimination against applicants or employees based on age applies to all aspects of employment including: hiring, discharges, treatment during employment, advertising, and retaliation. Therefore, employers are prohibited from the following:

1. failing or refusing to hire or discharging any individual or otherwise discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;"²⁰
2. limiting, segregating or classifying "employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his or her status as an employee, because of such individual's age;"²¹
3. reducing the wage rate of any employee in order to achieve ADEA compliance;²²
4. discriminating against an employee or applicant for employment because such individual has opposed any practice made unlawful under the ADEA or because such individual has made a charge, testified, assisted, or participated in any manner in an ADEA investigation, proceeding, or litigation;²³
5. printing or publishing any notice or advertisement relating to employment by such an employer "indicating any preference, limitation, specification, or discrimination, based on age;"²⁴ or
6. establishing or maintaining an employee pension benefit plan which requires or permits, in the case of a defined benefit plan, the cessation of allocations to an employee's account or the reduction of the rate of an employee's benefit accrual,²⁵ or "in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age."²⁶

Packing Co., 108 F.3d 621, 624 n.7 (5th Cir. 1997); Williams v. Ford Motor Co., 14 F.3d 1305, 1308 (8th Cir. 1994); Neebit v. Pepsico, Inc., 994 F.2d 703, 705 (9th Cir. 1993); Jackson v. Richards Med. Co., 961 F.2d 575, 587 n.12 (6th Cir. 1992); Howard v. Roadway Express, Inc., 726 F.2d 1529, 1534 (11th Cir. 1984). In contrast, the Fourth Circuit affirmed a district court's dismissal of a sex discrimination claim by a man because the plaintiff was replaced by another man. *See* Brown v. McLean, 159 F.3d 898, 905 (4th Cir. 1998) ("In order to make out a prima facie case of discriminatory termination, a plaintiff must ordinarily show that the position ultimately was filled by someone not a member of the protected class."), *cert. denied*, 119 S. Ct. 1577 (1999). The court in Brown did recognize three potential exceptions to this rule: (1) age discrimination cases in which a plaintiff is replaced by a younger person also within the protected class; (2) cases in which there has been a significant period of time between the adverse action against plaintiff and the decision to hire a replacement also within the protected class; and (3) cases in which hiring another person within the protected class was calculated to disguise discrimination against plaintiff. *Id.* at 905-06.

²⁰ 29 U.S.C.A. § 623(a)(1).

²¹ *Id.* § 623(a)(2).

²² *Id.* § 623(a)(3).

²³ *Id.* § 623(d).

²⁴ *Id.* § 623(e).

²⁵ *Id.* § 623(i)(1)(A).

²⁶ *Id.* § 623(i)(1)(B). Under the ADEA an employer cannot have a seniority system or employee benefit plan that requires or permits involuntary retirement of any protected individual because of his or her age. *Id.* § 623(f). The

An employer can avoid liability under the ADEA by proving any of the following: age is a bona fide occupational qualification; the adverse action was based on a reasonable factor other than age;²⁷ observance of a bona fide seniority system;²⁸ observance of a bona fide benefit plan;²⁹ or “discharge or ... discipline [of] an individual for good cause.”³⁰

While these substantive provisions are rooted in Title VII, the remedial and procedural provisions of the ADEA have their origins in the FLSA.

B. Remedial and Procedural Provisions

1. **Individual Remedies.** The ADEA’s remedial provisions mirror those provided in the FLSA.³¹ For example, in *Lorillard v. Pons*,³² the Supreme Court stated that Congress’s decision to enforce the ADEA in accordance with the powers, remedies, and procedures of the FLSA evidences congressional intent to allow jury trials in ADEA cases.³³ Therefore, in an action for damages brought under the ADEA, an individual claimant is entitled to a jury trial on factual issues,³⁴ regardless of whether equitable relief is sought.³⁵ Despite this established right to a jury trial under the ADEA, an individual suing under Title VII did not have a similar right until the Civil Rights Act of 1991 allowed for a jury trial in cases where a plaintiff claims compensatory or punitive damages.³⁶

ADEA does provide an exemption, however, that permits an employer to compel the retirement of an employee who is employed either as a bona fide executive or a high policymaker upon reaching age 65, provided the employee satisfies the age, tenure, executive status, and financial criteria under the exemption. *Id.* § 631(c)(1). This exemption applies only if the bona fide executive or high policymaker “is entitled to an immediate nonforfeitable Annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least \$44,000.” *Id.*

²⁷ *Id.* § 623(f)(1).

²⁸ *Id.* § 623(2)(A).

²⁹ *Id.* § 623(f)(2)(B).

³⁰ *Id.* § 623(f)(3).

³¹ The FLSA requires employers to pay the prescribed minimum wage to employees who are “engaged in commerce or in the production of goods for commerce, or [are] employed in an enterprise engaged in commerce or in the production of goods for commerce.” 29 U.S.C.A. § 206(a). Moreover, the FLSA prohibits the employment of workers for more than 40 hour work weeks unless the worker receives at least “one and one-half times the regular [hourly] rate.” *Id.* § 207(a).

³² 434 U.S. 575 (1978).

³³ *Id.* at 577-85.

³⁴ The EEOC also has a right to a jury trial when bringing an ADEA case. *See* EEOC v. Indian River Transp. Co., 33 Fair Erapl. Prac. Cas. (BNA) 862 (M.D. Fla. 1982); *but cf.* EEOC v. Emory Univ., 47 Fair Erapl. Prac. Cas. (BNA) 642 (N.D. Ga. 1988) (holding that the EEOC is not entitled to a jury trial when only equitable relief is sought because the ADEA only provides a jury trial when recovery of amounts owing is sought).

³⁵ 29 U.S.C.A. § 626(c)(2). An ADEA plaintiffs entitlement to front pay is to be determined by the court on the theory that front pay is an equitable remedy. *Wells v. New Cherokee Corp.*, 58 F.3d 233, 238 (6th Cir. 1995). Courts, however, are split on whether the court or the jury is to calculate the amount of the front pay award. *See* *Downes v. Volkswagen of Am., Inc.*, 41 F.3d 1132, 1141 (7th Cir. 1994) (jury should not determine amount of front pay award); *Wells*, 58 F.3d at 237 (determination of amount of front pay award is jury question).

³⁶ 42 U.S.C. § 1981a(c) (1994). The right to a jury trial under the ADEA may be waived, however, if a timely demand is not made pursuant to Rule 38(b) of the Federal Rules of Civil Procedure. The plaintiff’s ignorance of the right to a jury trial or the procedure for making a jury demand normally does not excuse the failure to make a timely demand. *See* *Washington v. New York City Bd. of Estimate*, 709 F.2d 792, 797-98 (2d Cir. 1983) (finding that a pro

A plaintiff prevailing on a claim of discriminatory discharge under the ADEA is generally entitled to both back pay and reinstatement to his or her former position.³⁷ Where reinstatement is not feasible or is inappropriate, the plaintiff may be entitled to prospective relief, commonly referred to as “front pay.” However, a defendant may limit the plaintiff’s damages by offering the individual reinstatement to his old job or a substantially equivalent job. If a reasonable curative offer from the defendant/employer is rejected, the defendant’s liability for continuing back pay ceases and the plaintiff forfeits the right to reinstatement or front pay.³⁸ The Supreme Court has reasoned that the defendant’s liability ends “if [the plaintiff] refuses a job substantially similar to the one he was denied.”³⁹

A willful violation of the ADEA, moreover, entitles the plaintiff to an award of liquidated damages in the form of double back pay.⁴⁰ The Supreme Court has defined willful conduct as requiring either reckless disregard or knowledge that the conduct was prohibited.⁴¹ This liquidated damages scheme has its origins in the FLSA and is not included in Title VII. Under Title VII, such damages are not available; however, a plaintiff can claim compensatory and punitive damages that are unavailable under the ADEA.⁴²

The ADEA also provides that successful plaintiffs are entitled to reasonable attorney fees and litigation costs.⁴³ While an award of attorney fees is mandatory to a prevailing plaintiff,⁴⁴

se plaintiff waived his right to a jury trial where he failed to make a timely demand, even if the waiver may have resulted from ignorance of the rule).

³⁷ Back pay is generally calculated from the date of the adverse employment action and incorporates the compensation (including benefits) that would have been received absent the discriminatory act less interim earnings.

³⁸ *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231-32 (1982); *Lewis v. Federal Prison Indus., Inc.*, 953 F.2d 1277, 1279 (11th Cir. 1992); *Morrison v. Genuine Parts Co.*, 828 F.2d 708, 709 (11th Cir. 1987).

³⁹ *Ford Motor Co.*, 458 U.S. at 231-32.

⁴⁰ 29 U.S.C.A. § 626(b).

⁴¹ *Trans World Airlines v. Thurston*, 469 U.S. 111, 126 (1985); *see also Ryther v. KARE 11*, 84 F.3d 1074, 1089 (8th Cir. 1996), *aff'd on rehearing en banc*, 108 F.3d 832 (8th Cir. 1997) (finding sufficient evidence to support jury’s finding that employer television station willfully discharged the plaintiff when it refused to renew his contract under the pretext of his low market rating); *Weaver v. Amoco Prod. Co.*, 66 F.3d 85, 88 (5th Cir. 1995) (finding that a piece of the conversation between the plaintiff and his supervisor supported jury’s finding of willful violation when employer forced his retirement).

⁴² While the Civil Rights Act of 1991 amended Title VII to allow claims for compensatory and punitive damages, Congress did not provide for the same allowance of damages under the ADEA. *See* 42 U.S.C. § 1981a(a)(1); *see also Johnson v. A1 Tech Specialties Steel Corp.*, 731 F.2d 143, 147 (2d Cir. 1984) (holding compensatory damages unavailable under the ADEA); *Perrell v. FinanceAmerica Corp.*, 726 F.2d 654, 657 (10th Cir. 1984) (holding plaintiff could not recover compensatory damages under the ADEA); *Clark v. Sun Elec. Corp.*, No. 95C76, 1995 WL 708567, at *1-2 (N.D. Ill. Nov. 30, 1995) (finding claim for punitive damages improper because such damages are unavailable under the ADEA); *Moses v. KoMart Corp.*, 905 F. Supp. 1054, 1058-59 (S.D. Fla. 1995) (disallowing recovery of punitive damages under state law and liquidated damages under ADEA because it would constitute double recovery). The lack of a similar amendment to the ADEA further highlights the remedial differences between the two statutes.

⁴³ 29 U.S.C.A. § 626(b) (incorporating section 216(b) of the FLSA). By contrast, a prevailing defendant is not entitled to attorney fees under the ADEA itself, but courts have held that such fees may be awarded to the successful defendant in exigent circumstances under other statutory or case law authority. *See Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1437 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 405 (1998) (holding that attorney fees can be awarded to a prevailing ADEA defendant only if the plaintiff litigated in bad faith); *EEOC v. O & G Spring & Wire Forms Specialty Co.*, 38 F.3d 872, 883 (7th Cir. 1994) (reading FLSA and ADEA to determine that common law attorney fees should be applied to prevailing defendants); *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251,

the amount of the attorney fees is left to the discretion of the trial judge. Under Title VII, by contrast, the trial judge retains discretion as to whether a prevailing party should recover attorney fees.⁴⁵

2. **Collective Actions.** Class actions highlight another feature of the ADEA distinct from Title VII. While in most federal class actions, including those brought under Title VII, issues such as joinder and notice to potential class members are governed by Rule 23 of the Federal Rules of Civil Procedure, class actions under the ADEA do not proceed under Rule 23.⁴⁶ Rather, most courts have held that ADEA class actions are governed by section 216(b) of the FLSA, which provides the procedures for representative or collective actions.⁴⁷ Under this section, no person can become a party plaintiff to an ADEA action unless that person affirmatively “opts into” the class by filing written consent with the court.⁴⁸

The pursuit of an ADEA “collective” action generally involves two steps. The first step is the “notice stage,” which begins when a plaintiff seeks court authorization to issue notice of the lawsuit to other potential plaintiffs. In the notice stage, the district court determines--usually based only on the pleadings and any affidavits that have been submitted--whether notice of the action should be given to potential class members. Because the court has very little evidence, this determination is made under a fairly lenient standard and typically results in “conditional certification” of a representative class.⁴⁹ If the district court conditionally certifies the class, putative class members are given notice and the opportunity to opt-in to the collective action.⁵⁰

260 n.1 (1st Cir. 1986) (permitting defendants to obtain attorney fees in ADEA cases under *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240 (1975))

⁴⁴ Whether a plaintiff is “successful” is sometimes difficult to determine. Generally, courts compare a successful plaintiff to the parallel reference in civil rights statutes, the “prevailing party.” *See Nance v. Maxwell Fed. Credit Union*, 186 F.3d 1338, 1343 (11th Cir. 1999) (interpreting ADEA’s attorney fees provisions under prevailing party standard). *But see Salvatori v. Westinghouse Elec. Corp.*, 190 F.3d 1244, 1245 (11th Cir. 1999) (Birch, J., concurring) (“[O]ur decision to construe the ADEA as requiring what is tantamount to a ‘prevailing party’ status for purposes of a litigant’s entitlement to attorney’s fees is not self-evident from the plain language of the statute.”).

⁴⁵ While the ADEA, by reference to the FLSA, states that the court “shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney’s fee to be paid by the defendant,” Title VII provides that the court “in its discretion, may allow the prevailing party... a reasonable attorney’s fee.” *Compare* 29 U.S.C.A. § 216(b), *with* 42 U.S.C.A. § 2000e-5(k). *See also Salvatori v. Westinghouse Elec. Corp.*, 190 F.3d 1244, 1245-46 (11th Cir. 1999) (Birch, J., concurring) (noting the ADEA incorporates the attorney fee provisions of the FLSA).

⁴⁶ *See Anson v. University of Tex. Health Science Ctr.*, 962 F.2d 539, 540 (5th Cir. 1992) (ADEA class action must conform to requirements of FLSA and not “opt-out” provisions of Rule 23); *Woods v. New York Life Ins. Co.*, 686 F.2d 578, 579 (7th Cir. 1982) (ADEA class action governed by the FLSA and not Rule 23); *La Chapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288 (5th Cir. 1975) (“[I]t is crystal clear that [the FLSA] precludes pure Rule 23 class actions.”). *But cf. Wilkerson v. Martin Marietta Corp.*, 875 F. Supp. 1456, 1461 (D. Colo. 1995) (class action under the ADEA must satisfy both the FLSA and Rule 23).

⁴⁷ 29 U.S.C.A. § 626(b).

⁴⁸ *Id.*

⁴⁹ *See Grayson v. K-Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir. 1996) (noting that the FLSA’s “similarly situated” requirement is less stringent than the standard for joinder or for separate trials and citing with approval case recognizing that similarly situated requirement is considerably less stringent than requirements of Rule 23(b)(3)).

⁵⁰ 29 U.S.C.A. § 216(b). A putative plaintiff who does not file a charge with the EEOC may join a class action by relying on the timely filing of the charge of the named plaintiff only if a written consent to opt-in is filed before the statute of limitations has run on the putative plaintiff’s individual claim. *Grayson*, 79 F.3d at 1105.

Therefore, because a representative action under the ADEA follows the procedures of the FLSA rather than Rule 23 as with Title VII, there are no absent class members as in Title VII class actions because all potential plaintiffs must opt into, rather than opt out of, the ADEA suit.

The second step usually occurs after all persons have filed consents to opt into the lawsuit, discovery is largely complete, and the matter is ready for trial. This stage is typically precipitated by a motion for “decertification” by the defendant. The court now has much more information on which to base its decision and makes a factual determination on the question of whether the putative plaintiffs are similarly situated. If the claimants are similarly situated, the district court allows the representative action to proceed to trial. Otherwise, the case is severed into separate lawsuits. Neither the FLSA nor the ADEA defines the similarly situated standard.⁵¹ Thus, the Rule 23 requirements of numerosity, commonality, typicality, and adequacy of representation do not apply to representative actions under the ADEA; rather, the only prerequisite is that the putative plaintiffs be similarly situated as set forth in the FLSA.

3. **Waivers of Age Claims.** Employees often enter into waivers of potential ADEA claims in exchange for consideration from the employer. Waivers (or “releases”) most commonly arise in the context of a termination where an employee signs a release of any and all claims for acts occurring during his or her employment or termination in exchange for a payment or other consideration to which the individual was not otherwise entitled. Despite this common practice, the proper analysis of waivers caused confusion among the courts and practitioners alike because the ADEA was initially silent with respect to whether individuals could enter into waivers unsupervised by the Department of Labor (“DOL”). A tension existed between Title VII and the FLSA as to which approach courts should take.⁵² While courts allowed a knowing and voluntary waiver of claims under Title VII, the ADEA’s waiver provisions more closely mirrored the FLSA. The FLSA allowed for waiver agreements by the DOL, but it was silent as to unsupervised waivers.⁵³ In 1990, however, Congress resolved this growing debate when it enacted the Older Workers Benefit Protection Act⁵⁴ (“OWBPA”), which amends the ADEA and defines the requirements that must be met for the waiver of a covered employee’s rights to be valid under the statute.⁵⁵ To be valid, the waiver must be “knowing and voluntary.”⁵⁶

⁵¹ Some courts have given the words a broad interpretation. The Eleventh Circuit has stated that in FLSA cases the plaintiff must make a showing that the individual claimants are similarly situated “with respect to their job requirements and with regard to their pay provisions.” *Dybach v. Florida Dep’t of Corrections*, 942 F.2d 1562, 1567-68 (11th Cir. 1991). However, the Eleventh Circuit has not addressed the issue of similarity in the context of an ADEA case.

⁵² See generally Robert G. Haas, *Waivers Under the Age Discrimination in Employment Act: Putting the Fair Labor Standards Act to Rest*, 55 GEO. WASH. L. REV. 382 (1987); Ronald Turner, *Release and Waiver of Age Discrimination in Employment Act Rights and Claims*, 5 LAB. LAW. 739 (1989).

⁵³ 29 U.S.C.A. § 216(c).

⁵⁴ Pub. L. No. 101-433, 104 Stat. 978 (1991).

⁵⁵ See 29 U.S.C.A. § 626(f)(1). The OWBPA also protects employee benefits from age discrimination and effectively overturned the Supreme Court’s ruling in *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989), which allowed some distinction based on age with respect to employee benefits.

⁵⁶ 29 U.S.C.A. § 626(f)(1). A waiver will not be considered “knowing and voluntary” unless it meets the following requirements:

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by the individual;

With the OWBPA, Congress affirmatively addressed the previously unresolved issue of voluntary waivers under the ADEA. By enacting the OWBPA, Congress approved unsupervised waivers, but only under strictly specified conditions that do not apply to Title VII.

C. *The Civil Rights Act of 1991: A Deafening Silence*

Despite their procedural and remedial differences, the ADEA and Title VII initially had a parallel course of substantive development in the courts. The Civil Rights Act of 1991 eliminated some of that consistency. Although, as explained below, Congress made an express change to the statute of limitations period under the ADEA, it was silent as to all other provisions of the statute. Even more significant, the revisions made to Title VII (for example, the availability of compensatory and punitive damages) were not carried over to the comparable provisions of the ADEA.

The Civil Rights Act of 1991 expressly amended the statute of limitations periods under the ADEA for actions initiated by individuals. Congress eliminated the two-year (non-willful violations) and three-year (willful violations) statute of limitations period for actions filed under the ADEA, which were originally patterned after the provisions in the FLSA⁵⁷. Instead, Congress imposed a requirement like that found in Title VII in which an individual claimant must file suit within ninety days of receipt of a right-to-sue notice from the EEOC.⁵⁸ Unlike

(B) the waiver specifically refers to rights or claims arising under [the ADEA];

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual is already entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement [(45 days if pursuant to an exit incentive or other employment termination program offered to a group of employees)];

(G) the agreement provides that for a period of at least seven days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired

29 U.S.C.A. § 626(f)(1). If the waiver is pursuant to an exit incentive or other employment termination program offered to a group of employees, the following information must be provided: (1) a description of the group covered by the program, (2) any eligibility factors for the program, and (3) the job titles and ages of all individuals selected for the program and the ages of all individuals in the same job classification or organizational unit who are not selected. *Id.* § 626(f)(1)(H); *see also* Bennett v. Coors Brewing Co., 189 F.3d 1221, 1229 (10th Cir. 1999) (extending analysis beyond the OWBPA and applying “totality of the circumstances” test to determine whether waiver was knowing and voluntary); Lloyd v. Brunswick Corp., 180 F.3d 893, 895 (7th Cir. 1999) (dismissing age discrimination claim where plaintiff signed waiver that tracked the requirements of the OWBPA); Griffin v. Kraft Gen. Foods, Inc., 62 F.3d 368, 373-74 (11th Cir. 1995) (must examine the validity of a waiver under the requirements of both the OWBPA and other “knowing and voluntary” factors).

The EEOC also published regulations defining the proper procedures for compliance with the OWBPA. *See* 29 C.F.R. § 1625.22 (1999). A plaintiff who signs an invalid release of ADEA claims under the OWBPA does not have to return the benefits he or she received before suing. *See* Oubre v. Entergy Operations, Inc., 522 U.S. 422, 428 (1998).

⁵⁷ See 29 U.S.C. § 255(a) (1994).

⁵⁸ Compare 42 U.S.C.A. § 2000e-5(f)(1), with 29 U.S.C.A. § 626(e). While the DOL originally implemented and enforced the ADEA, jurisdiction currently lies with the EEOC. *See* 29 U.S.C.A. § 626. The EEOC gained jurisdiction over the ADEA in 1979 when President Carter instituted a reorganization plan to consolidate the federal government’s equal employment enforcement efforts. *See* 5 U.S.C. § 906 (1994). An individual claiming a violation of the ADEA must file a charge of discrimination with the EEOC within 180 days of the alleged unlawful

Title VII, however, the ADEA provides that an individual can institute a civil action under the ADEA before receiving a right-to-sue letter so long as he or she waits sixty days after filing a charge alleging unlawful age discrimination with the EEOC.⁵⁹ This is another example of the clear difference that exists between the ADEA and Title VII.

EVIDENTIARY FRAMEWORK OF THE ADEA

Under the ADEA and Title VII, a plaintiff can allege (1) discrimination that affects a disparate impact on a protected class or (2) intentional discrimination, also called disparate treatment. The plaintiff may prove intentional discrimination either through direct or circumstantial evidence. The *McDonnell Douglas Corp. v. Green*⁶⁰ prima facie case framework was developed to “compensate” for the fact that direct evidence may be difficult to supply in intentional discrimination cases.⁶¹ When a plaintiff can produce direct evidence of discrimination, of course, *McDonnell Douglas* does not apply.

At least partially because the Civil Rights Act of 1991 amended substantive provisions of Title VII, without similarly amending the ADEA, some courts have not applied the same

act. 29 U.S.C.A. § 626(d)(1). In deferral states the charge must be filed within 300 days of the alleged unlawful act. 29 U.S.C.A. § 626(d)(2). The requirement that individuals alleging age discrimination must timely file a charge of discrimination prior to commencing a civil action under the ADEA is not a jurisdictional prerequisite to filing a civil action in federal court, but instead is a procedural prerequisite akin to a statute of limitations. Because of this distinction, timely filing is subject to waiver, estoppel, and equitable tolling. However, the complete failure to file an age discrimination charge with the EEOC, a jurisdictional requirement, will bar the hearing of an ADEA claim in federal court. Like the time frame for the filing of a charge, the 90-day period for filing suit is not a jurisdictional prerequisite to bringing an individual court claim, but rather is subject to equitable tolling. For example, a claimant may attempt to show that the failure to file was in some way caused by the EEOC. Because the EEOC may choose to bring suit on behalf of an individual when, as a result of the investigation, it has found that reasonable cause exists to believe discrimination, in violation of the ADEA, has occurred, the elimination of the statute of limitations arguably leaves the agency with an unlimited amount of time within which to initiate suit as it is not a “person aggrieved” as specified under the statute of limitations provision. 29 U.S.C.A. § 626(b)-(c); see also Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog That Didn't Bark*, 39 WAYNE L. REV. 1093, 1110-14 (1993).

⁵⁹ 29 U.S.C.A. § 626(d). See *Hodge v. New York College of Podiatric Med.*, 157 F.3d 164, 168 (2d Cir. 1998) (holding that unlike Title VII plaintiffs who must wait for a “right-to-sue” letter, ADEA plaintiffs need only wait 60 days after filing the EEOC charge). Title VII requires that a “person aggrieved” receive a right-to-sue letter before initiating legal proceedings. Acting pursuant to 29 C.F.R. § 1601.28(a)(2), the EEOC sometimes issues a right-to-sue letter “early” when it determines that it will not be able to complete the administrative processing of the charge in less than the 180 days provided by statute. The circuits are split as to whether the EEOC’s regulation is valid. See *Martini v. Federal Nat’l Mortgage Ass’n*, 178 F.3d 1336, 1346 (D.C. Cir. 1999) (dismissing complaint filed based upon an early right-to-sue letter prior to time when 180 days had elapsed); *Stetz v. Reeher Enters., Inc.*, 70 F. Supp. 2d 119, 123-25 (N.D.N.Y. 1999) (same); *Rodriguez v. Connection Tech. Inc.*, 65 F. Supp. 2d 107, 112 (E.D.N.Y. 1999) (same); *Montoya v. Valencia County*, 872 F. Supp. 904, 906 (D.N.M. 1994) (same). But cf. *Sims v. Trus Joist MacMillan*, 22 F.3d 1059, 1061 (11th Cir. 1994) (upholding EEOC’s regulation); *Brown v. Puget Sound Elec. Apprenticeship & Training Trust*, 732 F.2d 726, 729 (9th Cir. 1984) (same); *Berry v. Delta Air Lines*, 75 F. Supp. 2d 890, 892-93 (N.D. Ill. 1999) (denying motion to dismiss based on “early” right-to-sue letter); *Connor v. WTI*, 67 F. Supp. 2d 690, 693-94 (S.D. Tex. 1999) (same); *Thomas v. BET Sound-Stage Restaurant/BrettCo, Inc.*, 61 F. Supp. 2d 448, 458-59 (D. Md. 1999) (same).

⁶⁰ 411 U.S. 792 (1973)

⁶¹ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (O’Connor, J., concurring in the judgment).

evidentiary framework under these two statutes. This divergence is evident in cases where plaintiffs allege disparate impact.

A. *Disparate Impact*

The law governing the application of the disparate impact theory to ADEA cases is not well settled. The disparate impact theory requires the plaintiff to show that a facially neutral employment practice or policy has a discriminatory effect on the protected class. In *Hazen Paper Co. v. Biggins*,⁶² a sixty-two year-old employee was fired by his employer just weeks before his pension would have vested.⁶³ The Supreme Court held that without more, discharging an employee to prevent his pension benefits from vesting does not violate the ADEA.⁶⁴ More importantly, the Court called into question the availability of the disparate impact theory as applied to the ADEA.⁶⁵ In doing so, the Court pointed out one of the over-arching differences between the purposes of the ADEA and Title VII.⁶⁶ The Court stated that the ADEA was enacted to address the concern that stigmatizing stereotypes were depriving older workers of jobs, a problem that is eliminated when an employer's decision is wholly motivated by factors other than age.⁶⁷ This is true even if the motivating factor is correlated with age. Thus, the Court noted, without deciding, a facially neutral employment practice might not be violative of the ADEA, even if it had a disparate impact on older workers.⁶⁸ The circuits are split as to whether the disparate impact theory is applicable to age discrimination cases, but most circuit court decisions since *Hazen* appear to have rejected the theory.⁶⁹ The Eleventh Circuit has yet to decide the issue.⁷⁰ By contrast, the viability of the disparate impact theory under Title VII is clear both from

⁶² 507 U.S. 604 (1993). The Supreme Court also held that to establish a “willful” violation of the ADEA warranting liquidated damages, the plaintiff needed to show that the employer either knew or showed “reckless disregard” for whether its conduct was prohibited by the ADEA. *Id.* at 614-17.

⁶³ *Id.* at 606-07.

⁶⁴ *Id.* at 612-13.

⁶⁵ *Id.* at 609-10.

⁶⁶ *Id.* at 612-14.

⁶⁷ *Id.* at 610-11.

⁶⁸ *Id.* at 612-14. Prior to *Hazen* several circuits permitted disparate impact cases under the ADEA. *See* Finnegan v. Trans World Airlines, Inc., 967 F.2d 1161, 1163 (7th Cir. 1992); Maresco v. Evans Chemetics, 964 F.2d 106, 115 (2d Cir. 1992); EEOC v. Borden’s Inc., 724 F.2d 1390, 1394-95 (9th Cir. 1984); Leftwich v. Harris-Stowe State College, 702 F.2d 686, 690 (8th Cir. 1983).

⁶⁹ *See* Mullin v. Raytheon Co., 164 F.3d 696, 699-704 (1st Cir. 1999) (disparate impact claims cannot be brought under the ADEA). *Mullin* makes this holding despite recognizing that Title VII and the ADEA contain similar language prohibiting discrimination. *See id.* at 700; *see also* Ellis v. United Airlines, Inc., 73 F.3d 999, 1007 (10th Cir. 1996); Lyon v. Ohio Educ. Ass’n and Prof’l Staff Union, 53 F.3d 135, 138-39 (6th Cir. 1995); DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 732 (3d Cir. 1995) (“[I]n the wake of *Hazen*, it is doubtful that traditional disparate impact theory is a viable theory of liability under the ADEA”); EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1077 (7th Cir. 1994). Only two circuits permit disparate impact cases under the ADEA. *See* Smith v. Xerox Corp., 196 F.3d 358 (2d Cir. 1999); EEOC v. McDonnell Douglas Corp., 191 F.3d 948, 950 (8th Cir. 1999).

⁷⁰ *See* *Turlington*, 135 F.3d at 1437 n.17. The Ninth Circuit has recognized the general trend of post-*Hazen* cases to reject disparate impact in age discrimination, but implied in *Marigold v. California Pub. Util. Comm.*, 67 F.3d 1470, 1474 (9th Cir. 1995), that it might still follow its earlier decision in *Borden’s* and permit such cases.

the Supreme Court's interpretation of the language of Title VII⁷¹ and the codification of this interpretation in the Civil Rights Act of 1991.⁷²

B. *Disparate Treatment*

Courts have modified the elements of proof and burden-shifting schemes used in Title VII disparate treatment cases for use in cases brought under the ADEA.⁷³ An ADEA disparate treatment claim can arise as a pretext or a mixed-motive claim; each type of claim has slightly different proof analyses.⁷⁴

1. **Pretext Cases.** To prove discrimination under the pretext analysis, the plaintiff has the initial burden of establishing a prima facie case of unlawful age discrimination to create a presumption that the employer unlawfully discriminated against him or her because of age. Under the McDonnell Douglas framework, plaintiffs must establish a prima facie case by a preponderance of the evidence.

To establish a prima facie case of age discrimination in the hiring context, for example, it must be shown that: (1) the plaintiff is forty years old or older; (2) the plaintiff applied and was qualified for a job for which the employer was seeking applicants; (3) the plaintiff was rejected despite being qualified; and (4) after this rejection, the position remained open and the employer continued to seek applicants from persons of plaintiff's qualifications or the position was filled by a younger person.⁷⁵ If the plaintiff claims discriminatory failure to promote, the plaintiff must show instead that other equally or less qualified employees outside the protected class were promoted to satisfy the fourth element of the prima facie case.⁷⁶

For a plaintiff to make a prima facie case of age discrimination in the discharge context, it must be shown that plaintiff: (1) is forty years old or older; (2) was subject to adverse employment action; (3) was qualified for the job; and (4) was replaced by a younger employee.⁷⁷ If the employer engages in a reduction in force, the criteria for plaintiff to establish a prima facie case are altered so that plaintiff must show instead "evidence by which a fact finder could reasonably conclude that the employer intended to discriminate on the basis of age in reaching [the adverse] decision," rather than simply showing replacement by a younger individual.⁷⁸ When a particular job "is entirely eliminated for nondiscriminatory reasons, ... [plaintiff] must

⁷¹ Griglis v. Duke Power Co., 401 U.S. 424, 430-32 (1971).

⁷² 42 U.S.C.A. § 2000e-2(k).

⁷³ See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

⁷⁴ See Watson v. Southeastern Penn. Transp. Auth., Nos. 98-1832, 98-1833, 98-1834, 2000 WL 291159, at *4-9 (3d Cir. Mar. 20, 2000).

⁷⁵ See O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 312 (1996); Eskra v. Provident Life & Accident Ins. Co., 125 F.3d 1406, 1411 (11th Cir. 1997); Earley v. Champion Int'l Corp., 907 F.2d 1077, 1082 (11th Cir. 1990).

⁷⁶ See Combs v. Plantation Patterns, 106 F.3d 1519, 1539 n.11 (11th Cir. 1997).

⁷⁷ See Williams v. Vitro Servs. Corp., 144 F.3d 1438, 1441 (11th Cir. 1998).

⁷⁸ Jameson v. Arrow Co., 75 F.3d 1528, 1532 (11th Cir. 1996).

show that he was qualified for another available job with that employer; qualification for his current position is not enough.⁷⁹

If the plaintiff can establish a prima facie case and create a presumption of discrimination, the employer must then articulate a legitimate, nondiscriminatory reason for the challenged employment action. Once the employer carries its burden of producing legitimate, nondiscriminatory reasons for its decision, the presumption initially established by the plaintiff is negated. Because the ultimate burden of persuasion stays with the plaintiff at all times in a pretext case, the plaintiff must discredit the employer's proffered reason for its actions once the employer satisfies its burden of producing a legitimate, nondiscriminatory reason for its employment decision.⁸⁰ A plaintiff can satisfy this burden by showing by a preponderance of the evidence that the proffered reasons were not the true reasons for the employment decision. In other words, a plaintiff must persuade the trier of fact that a discriminatory reason more likely than not motivated the employer, or that the employer's explanation is unworthy of belief. This three-step burden-shifting analysis is normally triggered when an employee lacks direct evidence or comparable circumstantial evidence to create an inference of intentional discrimination. The employee retains the burden of proof throughout.

These issues become particularly difficult to parse at the summary judgment stage. Courts disagree as to the quantum of evidence required to survive summary judgment in pretext cases. Under the so-called "pretext-plus" standard, a plaintiff must come forward with sufficient evidence to create triable issues as to whether the defendant's proffered reason was false, or a pretext, and whether discrimination was the real reason for the employer's action in order to survive summary judgment. The First, Fourth, and Fifth Circuits apply the pretext-plus standard.⁸¹ Since the Supreme Court's decision in *St. Mary's Honor Center v. Hicks*,⁸² however, other circuits have adopted a "permissive-pretext" analysis.⁸³ Under this standard, a finding of

⁷⁹ *Earley*, 907 F.2d at 1083.

⁸⁰ In a discrimination case based on circumstantial evidence, the plaintiff can avoid judgment as a matter of law by putting on prima facie evidence sufficient to discredit all of the defendant's proffered reasons for its actions in the mind of a reasonable juror. *See Combs*, 106 F.3d at 1543. Moreover, some courts now hold that a plaintiff does not create an issue of fact showing pretext by selectively choosing one person outside the protected class who was treated more favorably. *See Simpson v. Kay Jewelers*, 142 F.3d 639, 645-46 (3d Cir. 1998).

⁸¹ *See Hidalgo v. Overseas Condado Ins. Agencies, Inc.*, 120 F.3d 328, 337 (1st Cir. 1997); *Walton v. Bisco Indus., Inc.*, 119 F.3d 368, 370 (5th Cir. 1997) ("plaintiff cannot succeed by proving only that the defendant's proffered reason is pretextual," but rather must show pretext "and that discrimination was the real reason") (quoting *Hicks*, 509 U.S. at 515); *Theard v. Glaxo, Inc.*, 47 F.3d 676, 680 (4th Cir. 1995) (for plaintiff to prevail, she must prove "both that [defendant's reason] was false and that discrimination was the real reason") (quoting *Hicks*, 509 U.S. at 515).

⁸² 509 U.S. 502 (1993). Various readings of *Hicks* paradoxically provide support for both the "pretext-plus" and the "pretext-only" analysis. *Compare Hicks*, 509 U.S. at 511 (rejecting pretext-only in noting that a mandatory inference compelling judgment for plaintiff after a mere finding of pretext would shift the burden of proof to the defendant), *and id.* (rejecting pretext-plus in holding that the "factfinder's disbelief of the reasons put forward by the defendant ... may, together with the elements of the prima facie case, suffice to show intentional discrimination"), *with id.* at 515 (plaintiff must show "both that the reason was false, and that discrimination was the real reason"), *and id.* at 519 ("It is not enough, in other words, to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination.").

⁸³ For a description of the three approaches relating to pretext cases, see Kenneth R. Davis, *The Stumbling Three-Step, Burden. Shifting Approach in Employment Discrimination Cases*, 61 BROOKLYN L. REV. 703, 714-16 (1995) (describing pretext-plus, pretext-only, and permissive-pretext).

pretext permits, but does not require, a finding of discrimination.⁸⁴ The Supreme Court recently granted certiorari in *Reeves v. Sanderson Plumbing Products, Inc.*,⁸⁵ to resolve this issue.

2. **Mixed-Motive Cases.** The mixed-motive analysis applies when both legitimate and illegitimate factors are, or could have been, considered by the employer in making the questioned employment decision.⁸⁶ Mixed-motive cases, however, arise only when the plaintiff offers direct evidence of discrimination in the employment decision. Thus, courts do not engage in the burden-shifting *McDonnell Douglas* analysis.⁸⁷ As a result, under a mixed-motive analysis, the plaintiff essentially begins by focusing on the alleged discrimination itself, whereas the plaintiff in a pretext case begins by focusing on the plaintiff's own qualifications and the employer's needs.

In *Price Waterhouse v. Hopkins*,⁸⁸ the Supreme Court defined the mixed-motive analysis. There, a plurality of the Court, with two justices concurring, established a burden-shifting framework different from that outlined in *McDonnell Douglas*.⁸⁹ Under the mixed-motive analysis, a plaintiff is obligated to present evidence, at the outset, that the employer relied on an impermissible consideration in making its employment decision. Often in mixed-motive cases, plaintiffs rely on the remarks, conduct, and attitudes of people in the workplace to demonstrate direct evidence of discrimination. In order to be considered direct evidence, the conduct or remarks must be made by the decisionmaker or someone having influence on the decisionmaking process.⁹⁰ Stray remarks are not sufficient proof to shift the burden to the defendant.⁹¹ If the plaintiff convinces the factfinder that the employer in fact relied on an illegitimate factor in making the employment decision, the employee has proved that the decision was made at least in

⁸⁴ This regime is sometimes described as pretext-only. This label is slightly misleading, however, because in most permissive-pretext circuits, a finding of pretext does not automatically assure a victory for the plaintiff; rather, it permits, but does not compel, a determination of discrimination. See *Jackson v. E.J. Brach Corp.*, 176 F.3d 971,984 (7th Cir. 1999); *Kline v. Tennessee Valley Auth.*, 128 F.3d 337, 347 (6th Cir. 1997); *Ryther v. KARE 11*, 108 F.3d 832, 837-38 (8th Cir. 1997) (permitting finding of intentional discrimination based on prima facie evidence and pretext); *Combs*, 106 F.3d at 1535-38; *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1069-72 (3d Cir. 1996) (en banc) (determination that defendant's proffered reason is pretextual, coupled with evidence that establishes prima facie case, permits finding of intentional discrimination); *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995) (same); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993) (same).

⁸⁵ 197 F.3d 688 (5th Cir. 1999) (per curiam), cert. granted, 120 S. Ct. 444 (1999).

⁸⁶ See *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1185 (2d Cir. 1992).

⁸⁷ See *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1208 n.4 (10th Cir. 1999) ("Generally, a mixed motives analysis only applies once a plaintiff has established direct evidence of discrimination."); *Eskra v. Provident Life & Acc. Ins. Co.*, 125 F.3d 1406, 1411 (11th Cir. 1997) (If the plaintiff can present direct evidence that a "discriminatory animus played a significant or substantial role in the employment decision, the burden shifts to the employer to show that the decision would have been the same absent discrimination. J); *Shook v. St. Bede Sch.*, 74 F. Supp. 2d 1172, 1177 (M.D. Ala. 1999) (same). If, however, no direct evidence of discrimination is available, and the plaintiff relies on circumstantial evidence, then the court simply applies the *McDonnell Douglas* paradigm. See *Evans v. McClain of Ga., Inc.*, 131 F.3d 957,963 (11th Cir. 1997).

⁸⁸ 490 U.S. 228 (1989).

⁸⁹ *Id.* at 243-50.

⁹⁰ See *Holifield v. Reno*, 115 F.3d 1555, 1563-64 (11th Cir. 1997) ("The biases of one who neither makes nor influences the challenged personnel decision are not probative in an employment discrimination case.") (quoting *Medina-Munoz v. R. J. Reynolds Tobacco Co.*, 896 F.2d 5, 10 (1st Cir. 1990)); *Dilla v. West*, 4 F. Supp. 2d 1130, 1137 (M.D. Ala. 1998).

⁹¹ *Price Waterhouse*, 490 U.S. at 277 (O'Connor, J. concurring in the judgment).

part “because of” an illegitimate factor, and the plaintiff has successfully shifted the burden of proof to the employer.⁹² Thus the plaintiff’s initial burden is heavier than the less onerous burden in pretext cases.⁹³

Although the quantum of evidence needed to satisfy the plaintiff’s initial burden is somewhat unclear, the plurality in *Price Waterhouse* referred to the Supreme Court’s decision in *Mt. Healthy City School District Board of Education v. Doyle*,⁹⁴ in which the Court held that plaintiff shifted the burden of proof to defendant when he had shown that his constitutionally protected speech was a “substantial” or “motivating factor” in his adverse treatment.⁹⁵ When the *Price Waterhouse* plurality opinion is read in conjunction with the concurring opinions of Justices O’Connor and White,⁹⁶ it is clear that the motivating factor requirement should be read as requiring the same proof as that needed to prove that the illegitimate factor was a substantial consideration in the adverse decision.⁹⁷

Once the plaintiff establishes that an impermissible factor played a motivating part⁹⁸ in the employment decision, the burden shifts to the employer to prove that its decision would have been the same without an illegitimate motive.⁹⁹ “[T]he defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the [impermissible factor] into account.¹⁰⁰ That is, the defendant bears the burden of proof at this stage and can avoid liability altogether if it meets that burden.

With the enactment of the Civil Rights Act of 1991, Congress partially overruled the Supreme Court’s holding in *Price Waterhouse* to preclude a defendant from using the “same-decision rationale as an affirmative defense to avoid all liability in a Title VII case. Thus, Congress amended Title VII to limit only the employee’s remedy, rather than defeating liability outright, if the employer shows it would have made the same employment decision regardless of any demonstrated discriminatory motive.

⁹² Id. at 277-78.

⁹³ See *Tyler*, 958 F.2d at 1185.

⁹⁴ 429 U.S. 274 (1977).

⁹⁵ *Price Waterhouse*, 490 U.S. at 248-49 (quoting *Mt. Healthy*, 429 U.S. at 287) (plurality opinion).

⁹⁶ Id. at 258-79 (White and O’Connor, JJ., concurring in the judgment).

⁹⁷ Any difference between the two terms may be so slight as to be negligible. In *Owen v. Thermoatool Corp.*, 155 F.3d 137 (2d Cir. 1998), the court recognized that although “the phrase ‘motivating factor’ is perhaps a more precise and more typical statement of the standard for liability in ADFA cases, the trial court’s use of ‘substantial factor’ adequately stated the law in this case.” Id. at 139 (noting that the “words ‘substantial’ and ‘motivating’ are reasonably interchangeable or at least have considerable overlap”). In the context of the Americans with Disabilities Act of 1990 (“ADA”), the Seventh Circuit has determined that a “motivating” factor need not be the only factor, but it must be a substantial factor in the challenged action. See *Foster v. Arthur Andersen, LLP*, 168 F.3d 1029, 1033 (7th Cir. 1999). The court further noted that the “impermissible consideration must contribute to the adverse employment decision in some substantial way.” Id.

⁹⁸ *Price Waterhouse*, 490 U.S. at 250 (plurality opinion); id. at 259 (White J., concurring in the judgment); id. at 265 (O’Connor, J., concurring in the judgment); see also *Siwik v. Marshall Field & Co.*, 945 F.Supp. 1158, 1162-64 (N.D. Ill. 1996).

⁹⁹ *Price Waterhouse*, 490 U.S. at 258 (plurality opinion).

¹⁰⁰ Id.

Section 107(a) of the Civil Rights Act of 1991 provides that an unlawful employment practice is established when “the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”¹⁰¹ Second, section 107(b) states that if a plaintiff proves a violation of section 107(a), even if a defendant proves that it “would have taken the same action in the absence of the impermissible motivating factor,” the court may make a finding of liability and grant declaratory and injunctive relief as well as attorney fees.¹⁰² Therefore, if the employer demonstrates that the same decision would have been made even absent the discriminatory motive, the court may not award damages or require reinstatement, hiring, or promotion. However, it may prohibit the employer from considering the discriminatory factor in the future and award declaratory relief and attorney fees and costs.

Courts are split as to whether section 107 applies to the ADEA.¹⁰³ Several well-reasoned decisions have found that this section does not apply to claims brought under the ADEA because the Civil Rights Act of 1991 Amends Title VII, not the ADEA. Furthermore, the plain language of the section does not refer to age discrimination as one of the protected classification.¹⁰⁴ Those courts holding to the contrary have assumed that section 107 applies to ADEA claims, apparently because case law developments under the ADEA, such as the burden of proof requirements for disparate treatment claims, have closely tracked case law under Title VII.¹⁰⁵

Statutory construction dictates that courts should examine the plain meaning of section 107. Section 107, on its face, does not apply to age claims. Not only does the section solely amend Title VII, it specifically defines as impermissible the consideration of race, color, religion, sex, and national origin as “a motivating factor for any employment practice, even though other factors also motivated the practice.”¹⁰⁶ Therefore, the lack of reference to either the ADEA or to

¹⁰¹ 42 U.S.C.A. § 2000e-2(m).

¹⁰² *Id.* § 2000e-5(g)(2)(B). The court cannot award other damages such as monetary relief or reinstatement or hiring.

¹⁰³ *See Wright v. Southland Corp.*, 187 F.3d 1287, 1303 n.17 (11th Cir. 1999) (noting that under Title VII, defendant’s demonstration that the employment decision would have been made absent the discriminatory motive does not relieve employer of liability altogether, but “[i]n other areas of employment discrimination law, however, this showing is a complete defense”).

¹⁰⁴ *See, e.g., DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 172 (2d Cir. 1993); *Lewis v. Young Men’s Christian Ass’n*, 53 F. Supp. 2d 1253, 1261 (N.D. Ala. 1999) (in the retaliation context); *Donoran v. Dairy Farmers, Inc.*, 53 F. Supp. 2d 194, 197 (N.D.N.Y. 1999); *Mumaw v. Dollar Gen. Corp.*, 19 F. Supp. 2d 786, 790 (S.D. Ohio 1998); *Sanderson v. City of New York*, No. 96-Civ. 3368 (LIS), 1998 WL 187834, at *3 n.2 (S.D.N.Y. Apr. 21, 1998); *Nelson v. Shoney’s, Inc.*, No. Civ. A. 96-2199, 1997 WL 567957, at *7 n.2 (E.D. La. Sept. 10, 1997); *Siwik v. Marshall Field & Co.*, 945 F. Supp. 1158, 1162 (N.D. Ill. 1996). Similarly, courts are split as to whether section 107 of the Civil Rights Act of 1991 applies to Title VII retaliation cases because Congress made no mention of retaliation claims in this section. *See, e.g., Kubicko v. Ogden Logistics Servs.*, 181 F.3d 544, 552 n.7 (4th Cir. 1999); *McNutt v. Board of Trustees*, 141 F.3d 706, 707-08 (7th Cir. 1998); *Woodson v. Scott Paper Co.*, 109 F.3d 913, 933-35 (3d Cir. 1997); *Tanca v. Nordberg*, 98 F.3d 680, 684 (1st Cir. 1996); *Behne v. Microtouch Sys. Inc.*, 58 F. Supp. 2d 1096, 1098 (N.D. Cal. 1999); *Riess v. Dalton*, 845 F. Supp. 742, 744 (S.D. Cal. 1993).

¹⁰⁵ *See, e.g., Fast v. Southern Union Co.*, 149 F.3d 885, 889 (8th Cir. 1998); *Miller v. Illinois Dep’t of Corrections*, 107 F.3d 483, 484 (7th Cir. 1997); *Gonzagowski v. Widnall*, 115 F.3d 744, 749 (10th Cir. 1997); *Mandavilli v. Maldonado*, 38 F. Supp. 2d 180, 194 (D.P.R. 1999).

¹⁰⁶ 42 U.S.C.A. § 2000e-2(m).

age in section 107 strongly suggests that Congress intended that section 107 not apply to age cases.¹⁰⁷

The recent Supreme Court decision in *Kimel v. Florida Board of Regents*¹⁰⁸ further illustrates the appropriateness of a divergence of analysis between Title VII claims and those based on age. In *Kimel* the Court noted that “[o]lder persons, again, unlike those who suffer discrimination on the basis of race or gender, have not been subjected to a ‘history of purposeful unequal treatment.’”¹⁰⁹ The Court further reassured that “[o]ld age also does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it.”¹¹⁰ As a result, it is no longer clear that substantive analysis of age claims should parallel those of Title VII discrimination. Moreover, the remedial scheme for age discrimination currently does not match nor does it need to match that of Title VII.

CONCLUSION

Because cases brought under the ADEA should not be governed by section 107, *Price Waterhouse* should continue to apply. Therefore, a plaintiff bringing an ADEA claim must show that age was a substantial factor in the employment decision, and a defendant may escape liability completely if it can establish that it would have made the same employment decision absent a motivation based on age.

In addition to complete congressional silence on the issue, the ADEA’s roots in the FLSA’s remedial and procedural provisions support a different treatment for mixed-motive cases under the ADEA. For example, if a defendant is not successful in proving that it would have made the same decision absent the unlawful consideration of age, the plaintiff can claim that he is entitled to liquidated damages under the ADEA. Therefore, in providing for liquidated damages in the event of a willful violation of the ADEA, Congress has already supplied a complete remedy to the successful plaintiff in a mixed-motive case. It is not illogical, then, given the allowance of liquidated damages for a willful violation of the ADEA, a provision not found in Title VII, that Congress would have intended for an employer to avoid liability altogether in the event that it is successful in proving the affirmative defense based on mixed-motive.

Finally, the Supreme Court in *Hazen* and most recently in *Kimel* indicated that there are differing rationales and remedial schemes to the ADEA and Title VII, thereby setting the ADEA apart from Title VII. The ADEA’s provision that “[i]t shall not be unlawful for an employer ... to take any action otherwise prohibited ... where the differentiation is based on reasonable factors other than age”¹¹¹ should be interpreted to mean that employers are allowed “to utilize factors

¹⁰⁷ Cf. *Woodson v. Scott Paper Co.*, 109 F.3d 913, 931-35 (3d Cir. 1997) (applying a similar analysis in a Title VII retaliation case); see also *McNutt v. Board of Trustees*, 141 F.3d 706, 709 (7th Cir. 1998) (“Legislation is often a product of compromises that are not readily apparent to the public or even consistent in their relation to other contemporaneous enactments from the same body. It is not the role of courts to question these kinds of seemingly inexplicable legislative choices where they are spelled out in plain statutory language (unless, of course, they are unconstitutional).”).

¹⁰⁸ 120 S. Ct. 631 (2000).

¹⁰⁹ *Id.* at 645 (quoting *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307,313 (1976) (per curiam)).

¹¹⁰ *Id.*

¹¹¹ 29 U.S.C.A. § 623(f)(1).

other than age as grounds for employment-related decisions that differentially impact members of the protected class (individuals between the ages of 40 and 69).”¹¹² This narrower congressional directive of the ADEA could be reason enough to warrant a following of *Price Waterhouse*, rather than adopting the more lenient standard developed under Title VII.

¹¹² Mullin v. Raytheon Co., 164 F.3d 696, 702 (1st Cir. 1999) (analyzing the inapplicability of the Civil Rights Act of 1991 on the ADEA in the disparate impact context).