

# Preventing Age Discrimination

A Fall Liability Workshop  
Presented By

## VML Insurance Programs

October 25, 2001, Bristol, Virginia  
October 26, 2001, Lynchburg, Virginia  
November 8, 2001, Williamsburg, Virginia  
November 9, 2001, Manassas, Virginia

These materials are provided courtesy of

Raymond L. Hogge, Jr.  
Payne, Gates, Farthing & Radd, P.C.  
Attorneys and Counsellors at Law  
1515 Dominion Tower  
999 Waterside Drive  
Norfolk, Virginia 23510-3309  
Telephone: (757) 640-1500  
Fax: (757) 627-6583  
E-Mail: RHogge@PayneGates.com

These materials are provided solely for educational purposes,  
and do not constitute legal advice.  
For legal advice, the reader should consult qualified counsel.

For additional educational resources, go to  
**[www.VirginiaLaborLaw.com](http://www.VirginiaLaborLaw.com)**

# Preventing Age Discrimination

## 1. INTRODUCTION

The Age Discrimination in Employment Act of 1967, 29 U.S.C. Section 621 *et seq.* ("ADEA"), is a federal statute that prohibits age-based discrimination in employment. It has a number of similarities with Title VII of the Civil Rights Act of 1964, but also has a number of important differences. The ADEA is enforced by the Equal Opportunity Employment Commission, which has issued regulations interpreting it including those published at 29 C.F.R. Section 1625. Basic information of the ADEA can be found on the EEOC's website ([www.eeoc.gov](http://www.eeoc.gov)). The information stated there, however, reflects the views of the EEOC which, depending upon the particular issue, may or may not be consistent with controlling Fourth Circuit decisions.

## 2. OVERVIEW OF THE ADEA

### A. Employer Coverage

The ADEA defines "employer" as follows:

The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year; Provided, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

29 U.S.C. Section 630(b). Therefore, the ADEA applies to all businesses that have 20 or more employees in each of twenty or more calendar weeks in the current or preceding calendar year, and applies to all Virginia cities and counties regardless of the number of their employees.

### B. Discrimination Prohibited

The ADEA provides:

It shall be unlawful for an employer-

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees 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 age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. Section 623(a). This prohibition against age discrimination applies to all persons who are at least 40 years of age. 29 U.S.C. Section 631 (a).

### **C. Employment Solicitations**

The ADEA contains a specific prohibition against publication of age-based employer solicitations. It provides:

It shall be unlawful for an employer... to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer ... indicating any preference, limitation, specification, or discrimination, based on age.

29 U.S.C. Section 623(e).

### **D. Discharge for Good Cause**

The ADEA does not insulate older workers from discharge or discipline for good cause. To the contrary, it provides, "it shall not be unlawful for an employer ... to discharge or otherwise discipline an individual for good cause." 29 U.S.C. Section 623(f)(3). See Cline v. Roadway Express, Inc., 689 F.2d 481, 484-85 (4th Cir. 1982); Jacobs v. College of William and Mary, 517 F. Supp. 791, 801 (E.D. Va. 1980), aff'd 661 F.2d 922 (4th Cir.1981), cert. denied, 454 U.S. 1033 (1981) ("an employer may meet this burden by showing that the failure to select (discharge) was for 'good cause,' 29 U.S.C. Section 623(f)(3), or by showing that the failure to select (discharge) was 'based on reasonable factors other than age'")(quoting Cova v. Coca-Cola Bottling Co., 574 F.2d 958, 959-60 (8th Cir. 1978)). In other words, "the [ADEA] does not require that advanced age and substantial length of service entitle employees to special favorable consideration; it requires merely that an employee ... not be the subject of discrimination because of ... age." Jacobs v. College of William and Mary, id.

### **E. Reasonable Factors Other Than Age**

The ADEA allows employment decisions based upon "reasonable factors other than age." Specifically, it provides, "it shall not be unlawful for an employer ... to take any action otherwise prohibited (where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or) where the differentiation is based on reasonable factors other than age ...." 29 U.S.C. Section 623(f)(1). See Jacobs v. College of William and

Mary, 517 F. Supp. 791, 801 (E.D. Va. 1980), aff'd 661 F.2d 922 (4th Cir.1981), cert. denied, 454 U.S. 1033 (1981) ("an employer may meet this burden by showing that the failure to select (discharge) was for 'good cause,' 29 U.S.C. Section 623(f)(3), or by showing that the failure to select (discharge) was 'based on reasonable factors other than age'")(quoting Cova v. Coca-Cola Bottling Co., 574 F.2d 958, 959-60 (8th Cir. 1978)).

#### **F. Bona Fide Occupational Qualifications**

The ADEA allows employment decisions based on age if age is a "bona fide occupational qualification." Specifically, it provides, "it shall not be unlawful for an employer ... to take any action otherwise prohibited ... where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age ...." 29 U.S.C. Section 623(f)(1).

#### **G. Retaliation**

The ADEA prohibits retaliation by an employer against an employee for opposing violations of the ADEA or for participating in proceedings to enforce the ADEA. It provides:

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment ... because such individual ... has opposed any practice made unlawful by this section, or because such individual ... has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

29 U.S.C. Section 623(d).

### **3. TYPES OF AGE DISCRIMINATION CLAIMS**

In theory, there can be two types of age discrimination claims. The first type is "disparate treatment." The second type is "disparate impact." See generally Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993); Equal Employment Opportunity Commission v. Clay Printing Co., 955 F.2d 936, 940 (4th Cir. 1992).

#### **A. Disparate Treatment**

"Disparate treatment" ... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion [or other protected characteristics.] Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment..." Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993). "When a plaintiff alleges disparate treatment, "liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 141 (2000). "That is, the plaintiff's age must have actually played a role in the employer's decisionmaking process and had

a determinative influence on the outcome." Reeves, 530 U.S. at 141. The United States Supreme Court has summarized the essence of ADEA disparate impact cases as follows:

In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision. The employer may have relied upon a formal, facially discriminatory policy requiring adverse treatment of employees with that trait. Or the employer may have been motivated by the protected trait on an ad hoc, informal basis. Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome.

Disparate treatment, thus defined, captures the essence of what Congress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age. Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.

Although age discrimination rarely was based on the sort of animus motivating some other forms of discrimination, it was based in large part on stereotypes unsupported by objective fact. Moreover, the available empirical evidence demonstrated that arbitrary age lines were in fact generally unfounded and that, as an overall matter, the performance of older workers was at least as good as that of younger workers.

Thus the ADEA commands that employers are to evaluate older employees on their merits and not their age. The employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly.

Hazen Paper Co. v. Biggins, 507 U.S. 604, 609-11 (1993).

Disparate treatment claims are discussed further below.

## **B. Disparate Impact**

"Claims that stress 'disparate impact' involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is not

required under a disparate-impact theory." Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993).

A few older cases in the Fourth Circuit recognize ADEA claims under a disparate impact theory, either expressly or by implication. See, e.g., Wright v. Brown, 1993 U.S. App. Lexis 11502 (4th Cir. 1993) (unpub.); Keplinger v. Blue Cross & Blue Shield of Va., 1991 U.S. App. Lexis 5538 (4th Cir. 1991) (unpub.); Smith v. Springs Industries, Inc., 1991 U.S. App. Lexis 27221 (4th Cir. 1991) (unpub.); Fisher v. Asheville-Buncombe Technical Community College, 857 F. Supp. 465 (W.D.N.C. 1993); Richi v. Fruehauf Corp., 724 F. Supp. 1197 (W.D.N.C. 1989); Herold v. Hajoca Corp., 682 F. Supp. 297 (W.D. Va. 1988); Equal Employment Opportunity Commission v. The Babcock & Wilcox Co., 1987 U.S. Dist. Lexis 5808 (E.D.N.C. 1987); Nicholson v. Western Electric Co., 55 F. Supp. 3 (M.D.N.C. 1982).

However, in Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993), the United States Supreme Court stated:

In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision. The employer may have relied upon a formal, facially discriminatory policy requiring adverse treatment of employees with that trait. Or the employer may have been motivated by the protected trait on an ad hoc, informal basis. Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome.

*Disparate treatment, thus defined, captures the essence of what Congress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age. As we explained in EEOC v. Wyoming, 460 U.S. 226, 75 L. Ed. 2d 18, 103 S. Ct. 1054 (1983), Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes:*

"Although age discrimination rarely was based on the sort of animus motivating some other forms of discrimination, it was based in large part on stereotypes unsupported by objective fact.... Moreover, the available empirical evidence demonstrated that arbitrary age lines were in fact generally unfounded and that, as an overall matter, the performance of older workers was at least as good as that of younger workers."

Thus the ADEA commands that "employers are to evaluate [older] employees ... on their merits and not their age." The employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly.

When the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is. Pension plans typically provide that an employee's accrued benefits will become nonforfeitable, or "vested," once the employee completes a certain number of years of service with the employer. On average, an older employee has had more years in the work force than a younger employee, and thus may well have accumulated more years of service with a particular employer. Yet an employee's age is analytically distinct from his years of service. An employee who is younger than 40, and therefore outside the class of older workers as defined by the ADEA, see 29 U. S. C. § 631(a), may have worked for a particular employer his entire career, while an older worker may have been newly hired. Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily "age based."

507 U.S. at 610-11 (emphasis added).

Based upon Biggins, the emerging consensus among the courts of appeal is that a disparate impact analysis is inapplicable to claims under the ADEA. See, e.g., Ellis v. United Airlines, Inc., 73 F.3d 999 (10th Cir. 1996), cert. denied, 517 U.S. 1245 (1996). Following the reasoning of these cases, the United States District Court for Eastern District of Virginia has expressly held that "disparate impact claims are no longer cognizable under the ADEA." Fobian v. Storage Technology Corp., 956 F. Supp. 742, 747 (E.D. Va. (Richmond) 1997) (Williams, J.), aff'd after remand, 217 F.3d 838, 2000 U.S. App. Lexis 15439 (4th Cir 2000); Green v. Storage Technology Corp., 1997 U.S. Dist. Lexis 20564, p.14 (E.D. Va. (Richmond) 1997) (Williams, J.).

#### **4. PROOF OF DISPARATE TREATMENT**

There are two methods of proving disparate treatment based on age. The first method is direct and circumstantial evidence; the second method is the McDonald Douglas analysis. See Presnell v. Collins & Aikman Corp., 1999 U.S. App. Lexis 10205 (4th Cir. 1999) (unpub.); Cramer v. Intelidata Technologies Corp., 1998 U.S. App. Lexis 32676 (4th Cir. 1998) (unpub.);

## **A. Direct and Circumstantial Evidence**

"Under the ordinary standards of proof, the [plaintiff] must demonstrate ... (1) that he (she) was an employee covered by the Act, (2) who suffered an unfavorable action by an employer covered by the Act, and (3) that age was a determining factor in the action in the sense that but for [the defendant's] intent to discriminate on the basis of age, the claimant would not have been subjected to the employment action." Equal Employment Opportunity Commission v. Clay Printing Co., 955 F.2d 936, 940-41 (4th Cir. 1992).

If a plaintiff is unable to establish age discrimination through direct and circumstantial evidence, he may utilize the burden-shifting analysis established under McDonald Douglas Corp. v. Green, 411 U.S. 792 (1973).

## **B. The McDonald Douglas Analysis**

"Recognizing that the question facing triers of fact in [disparate treatment] discrimination cases is both sensitive and difficult, and that there will seldom be eyewitness testimony as to the employer's mental processes, the Courts of Appeals ... have employed some variant of the framework articulated in McDonnell Douglas to analyze ADEA claims that are based principally on circumstantial evidence." Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 141 (6/12/2000). The U.S. Supreme Court has never ruled on whether the McDonnell Douglas framework, developed to assess claims brought under § 703(a)(1) of Title VII of the Civil Rights Act of 1964, applies to ADEA claims, but has assumed that it does for purposes of ruling on court of appeals cases which have applied it under the ADEA. See Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 142 (6/12/2000); see, e.g., Stokes v. Westinghouse Savannah River Co., 206 F.3d 420, 429 (4th Cir. 2000); Mason v. Baltimore Gas and Elec. Co., 1999 U.S. App. Lexis 14644 (4th Cir. 1999) (unpub.).

## **5. RECENT DEVELOPMENTS UNDER THE ADEA**

### **A. Factors Correlated With Age**

In Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993), the Supreme Court noted that "the Courts of Appeals repeatedly have faced the question whether an employer violates the ADEA by acting on the basis of a factor, such as an employee's pension status or seniority," and held that "there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age." 507 U.S. at 608-09. The Court observed that, "because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily 'age based.'" 507 U.S. at 611.

The Court, however, cautioned that a case could present an ADEA claim if age, rather than or in addition to other correlated factors, was shown to be the motivation for the action:

We do not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that

these employees are likely to be older thereby engages in age discrimination. Pension status may be a proxy for age, not in the sense that the ADEA makes the two factors equivalent, but in the sense that the employer may suppose a correlation between the two factors and act accordingly. Nor do we rule out the possibility of dual liability under ERISA and the ADEA where the decision to fire the employee was motivated both by the employee's age and by his pension status. Finally, we do not consider the special case where an employee is about to vest in pension benefits as a result of his age, rather than years of service, and the employer fires the employee in order to prevent vesting. That case is not presented here. Our holding is simply that an employer does not violate the ADEA just by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service.

507 U.S. at 612-13.

**B. "Substantially Younger" Replaces "Under 40" Rule**

Prior to the decision of the United States Supreme Court in O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996), the Fourth Circuit held that in order to establish a prima facie ADEA claim for demotion or discharge under McDonald Douglas, the plaintiff was required to establish that:

- (1) he was in the age group protected by the ADEA;
- (2) he was discharged or demoted;
- (3) at the time of his discharge or demotion, he was performing his job at a level that met his employer's legitimate expectations; and
- (4) following his discharge or demotion, he was replaced by someone of comparable qualifications *outside the protected class*.

517 U.S. at 310 (emphasis added). In O'Conner, however, the United States Supreme Court held that the fourth of those requirements was incorrect. The Supreme Court explained:

In McDonnell Douglas, we established an allocation of the burden of production and an order for the presentation of proof in Title VII discriminatory-treatment cases. We held that a plaintiff alleging racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., could establish a prima facie case by showing (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." Once the plaintiff has met this initial burden, the burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. If the trier of fact finds that the elements of the prima facie case are supported by a preponderance of the evidence and the employer remains silent, the court must enter judgment for the plaintiff.

\*\*\*

As the very name "prima facie case" suggests, there must be at least a logical connection between each element of the prima facie case and the illegal discrimination for which it establishes a legally mandatory, rebuttable presumption. *The element of replacement by someone under 40 fails this requirement.* The discrimination prohibited by the ADEA is discrimination "because of [an] individual's age," 29 U.S.C. § 623(a)(1), though the prohibition is "limited to individuals who are at least 40 years of age," § 631(a). This language does not ban discrimination against employees because they are aged 40 or older; it bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older. *The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age.* Or to put the point more concretely, there can be no greater inference of age discrimination (as opposed to "40 or over" discrimination) when a 40-year-old is replaced by a 39-year-old than when a 56-year-old is replaced by a 40-year-old. Because it lacks probative value, the fact that an ADEA plaintiff was replaced by someone outside the protected class is not a proper element of the McDonnell Douglas prima facie case.

517 U.S. at 311-13 (emphasis added). The Court went on to explain that, for purposes of the McDonald Douglas analysis, a "substantially younger" analysis should be used for the forth prong of the prima facie case:

Perhaps some courts have been induced to adopt the principle urged by respondent in order to avoid creating a prima facie case on the basis of very thin evidence -- for example, the replacement of a 68-year-old by a 65-year-old. While the respondent's principle theoretically permits such thin evidence (consider the example above of a 40-year-old replaced by a 39-year-old), as a practical matter it will rarely do so, since the vast majority of age-discrimination claims come from older employees. In our view,

however, the proper solution to the problem lies not in making an utterly irrelevant factor an element of the prima facie case, but rather in recognizing that the prima facie case requires "evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion...."

In the age-discrimination context, such an inference cannot be drawn from the replacement of one worker with another worker insignificantly younger. Because the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is *substantially younger* than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class.

517 U.S. at 313-14 (emphasis added).

After O'Connor, a plaintiff may establish a prima facie demotion or discharge case in the Fourth Circuit under McDonald Douglas by establishing that:

- (1) he is a member of the protected age group (over 40 years old);
- (2) he suffered an adverse job action;
- (3) he was performing at a level that met his employer's legitimate expectations; and
- (4) there was adequate evidence to create an inference that the adverse action was based on the employee's age, including evidence that he was replaced by someone of comparable qualifications who was "substantially younger."

Cramer v. Intelidata Technologies Corp., 1998 U.S. App. Lexis 32676, p. 6 (4th Cir. 1998) (unpub.).

What is "substantially younger?" In Cramer v. Intelidata Technologies Corp., 1998 U.S. App. Lexis 32676 (4th Cir. 1998) (unpub.), the Fourth Circuit held that "the person who assumed the duties that remained following Cramer's termination was only five years younger than Cramer, and not therefore 'substantially younger' than Cramer in the absence of additional evidence." Id. at p. 7.

### **C. Pretext-Plus Rejected**

The United States Supreme Court, in Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (6/12/2000), recently clarified the proper McDonald Douglas analysis to be used in an

ADEA cases, and rejected the "pretext plus" requirement which had been adopted by some courts. The Court stated:

McDonnell Douglas and subsequent decisions have established an allocation of the burden of production and an order for the presentation of proof in discriminatory-treatment cases.

First, the plaintiff must establish a prima facie case of discrimination. It is undisputed that petitioner satisfied this burden here: (i) at the time he was fired, he was a member of the class protected by the ADEA ("individuals who are at least 40 years of age," 29 U.S.C. § 631(a)), (ii) he was otherwise qualified for the position of Hinge Room supervisor, (iii) he was discharged by respondent, and (iv) respondent successively hired three persons in their thirties to fill petitioner's position.

The burden therefore shifted to respondent to produce evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. This burden is one of production, not persuasion; it can involve no credibility assessment. Respondent met this burden by offering admissible evidence sufficient for the trier of fact to conclude that petitioner was fired because of his failure to maintain accurate attendance records.

Accordingly, the McDonnell Douglas framework -- with its presumptions and burdens -- disappeared, and the sole remaining issue was "discrimination vel non."

Although intermediate evidentiary burdens shift back and forth under this framework, the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. And in attempting to satisfy this burden, the plaintiff -- once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision -- must be afforded the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. That is, the plaintiff may attempt to establish that he was the victim of intentional discrimination by showing that the employer's proffered explanation is unworthy of credence.

Reeves, 530 U.S. at 142-43. The Supreme Court then turned to the issue presented for its determination, which was whether a plaintiff could satisfy his ultimate burden of proving pretext under McDonald Douglas by using the same evidence he used to establish his prima facie case.

The Court ruled that he could, and clarified its ruling in St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993):

[A]lthough the presumption of discrimination drops out of the picture once the defendant meets its burden of production, the trier of fact may still consider the evidence establishing the plaintiff's prima facie case and inferences properly drawn therefrom on the issue of whether the defendant's explanation is pretextual.

\*\*\*

Based on [the evidence before it], the Court of Appeals concluded that petitioner "very well may be correct" that "a reasonable jury could have found that [respondent's] explanation for its employment decision was pretextual." Nonetheless, the court held that this showing, standing alone, was insufficient to sustain the jury's finding of liability: "We must, as an essential final step, determine whether Reeves presented sufficient evidence that his age motivated [respondent's] employment decision." And in making this determination, the Court of Appeals ignored the evidence supporting petitioner's prima facie case and challenging respondent's explanation for its decision. The court confined its review of evidence favoring petitioner to that evidence showing that Chesnut had directed derogatory, age-based comments at petitioner, and that Chesnut had singled out petitioner for harsher treatment than younger employees. It is therefore apparent that the court believed that only this additional evidence of discrimination was relevant to whether the jury's verdict should stand. That is, the Court of Appeals proceeded from the assumption that a prima facie case of discrimination, combined with sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory reason for its decision, is insufficient as a matter of law to sustain a jury's finding of intentional discrimination.

In so reasoning, the Court of Appeals misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence. This much is evident from our decision in St. Mary's Honor Center. There we held that the factfinder's rejection of the employer's legitimate, nondiscriminatory reason for its action does not compel judgment for the plaintiff. The ultimate question is whether the employer intentionally discriminated, and proof that "the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason . . . is correct." In other words, "it is not enough . . . to disbelieve the

employer; the factfinder must believe the plaintiff's explanation of intentional discrimination."

In reaching this conclusion, however, we reasoned that it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation. Specifically, we stated: "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination."

Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. *Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.*

This is not to say that such a showing by the plaintiff will always be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record *conclusively* revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a *weak* issue of fact as to whether the employer's reason was untrue and there was abundant and *uncontroverted* independent evidence that no discrimination had occurred. To hold otherwise would be effectively to insulate an entire category of employment discrimination cases from review under Rule 50, and we have reiterated that trial courts

should not "treat discrimination differently from other ultimate questions of fact."

Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law. For purposes of this case, we need not -- and could not -- resolve all of the circumstances in which such factors would entitle an employer to judgment as a matter of law. It suffices to say that, *because a prima facie case and sufficient evidence to reject the employer's explanation may permit a finding of liability, the Court of Appeals erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination.*

Reeves, 530 U.S. at 143-49 (emphasis added).

All employers concerned about ADEA liability should take note of Reeves. It may allow plaintiffs to prove pretext by doing little more than convincing the judge or jury not to believe the reason offered by the employer for the employment action in question. Therefore, it may make summary judgment more difficult for employers to obtain, and may make verdicts for plaintiffs more likely.

What does this mean in practice for employers?

Reeves does not mean that employers should change their employment decisions. It does not mean, for example, that employers should hire an older worker over a more qualified younger worker. It does not mean that employers should shy away from disciplining older workers in appropriate circumstances. And it does not mean that employees should retain older workers who should be dismissed.

Reeves, however, does mean that some employers may need to improve their methodology of making and recording the grounds for employment decisions affecting older workers. The paper trail is now more important than ever, as is a cogent and understandable basis for selection, discipline and discharge. After Reeves, an employer must be able to convincingly demonstrate the legitimate reasons for such decisions. If it is unable to do so, it may be exposed to liability under the McDonald Douglas analysis as refined in Reeves.

## **6. OTHER IMPORTANT ADEA ISSUES**

### **A. Mitigation Of Damages**

If an ADEA claim is asserted, mitigation of damages may become an important issue. Mitigation of damages refers to the legal duty of a person seeking damages to avoid those

damages that person reasonably may avoid. In general, a plaintiff's damages may be reduced by the amount which the plaintiff could have avoided had he taken reasonable steps to mitigate his damages.

It is well established that "plaintiffs in ADEA cases have a duty to mitigate their damages by seeking other available employment with reasonable diligence." Cline v. Roadway Express, Inc., 689 F.2d 481, 488 (4th Cir. 1982); see Spagnuolo v. Whirlpool Corp., 641 F.2d 1109, 1114 (4th Cir. 1981). The employer, however, bears the burden of proving failure to mitigate damages. Cline v. Roadway Express, Inc., 689 F.2d 481, 489 n. 8 (4th Cir. 1982). Therefore, an employer confronted with an ADEA claim should ascertain what efforts, if any, the plaintiff is making and has made to obtain other employment, and should assert as a defense any failure by the plaintiff in this regard.

An example of these principles in action can be seen in Cline v. Roadway Express, Inc., 689 F.2d 481 (4th Cir. 1982). In Cline, a dock foreman sued under the ADEA after he was fired from a trucking company. After being fired, he changed occupations from trucking to real estate. The company argued that in doing so he failed to mitigate his damages. The court rejected that argument, explaining:

Roadway [the defendant] had not carried its burden of showing that Cline [the plaintiff] failed to mitigate damages. After his discharge in December 1976, Cline made weekly visits to the Employment Security Commission to discuss job opportunities and then obtained a realtor's license and went into the real estate business. Cline earned substantially less in his new occupation than he had previously, but Roadway has not shown that his decision to turn to real estate, after being illegally fired from his job in the trucking industry, was not bona fide. In determining the back-pay award, the district court properly subtracted Cline's actual real estate earnings from the salary he would have received at Roadway, and we see no error in its calculations.

Cline, 689 F.2d at 488-89.

## **B. Settlement of ADEA Claims**

An employer confronted with an ADEA claim may be willing to settle the claim in exchange for a written release from liability. In situations such as planned reductions in force, an employer may wish to manage its risk of claims, including ADEA claims, by offering employees a severance package which includes a written waiver of ADEA claims. In either case, the enforceability of the waiver will depend upon the employer's compliance with the Older Workers' Benefit Protection Act ("OWBPA"), which amended the ADEA. Information concerning the OWBPA can be found on the EEOC's website ([www.eeoc.gov](http://www.eeoc.gov)) or on [www.VirginiaLaborLaw.com](http://www.VirginiaLaborLaw.com) (click "Virginia Labor Law Library," then click "EEO"). Employers are cautioned not to attempt to draft releases or waivers of ADEA claims without assistance from legal counsel.

### **C. Arbitration of ADEA Claims**

Many employers, seeking to avoid the expense and uncertainty inherent in litigation of ADEA claims, have required their employees to sign agreements to arbitrate such claims. Because such agreement affect statutory rights under the ADEA, their enforceability depends upon their compliance with a number of requirements beyond those applicable generally to arbitration agreements. In addition, the law governing the enforceability of such agreements is still developing. Therefore, such agreements must be drafted with particular care, and with consideration to the most recent legal developments affecting them. Additional information concerning arbitration of ADEA claims can be found on the EEOC's website ([www.eeoc.gov](http://www.eeoc.gov)) or on [www.VirginiaLaborLaw.com](http://www.VirginiaLaborLaw.com) (click "Virginia Labor Law Library," then click "Risk Management and Dispute Resolution" or "Arbitration").

### **7. A HYPOTHETICAL: SENIOR BUS DRIVERS**

The following hypothetical example can serve to illustrate how an employer way wish to analyze ADEA concerns.

#### **ISSUE 1:**

Suppose a municipality operates buses, and needs drivers for them. Suppose further that historically the municipality's school bus drivers have been over 60 years of age, and have had a relatively short length of service because of declining physical and mental abilities. To reduce turnover, the municipality would like to recruit drivers who are such an age as to be expected to be capable of driving for a significant number of years. The municipality is concerned, however, that its recruitment will be perceived as discriminating on the basis of age.

The municipality should not seek out "younger" drivers. Instead, in order to reduce turnover, and in order to attract the best job applicants, the municipality should announce the vacancies as widely as feasible. Advertisements should be placed in local newspapers, and the Virginia Employment Commission should be notified that these jobs are available. In addition, if individuals regularly move into the municipality from other locations which the municipality can identify, then the municipality may wish to advertise the vacancies in those other locations. For example, a municipality on the outskirts of northern Virginia may wish to advertise the position aggressively in the Washington Post and the Richmond Times-Dispatch. While age minimums necessary for licensing may be stated, no other references to age should be made in the job announcements. This strategy will not discriminate on the basis of age, but should broaden the pool of applicants.

#### **ISSUE 2:**

Suppose that the majority of the individuals responding to the announcements are around 60 years of age. Due to safety concerns, the municipality wishes to require these drivers to pass fitness for duty medical examinations before beginning work. The municipality is concerned,

however, that imposing such a requirement will be perceived as discrimination on the basis of age, and will result in ADEA claims.

For purposes of the ADEA, the municipality may safely require fitness for duty examinations, provided it does so for all applicants for the job and provided the examinations are job-related and consistent with business necessity. In requiring these examinations, the municipality will want to be sure it complies with the Americans with Disabilities Act. For example, it will want to require those examinations only after it makes a conditional offer of employment. Requiring such examinations would be desirable, since the positions are inherently safety-sensitive. On the other hand, the failure to require some or all such examinations may be negligence, and if causally related to an injury or death may expose the municipality to far more liability than any ADEA claim.

#### ISSUE 3:

Suppose the municipality notices that its bus drivers have an unusually high rate of accidents and errors, which the municipality perceives as being related to age-related physical deterioration of the physical and mental abilities of the drivers. The municipality wishes to require the drivers to undergo post-accident, periodic, and random medical examinations, but is reluctant to do so because of concerns about ADEA claims.

Such examinations should not run afoul of the ADEA, provided it is required for all school bus drivers regardless of age, and provided the examinations are job-related and consistent with business necessity. Because of the safety-sensitive work of the drivers, the decision to require such examinations is readily defensible. On the other hand, the failure to require some or all such examinations may be negligence, and if causally related to an injury or death may expose the municipality to far more liability than any ADEA claim.

#### ISSUE 4:

A bus driver employed by the municipality falls asleep at the wheel while driving an empty bus to the maintenance garage, and is involved in a minor accident involving no other vehicles. The driver is 67 years old, and on previous occasions has been observed to have lapses in concentration while driving. The municipality wishes to terminate the driver, but is concerned that doing so will result in an ADEA charge of discrimination.

The municipality should handle this incident in the same way it would handle any vehicular accident involving a bus driver, in accordance with its established, written, and distributed policy. It should first fully investigate the accident to determine what occurred. Because the accident potentially reflected an impairment in the employee's physical or mental capacities, an appropriate fitness for duty examination should be conducted by medical personnel selected by the municipality, and the employee should not be allowed to return to duty if he does not pass the examination. Since the accident involved negligence on the part of the employee, appropriate discipline should be imposed, up to and including discharge. Most importantly, all drivers should be held to the same performance standards, regardless of age, and if a younger employee would be terminated for falling asleep at the wheel then the same should be true for

this employee. The ADEA prohibits employers from discriminating against employees on the basis of age, but it does not require employers to reduce legitimate performance requirements to meet the diminished capabilities of an older worker. Moreover, the failure of the municipality to evaluate the ability of the driver to perform the safety-sensitive functions of the job may constitute negligence, exposing the municipality to enormous potential liability if the driver, under similar circumstances, causes an accident in which, for example, a bus full of passengers are injured or a pedestrian is killed.

#### ISSUE 5:

The municipality wishes to adopt a policy of refusing employment to bus drivers 70 years of age or older, and terminating the employment of drivers once they reach age 70. The municipality's motivation is entirely related to safety concerns, as it has learned that many studies indicate that the physical and mental abilities of drivers that age can diminish unpredictably and therefore cannot effectively be measured through periodic or random testing. The municipality is concerned, however, that doing so will expose it to liability under the ADEA.

The ADEA allows an employer to make age-related decisions for "bona fide occupational qualifications." Some courts have indicated that the age limit proposed by the municipality would constitute a BFOQ and therefore would be permissible under the ADEA. *See, e.g., Equal Employment Opportunity Commission v. North Knox School Corp.*, 154 F.3d 744, 751 n.2 (7th Cir. 1998) ("when transporting school children, limiting bids for four-year contracts to [school bus] drivers under 70 would easily meet the [*Western Airlines, Inc. v. Criswell*, 472 U.S. 400 (1985),] test"). The municipality therefore may wish to impose the limitation, with the understanding that it probably will be required by the EEOC and by disqualified drivers to defend it. In deciding which course to follow, the municipality must weigh the costs of each course of action and the benefits of each course of action. The costs could include, for example, litigation expenses, either of an ADEA claim or of a negligence claim relating to a vehicular accident, and potential liability for an ADEA violation or for negligence. (The dollar cost for negligence probably would be greater than the dollar costs associated with the ADEA claim.) The benefits of imposing the limitation could include enhanced public safety; the benefits of not doing so could include enhanced employment opportunities for elders.

### **8. 10 STEPS TO TAKE TO MANAGE THE ADEA RISK**

An employer wishing to effectively manage the risk of liability under the ADEA should consider taking the following actions:

1. Evaluate all existing personnel policies and procedures, including but not limited to those stated in the employee handbook, for ADEA compliance, and make any changes necessary. Personnel policies and procedures should be in writing, and should be distributed to all affected employees.
2. Verify that personnel practices, including discipline and discharge, are administered uniformly without regard to age.

3. Verify that supervisors understand the basics of the ADEA. Conduct any training necessary.
4. Review all job descriptions and announcements for ADEA compliance; make any changes necessary. Verify that job functions are stated clearly, and that they are job-related.
5. Consider fitness for duty examinations to be administered after a conditional offer of employment, post-accident, periodically, and/or randomly.
6. Thoroughly investigate all accidents, to determine whether diminished physical or mental capacity is reducing the employee's ability to perform the functions of his job. Hold all employees to the same standards of performance, regardless of age.
7. If relying upon the bona fide occupational qualification defense, ensure that support for the defense is established before the action in question is taken.
8. Thoroughly document all employment decisions and actions. These documents will be crucial when it becomes necessary to demonstrate that age was not the reason for the decision or action.
9. Implement an effective grievance procedure for applicants or employees having ADEA concerns. Verify that the procedure includes a "by-pass" of any supervisor allegedly engaged in age discrimination.
10. Ensure that all supervisors and employees know that they can bring age discrimination concerns to the human resources department, and that their concerns will be addressed in a timely and meaningful way.