PENNSYLVANIA BAR INSTITUTE

Employment Law Institute 2022

‘When I get older, losing my hair’: Age Discrimination Blues and Trends

Michael D. Homans
Gabrielle Talvacchia (Villanova Law, 2022)
HOMANSPECK, LLC
215-419-7477
MHOMANS@HOMANSPECK.COM

I. Introduction

Although the coronavirus brought us the "Great Retirement" in the past two years, older workers continue to make up almost 44% of the workforce, including more than 66 million workers aged 45 or older. https://www.bls.gov/cps/cpsaat11b.pdf.

And more older people are remaining on the job. The U.S. Census Bureau reports that from 2010 to 2020 the percent of people ages 65 to 74 participating in the workforce increased from 24.8% to 26.8%. And for those aged 75 and older the participation rate rose from 5.7% to 7.2%. https://www.census.gov/library/stories/2021/06/why-did-labor-force-participation-rate-decline-when-economy-was-good.html#:~:text=Despite%20the%20overall%20dip%2C%20the,%3A%2024.8%25%20to%2026.8%25.

And so, with close to half of the workforce over 40 and protected against age discrimination by federal and state laws, 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 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 can arise;
- "Age-plus" claims after *Gross*;
- Disparate impact claims based on age – and subgroups of older workers;
- Age-related comments in the workplace that can make or break an age bias claim;
- Dealing with the dangerous issue of suggesting that, lo and behold, performance sometimes does decline with age;
- Dealing with age discrimination issues in reductions in force;
- Jury selection issues;
- Trial issues unique to age claims; and
- The Older Workers Benefit Protection Act as it applies to the waiver and 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 Mixed Decisions 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 recognizing that requiring aging ADEA plaintiffs to wait 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 ("PHRA") 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*.

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*.

Plaintiffs in Pennsylvania have had mixed success in circumventing the PHRA's one-year limitation.

1. Decisions favoring plaintiffs

Significantly, some courts have held that "dual filing an EEOC charge of discrimination and procuring a Notice of the Right to Sue from either agency, satisfies exhaustion requirements." *Real-Loomis v. Bryn Mawr Tr. Co.*, No. CV 20-0441, 2021 WL 1907487, at *4 (E.D. Pa. May 12, 2021) (citing supportive precedents and holding that administrative exhaustion met under PHRA where plaintiff filed a discrimination claim with the EEOC and the PHRC and received a right to sue letter from the EEOC six months later: "the EEOC [right to sue] letter is sufficient to satisfy the administrative exhaustion requirements of the PHRA").

The logic of treating the EEOC right to sue notice as a PHRC dismissal was explored in *Simon v. IPS-Integrated Project Servs., LLC*, No. CV 17-03474, 2018 WL 3585137, at *3 (E.D. Pa. July 26, 2018):

> Through a dual-filing agreement, the PHRC and the EEOC enter into an arrangement through which they apportion initial jurisdiction over discrimination complaints in order to avoid unnecessary duplication of investigatory time and effort. Woodson v. Scott Paper Co., 109 F.3d 913, 925 (3d Cir.

> 1997). Under a dual-filing agreement, each agency waives its right to initially review claims that are first filed with the other agency. Id. at 926. As such, a claim that is filed first with the EEOC can be processed by the EEOC, without being investigated as an initial matter by the PHRC. Id. Therefore, Pennsylvania waives its statutory right to initially process discrimination claims, and hence the agreement operates to "terminate" the PHRC proceedings with respect to those complaints that are filed first with the EEOC. Id. Dual-filing an EEOC charge of discrimination satisfies the PHRA's prerequisites. See Remp v. Alcon Labs., Inc., 701 Fed.Appx. 103, 106 (3d Cir. 2017).

2. Decisions favoring defendants, refusing to allow PHRA claims, if suit filed earlier than one year after administrative complaint filed

While the decisions above suggest that a plaintiff will be permitted to file suit and pursue her PHRC claims before the one-year administrative exhaustion requirement has passed, plaintiffs and their counsel should be aware of the minority of decisions going against this trend.

Most recently, in *O'Brien v. Middle E. F.*, No. 2:19-CV-06078-JMG, 2021 WL 183271, at *4 (E.D. Pa. Jan. 19, 2021), the court found that the plaintiff's actions in seeking immediate dismissal of her EEOC charge and then filing suit – well short of the one-year exhaustion period – demonstrated failure to exhaust administrative remedies under the PHRA:

> Requesting immediate dismissal of her EEOC complaint and subsequently filing suit prior to the one-year review period foreclosed PHRC from resolving Plaintiff's case by either concurring with the results of EEOC's investigation or by evaluating her claims through their own administrative process. . . . Therefore, Plaintiff failed to exhaust her administrative remedy under § 962(c)(1) and her PHRA claims must be dismissed.

Similarly, in *Jones v. Delaware River Stevedores, Inc.*, No. CV 18-4276, 2019 WL 498517, at *3 (E.D. Pa. Feb. 7, 2019), the plaintiff was found to have not exhausted her remedies under the PHRA where she dual-filed her administrative charge with the EEOC in May of 2018, but then filed suit in October of that year.

A series of state and federal rulings have refused to allow amendment of a court complaint after the 12-month period required by the PHRA, holding that filing suit before the 12 months has passed demonstrates a lack of "good faith use" of the administrative procedures under the PHRA. *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").

3. Middle ground – allowing plaintiffs to amend complaints to add PHRA claims.

Although some decisions have refused to allow amendment of a court complaint to add PHRA claims 12 months after the PHRA complaint was first filed, most courts that have addressed the issue have allowed such amendment to cure any claim of failure to exhaust administrative remedies. These decisions include:

- *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).

- *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 for one year had passed since initial filing with PHRC); *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).

- *Szurgyjlo v. Sourceone Pharmacy Servs., LLC*, No. CV 20-4304, 2020 WL 7249095, at *3 (E.D. Pa. Dec. 9, 2020):

> Accordingly, the Court will dismiss Plaintiff's state law claims, but it will permit her to file an Amended Complaint regarding her state law claims after the PHRC Period elapses. Doing so is in line with typical practices in this jurisdiction. See, e.g., *Simon v. Integrated Project Servs., LLC*, Civ. No. 17-03474, 2018 WL 3585137, at *4 (E.D. Pa. July 26, 2018) (Jones, J.) ("Plaintiff cured said 'premature' filing by submitting an Amended Complaint after the one-year limitation had expired.") (citing cases in support). Plaintiff will be able to pursue discovery based on her related federal law claims in the meantime.

- *Simon v. IPS-Integrated Project Servs., LLC*, No. CV 17-03474, 2018 WL 3585137, at *4 (E.D. Pa. July 26, 2018) ("even if the PHRA one-year limitation was determinative here, Plaintiff cured said "premature" filing by submitting an Amended Complaint after the one-year limitation had expired."); *but see Rizzotto v. Quad Learning, Inc.*, 2019 WL 2766588, at *3 n.5 (E.D. Pa. June 28, 2019) (concluding that the *Simon* court erred to the extent it held that the exhaustion requirement of the PHRA could be satisfied where the plaintiff dual-filed with the EEOC).

- *Magerr v. City of Phila*., No. 15-4264, 2016 WL 1404156, at *2–3, 2016 U.S. Dist. LEXIS 48177, at *7-8 (E.D. Pa. 2016) (denying defendant's motion to dismiss by concluding that plaintiff exhausted his administrative remedies with respect to his federal and PHRA claims based on plaintiff's EEOC right to sue letter).

4. Different rules in New Jersey – plaintiffs may go straight into court

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 between 18 and 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. <u>That's Gross: "But-For" Causation Raises the Bar for ADEA Claims, But What About State Age Discrimination Claims?</u>

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.

1. 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. See also Giuliani v. Polysciences, Inc., 275 F. Supp. 3d 564, 575–76 (E.D. Pa. 2017) ("In the Third Circuit, ADEA and PHRA claims are litigated according to the burden-shifting framework developed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) for Title VII claims.")

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.

Other decisions have similarly stated that the "same standard" applies, with little or no analysis to explain why the PHRA standard would change for age discrimination claims only. *Willis v. UPMC Children's Hosp. of Pittsburgh*, 808 F.3d 638, 643 (3d Cir.) ("this Court has determined that the interpretation of the PHRA is identical to that of federal anti-discrimination laws,

including the ADEA, we present a single analysis for Willis's claims under both statutes.")

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.

2. *Gross* does not require that age be the "sole cause" of the adverse action

For a short period after *Gross*, some courts ruled that a plaintiff cannot prevail on a claim of both age discrimination and some other form of discrimination – such as sex or race, contending that *Gross* required 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").

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 have consistently 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.").

More recently, the Middle District of Pennsylvania held in *Nicholson v. Petco Animal Supplies Stores, Inc.*, 409 F. Supp. 3d 323, 337 n.7 (M.D. Pa. 2019):

> We note that, although Nicholson's claims for discrimination and retaliation under the ADEA both require "but-for" causation, there may be more than one "but-for" cause of a single adverse employment action . . . The "but-for causation" standard does not require discrimination or retaliation to be the sole cause, only a necessary one. A jury, therefore, reasonably could find in Nicholson's favor on both claims without being irreconcilably inconsistent.

See also Robinson v. City of Philadelphia, 491 F. App'x 295, 299 (3d Cir. 2012) ("We do not require that age discrimination be the sole cause for an adverse employment decision to prevail on an age discrimination claim"); and *Bertani v. Westmorland Cty., Pennsylvania*, 212 F. Supp. 3d 564, 571 (W.D. Pa. 2014) ("To the extent defendant is implying that the Court's use of the phrase "but for" causation should be understood as requiring a showing of sole causation, the contention is misplaced").

IV. Unique Evidentiary Issues In Age Discrimination Litigation

1. 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 ageism 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.

- Fifty-nine-year-old female employee at university sufficiently established prima facie case of age discrimination in violation of ADEA and Pennsylvania Human Relations Act (PHRA); evidence used to support inference of discrimination included the decision-maker in the employee's termination stating – on the day before employee's 57th birthday – that in his home country, women of the employee's age were "put out to pasture." *Briggs v. Temple University*, 339 F. Supp. 3d 466, 2018 Fair Empl. Prac. Cas. (BNA) 380986 (E.D. Pa. 2018).

- Manager's statements including "we need to get all these old farts out of here," and older employees "have got way too much baggage" and "they're no good for us," and that the employer needed to work on "getting the old dogs out of here" were not "direct evidence" of age discrimination under the ADEA. *Sellers v. Deere & Co*., 23 F. Supp. 3d 968 (N.D. Iowa 2014).

- Statement by head of school that those who could not keep up with new technology should retire or quit was not direct evidence of age discrimination, as the comment was not related to protected class of persons over age 40 of which plaintiff teacher was member, was not proximate in time to decision to not renew teacher's contract for the following school year, and was not related to that decision. *Haglund v. St. Francis Episcopal Day School*, 8 F. Supp. 3d 860 (S.D. Tex. 2014).

- In *Gold v. Gensler*, 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.

- Statements by employer's president and CEO that another employee (not the plaintiff) in her eighties had "limited shelf life" and had reached her "expiration date," that he

intended to reduce that employee's hours until she quit, and that he would like to hire younger employees was not direct evidence that age was but-for cause of employee's termination. *Pelcha v. MW Bancorp, Inc*., 988 F.3d 318 (6th Cir. 2021).

- Evidence that the employer's general manager was overheard to say that he needed to make major changes to the organization because so many employees were over the age of 40 was admissible circumstantial evidence in terminated employee's age discrimination action, despite contention that general manager was not a decision-maker with respect to employee's termination; evidence supported employee's theory that his termination was part of a company-wide policy of age discrimination. *Cox v. Kansas City Chiefs Football Club, Inc*., 473 S.W.3d 107 (Mo. 2015).

2. "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).

In *Cox*, the Missouri Supreme Court held "the trial court abused its discretion in excluding 'me too' evidence offered by several employees who, like Mr. Cox, were older than age 40, were terminated during the time period in question and replaced by younger workers, and many of whom were terminated directly or indirectly by the person who fired Mr. Cox. These commonalities make 'me too' evidence relevant and admissible in this case even when the other former employees are not similarly situated in all respects." *See also Goldsmith v. Bagby Elevator Co., Inc*., 513 F.3d 1261, 1287 (11th Cir. 2008) ("[T]he 'me too' evidence was admissible both because it was probative of the intent of the supervisors of Bagby Elevator to retaliate and discriminate against Goldsmith and was relevant to Goldsmith's hostile work environment claim").

3. 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 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 more recently affirmed in *Anderson v. City of Coon Rapids*, 88 F. Supp. 3d 977, 984 (D. Minn. 2015) ("employment decisions motivated by factors other than age (such as salary, seniority, or retirement eligibility), even when such factors correlate with age, do not constitute age discrimination."); *see also Hansen v. Crown Golf Properties, LP*, 826 F. Supp.2d 1118 (N.D. Ill. 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

1. Plaintiff's replacement needs to be substantially younger – but how much?

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).

In *Carter v. Mid-Atl. Healthcare, LLC*, 228 F. Supp. 3d 495, 504 (E.D. Pa. 2017), the court held that an age difference of four years, five months, and three days was sufficient at summary

judgment stage to satisfy the "sufficiently younger" element for establishing the prima facie claim of age discrimination, noting "the unsettled precedent with respect to the 'sufficiently younger' element, the lack of clear guidance from the Third Circuit, the Supreme Court's directive that a prima facie case be viewed flexibly, and because I must view the evidence in the light most favorable to Plaintiff, and draw all reasonable inferences in her favor."

Our Court of Appeals had indeed been less than definitive on this issue but has held that no particular age difference must be shown and citing cases indicating a five-year difference is sufficient. *Sempier v. Johnson & Higgins*, 45 F.3d 724 (3d Cir. 1995).

More recently, and taking the bar even lower, is *Floyd v. Merck & Co*., No. CV 18-3912, 2020 WL 1640083, at *9 (E.D. Pa. Apr. 2, 2020) (finding "sufficiently younger" element was met where employer ultimately filled positions with employees in their 50s, including two employees who were only three and four years younger than the plaintiffs).

For the defense, many older rulings suggest that the 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).

2. 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.

3. The same actor inference – with an old wrinkle

Defendants in age discrimination suits also may find themselves on 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. *See also*

Maybin v. Hilton Grand Vacations Co., LLC, 343 F. Supp. 3d 988, 995 (D. Haw. 2018) (finding "same actor inference" of no discrimination applied where the same decision-makers both hired and fired employee: "In discrimination cases, when the same actor is responsible for both the hiring and the firing of a discrimination plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory action.")

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.

1. 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.

Employers can take some comfort in that courts recognize that in a reduction in force, even strong performers may have to be terminated, and a strong record of performance is not enough in a RIF, as in some other contexts, to establish pretext or age discrimination. *See, e.g., McGrath v. Lumbermens Merch. Corp*., 851 F. Supp. 2d 855, 866 (E.D. Pa. 2012) (holding plaintiff's bonus and promotion evidence alone did not suffice to establish pretext in the employer's articulated reason for termination, particularly in a RIF context, where the employer noted other reasons for the employee's selection).

"The need for some additional evidence beyond a positive employment history is especially warranted in the RIF context." *Id.* at 865. "Our Court of Appeals has explained that '[i]n

a RIF, a company is often forced to terminate the worst of the best, i.e., an adequate or even high-performing employee who is under-performing relative to his peers.'" *Id*. (quoting *Tomasso v. Boeing Co.*, 445 F.3d 702, 711 (3d Cir. 2006)).

2. 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") 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.

Note also that the Third Circuit Court of Appeals expressly recognizes the use of statistical evidence as to disparate impacts on older workers in subgroups other than just under 40 and 40 and over. *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61 (3d Cir. 2017) (allowing evidence of disparate impact of RIF on employees 50 and over).

3. 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 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:

1) Waiver

(a) 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—

i. 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;
ii. the waiver specifically refers to rights or claims arising under this chapter;
iii. the individual does not waive rights or claims that may arise after the date the waiver is executed;
iv. the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;
v. the individual is advised in writing to consult with an attorney prior to executing the agreement;
vi. the individual is given a period of at least 21 days within which to consider the agreement; or
vii. 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;
viii. 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;
ix. 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—
    (a) 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
    (b) 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 be valid.

But this "strict compliance" requirement has its limits, especially when the alleged deficiencies in the release are de minimis and/or the employer can show a good-faith effort to comply with the language of the OWBPA. *See, e.g., Romero v. Allstate Ins. Co.*, 1 F. Supp. 3d 319, 379 (E.D. Pa. 2014) (upholding release and finding that despite the employer failing to precisely follow OWBPA's disclosure requirements, the employer's "disclosures complied with the spirit of the regulations in that Plaintiffs were not deprived of any information needed to decide whether to sign the Release or to accurately assess whether they had a possibly valid discrimination claim"); *Am. Airlines, Inc. v. Cardoza–Rodriguez*, 133 F.3d 111, 118 n. 6 (1st Cir.1998) ("In light of the OWBPA's imprecise terms, some violations may be so technical as to be de minimis, and thus may not invalidate an otherwise valid release of ADEA claims").

Veering further away from the "strict compliance" requirement, one court has held that the focus should be on whether the OWBPA release was written in a manner calculated to be understood in accordance with the OWBPA and considering the "totality of the circumstances." *Warren v. Mastery Charter Sch*., 312 F. Supp. 3d 456, 463 (E.D. Pa. 2018).

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

1. 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* https://www.ca3.uscourts.gov/sites/ca3/files/8_Chap_8_2020_August.pdf.

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

In this case [plaintiff] is alleging that [defendant] [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 to [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 [plaintiff]] [failed to renew [plaintiff's] employment arrangement] [failed to promote [plaintiff]] [demoted [plaintiff]] [terminated [plaintiff]] [constructively discharged [plaintiff]] [or otherwise discriminated against [plaintiff] in a serious and tangible way with respect to [plaintiff's] compensation, terms, conditions, or privileges of employment]; 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 case challenging ADEA jury instructions, one 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 need not prove that age was the "sole cause" of the termination. *See above*.

2. 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 in the 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 age 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. In fact, there is evidence to suggest that younger jurors may even be hostile to older workers, especially Baby Boomers who are seen to have unfairly benefited from a more robust and equal economy in the past, leaving the world and its economy worse for the generations that have followed. *See, e.g.*, "'*OK Boomer' Marks the End of Friendly Generational Relations*" https://www.nytimes.com/2019/10/29/style/ok-boomer.html.

Juror surveys, not surprisingly, indicate that younger workers are more likely than older workers to perceive that older workers benefit from their age and experience and are seen by employers as more valuable. https://www.litigationinsights.com/attitudes-gender-age-discrimination-workplace-affect-case/. And while half of workers over 50 believe that employers look to lay off or fire older workers first, only about 37% of workers under 50 believe that. *Id.* Likewise, older workers perceive themselves as having a much harder time getting a job once unemployed due to age bias, although younger workers perceive this bias, too. *Id.*

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 workers 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 research[1], surely seems powerful and

[1] *See, e.g.*, Jean E. Kubeck, et al., *Does Job-Related Training Performance Decline With Age?,* Psychology and Aging, 1996, Vol. 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),

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, bread- winner, "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 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. The same rules applied to Mr. Smith as to everyone else – that is not age discrimination. That is equal treatment.

- This case reminds me of when the Philadelphia Phillies baseball team did not renew the contract of 48-year-old pitcher Jamie Moyer, one of their greatest pitchers ever. The Phillies did not end Mr. Moyer's contract because he was 48, they ended it because his abilities had declined: because of injuries and poor

---

completed the final training task more slowly (r = .28), and took longer to complete the training program (r = .42).").

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 Mr. 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 mid and late 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.

◊ Plaintiff's themes on closing:

As for plaintiffs, a successful theme on closing can be to turn the *Gross* standard on its head and point out to the jury – if the evidence will support the implication – that if the plaintiff had been 20 years younger, and all other facts the same, the Company never would have fired her. This leads to the clencher in closing:

> "Come on! The evidence is clear that if Ms. Jones had been 38, instead of 58, and all other facts were the same – a strong performance record, great skills, no prior write-ups – she never would have been terminated. That is 'but-for' age discrimination. But for Ms. Jones being 58, instead of 38, she would not have been fired. If she were 38 and had all the same skills and experience, they would have viewed her as an up-and-coming superstar, a "keeper." Any deficiency they found they would have trained her to address – not fired her after xx years of service. But with Ms. Jones at 58, she was viewed as too old and worn out, she needed to be put out to pasture. Get real. That's age discrimination."