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**New Tricks in Age Discrimination Litigation:
You're Never Too Old to Learn**

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By

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I. Introduction

Workers in the United States filed 23,465 age discrimination claims with the EEOC in 2011 – nearly one quarter of the total charges filed. The number of age claims is up nearly 35 percent over the last 10 years, while sex discrimination increased only 14 percent.

The relative surge in age-discrimination claims is not surprising. The seventy-six million people born in the Baby Boom generation (roughly 1946 to 1964) are now all over the age of 47, with many entering “retirement age,” yet not wanting to retire.¹ As they age, Baby Boomers are being pushed aside for younger workers. And this generation, which has never been one to go quietly into the night, is not taking it without a fight.

And so employment lawyers can expect to keep busy with these claims for years to come.

Recognizing this trend, and the corresponding rise in age discrimination litigation, this paper attempts to set forth some of the unique and developing legal issues related to litigating age discrimination claims. The main topics covered are:

- Unique aspects of the administrative filing process for age discrimination claims;
- Federal and state law variations as to age discrimination;
- The new, higher standard of proof for age discrimination claims under Gross v. FBL Financial Services, Inc., 129 S. Ct. 2343 (2009), and the litigation issues that creates;
- The tenuous nature of “age-plus” claims after Gross;
- Age-related comments in the workplace;
- Dealing with the dangerous issue of suggesting that, lo and behold, performance sometimes does decline with age;
- The danger and ease of analyzing disparate impact claims for age discrimination when reductions in force are involved;

¹ According to the 2011 Associated Press and LifeGoesStrong.com surveys, 42% of Baby Boomers are delaying retirement and 25% claim they'll never retire. "Retirement? For More Baby Boomers, The Answer Is No," Third Age Staff, May 10, 2011, posted at <http://www.thirdage.com/retirement/retirement-for-more-baby-boomers-the-answer-is-no>.



- Jury selection issues, including what a defendant can do with the over-abundance of older jurors;
- Trial issues unique to age claims;
- Unique issues to the release of age discrimination claims in settlement or severance agreements.

II. The Administrative Stage: The ADEA’s 60-day Waiting Period Allows Federal Claims to Move into Court Quickly, But Beware of Losing Claims Under Pennsylvania Law.

Under most federal anti-discrimination laws, a plaintiff must initiate his or her charge with the U.S. Equal Employment Opportunity Commission (“EEOC”) and provide the EEOC with at least 180 days to investigate and attempt to resolve the claim.

ADEA claims are different. Perhaps in recognition of the fact that to aging ADEA plaintiffs waiting 180 days for the EEOC to take action eliminates a substantial portion of the plaintiff’s remaining work-life, the ADEA requires only a 60-day waiting period before a plaintiff may pull his or her claims and file a lawsuit under the ADEA. 29 U.S.C. § 626(d)(1).

Unfortunately for plaintiffs in Pennsylvania eager to move their state and federal claims into court, the Pennsylvania Human Relations Act requires that a plaintiff provide the Pennsylvania Human Relations Commission (PHRC) with one year to investigate and resolve his or her administrative complaint, before a court action can be initiated. 43 P.S. § 962(c). The only exceptions are if the PHRC dismisses the complaint or enters into a conciliation agreement to which the complainant is a party. *Id.*

Plaintiffs in Pennsylvania have had limited success in circumventing this one-year limitation by first filing their ADEA action in federal court, and then amending the federal court complaint to add the PHRC claim once the one-year PHRA waiting period has elapsed. *See, e.g., Prisco v. Methodist Hospital*, 2011 WL 1288678 (E.D. Pa. April 4, 2011) (slip op.) (plaintiff filed original complaint nine months after administrative complaint filed, but filing of amended complaint after one year deemed sufficient to exhaust administrative remedies under PHRA); *Pergine v. Penmark Management Co.*, 314 F. Supp. 2d 486, 490 (E.D. Pa. 2004) (similar); *Schaefer v. Independence Blue Cross, Inc.*, No. 03-5897, 2005 WL 1819896 at *5 (E.D. Pa. Jan. 26, 2006) (similar); *McGovern v. Jack D’s, Inc.*, No. 03–5547, 2004 WL 228667, at *8 (E.D. Pa. Feb.3, 2005) (granting plaintiff leave to amend complaint since one year had passed since initial filing with PHRC).

Nevertheless, Defendants can and should challenge any plaintiff who attempts to evade the PHRC process through such early filing of an ADEA claim, followed by an amended complaint to add the PHRA claim, relying on a series of state and federal rulings that mandate a year-long, “good faith use” of procedures under the PHRA before a plaintiff can proceed to court. *See, e.g., DeAngelo v. DentalEZ, Inc.*, 738 F. Supp. 572 (E.D. Pa. Sept. 2, 2010) (holding that plaintiff’s filing of a federal court action nine months after filing the administrative charge, and plaintiff’s request that the PHRC “dismiss” the administrative complaint, reflected a failure



to exhaust her administrative remedies); Lyons v. Springhouse Corp., No. 92-6133, 1993 WL 69515 at *3 (E.D. Pa. March 10, 1993) (granting summary judgment for defendant on PHRA claim where plaintiff filed suit within six months of filing the charge with the PHRC -- “invocation of the procedures set forth in the [PHRA] entails more than filing of a complaint; it includes the good faith use of procedures provided for disposition of the complaint”); Flowers v. Univ. of Penn. Health Sys., No. 08-3948, 2009 WL 1688461 at * 5 (E.D. Pa. June 16, 2009) (granting summary judgment to defendant on PHRA claim because “Plaintiff’s case was not before the PHRC for the full one-year period required by the PHRA prior to filing in federal court . . .”); see also Clay v. Advanced Computer Applications, Inc., 552 Pa. 86, 90 (1989) (noting that the administrative procedures under the PHRA are “a mandatory rather than discretionary means of enforcing the rights created thereby”).

Retaining PHRA claims is important for two reasons: (1) the PHRA provides for the recovery of unlimited emotional distress damages, while the ADEA does not allow such damages; and (2) the PHRA – like most state EEO statutes – includes age with all other categories of protected status, therefore suggesting that under state law the standard of proof for age discrimination claims is the same as that for other discrimination laws. In contrast, under federal law a plaintiff claiming age discrimination has a slightly higher burden of proof (“but for” causation) than a plaintiff bringing any other type of EEO claim -- such as race, sex or disability discrimination – where he or she need only prove that the protected status was a motivating or determinative factor in the decision. *See discussion below.*

In New Jersey and many other states, age discrimination plaintiffs do not face the delays created by the PHRA. Under New Jersey’s Law Against Discrimination (“LAD”), a disgruntled employee may proceed directly to state court. If, however, the plaintiff or her counsel prefers federal court, she must have diversity jurisdiction or exhaust the ADEA’s 60-day requirement. Plaintiffs who do not preserve their ADEA claims also lose the right to double their back-pay losses under the liquidated damages provision of the ADEA.

Note also that New Jersey’s LAD, unlike the ADEA, prohibits discrimination based on any age up to 70 (i.e., a younger person can sue for unequal treatment in comparison to older employees). The ADEA and PHRA, in contrast, protect only employees and applicants who are 40 and older, and do not have the 70-year-old age limit.

III. That’s Gross: “But-For” Causation Raises the Bar for ADEA Claims, But Not State Age Discrimination Claims.

In 2009, the Supreme Court issued a decision refusing to allow a mixed-motives claim under the ADEA, finding that Congress’s decision after PriceWaterhouse v. Hopkins, 490 U.S. 228 (1989), to amend Title VII of the Civil Rights Act of 1964 (but not the ADEA) to allow for a “mixed-motive theory was presumably an intentional decision not to amend the ADEA.” Gross v. FBL Financial Services, 557 U.S.167, 129 S. Ct. 2343, 2350 (2009). The court in Gross noted that “the ADEA’s text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor,” as does Title VII of the Civil Rights Act of 1964, as amended (which prohibits discrimination based on race, color, religion, sex or national origin).

Id. at 2349. Rather, the court held that to establish a claim under the ADEA, “a plaintiff must prove that age was the ‘but-for’ cause of the employer’s adverse decision.” Id. at 2350. Other language in Justice Thomas’s opinion suggests that a plaintiff must prove that age was “the reason” for the termination. Id.

Lower courts have since read Gross to not only exclude “mixed-motive” claims – where the evidence may suggest both lawful and unlawful motives – but also to require plaintiffs under the ADEA to meet a higher burden of proof (“but-for” causation) in all cases.

Democrats have proposed legislation that would overrule Gross and return the ADEA standard of proof to that of Title VII and the Americans with Disabilities Act. Unless and until such legislation is passed, litigators need to analyze ADEA claims under the new “but-for” standard.

A. McDonnell-Douglas Burden-Shifting Still Applies to Age Claims.

Gross has not changed the established burden-shifting model for analyzing ADEA claims. In Smith v. City of Allentown, 589 F.3d 684, 691 (3d Cir.2009), the appellate court held that “the but-for causation standard required by Gross does not conflict with our continued application of the McDonnell-Douglas paradigm in age discrimination cases.” The Court in Smith explained:

Gross stands for the proposition that it is improper to shift the burden of persuasion to the defendant in an age discrimination case. *McDonnell-Douglas*, however, imposes no shift in that particular burden ... Throughout [the *McDonnell-Douglas*] burden-shifting exercise, the burden of persuasion, including the burden of proving ‘but for’ causation ... remains on the employee. Hence, *Gross*, which prohibits shifting the burden of persuasion to an ADEA defendant, does not forbid our adherence to precedent applying *McDonnell-Douglas* to age discrimination claims ...

Id.

Since Gross, some Third Circuit courts have failed to note the new ADEA standard when determining what standard applies to PHRA age discrimination claims. For example, in Russell v. Mercer County Ass’n for the Retarded, 2011 WL 3610082 at *1, n.1 (W.D. Pa. Aug. 15, 2011), the court held blithely that “[t]he same legal standard that applies to Russell’s ADEA claim applies to his PHRA claim.” The court relied on a previous decision under the Americans with Disabilities Act (not the ADEA), and stated that Gross was limited to the “mixed-motives” issue and did not apply to the case at bar. Id. at *2, n.2. Nevertheless, defendants can and should use Russell and similar cases to argue that PHRA cases must continue to be litigated on the same standards as the ADEA, while plaintiffs surely have ammunition to argue that age claims under the PHRA should be determined by the general “motivating or determinative” standards that apply for all PHRA claims, as the Supreme Court’s decision under the ADEA has no relevance to interpreting age claims under the PHRA.

B. *Gross* may bar proceeding with multiple claims of discrimination.

One key fall-out for plaintiffs is that since Gross, some courts that have addressed the issue have ruled that a plaintiff cannot prevail on a claim that both age discrimination and some other form of discrimination – such as sex or race – motivated the termination, as Gross requires that age be “the reason” and that “but for” age the person would not have suffered the adverse action. See, e.g., DeAngelo v. DentalEZ, 738 F. Supp. 572, 578 (E.D. Pa. 2010) (Pratter, J.) (analyzing cases dealing with the issue of whether a plaintiff bringing claims of age discrimination can also allege other forms of discrimination, and holding that at the pleading and summary judgment stage both age and sex discrimination claims are permitted, but “[b]y the conclusion of her trial, [plaintiff] may have to elect between pursuing an ADEA claim or a Title VII claim”).

For plaintiffs contemplating bringing claims of both sex and age discrimination (the most common combination with age claims) the developing case law since Gross suggests that plaintiffs are best off bringing the claim under Title VII as a “sex-plus-age” claim, as opposed to bringing an “age-plus-sex” claim under the ADEA. Of course, if the strength of the case is the age discrimination claim, and it must be brought as an ADEA claim, then the plaintiff and her lawyer will have to decide whether they wish to abandon the sex discrimination claim, or attempt to make new law under Gross.

Importantly, Gross’s new standard applies at trial – but not at the pleading stage.

Courts have held that a plaintiff may **plead** alternative theories of relief, but at the **trial** stage, a plaintiff may not be able to prevail on both an age discrimination claim and a claim of a different motivation. Prisco v. Methodist Hospital, 2011 WL 1288678 (E.D. Pa. April 4, 2011) (slip op.) (rejecting application of Gross “but for” standard at the pleading stage); DeAngelo v. DentalEZ, 738 F. Supp. 572, 578 (holding that a plaintiff may plead separate counts of age and sex discrimination through summary judgment, but “[b]y the conclusion of her trial, [plaintiff] may have to elect between pursuing an ADEA claim or a Title VII claim”); Houchen v. Dallas Morning News, Inc., No. 08–1251, 2010 WL 1267221, at *3 (N.D. Tex. Apr. 1, 2010) (holding that, on summary judgment, “[w]hile issues of proof may prevent Plaintiffs from prevailing on both theories, the court does not find the mere fact of pleading sex and age discrimination claims together a basis for dismissing the age discrimination claims.”); Siegel v. Inverness Med. Innovations, Inc., No. 09–1791, 2010 WL 1957464, at *6 (N.D. Ohio May 14, 2010) (“[Plaintiff] may pursue alternative claims at this [summary judgment] stage of the case; what Gross prohibits is an age discrimination verdict based on a mixed-motive jury instruction.”); Belcher v. Service Corp. Int’l, No. 07–285, 2009 WL 3747176, at *3 (E.D. Tenn. Nov. 4, 2009) (“While Gross arguably makes it impossible for a plaintiff to ultimately recover on an age and a gender discrimination claim in the same case, the undersigned does not read Gross as taking away a litigant’s right to plead alternate theories under the Federal Rules.”).

B. Does *Gross* Require that Age Be the “Sole Cause” of the Adverse Action? The Jury Is Still Out on That One.

Since Gross, some defendants have argued that it means that a plaintiff must prove that age was the “sole” cause of the adverse action, and if the plaintiff admits – or the evidence demonstrates – that another cause also motivated it, then the ADEA claim must fail. Pennsylvania courts, so far, have rejected this argument. For example, in Geisel v. Primary Health Network, 2010 WL 3719094 at *5 (W.D. Pa. Sept. 17, 2010), the court held:

To the extent defendants are implying that the Court's use of the phrase “but for” causation should be understood as requiring a showing of sole causation, their contention is misplaced. See Smith v. City of Allentown, 589 F.3d 684, 690 (3d Cir.2009) (reiterating that the burden of persuasion remains with the plaintiff at all times under the McDonnell Douglas burden shifting analysis, including the burden of proving “but for” causation) (citing Starceski v. Westinghouse Elec. Corp., 54 F.3d 1088, 1096 n. 5 (3d Cir.1995) (“In Miller [v. CIGNA Corp.], 47 F.3d 586, 593-94 (3d Cir.1995)], we rejected the statement in Griffiths [v. CIGNA Corp., 988 F.2d 457 (3d Cir.1993)] that an employee advancing a McDonnell Douglas/Burdine pretext theory must show that invidious discrimination is the ‘sole cause’ of his employer's adverse action.”)).

This holding is consistent with prior Third Circuit rulings. See, e.g., Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 897 (3d Cir. 1987) (en banc) (“Under the ADEA, the ultimate burden remains with the plaintiff to prove that age was a determinative factor in the defendant employer’s decision. The plaintiff need not prove that age was the employer’s sole or exclusive consideration, but must prove that age made a difference in the decision.”).

IV. Unique Evidentiary Issues In Age Discrimination Litigation.

A. Age-biased Comments in ADEA Litigation.

Another common issue in age discrimination claims is the creative array of comments that plaintiffs will cite as evidence of age bias. Plaintiff’s counsel often search for and focus on such comments as “windows to the soul” of the alleged discriminator, or evidence of a culture or atmosphere of age-ism in the workplace. When the comments are about the plaintiff, explicitly age-related, and made by a decision-maker in relation to the adverse action at issue, there is no question that they are relevant and admissible. But age discrimination litigation seems to generate a much broader array of comments that plaintiffs seek to introduce – and defendants work to exclude – as evidence of age bias.

Recent examples include:

- A New Jersey state jury awarded \$509,000 to a high school teacher who demonstrated that, after she changed plans to retire at age 60, her supervisors began unprecedented scrutiny of her performance, including statements that her teaching methods were “antiquated” and “too traditional,” and that she was “regressing” in her ability to teach. O’Neill v. Jefferson Township Bd. of Educ.,

N. J. Super. Ct. (1/6/12) (reported in BNA Daily Labor Report, 10 DLR A-13 (Jan. 17, 2012)). She was replaced by a substantially younger teacher. The jury found the school board liable for both a hostile work environment and constructive discharge.

- In a Washington, D.C. lawsuit, Gold v. Gensler, -- F. Supp. 2d --, 2012 WL 19387 (D.D.C. Jan. 5, 2012), a judge found “frivolous” a plaintiff-employee’s argument that age discrimination was evident from interview notes in which a manager commented that a younger candidate brought a “fresh perspective and new energy” to the position. Such job-related comments are simply too distinct from age to support an age claim, the court held.
- In a Michigan state court ruling, Hermann v. MidMichigan Health, 2012 WL 205839 (Mich. App. Jan. 24, 2012), the fired employee pointed to two age-related comments to support her claim: (1) the company president highlighted the employer’s “aging workforce” in a PowerPoint presentation, below a box reading “Physician, nurse and skilled clinician shortages;” and (2) during a post-termination conversation, the vice president of human resources suggested to the employee that she “just write down . . . that you’re retiring so you can stay home and play with your granddaughter.” In an opinion that may be more conservative than parties may find in Pennsylvania or New Jersey, the court dismissed the case and held that “it is not reasonable to infer . . . a discriminatory animus against older employees” from such comments.

B. “Me, Too” Evidence of Discrimination Against Others.

Plaintiffs will often seek to introduce evidence of discrimination against other employees, to either show discriminatory intent – if the same decision-makers were involved in the adverse actions against the plaintiff and the others – or to show a company-wide policy discriminating based on age.

Such evidence can be powerful and prejudicial – unduly or not – and defendants obviously must fight against its introduction.

Evidence of alleged age discrimination against others is admissible only if the plaintiff can establish, per Fed. R. Evid. 403, that the probative value of such evidence substantially outweighs the risk of undue prejudice, confusion of the issues and delay (e.g., by requiring a series of mini-trials to prove or disprove the alleged discrimination against others). See Sprint/United Mgmt. Co. v. Mendelsohn, 128 S. Ct. 1140 (2007).

C. Targeting High-Compensation Employees Is Not Age Discrimination.

Courts from the Supreme Court down also have rejected arguments that targeting high-compensation employees or employees with a certain level of seniority is somehow age biased.

But that does not mean that plaintiffs cannot aggressively and explore that the facially age-neutral factor was pretextually selected by the employer as a way to get rid of older workers.

These issues were explored and decided in Hazen Paper Co. v. Biggins, 507 U.S. 604, 611 (1993). There, the Court held that the ADEA does not prohibit discrimination on the basis of an employee's seniority, as seniority is distinct from age. The Court first noted that the ADEA merely commands that "employers are to evaluate [older] employees . . . on their merits and not their age." When the "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. . . ." The Court explained that, 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, the Court reiterated. For example, 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, the Court held that 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."

Importantly for plaintiffs, the Court added a *caveat*: "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. . . ."

The legality of firing senior, highly compensated employees – even if they may tend to be older -- was recently affirmed in Hansen v. Crown Golf Properties, LP, No. 10-C-226, -- F. Supp. 2d --, 2011 WL 5925542 (Nov. 29, 2011) (holding that the plaintiff could not establish pretext in the employer's "cogent" explanation of the plaintiff's firing: "He was the most expensive employee, and expenses needed to be cut").

V. Unique Legal Issues in Age Discrimination.

A. Lucky 7 or 5? Plaintiff's Replacement Needs to be Substantially Younger.

One element of a prima facie case of age discrimination under the ADEA is whether the plaintiff "was ultimately replaced by a person sufficiently younger to permit an inference of age discrimination." Duffy, 265 F. 3d at 167. But what is "sufficiently younger"? The Third Circuit has not provided a bright line rule on the issue, commenting that "[t]here is no magical formula to measure a particular age gap and determine if it is sufficiently wide to give rise to an inference of discrimination." Barber v. CTX Distribution Servs., 68 F.3d 694, 699 (3d Cir.1995).

Case law suggests that an age difference must be greater than seven years for a plaintiff to be safe in arguing an inference of age discrimination. See, e. g., Narin v. Lower Merion Sch. Dist., 206 F.3d 323, 333 n. 9 (3d Cir.2000) (difference in age between 56-year-old employee and 49-year-old employee not sufficient to allow inference of discrimination); Steward v. Sears, Roebuck & Co., No. 02-8921, 2006 U.S. Dist. LEXIS 39034, 2006 WL 1648979, *14 (E.D. Pa. June 13, 2006) (citing cases and finding difference of 6.75 years to be insufficient to permit inference); see also Angelico v. Agilent Techs., No. 06-348, 2006 U.S. Dist. LEXIS 72399, 2006 WL 2854377, *4 (E.D. Pa. Oct.4, 2006) (“[I]t appears that our Court of Appeals has never found a difference of less than seven years to be sufficient to infer age discrimination.”); and Campbell v. West Pittston Borough, 2011 WL 4435402 (M.D. Pa. Aug. 23, 2011) (one and one-quarter year difference between plaintiff and person selected for position insufficient to infer age bias).

Older cases, however, have held a five-year difference to be sufficient. See, e.g., Sempier v. Johnson & Higgins, 45 F.3d 724 (3d Cir. 1995) (noting that no particular age difference must be shown; citing cases holding that a five year difference was sufficient).

B. Older Decision-maker May Be Relevant, But Clearly Not Decisive.

In many age cases, defendants can point to the fact that the decision-maker is older than the plaintiff to refute claims that the decision-maker had bias against older workers. This point is certainly worth the defendant raising in any case in which it exists, but courts have repeatedly held that such a fact, alone, is not sufficient to defeat an age discrimination claim. This recognizes the vanity of human beings – just because a manager thinks he, himself, is not too old to do the job does not mean that he can’t think that others are too old to do their jobs.

C. The Same Actor Inference – With an Old Wrinkle.

The parties in age discrimination suits also may encounter shaky ground in applying the “same actor inference.” As explained in Martino v. MCI Communications Services Inc., 574 F.3d 447 (7th Cir. 2009), “common sense tells us that it’s unlikely for a person to suddenly develop a strong bias against older folks” so that an individual who both hires and fires the plaintiff within a short period is unlikely to be motivated by age discrimination.

But how much time must pass before the “same actor inference” evaporates in an age discrimination claim, as the plaintiff becomes older (in contrast to a race or sex claim, where the status never changes)? Certainly, if one looks to the “replacement” analysis above (in which courts have indicated that a replacement must be at least seven years younger to support a prima facie case), one would assume that the passage of seven years or more from hiring to firing would be sufficient to indicate that the plaintiff has become “sufficiently” older since hiring to void the claim of a “same actor inference.” Likewise, the inference would seem secure if the two decisions occur within a few years of each other. In between those two points, the parties likely will have to battle out whether any inference, or inference instruction, is warranted.

VI. Litigating Age Claims Relating to Reductions In Force.

Another unique aspect of age discrimination litigation is the vulnerability of employers to age discrimination claims during down-sizing or restructuring, often referred to as a reduction in force (“RIF”). Age bias claims during a RIF are more common than other types of claims because (1) if a release is sought in exchange for waiver of ADEA claims, employers are required to give certain notices and disclosures, including the ages of all of those impacted and not impacted by the job action, under the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f); and (2) such RIFs tend to have a larger impact on older workers, for various reasons.

A. Best Practices on the Front End for RIFs.

Counsel advising employers on reductions in force need to closely analyze decision-making and results to weed out any age bias. Such bias can be reflected in the factors and subjectivity of the decision-making itself, as well as in the results – which may show a “disparate impact” on older workers.

The best practices for structuring a RIF include the following steps:

- Establish and document the company’s basis and goals for the RIF.
- If the RIF is part of an overall restructuring or reorganization of the workforce, develop and document that reorganization, and the positions remaining; and establish company-wide or unit-wide processes to be used to fill the new organization, and the criteria to be used in selecting individuals to fill the structure, where a position has changed or been eliminated.
- For situations in which the company is reducing the number of people doing a certain job, or changing or combining jobs in the new structure, establish a deliberate process and criteria to be used and then document the decision-making.
- Where possible use objective criteria. Most employers strive to retain the “best” employees who possess the skill sets that match the reorganized workforce needs. However, this description is rather subjective and, therefore, subject to challenge. If possible, the company should strive to create a more objective decision-making process that breaks down the selection process into a number of weighted criteria. Things like education, certification, experience, demonstrated skill set, past performance reviews, seniority and cost are all legitimate considerations. Both subjective and objective criteria may be used, but objective criteria – and those based on past evaluations of performance - - are generally safer from attack by a disgruntled employee. Other “safe” criteria to consider include seniority (where the most senior are favored) and termination of any employee who is on a performance improvement plan, has an unsatisfactory annual performance review, or is still in his or her probationary period.
- Creating and applying a decision matrix. Once the legitimate business criteria are determined for each open position that is competitive (e.g., a position with more candidates than open positions), decision-makers should develop matrices for each position, which will be used to evaluate each eligible employee and select the best candidates for retention.

- The company also should consider who will be the decision-makers. Having a central group of top executives who make all the selections, with the input of human resources professionals, may ensure consistency and confidentiality, but such individuals may lack direct knowledge of employee performance. It is advisable to have at least some input and buy-in at the facility level, and to ensure some centralized review to scrutinize the decision-making process and ensure consistency. Close selection decisions should be scrutinized by someone outside the decision-making process, usually outside counsel, in a “challenge day” to identify and work out potential problems.
- Once all selections are made, the company should run an analysis of the impact on its workforce to ensure the RIF has not had a disproportionate impact on older workers, women, a racial minority group, or some other protected status. This analysis basically compares the makeup of the workforce before the RIF with the makeup after the RIF, to ensure that a protected group has not been adversely impacted. If an employee can show a disproportionate impact from a RIF, then the burden of proof shifts to the employer to establish that it made the decisions for legitimate business reasons.

B. Check the Statistical Impact of Any RIF Before The Employee and Her Lawyer Do.

This article does not provide a summary of the law in this area, but such analyses are commonplace and necessary to avoid age discrimination claims in RIFs. Any age discrimination litigation involving a RIF or other widespread impact on older workers should include a review of whether a case can be proven or disproven through a statistical analysis. As noted below, the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f), requires that age data of those selected and not selected for termination be provided to the terminated employees as part of any severance proposal that requires them to waive their rights under the ADEA. Such information, by design, makes it infinitely easier for plaintiffs and their counsel to evaluate, pre-litigation, the statistical impact of the job action on older workers.

This information can help an employee and/or her attorney quickly determine whether the RIF had a disproportionate impact (also known as a “disparate impact” or “adverse impact”) on older workers. If that disproportionate impact can be established (often through statistics, showing at least two standard deviations from the expected norm), then the plaintiff may bring a “disparate impact” claim, in which the burden of proof shifts to the employer to demonstrate that a reasonable non-age factor was used to make the selections. See Smith v. City of Jackson, 125 S. Ct. 1536, 1542–43 (2005) (affirming the viability of disparate impact claims under the ADEA). Even if a disparate impact claim is not brought, such a disproportionate impact can be helpful evidence in a disparate treatment claim.

C. Complying with the Older Workers Benefit Protection Act.

Counsel to management also must be careful to strictly comply with the requirements of the OWBPA in order for any waiver and release of ADEA claims to be valid.



In Ruehl v. Viacom, Inc., 500 F.3d 375, 382 (3d Cir. 2007), the employee, James Ruehl, challenged the validity of a release of claims under the ADEA that Viacom required him to sign in order to receive enhanced severance benefits. Such releases -- which require employees to give up almost all of their legal claims against the employer -- are typical in RIFs and terminations. They help ensure that employers that provide separation pay to severed employees are not subsequently sued by those same employees for wrongful termination.

However, as most employment lawyers now know, the OWBPA provides that such waivers and releases, as they apply to federal age discrimination claims, are valid only if they meet specific, somewhat onerous requirements, as follows:

(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum—

(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 such individual, or by the average individual eligible to participate;**

(B) the waiver specifically refers to rights or claims arising under this chapter;

(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 already is 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; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least **45 days** within which to consider the agreement;

(G) **the agreement provides that for a period of at least 7 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;

(H) **if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees,** the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—



- (i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and
- (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

29 U.S.C. § 626(f) (emphasis added)

In Ruehl, Viacom, recited the proper OWBPA language in the release agreement, but did not actually provide him or other fired employees with the required information as to eligibility factors, applicable time limits and job titles and ages of those selected and not selected for termination. Viacom argued that providing the information required by OWBPA to each employee would be unduly burdensome and require too much paperwork. Viacom said Ruehl could have requested the missing information from Viacom, and it would have supplied it, but he never did, making the point moot.

The Third Circuit rejected Viacom’s defense with strong language, noting that the OWBPA places the burden on the employer -- not the employee -- to provide the required information to employees. The court noted that courts require “strict compliance” with the terms of the OWBPA, as recognized by the U.S. Supreme Court in Oubre v. Energy Operations, Inc., 522 U.S. 522 (1998), for a waiver of age discrimination claims to valid.

VII. Jury Instructions after *Gross* – Caution, State Claims May Vary.

A. Third Circuit Model instructions and decisions.

The Third Circuit has revised its model jury instructions to be consistent with Gross, but they are not dramatically changed from those applicable to Title VII claims, and retain the use of the “determinative factor” language. One major exception, obviously, is that the Model Instructions no longer provide an option for a mixed-motives instruction. See http://www.ca3.uscourts.gov/civiljuryinstructions/Final-Instructions/august2011/8_Chap_8_2011_August.pdf.

Here is the basic instruction still advocated by the Model Rules:

In this case [plaintiff] is alleging that [describe alleged treatment] [plaintiff]. In order for [plaintiff] to recover on this discrimination claim against [defendant], [plaintiff] must prove that [defendant] intentionally discriminated against [plaintiff]. This means that [plaintiff] must prove that [his/her] age was a determinative factor in [defendant's] decision [describe action] [plaintiff].

To prevail on this claim, [plaintiff] must prove both of the following by a preponderance of the evidence:



First: [Defendant] [failed to hire] [failed to promote] [demoted] [terminated] [constructively discharged] [plaintiff]; and

Second: [Plaintiff's] age was a determinative factor in [defendant's] decision.

Third Circuit Model Jury Instructions at § 8.1.1. [excerpt].

Defendants can and should aggressively push for instructions that stress the “but-for” language of Gross, as well as the language suggesting that age must be shown to be “the reason” for the adverse action. As is often the case, however, the jury instructions often end up becoming a dense mixture of the model instructions and the “because of,” “but-for” and “the reason” language of Gross.

In a recent case reviewing challenged ADEA jury instructions, the court refused to find error where the instruction included a statement that age must have been a “decisive” or “determinative” factor in the decision to terminate, and the verdict slip asked the jury whether “age was a ‘but for’ cause of [the employer’s] decision.” Marcus et al. v. PQ Corp., 2012 WL 149802 at *2 (3d Cir. Jan. 19, 2012) (slip op.) (concluding that, “[w]hile some language in the instructions, read in isolation, strayed from the stringent but-for standard, we will not reverse unless the instructions as a whole fail to correctly state the burden of proof. Read together, these instructions were not deficient”). Note that in *Marcus* the defendant challenged the court’s use of the article “a” rather than “the” in describing the “but-for” causation. While *Gross*’s language suggests that “the” would be proper, plaintiffs will continue to push for “a” and broader instructions, consistent with case law indicating that a plaintiff not prove that age was the “sole cause” of the termination. *See above*.

B. Jury instructions under ADEA and state law may vary.

An important issue is whether alternative burdens of proof must be offered in jury instructions, and the jury verdict form, when a plaintiff is proceeding with both an ADEA and PHRA claim. Because the PHRA has always included “age” among the other protected categories (sex, race, religion, national origin, etc.), it would appear there is no basis for requiring a different, Gross-type burden of proof to establish age discrimination under the PHRA. Therefore, a plaintiff proceeding under both the ADEA and PHRA would, one expects, be entitled to a “but-for” jury instruction under the ADEA and a lower “motivating or determinative factor” instruction under the PHRA.

Faced with the prospect of providing two, confusing instructions on the burdens of proof under state and federal law, one can imagine the parties and the courts pushing to reach agreement to have simply one standard instruction as to both claims. However, one party will be giving up considerable rights if it concedes the point. Defendants will definitely want the “but for” higher standard, and plaintiffs will prefer the “motivating or determinative” standard. Plaintiffs also may prefer to have the jury decide the issue twice, with two separate questions.

Defense counsel in Florida has even attempted to use the “but for” standard from Gross to heighten the burden of proof for all discrimination claims (“such as race, gender, national origin, etc.”) under the Florida Civil Rights Act. “Florida Court Reverses \$1 Million Award to Terminated Female Miami TV Reporter,” BNA Daily Labor Report, 13 DLR A-4 (Jan. 20, 2012) (reporting on reversal Florida District Court of Appeals in Sunbeam Television Corp. v. Mitzel, NO. 3D11-249, Jan. 18, 2012).

VIII. Unique Age Issues in Jury Selection.

If you were a plaintiff’s lawyer with a disability discrimination claim, can you imagine the good fortune of having a jury in which three-fourths of the members were disabled? Or a race discrimination claim in which three-fourths of the jury was your client’s race? Or a religious discrimination claim for a Catholic woman, with a vast majority of jurors being Catholic?

This sounds too good to be true for the plaintiff, and unfair for the defendant, right?

Yet, picking a jury in an age discrimination claim can be just like this for plaintiff’s and defense counsel -- the average jury pool consists of older Americans, often quite older. Although I could not find any data on the average jury age, in my experience most jurors in the Eastern District of Pennsylvania are at or above age 50 – with at least one quarter over 60, and about three quarters over 40.

As such, jury trials pose special challenges for defendants. Here are key issues to consider when conducting *voir dire* in an age discrimination claim:

- *The educated, under-achieving juror.* If an older juror appears to have a job that does not live up to his or her educational achievements, that could be one to avoid for the defense. Workers who feel they have been passed over for promotions or better jobs, likely lost at least some of those opportunities to younger workers and may be especially open to arguments of age discrimination.
- *Job turnover and unemployment.* The unemployed, older juror is the plaintiff’s best friend and can be counted on to try on the plaintiff’s shoes during the trial.
- *How old is too old?* Defendants may not have a choice, but they should not be overly concerned about jurors in their 40s. Although the ADEA and PHRA set 40 as the limit for protection, few employees encounter age discrimination in their 40s, and as such they are likely to be open to evidence and arguments from both sides. On the other hand, age discrimination in employment seems to hit employees hardest in their late 50s and 60s, as they are passed over for promotions, demoted or laid off – and such wounds are more likely to be fresh at the time of trial.
- *Is the individual conservative or liberal?* Jury consultants seem to agree that most people grow more conservative with age, but one cannot be sure that conservatism will apply with regard to feelings on age discrimination.

- *Has the individual succeeded in his or her career?* Someone who has succeeded is probably less open to the claims of the plaintiff that he or she did not succeed because of bias – as the successful juror likely will see himself or herself as earning the success, and the plaintiff – and others – as deserving their failure.
- *Does the juror seem more trusting or suspicious?* While more suspicious, conspiracy types are generally seen as more pro-plaintiff in employment discrimination cases, the suspicion can be turned on the plaintiff, if he or she lacks evidence to show age bias and/or prove pretext in the employer’s business reasons for its actions, and instead seems to be trying to cover up or excuse his or her own inadequacies.
- *Neat or sloppy appearance?* I don’t see much of an age issue here, but if your case hangs on a complex analysis of facts and law, or strict adherence to written rules, then you want the OCD dresser. If your case is more emotional, and you want to gloss over the disconnects, then go with the guy with the tattoo, Grateful Dead Tee-shirt and flip-flops.

Younger jurors obviously pose less of a risk to defendants, unless they show signs of being generally anti-establishment, non-trusting of corporations, etc.

Jurors also may process information differently, based on their age. One study indicates that older jurors respond more to positive publicity or information about a party, while younger jurors respond more to negative publicity or information. *See Douglas Keene, Pretrial publicity & bias: Take a look at the age of your jurors!* posted Jan. 27, 2012, at <http://keenetrial.com/blog/2012/01/27/pretrial-publicity-bias-take-a-look-at-the-age-of-your-jurors/>.

IX. Themes at Trial – “Special Treatment” or “Retiring with Dignity”?

Key themes and issues to consider at the trial of any age discrimination case include:

- Optics on age
 - For the defense it is usually preferable to have an older party representative and counsel with some gray hair.
 - For the plaintiff, the older the plaintiff looks the better – but avoid going overboard and projecting a client who is too old, too slow, or too “out of it” – the plaintiff should appear sharp, energetic and competent, regardless of age.
- Identifying favorable comparators
 - Plaintiff will want to identify younger works who were treated more favorably, leading to a compelling theme that plaintiff would have been treated the same “but for” his or her age – “just look at Susie, she did the same thing and she was not fired. Why not? Because she’s not old and wrinkly.”
 - Defendants will strive to put the reverse before the jury – older workers and managers who have thrived at the company, and younger workers who

have also been subject to similar discipline and/or termination – if you don't have these, beware!

- Retiring with dignity
 - A strong theme for any plaintiff who is near retirement age is to stress that defendants have taken away the plaintiff's ability to retire with dignity.
 - Defendants must stress equal treatment and that the plaintiff is seeking "special treatment" – basically to be exempted from the requirements everyone else had to follow, simply because of his or her age.
- Performance declining with age?
 - A unique aspect of age discrimination claims is that most of us have observed – either in our own loved ones or in general– that physical and mental abilities often decline somewhat with age. Such empirical evidence, which has been supported to some extent by scientific research², surely seems powerful and relevant in age discrimination litigation. But is it ever wise or prudent for a defendant to seek to argue the point, or to have an expert opine on the effects of aging on the typical worker? Probably not, as such evidence feeds directly into the type of age-based decision-making the plaintiff is required to prove.
 - Rather than directly raise an inference that performance declines with age, and risk the jury's wrath, let some jurors reach that conclusion on their own, without the defense confirming the charge of age bias.
- Emotional appeal
 - It is important to note that age bias is not viewed with the revulsion that our society reserves for race discrimination, sexual harassment and other protected statuses under the law. This likely arises from the fact that all of us are aging and will someday fall into the "protected status," if not already there. As a result, any discrimination against older workers is less likely to be seen as hateful separation of people into "us and them."
 - Nevertheless, plaintiffs can create powerful linkages by identifying the plaintiff in a role that all jurors can relate to – father, grandfather, breadwinner, "company man who devoted his life to his job and then was forced out because they thought he was too old."
- Comparisons to athletes
 - One effective theme for defense counsel is to compare the plaintiff to a well-known athlete whose performance declined, leading to his or her demotion or termination. For example:
 - *Mr. Smith's case seems to be that because he was over 60 when he was terminated, it must have been because of his age. That reasoning is false. As we have shown you, the Company employs*

² See, e.g., Jean E. Kubeck, et al., Does Job-Related Training Performance Decline With Age?, PSYCHOLOGY AND AGING, 1996, Vo. 11, No. 1, 92-107 (collecting results and reporting studies, and concluding that "[i]n general, older adults, relative to younger adults, showed less mastery of training material ($r = -.26$), completed the final training task more slowly ($r = .28$), and took longer to complete the training program ($r = .42$).").

people of all ages, including dozens over the age of 60. Mr. Smith was let go because his performance was getting worse – he was producing fewer widgets, the ones he produced often had quality problems, and he was slow to get certified on the new machines. The Company did not care about his age, they cared about getting the job done, and he was not getting it done. When the same rules applied to Mr. Smith as to everyone else – that is not age discrimination. ¶ This case reminds me of a year ago when the Philadelphia Phillies baseball team did not renew the contract of 48-year-old pitcher Jamie Moyer. The Phillies did not end Moyer’s contract because he was 48, they ended it because his abilities had declined: because of injuries and poor performance, he was pitching fewer innings than other starters. And when he did pitch, he was giving up more hits and runs to the opposing team. Was Moyer’s drop in performance related to his aging? Who knows, who cares? The Phillies did not cut Jamie Moyer because of his age – after all, they renewed his contract several times when he was in his 40s. They cut him because his pitching was not as good as needed and they had better pitchers to keep. ¶ The same has happened to Mr. Smith here. His performance dropped off sharply, you have seen the proof. And that decline is why he was terminated. Not because of his age.