No. 14-_____

In The Supreme Court of the United States

ANTHONY HILDEBRAND,

Petitioner,

v.

ALLEGHENY COUNTY and ALLEGHENY COUNTY DISTRICT ATTORNEY'S OFFICE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Age Discrimination in Employment Act, which forbids age-based discrimination against state and local government employees, preclude those employees from bringing a section 1983 action to redress age discrimination that violates the Equal Protection Clause?

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Petitioner Anthony Hildebrand respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on June 27, 2014.

OPINIONS BELOW

The June 27, 2014 opinion of the court of appeals, which is reported at 757 F.3d 99 (3d Cir. 2014), is set out at pp. 1a-32a of the Appendix. The January 4, 2013 opinion of the district court, which is not officially reported, is set out at pp. 33a-54a of the Appendix. The December 7, 2012 opinion of the district court, which is unofficially reported at 2012 WL 6093798 (Dec. 7, 2012), is set out at pp. 57a-80a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on June 27, 2014. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND CONSTITUTIONAL PROVISION INVOLVED

The statutory provisions and constitutional provision involved are set out in the Appendix. App. 81a-123a.

STATEMENT OF THE CASE

This case presents the issue which the Court granted certiorari to decide in *Madigan v. Levin*, No. 12-872, *cert. dismissed*, 134 S.Ct. 2 (2013): whether the Age Discrimination in Employment Act precludes section 1983 actions alleging age-based discrimination that violates the Equal Protection Clause.

Anthony Hildebrand was employed as a detective for the Allegheny County District Attorney's Office ("DA's Office") for five years before he was terminated in early 2011. Prior to his work at the DA's Office, Hildebrand spent fifteen years as an undercover narcotics detective with the Pittsburgh Police Department.

Hildebrand alleges that for several years before his dismissal he was subject to a campaign of harassment by officials in the DA's Office. Officials repeatedly described Hildebrand as an "old man" or "old mother f**ker," commented on his "gray old man beard," "ugly old ass," and "senility," taunted him as having Alzheimer's disease, and referred to Hildebrand and others of the same age as "old sons of bitches." One official commented, "'[Y]ou old guys just don't understand English. Can't your old decrepit mind understand plain English?'" One Assistant District Attorney posted on a public bulletin board near Hildebrand's work area a photograph "of a very old man with a beard smoking crack cocaine," labeling the old man with Hildebrand's name. Hildebrand was given far

more work than younger detectives, but at times was relegated to demeaning tasks and a smaller work area without a desk, phone or computer. He was given a dangerously defective car, described by one official as an "old car for an old man." Ultimately Hildebrand was threatened with baseless criminal charges. When Hildebrand did not resign, he was dismissed. Complaint, pp. 4-21.

Hildebrand filed a charge of discrimination with the EEOC and Pennsylvania Human Relations Commission. The charge asserted that because of his age he had been "subjected ... to a hostile work environment" and discharged. Following receipt of a right-to-sue letter from the EEOC, Hildebrand commenced this action in federal district court, alleging that he had been repeatedly harassed and finally dismissed because of his age. The complaint asserted a number of different legal claims, including an allegation that this discrimination violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634, and a contention that the discrimination violated the Equal Protection Clause of the Fourteenth Amendment. Complaint, p. 24. The complaint sought to enforce that constitutional claim through the private cause of action provided by section 1983. 42 U.S.C. § 1983.

The District Court dismissed the complaint for failure to state a claim.[1] With regard to Hildebrand's

[1] The district court initially dismissed the complaint in December 2012. App. 57a-80a. Hildebrand filed an amended

(Continued on following page)

ADEA claim, the court held that the complaint was insufficient because, although it contained a general allegation that Hildebrand had filed a timely charge and brought suit within 90 days of the right-to-sue letter, the complaint lacked a specific allegation as to the dates of that charge and letter. App. 36a-44a, 61a-62a (citing *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). The district court dismissed the section 1983 claim on the ground that the complaint lacked sufficiently specific allegations of a custom or policy of unconstitutional action. App. 48a-53a, 67a-71a; *see Monell v. Dept. of Soc. Svcs. of City of New York,* 436 U.S. 658 (1978).

On appeal, the Third Circuit reinstated the ADEA claim against the Allegheny County District Attorney's Office, although not against Allegheny County. App. 25a-30a. With regard to Hildebrand's section 1983 action, the Third Circuit held that the ADEA precludes any section 1983 action based on a claim that age-based discrimination violates the Equal Protection Clause, and on that ground affirmed the dismissal of the section 1983 claim. App. 8a-22a. The Third Circuit acknowledged that there is a circuit conflict on this issue, and expressly disagreed with the contrary holding of the Seventh Circuit in *Levin*

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complaint, which the court dismissed in January, 2013. App. 33a-54a.

v. Madigan, 692 F.3d 607 (7th Cir. 2012), *cert. granted*, 133 S.Ct. 1600 (2013), *cert. dismissed*, 134 S.Ct. 2 (2013).

REASONS FOR GRANTING THE WRIT

In March 2013 this Court granted certiorari to decide whether the ADEA precludes a section 1983 claim of unconstitutional age-based discrimination. *Madigan v. Levin*, 133 S.Ct. 1600 (2013). There was an insolvable vehicle problem in *Madigan*, and the petition was dismissed as improvidently granted. 134 S.Ct. 2 (2013). This case presents the same question, and provides an ideal vehicle for resolving it.

I. THERE IS AN IMPORTANT CIRCUIT CONFLICT REGARDING WHETHER THE ADEA PRECLUDES A SECTION 1983 ACTION TO REDRESS UNCONSTITUTIONAL AGE-BASED DISCRIMINATION

This Court granted certiorari in *Madigan v. Levin* to resolve the circuit conflict regarding whether the ADEA precludes a section 1983 claim of unconstitutional age-based discrimination. *See* Petition for a Writ of Certiorari, *Madigan v. Levin*, 7-10, available at 2013 WL 166411. The Third Circuit decision in this case, expressly disagreed with the Seventh Circuit decision in *Levin v. Madigan*, 692 F.3d 607 (7th Cir. 2012), further entrenching and compounding that conflict.

The Seventh Circuit in *Levin* concluded, contrary to the decision of the Third Circuit in the instant case, that the ADEA does not preclude section 1983 age-based equal protection claims. 692 F.3d at 611-22. The Seventh Circuit insisted that the standard governing preclusion of a section 1983 constitutional claim is more demanding than the standard governing cases in which a plaintiff seeks to use the section 1983 private cause of action to enforce a statutory right. 692 F.3d at 611-15. The ADEA did not preclude section 1983 equal protection claims, the Seventh Circuit reasoned, because the ADEA was not enacted for the purpose of enforcing constitutional rights.

> In [*Preiser v. Rodriguez,* 411 U.S. 75 (1972) and *Smith v. Robinson,* 468 U.S. 992 (1984)], the statutes at issue were specifically designed to address constitutional issues.... The ADEA is readily distinguishable. "In contrast to the statutes at issue in *Preiser* and in *Smith*, the ADEA does not purport to provide a remedy for violation of constitutional rights. Instead it provides a mechanism to enforce only the substantive rights created by the ADEA itself." *Zombro* [*v. Baltimore City Police Dept.,* 868 F.2d 1364,] 1371 [(4th Cir. 1989)] (Murnaghan, J., concurring in part and dissenting in part).

692 F.3d at 618-19. In addition, the Seventh Circuit held that preclusion was inappropriate because the rights and protections afforded by the ADEA are different from those that would exist in a section 1983 equal protection case. "[T]he right and protections

afforded by the ADEA and § 1983 equal protection claims diverge in a few significant ways." 692 F.3d at 621. Moreover, it explained, the ADEA did not authorize civil actions against certain categories of defendants who could be sued in a section 1983 case. *Id.*

The Third Circuit in this case expressly disagreed with the reasoning and conclusion of the Seventh Circuit in *Levin*. The court below rejected the Seventh Circuit's view that the ADEA could not preclude section 1983 equal protection claims unless Congress adopted the ADEA for the purpose of enforcing the constitutional right against age discrimination. The Third Circuit thought it sufficient that the ADEA forbids at least some discriminatory practices that would also violate the Equal Protection Clause, even if Congress did not adopt the ADEA for that purpose. App. 21a. The Third Circuit rejected the Seventh Circuit's objection that the ADEA provides no protection at all for a significant numbers of excluded individuals and types of age discrimination claims, and contains no remedies at all for other types of age-discrimination equal protection violations. According to the Third Circuit, the denial of any relief for those categories of potential constitutional violations confirmed – rather than undermined – its conclusion that the ADEA precludes all section 1983 equal protection claims. App. 22a. In addition, the court of appeals below explained that it "cannot agree with *Levin* that Congress must provide some 'additional indication' of its intent" beyond creating an administrative and judicial enforcement scheme

for the statutory rights that are created by the ADEA. App. 19a (quoting *Levin*, 692 F.3d at 619).

The Seventh Circuit decision in *Levin* was itself avowedly contrary to earlier decisions in several other circuits. 692 F.3d at 616. In *Zombro v. Baltimore City Police Dept.,* 868 F.2d 1364 (4th Cir. 1989), the Fourth Circuit applied a general rule that statutory schemes are presumed to preempt section 1983 actions, unless there is a clear showing that Congress intended to preserve such section 1983 actions, applying the same rule regardless of whether the section 1983 action in question was to enforce that statute or to enforce the constitution.

> [T]he general policy of precluding § 1983 suits, where Congress has enacted a comprehensive statute specifically designed to redress grievances alleged by the plaintiff, is as applicable in instances such as the case at bar as cases where a constitutional claim is attached to a statutory claim brought under § 1983. We hold that this policy should be followed unless the legislative history of the comprehensive statutory scheme in question manifests a congressional intent to allow an individual to pursue independently rights under both the comprehensive statutory scheme and other applicable state and federal statutes, such as 42 U.S.C. § 1983. We find no such intent in the language and history of the ADEA.

868 F.2d at 1368-69. In *Lafleur v. Texas Dep't of Health,* 126 F.3d 758, 759-60 (5th Cir. 1997), the Fifth

Circuit reasoned that the fact that the ADEA "covered" age discrimination was sufficient to preclude any section 1983 age-based equal protection claim.

> [W]here Congress has enacted a statute that covers a specific substantive area providing specific remedies, a cause of action under § 1983 is foreclosed.... [B]ecause Congress has enacted a statutory provision to confront age discrimination in the work place via the ADEA, ... Lefleur's § 1983 age discrimination claim is preempted by the ADEA.

The Tenth Circuit subsequently adopted the holding in *Lafleur*. *Migneault v. Peck,* 158 F.3d 1131, 1140 (10th Cir. 1998) ("For numerous, well-founded reasons ... the ... Fifth Circuit[ ] ha[s] concluded that age discrimination claims brought under § 1983 are preempted by the ADEA. *See LaFleur*.... We ... adopt the holding and rationale of *LaFleur* ... as the law of this circuit...."). Later the Ninth Circuit also held that the ADEA bars such section 1983 equal protection claims. *Ahlmeyer v. Nevada System of Higher Education,* 555 F.3d 1051, 1058 (9th Cir. 2009) ("Congress intended the ADEA to serve as the exclusive means for pursuing claims of age discrimination in employment. Therefore, the preclusion of § 1983 claims in this context is required."); *see Cummins v. City of Yuma, Arizona,* 410 Fed.Appx. 72, 73 (9th Cir. 2011) ("the ADEA is plaintiff's exclusive remedy. As a matter of law, plaintiff cannot state a § 1983 equal protection claim for age discrimination in employment."). The First and Fourth Circuits have applied

this majority rule to constitutional claims by federal employees.[2] *Tapia-Tapia v. Potter,* 322 F.3d 742, 745 (1st Cir. 2003); *Chennareddy v. Bowsher*, 935 F.3d 315, 318 (D.C.Cir. 1991).

The existence of this circuit split is deeply entrenched and widely acknowledged. The court of appeals below recognized this circuit conflict. "[A] number of our sister Courts of Appeals have held that the ADEA precludes § 1983 claims of age discrimination.... The Seventh Circuit ... , however, reached the opposite conclusion." App. 15a; *see id.* at 16a ("the Seventh Circuit diverged from this consensus view."). "Contrary to *Levin*, ... we conclude that ... the relevant considerations weigh in favor of finding that the ADEA does indeed bar such § 1983 claims." App. 18a. The Third Circuit explained that it "cannot agree with *Levin*" that the mere existence of a comprehensive remedial scheme in the ADEA is insufficient without more to demonstrate that the ADEA precludes section 1983 actions. App. 19a. "Although, as the *Levin* court emphasizes, the potential defendants are different under the ADEA and § 1983, we do not believe this distinction significant enough to demonstrate congressional intent to permit both claims." App. 21a-22a.

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[2] An equal protection claim by federal employees would rest on the private cause of action recognized in *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971). The cause of action provided by section 1983 is limited to discrimination that occurs under color of state law, and thus applies only to state and local government employees.

In its brief in the court of appeals, Allegheny County noted that the Seventh Circuit decision in *Levin* was contrary to decisions in the First, Fourth, Fifth, Ninth, and Tenth Circuits. Brief of Allegheny County, 19 n.3, available at 2013 WL 2951781. Since the Seventh Circuit decision in *Levin*, a number of district courts have recognized the circuit split. *Edwards v. Borough of Dickson City,* 994 F.Supp.2d 616, 622 (M.D.Pa. 2014) (contrasting the majority view with "the minority position taken by the Seventh Circuit"); *Collins v. Fulton County School Dist.,* 2012 WL 7802745 at *24 (N.D.Ga. Dec. 26, 2013) ("the Seventh Circuit has split from the majority rule...."); *McCampbell v. Bishop State Community College,* 2013 WL 5979752 at *3 (S.D.Ala. Nov. 12, 2013) (noting "the emergent circuit split").

The importance of this issue is attested to by the amicus briefs that were filed at the certiorari stage in *Madigan.* Twelve states submitted a brief urging the Court to "intervene to end the conflict among the circuits." Brief of Amici Curiae State of Michigan and Eleven Other States in Support of Petitioners, 3, available at 2013 WL 648688. That brief correctly noted that "whether a state or municipality may be subjected to suit under both the ADEA and § 1983 depends entirely on its location." *Id.* at 4. The International Municipal Lawyers Association also filed a brief urging this Court to grant review. Brief for International Municipal Lawyers Association as Amicus Curiae in Support of Petitioners, available at 2013 WL 648687.

As the state petitioner in *Madigan* correctly pointed out, "the question whether the ADEA precludes § 1983 employment discrimination claims arises regularly, and the federal courts are intractably divided. Only this Court can impose national uniformity on this recurring question." Petition for Writ of Certiorari, 10.

II. THE DECISION OF THE THIRD CIRCUIT IS INCONSISTENT WITH THE STANDARDS IN *SMITH V. ROBINSON* AND *FITZGERALD V. BARNSTABLE SCHOOL COMMITTEE*

Smith v. Robinson, 468 U.S. 992 (1984), and *Fitzgerald v. Barnstable Sch. Comm.,* 555 U.S. 246 (2009), establish the standards governing when a statute precludes a section 1983 action to enforce a related constitutional right. First, the statute must have been enacted for the purpose of enforcing that specific constitutional right. Second, Congress must have intended that the statute be the "sole" and "exclusive" method of enforcing the constitutional right in question.[3] Neither of those standards are

[3] *Fitzgerald*, 555 U.S. at 247 (burden on the defendant is to show that Congress saw Title IX, Education Amendments of 1972, 20 U.S.C. § 1681, as "the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions"); *Smith*, 468 U.S. at 1009 (issue is whether "Congress intended that the [statute] be the exclusive avenue through which a plaintiff may assert those [constitutional] claims.").

satisfied in this case. The Third Circuit did not purport to hold that these standards had been met, but instead mistakenly rested its decision largely on the fact that the ADEA creates an administrative and judicial remedy for enforcing the statutory rights created by that law.

(1) The first element of the *Smith/Fitzgerald* test is a demonstration that in enacting a given statute, Congress intended the legislation, not merely to enforce the rights established by the statute itself, but also to provide a remedy for a constitutional right. In *Smith* that showing was made in several ways. The statute there at issue, the Education of the Handicapped Act ("EHA"), itself expressly stated that one purpose of the legislation was to protect the equal protection rights of handicapped children. Section 3 of the EHA explained that the legislation was enacted "to assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law."[4] 20 U.S.C. § 1400(c)(6). The legislative history of the EHA specifically emphasized the need to assure that handicapped children have the access to an appropriate public education that several courts had held was guaranteed by the Equal Protection

[4] In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), there was similar textual evidence that Congress intended to provide a remedy for constitutional violations when it adopted the habeas corpus act. 411 U.S. at 483 (quoting 28 U.S.C. § 2241(c)).

Clause. 468 U.S. at 1010. The Senate Report expressly detailed the intent of Congress to provide a remedial mechanism to enforce the constitutional rights of handicapped children. S.Rep. 94-168, p. 9 (1975). And the EHA applied to the very individuals – handicapped children in public schools – whose constitutional rights were at stake. *See Smith*, 468 U.S. at 1009 ("petitioner's constitutional claims ... are virtually identical to their EHA claims.").

In *Fitzgerald*, on the other hand, there was no showing that Congress had enacted the statute in question – Title IX – to provide redress for any identified constitutional problem. The text of Title IX contains no reference to equal protection or any other constitutional right. Because there was a lack of congruity between the schools and practices covered by Title IX, and the schools and practices subject to the Equal Protection Clause, the Court concluded it was unlikely that Congress intended Title IX to be a remedy – least of all an exclusive remedy – for equal protection violations. "In cases in which the § 1983 claim alleges a constitutional violation, lack of congressional intent may be inferred from a comparison of the rights and protections of the statute and those existing under the Constitution. Where the contours of such rights and protections diverge in significant ways, it is not likely that Congress intended to displace § 1983 suits enforcing constitutional rights." *Fitzgerald*, 555 U.S. at 252-53. "A comparison of the substantive rights and protections under Title IX and under the Equal Protection Clause lends further

support to the conclusion that Congress did not intend Title IX to preclude § 1983 constitutional suits. Title IX's protections are narrower in some respects and broader in others. Because the protections guaranteed by the two sources of law diverge in this way, we cannot agree with the Court of Appeals that 'Congress saw Title IX as the sole means of vindicating the constitutional right....'" 555 U.S. at 256.[5]

The question in the instant case is whether the ADEA forbade age-based discrimination against state and local government employees for the purpose of protecting the constitutional right of those workers to be free from irrational age-based discrimination.[6] This Court's decision in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000), forecloses any possibility of meeting this standard. "Judged against the backdrop of this Court's equal protection jurisprudence, it is clear that the ADEA ... ' ... cannot be understood as responsive to, or designed to prevent, unconstitutional

[5] This Court made a similar point when explaining why Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, does not preclude utilization of the pre-existing rights in section 1981 to remedy racial discrimination in employment. "Section 1981 is not coextensive in its coverage with Title VII. The latter is made inapplicable to certain employers. 42 U.S.C. § 2000e(b)." *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454, 460 (1975).

[6] As originally enacted in 1967, the ADEA did not apply to government employees. It was amended in 1974 to cover those workers.

behavior.'" *Kimel v. Florida Bd. of Regents*, 528 U.S. at 83-84 (2000) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997)). The problems which the ADEA addressed were usually not constitutional in nature. "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation." 528 U.S. at 89.

In addition, the prohibitions enacted by the ADEA have little correlation with potential constitutional violations. On the one hand, most of the government employment practices forbidden by the ADEA would not violate the Equal Protection Clause. "The [ADEA] through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard." *Kimel v. Florida Bd. of Regents*, 528 U.S. at 86. To the extent that some employment decisions forbidden by the ADEA also happen to violate the Equal Protection Clause, that is an entirely incidental effect of legislation that was not adopted for the purpose of enforcing constitutional rights. On the other hand, the ADEA is limited in a manner which necessarily excludes many government employees and possible constitutional violations claims.

The Third Circuit did not hold or suggest that the ADEA, like the EHA, was enacted for the purpose of enforcing constitutional rights. To the contrary, it stated only that "[b]y prohibiting 'arbitrary age discrimination,' the ADEA encompasses the protections

afforded by the Fourteenth Amendment....” App. 21a. That comment is only an observation that there is a limited degree of overlap between the prohibitions of the ADEA and the guarantees of the Equal Protection Clause, not a claim that Congress applied the ADEA to state and local government employees for the *purpose* of enforcing that constitutional right.

(2) Second, there must be a showing that Congress intended that the statutory scheme in question be the *exclusive* remedy for the constitutional right. *Fitzgerald*, 555 U.S. at 252 (“exclusive avenue”), 256 (“sole means”). Such a demonstration is necessary to meet a defendant’s burden of proving that the statutory scheme was intended to supplant, rather than merely supplement, enforcement of that constitutional right under section 1983.

Congress often adopts a series of overlapping statutes and remedial schemes to deal with a single problem. In *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 48 (1974), the Court noted that “Title VII was designed to supplement rather than supplant, existing laws and institutions relating to employment discrimination.” Where Congress creates supplementary provisions to address a particular problem, those provisions will ordinarily have different remedies or procedural schemes. Such differences alone cannot demonstrate that one provision was intended to preclude use of the other; Congress may simply have intended to provide several tools for addressing a

difficult problem.[7] Thus the mere fact that a statute was adopted to provide a remedy for a constitutional violation does not, without more, establish that the law was intended to be the *only* such remedy, displacing section 1983 actions or any other pre-existing right or remedy.

Smith concluded that this standard had been met in that case because "[t]he legislative history [of the EHA] ... indicates that Congress perceived the EHA as *the most effective vehicle* for protecting the constitutional right of a handicapped child to a public education." 468 U.S. at 1012-13 (emphasis added). The comprehensive scheme established by the EHA had been described in detail in *Board of Education of Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176 (1984). Under the EHA, an "individualized educational program," containing a number of required features, must be developed to meet the needs of each child, through a highly structured process mandated by the statute. The Court in *Smith* concluded that the EHA precluded section 1983 actions because Congress had determined that the elaborate system of rights and procedures established by the EHA was "the most effective means" for enforcing the

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[7] *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. at 461 ("Congress has made available to the claimant ... independent administrative and judicial remedies. The choice is a valuable one. Under some circumstances, the administrative route may be highly preferred over the litigatory; under others the reverse may be true.").

constitutional rights of handicapped children, specifically a more effective means of doing so than lawsuits to enforce those constitutional rights. 468 U.S. at 1011-12. "No federal district court presented with a constitutional claim to a public education can duplicate that process." *Id.*[8] It was on that basis that *Smith* concluded that "Congress intended the EHA to be the *exclusive* avenue through which a plaintiff may assert an equal protection claim to a publicly financed education...." 468 U.S. at 1009 (emphasis added).

On the other hand, *Fitzgerald* explained that a "lack of congressional intent may be inferred from a comparison of the rights and protections of the statute and those existing under the Constitution. Where the contours of such rights and protections diverge in significant ways, it is not likely that Congress intended to displace § 1983 suits enforcing constitutional rights." *Fitzgerald,* 555 U.S. at 252-53 (internal citations and quotation marks omitted). *Fitzgerald* reasoned that Congress could not have intended that Title IX be the exclusive remedy for gender-based discrimination in education because Title IX itself did not apply to all institutions subject to the commands of the Equal Protection Clause or to all constitutional claims that might arise at covered institutions. 555 U.S. at 257-58.

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[8] "The very importance which Congress has attached to compliance with certain procedures in the preparation of an IEP would be frustrated if a court were permitted simply to set state decisions at nought." *Rowley*, 458 U.S. at 206.

As the Seventh Circuit noted in *Levin*, the ADEA like Title IX is expressly inapplicable to significant categories of public employees and to certain identifiable types of unconstitutional discrimination. "[T]he ADEA expressly limits or exempts claims by certain individuals, including elected officials and certain members of their staff, appointees, law enforcement officers, and firefighters. *See* 29 U.S.C. §§ 623(j), 630(f).... The statutory scheme also prohibits claims by employees under the age of forty or those bringing so-called 'reverse age discrimination' claims. *See Gen. Dynamics Land Sys., Inc. v. Cline,* 540 U.S. 581 (2004).... There are no such limitations for § 1983 equal protection claims." *Levin v. Madigan*, 692 F.3d at 621.[9] In addition, the ADEA provides no remedies at all for certain types of age-based discrimination. Of particular importance here, because the ADEA does not authorize compensatory damages, there would ordinarily be no statutory remedy for age-based harassment,[10] one of the very claims in this case. The ADEA cannot possibly be the "exclusive remedy" for age-based discrimination against workers under 40, for discrimination against workers because of their

[9] E.g., *McMahon v. Barclay*, 510 F.Supp. 1114, 1117 (S.D.N.Y. 1981) (statute law forbidding hiring of any person over the age of 29 as a police officer "bears no rational relationship to any legitimate state purpose and is violative of the equal protection of the law.").

[10] See *Collazo v. Nicholson*, 535 F.3d 41, 45 (1st Cir. 2008).

youth, or for age-based harassment, because it provides no remedy at all for such discrimination.[11]

The Third Circuit "th[ought] that the fact that certain government employees are either exempted from the ADEA, or limited to certain remedies, ... demonstrates congressional intent to specifically define the rights of those employees rather than to permit such employees to circumvent these limitations by filing directly under § 1983." App. 22a. On this view, the intent of Congress in adopting the ADEA was not to enforce the rights guaranteed by the Equal Protection Clause, but instead to bar enforcement of some of those rights by "defin[ing]" them out of the ADEA. This is the very opposite of the standard established by *Fitzgerald* and *Smith*. Under those decisions, the exclusion from a statutory scheme of an identifiable subset of constitutional rights demonstrates that Congress did not intend the statute to be the exclusive method of enforcing that right, not that Congress was attempting to "define" away and obstruct enforcement of those rights.

(3) The linchpin of the Third Circuit's opinion was its insistence that the existence of a comprehensive remedial scheme in ADEA is sufficient, without

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[11] This problem is highlighted by the comment in *Ahlmeyer v. Nevada System of Higher Education,* that "[w]e are unable to perceive ... a constitutional claim for age discrimination that is not vindicated fully by the ADEA." 555 F.3d at 1058. In fact, as the Seventh Circuit emphasized in *Levin*, there are many such claims.

more, to preclude any section 1983 age discrimination claim. The court emphasized that the ADEA requires an employee to file an administrative charge with the EEOC prior to filing suit, and directs the EEOC to seek to conciliate such discrimination charges. App. 20a. "In light of these requirements, we agree with the majority of our sister Courts of Appeals that this scheme would be undermined if plaintiffs could sue directly under § 1983." App. 20a-21a.

If that aspect of the ADEA is sufficient to bar section 1983 actions for age-based discrimination, however, the similar remedial provisions of Title VII would also bar section 1983 actions for race-based discrimination. The ADEA remedial scheme is largely modeled on the provisions of the earlier-enacted Title VII charge process; significant portions of the language of the ADEA are taken essentially verbatim from the provisions of Title VII. The direction in sections 626(b) and 626(d)(1) of the ADEA that the EEOC seek "to eliminate" any unlawful practice "through informal methods of conciliation, conference, and persuasion" is lifted, verbatim, from section 706(b) of Title VII. 42 U.S.C. § 2000e-5(b). Section 626(d)(1) of the ADEA establishes three possible deadlines for a charge: within 180 days after the alleged unlawful practice occurred, within 300 days of such an occurrence in a state with its own anti-discrimination law, or within 30 days after receipt of notice of the termination of such state proceedings. These are the identical deadlines earlier provided in

section 706(e) of Title VII, and much of the wording is the same. 42 U.S.C. § 2000e-5(e).

But this Court has repeatedly held that Title VII does not bar those employees from bringing a section 1983 action under the Equal Protection Clause to redress employment discrimination on the basis of race. That well-established interpretation of Title VII is largely dispositive of the dispute regarding the effect of the ADEA on section 1983 actions. In a series of decisions over a period of four decades, this Court has repeatedly held that Title VII does not preclude either section 1983 equal protection claims or claims under other federal anti-discrimination statutes. That rule applies not only to state and local government workers, but also to employees of private employers, who may – in addition to claims under Title VII – assert claims under section 1981. 42 U.S.C. § 1981.

Shortly before the ADEA was amended in 1974 to apply to state and local government employees, the Court pointed out in *Alexander v. Gardner-Denver Co.* that "legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination." 415 U.S. at 47. *Alexander* cited as examples of that congressional practice "42 U.S.C. § 1981 (Civil Rights Act of 1866) [and] 42 U.S.C. § 1983 (Civil Rights Act of 1871)." 415 U.S. at 47 n.7. "Title VII was designed to supplement rather than supplant, existing laws and institutions relating to employment discrimination." 415 U.S. at 48-49. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975), reiterated that interpretation of

Title VII. *Johnson* explained that under this well-established body of law, "[w]here conduct is covered by both section 1981 and Title VII, ... a plaintiff is free to pursue a claim by bringing suit under § 1981 without resort to th[e] [Title VII] statutory prerequisites." *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512 (1982), held that Title VII does not preclude claims under Title IX asserting gender-based discrimination in employment. "[T]he school boards insist that the victims of employment discrimination have remedies other than those available under Title IX.... [E]ven if alternative remedies are available ... this Court repeatedly has recognized that Congress has provided a variety of remedies, at times overlapping, to eradicate employment discrimination." 456 U.S. at 535 n.26. "Despite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief." *Patterson v. McLean Credit Union*, 491 U.S. 164, 181 (1989). In *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008), the defendant objected that if section 1981 were interpreted to encompass retaliation claims, plaintiffs able to file suit under section 1981 could skip the exhaustion requirements in Title VII, and would be able to obtain remedies greater than those authorized by Title VII. This Court rejected that contention as inconsistent with the long-recognized intent of Congress to accord to discrimination victims access to several distinct and overlapping remedies. "Precisely the same kind of Title VII/§ 1981 'overlap'

and potential circumvention exists in respect to employment-related direct discrimination. Yet Congress explicitly created the overlap in respect to direct employment discrimination.... In a word, we have previously held that the 'overlap' reflects congressional design.... We have no reason to reach a different conclusion in this case." 553 U.S. at 454-55.

There is no reason to believe that Congress, having determined that Title VII should supplement, rather than supplant, other remedies for discrimination, claims, would have intended the ADEA to function in a different manner. Title VII and the ADEA are parts of a single overall national policy to eradicate bias in the workplace. "The ADEA [was] enacted in 1967 as part of an ongoing congressional effort to eradicate discrimination in the workplace.... The ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide. *See* Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.,* ... (race, color, sex, national origin, and religion); the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* ... (disability); .... ; the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (sex)." *McKennon v. Nashville Banner Publ'g Co.,* 513 U.S. 352, 357 (1995). The existence of independent, overlapping remedies has for decades been a hallmark of that congressional scheme. The national policy to prevent and correct age discrimination in employment, like the similar policy regarding discrimination on the basis of race, deliberately involves a range of overlapping prohibitions and remedies.

III. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR RESOLVING THE QUESTION PRESENTED

This case provides an excellent vehicle for resolving the question presented. The Third Circuit dismissed Hildebrand's section 1983 constitutional claim expressly, and solely, based on its view that the ADEA bars section 1983 claims for age-based equal protection violations. The Third Circuit decision, although incorrect, presents a significantly more detailed analysis than previous decisions adopting the majority view. As a result, the issues raised by the question presented have now been more thoroughly aired in the lower courts than was true when this Court granted certiorari in *Madigan v. Levin*.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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757 F.3d 99
United States Court of Appeals,
Third Circuit.

Anthony HILDEBRAND, Appellant
v.
ALLEGHENY COUNTY, a political entity;
Allegheny County District Attorney's Office.

No. 13-1321. | Argued Nov. 7, 2013. |
Opinion Filed: June 27, 2014.

Attorneys and Law Firms

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Before: GREENAWAY, JR., VANASKIE and ROTH, Circuit Judges.

OPINION OF THE COURT

VANASKIE, Circuit Judge.

This appeal presents three issues on which we have not previously ruled in a precedential opinion. First, whether an employee terminated from a local government position may maintain an action for age discrimination under 42 U.S.C. § 1983. Second, whether the pleading of exhaustion of administrative remedies, a prerequisite to bringing a lawsuit under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634, must satisfy the standards established in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), and *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). And third, whether a complainant's submission of the Equal Employment Opportunity Commission's revised Intake Questionnaire constitutes the filing of a charge of discrimination.

As to the first question, we hold that a state or local government employee may not maintain an age discrimination claim under 42 U.S.C. § 1983, but must instead proceed under the ADEA. As to the second question, we hold that a plaintiff is not obligated to plead exhaustion of administrative remedies with particularity, but may instead allege in general terms that the required administrative process has been completed. And finally, we hold that the EEOC Intake Questionnaire, revised in the wake of *Federal Express Corp. v. Holowecki,* 552 U.S. 389, 128 S.Ct.

1147, 170 L.Ed.2d 10 (2008), when properly completed, constitutes a charge of discrimination.

As a result of our holdings, we will affirm the District Court's dismissal of Appellant Anthony Hildebrand's § 1983 claims but we will vacate the District Court's dismissal of Hildebrand's ADEA claim against the Allegheny County District Attorney's Office as Hildebrand submitted a properly completed Intake Questionnaire to the EEOC within the deadline for filing a charge of discrimination, and Hildebrand adequately pled the exhaustion of administrative remedies. Finally, we will affirm the dismissal of the ADEA claims against Appellee Allegheny County because it was not named on the Intake Questionnaire, and was not identified as a respondent to an age discrimination charge until after the deadline for filing a charge of discrimination against it had passed.

I. Background

Anthony Hildebrand was employed as a detective for the Allegheny County District Attorney's Office ("DA's Office") for five years before he was terminated on February 18, 2011. Prior to his work at the DA's Office, Hildebrand spent fifteen years as an undercover narcotics detective with the Pittsburgh Police Department.

On February 18, 2011, Hildebrand received a letter suspending him without pay for five days pending discharge, and announcing his termination

effective that day. He filed an internal grievance, but the termination was ultimately upheld.

Hildebrand maintains that his termination was part of "a well-known and established practice to push out older workers through termination or forced resignation." (Appellant's Br. 5.) He contends that he became a victim of age-based discrimination beginning in 2009 when he was assigned a new supervisor who, he asserts, demoted him because of his age despite his satisfactory work performance. As part of his demotion, Hildebrand states that he was insulted on the basis of his age and relocated to an inferior workplace. He further alleges that the discrimination he faced was part of a hostile work environment that transcended the conduct of any one employee.

On December 1, 2011, Hildebrand completed an Intake Questionnaire ("the Intake Questionnaire") with the EEOC, indicating that he was the victim of discrimination on the basis of his age. He also checked a box on the Intake Questionnaire authorizing the EEOC to investigate his claim and indicating that he "want[ed] to file a charge of discrimination." (EEOC Br. 3.) Subsequently, on January 11, 2012, Hildebrand completed a "Charge of Discrimination" with the EEOC, naming the Allegheny County District Attorney as the respondent. The EEOC issued a right-to-sue letter on May 7, 2012, and Hildebrand filed suit on August 7, 2012.

Hildebrand's complaint named Allegheny County ("the County"), as well as the DA's Office, as defendants. His complaint asserted violations of the ADEA, Title VII (retaliation), 42 U.S.C. § 1983 (asserting violation of the Equal Protection Clause due to age-based discrimination, as well as violation of his First Amendment free speech rights), the Pennsylvania Whistleblower Law, 43 Pa. Stat. §§ 1421-1428, and the Pennsylvania Human Relations Act, 43 Pa. Stat. §§ 951-963. His complaint also alleged:

> All conditions precedent to jurisdiction under section 706 of Title VII, have occurred or been complied with. Plaintiff filed a claim of employment discrimination with the [EEOC]. The EEOC issued a Notice of Right to Sue. This Complaint is filed within 90 days of such Notice of Right to Sue.

(A.2.)

The County and the DA's Office (collectively, "Appellees") separately filed motions to dismiss. On December 7, 2012, the District Court granted the motions to dismiss the Title VII retaliation claim. The District Court also applied the pleading standards set forth in *Twombly,* 550 U.S. 544, 127 S.Ct. 1955, and *Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, to Hildebrand's assertion that he satisfied all conditions precedent to filing suit under the ADEA. Analyzing Hildebrand's complaint in light of the *Iqbal/Twombly* standard, the District Court stated:

> Because [the complaint] fails to provide any facts, *i.e.* specific dates, as to when Plaintiff raised his claim with the EEOC and when the EEOC issued its right to sue letter to Plaintiff, and because Plaintiff failed to attach his Right to Sue to the Complaint, . . . the Complaint falls short of providing the facts to establish whether he has adequately exhausted his administrative remedies.

(A.112.) Accordingly, the Court dismissed the ADEA claim without prejudice. The District Court also dismissed Hildebrand's section 1983 claims without prejudice.

Hildebrand filed an amended complaint, alleging with greater particularity that he satisfied all conditions precedent to filing suit under the ADEA. Specifically, he averred that he had filed a timely charge of discrimination, the EEOC had issued a right-to-sue letter, and he had filed the complaint within 90 days of notice of the right-to-sue. He attached his charge of discrimination and the EEOC right-to-sue letter to the amended complaint.

Appellees each filed motions to dismiss the Amended Complaint under Federal Rule of Civil Procedure 12(b)(6), arguing, *inter alia,* that Hildebrand's charge was untimely because it was filed more than 300 days after the last date of discrimination. Allegheny County also urged the District Court to dismiss Hildebrand's ADEA claim against the County on the additional ground that the charge of

discrimination named only the DA's Office as a defendant.

Hildebrand attached to his responses to the motions his completed EEOC Intake Questionnaire. He contended that the completed Intake Questionnaire constitutes a charge and was filed within 300 days of the last date of discrimination.

On January 4, 2013, the District Court dismissed Hildebrand's amended complaint. The District Court first dismissed the ADEA claim, concluding that Hildebrand did not file a "charge of discrimination" with the EEOC within the requisite 300 days of the last date of discrimination. Specifically, the District Court found that the last date of alleged discrimination was Hildebrand's February 18, 2011 termination, and that the charge of discrimination filed on January 11, 2012 was therefore untimely. Thus, the District Court concluded that Hildebrand failed to sufficiently plead that he timely filed his claim with the EEOC "in light of the *Iqbal/Twombly* standard." (A.307.) Finding that further amendment would be futile, the District Court dismissed the ADEA claim with prejudice.

As to his § 1983 claims, the District Court held that Hildebrand failed to state a plausible claim against Allegheny County under a theory of municipal liability, because he did not plead sufficient facts to support a plausible inference that the County had adopted a custom or practice of age discrimination. The District Court also dismissed the § 1983 claims

against the DA's Office based on Hildebrand's concession that it was not a separate entity from the County for purposes of § 1983. Finally, having dismissed with prejudice all claims arising under federal law, the District Court declined to exercise supplemental jurisdiction over the remaining claims asserted under the Pennsylvania Whistleblower Law and the Pennsylvania Human Relations Act.

II. Discussion

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), and 1367. We have jurisdiction under 28 U.S.C. § 1291. We exercise plenary review over a decision granting a motion to dismiss. *Santiago v. Warminster Twp.,* 629 F.3d 121, 128 (3d Cir.2010). Accordingly, "[w]e may affirm the district court on any ground supported by the record." *Tourscher v. McCullough,* 184 F.3d 236, 240 (3d Cir.1999).

A. Hildebrand's § 1983 Age Discrimination Claim

We turn first to Hildebrand's claim brought under § 1983 that Appellees discriminated against him on the basis of his age, in violation of the Equal Protection Clause of the Fourteenth Amendment. Allegheny County argues that the District Court properly dismissed this § 1983 cause of action, contending that "[t]he ADEA 'is the exclusive remedy for claims of age discrimination in employment.'"

(Allegheny Cnty. Br. 19 (quoting *Ahlmeyer v. Nev. Sys. of Higher Educ.,* 555 F.3d 1051, 1060-61 (9th Cir.2009))). For the reasons that follow, we agree.

1.

42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Rather than conferring any substantive rights, section 1983 "provides a method for vindicating federal rights elsewhere conferred." *Albright v. Oliver,* 510 U.S. 266, 271, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) (internal quotation marks and citations omitted). "Nevertheless, § 1983 is a statutory remedy and Congress retains the authority to repeal it or replace it with an alternative remedy." *Smith v. Robinson,* 468 U.S. 992, 1012, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984), superseded by statute, Education of the Handicapped Act, § 615(e)(4) as amended, 20 U.S.C. § 1415(e)(4). Thus, "[s]ection 1983 claims are not available . . . where Congress has evinced an intent to

preclude such claims through other legislation." *Ahlmeyer,* 555 F.3d at 1055.

In determining whether a statutory enactment precludes suit under § 1983, "[t]he crucial consideration is what Congress intended." *Smith,* 468 U.S. at 1012, 104 S.Ct. 3457. Congressional intent to preclude § 1983 claims may be inferred "[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive." *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n,* 453 U.S. 1, 20-21, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981). In *Sea Clammers,* the Supreme Court held that a plaintiff was precluded from bringing a § 1983 suit for damages under the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 *et seq.* (1976), and the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1401 *et seq.* (1976). 453 U.S. at 20-21, 101 S.Ct. 2615. Emphasizing the "unusually elaborate enforcement provisions" of the statutory framework, *id.* at 13, 101 S.Ct. 2615, the Court concluded that "[a]llowing parallel § 1983 claims to proceed . . . would have thwarted Congress' intent in formulating and detailing these provisions." *Fitzgerald v. Barnstable Sch. Comm.,* 555 U.S. 246, 253, 129 S.Ct. 788, 172 L.Ed.2d 582 (2009).

The Supreme Court has also held that § 1983 suits were precluded by statute in a case where a plaintiff sought vindication of a constitutional – rather than a statutory – right. *See Smith,* 468 U.S. 992, 104 S.Ct. 3457. In *Smith,* plaintiffs alleged violations of the Due Process and Equal Protection

Clauses of the Fourteenth Amendment, asserting a deprivation of the right to "a free appropriate public education" for their handicapped child. *Id.* at 1009, 104 S.Ct. 3457. Focusing once again on the "comprehensive nature of the procedures and guarantees" set forth in the statute's remedial scheme, the Court concluded that Congress did not intend to "leave undisturbed the ability of a handicapped child to go directly to court with an equal protection claim to a free appropriate public education." *Id.* at 1011, 104 S.Ct. 3457. Permitting such suits, the Court observed, would "[a]llow[ ] a plaintiff to circumvent" congressional intent. *Id.* at 1012, 104 S.Ct. 3457.

Subsequently, in *Rancho Palos Verdes v. Abrams,* 544 U.S. 113, 125 S.Ct. 1453, 161 L.Ed.2d 316 (2005), the Court again found that a comprehensive remedial statutory framework precluded suit under § 1983. The plaintiff in *Rancho Palos Verdes* filed suit under the Telecommunications Act of 1996 and for damages under § 1983. *Id.* at 115, 125 S.Ct. 1453. Applying its prior decisions in *Sea Clammers* and *Smith,* the Court ruled that the Telecommunications Act's remedial scheme would be "distort[ed]" by direct enforcement through § 1983. *Id.* at 127, 125 S.Ct. 1453.

Most recently, the Court considered whether Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), precludes § 1983 claims of sex discrimination in violation of the Equal Protection Clause. *See Fitzgerald,* 555 U.S. at 249, 129 S.Ct. 788. In *Fitzgerald,* the plaintiffs alleged that their daughter, then an elementary school student, suffered several incidents

of sexual harassment by another student while on the school bus, and that the school's response to their allegations had been inadequate. *Id.* at 250, 129 S.Ct. 788. The plaintiffs brought suit, asserting that their daughter had suffered sex discrimination in violation of Title IX and the Equal Protection Clause of the Fourteenth Amendment. *Id.* The Court of Appeals for the First Circuit dismissed plaintiffs' constitutional claims, holding that Title IX provided the sole remedy for sex discrimination in the education context. *Id.* at 251, 129 S.Ct. 788. The Supreme Court reversed. *Id.* Reiterating that "the crucial consideration is what Congress intended," *id.* (citation omitted), the Court signaled that its analysis of congressional intent might differ depending upon whether the right asserted under § 1983 arises from a statute or the Constitution:

> In those cases in which the § 1983 claim is based on a statutory right, evidence of such congressional intent may be found directly in the statute creating the right, or inferred from the statute's creation of a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983. In cases in which the § 1983 claim alleges a constitutional violation, lack of congressional intent may be inferred from a comparison of the rights and protections of the statute and those existing under the Constitution. Where the contours of such rights and protections diverge in significant ways, it is not likely that Congress intended

> to displace § 1983 suits enforcing constitutional rights.

Id. at 252-53, 129 S.Ct. 788 (internal citations and quotation marks omitted).

Notwithstanding the distinction between statutorily-created rights and constitutionally-conferred rights, the Court emphasized that, "[i]n determining whether a subsequent statute precludes enforcement of a federal right under § 1983 . . . *primary emphasis* [is placed] on the nature and extent of that statute's remedial scheme." *Id.* This was true even where plaintiffs, such as those in *Smith,* "relied on § 1983 to assert independent constitutional rights," rather than statutory rights. *Id.* Indeed, the Court observed that in each of the cases where it found a statute to be the exclusive remedy for an asserted right, "the statutes at issue required plaintiffs to comply with particular procedures and/or to exhaust particular administrative remedies prior to filing suit," and "'[a]llowing a plaintiff to circumvent' the statutes' provisions [by suing directly under § 1983] would have been 'inconsistent with Congress' carefully tailored scheme.'" *Id.* at 254-55, 129 S.Ct. 788 (quoting *Smith,* 468 U.S. at 1012, 104 S.Ct. 3457).

Turning to the question of whether Title IX precludes suit under § 1983 for sex discrimination, the Court first found that Title IX does not provide a comprehensive enforcement scheme, emphasizing that Title IX's "remedies – withdrawal of federal funds and an implied cause of action – stand in stark

contrast to the 'unusually elaborate,' 'carefully tailored,' and 'restrictive' enforcement schemes of the statutes at issue in *Sea Clammers, Smith,* and *Rancho Palos Verdes.*" *Id.* at 255, 129 S.Ct. 788. The Court observed that Title IX does not contain an administrative exhaustion requirement or a notice provision. *Id.* Affording particular weight to Title IX's lack of an express private right of action, the Court noted that it "has never held that an implied right of action had the effect of precluding suit under § 1983." *Id.* Given the absence in Title IX of a detailed remedial scheme, the Court concluded that "parallel and concurrent § 1983 claims will neither circumvent required procedures, nor allow access to new remedies." *Id.* at 255-56, 129 S.Ct. 788. The Court found further support for its conclusion that gender discrimination covered by Title IX could be pursued by way of a § 1983 suit by analyzing "the substantive rights and protections guaranteed under Title IX and under the Equal Protection Clause." *Id.* at 256, 129 S.Ct. 788. The Court found that "Title IX's protections are narrower in some respects and broader in others." *Id.* For instance, Title IX exempts several activities that can be challenged under the Equal Protection Clause, such as discrimination in admissions decisions of elementary and secondary schools, and all activities of military service schools, as well as traditionally single-sex public colleges. *Id.* at 257, 129 S.Ct. 788. Additionally, the Court cited incongruous standards for establishing liability under Title IX and the Equal Protection Clause, explaining that, while "a Title IX plaintiff can establish school district liability by

showing that a single school administrator with authority to take corrective action responded . . . with deliberate indifference," the same plaintiff would be required to show a municipal policy, custom, or practice under § 1983. *Id.* at 257-58, 129 S.Ct. 788. Because of this disparity in coverage, as well as Title IX's lack of a comprehensive enforcement framework, the *Fitzgerald* Court concluded that, in passing Title IX, Congress did not intend to preclude sex discrimination claims in the context of education under § 1983. *Id.* at 258, 129 S.Ct. 788.

2.

Prior to *Fitzgerald,* a number of our sister Courts of Appeals had held that the ADEA precludes § 1983 claims of age discrimination. *See Ahlmeyer,* 555 F.3d at 1057; *Tapia-Tapia v. Potter,* 322 F.3d 742 (1st Cir.2003); *Migneault v. Peck,* 158 F.3d 1131 (10th Cir.1998), *vacated on other grounds by Bd. of Regents of Univ. of N.M. v. Migneault,* 528 U.S. 1110, 120 S.Ct. 928, 145 L.Ed.2d 806 (2000); *Lafleur v. Tex. Dep't of Health,* 126 F.3d 758 (5th Cir.1997); *Chennareddy v. Bowsher,* 935 F.2d 315 (D.C.Cir.1991); *Zombro v. Baltimore City Police Dept.,* 868 F.2d 1364 (4th Cir.1989). The Seventh Circuit – the only Court of Appeals to consider this question after *Fitzgerald* –, however, reached the opposite conclusion. *See Levin v. Madigan,* 692 F.3d 607, 622 (2012).

The leading case concluding that the ADEA precludes § 1983 claims of age discrimination is

Zombro v. Baltimore City Police Department, 868 F.2d 1364. *See Ahlmeyer,* 555 F.3d at 1056. In *Zombro,* the Fourth Circuit held that Congress intended the ADEA to be the exclusive remedy for claims of age discrimination, reasoning that private causes of action brought directly under § 1983 "would severely undermine, if not debilitate, the enforcement mechanism created by Congress under the ADEA." 868 F.2d at 1369. *Zombro* focused on the ADEA's comprehensive statutory scheme, which "was structured to facilitate and encourage compliance through an informal process of conciliation and mediation." *Id.* at 1366. Providing a plaintiff with "direct and immediate access to the federal courts" via § 1983 could result in "the comprehensive administrative process. . . . be[ing] bypassed, and the goal of compliance through mediation. . . . be[ing] discarded." *Id.* Given these concerns, the *Zombro* court reached what it deemed "[t]he inescapable conclusion" that the ADEA precludes suits under § 1983 for age discrimination. *Id.* at 1366-67.

After *Zombro,* the Courts of Appeals for the First, Fifth, Ninth, Tenth, and District of Columbia Circuits agreed. *See Tapia-Tapia,* 322 F.3d at 745; *Lafleur,* 126 F.3d at 760; *Ahlmeyer,* 555 F.3d at 1057; *Migneault,* 158 F.3d at 1140; *Chennareddy,* 935 F.2d at 318. In light of the Supreme Court's decision in *Fitzgerald,* however, the Seventh Circuit diverged from this consensus view, concluding instead that the ADEA does not preclude constitutional claims of age

discrimination asserted under § 1983. *Levin,* 692 F.3d at 617.

While recognizing that "the ADEA sets forth a rather comprehensive remedial scheme," *id.* at 618, *Levin* interpreted *Fitzgerald* as setting a higher bar for inferring preclusive intent in cases where a plaintiff alleges a constitutional violation. *Id.* To imply congressional intent to preclude constitutional claims, the *Levin* court held that "some additional indication of congressional intent" is required. *Id.* at 619. Emphasizing that the ADEA lacks express language evincing congressional intent to preclude § 1983 suits, *Levin* considered the statute's purpose. The court reasoned that "the ADEA does not purport to provide a remedy for violation of constitutional rights," but rather, "it provides a mechanism to enforce only the substantive rights created by the ADEA itself." *Id.* at 619 (citing *Zombro,* 868 F.2d at 1373 (Murnaghan, J., concurring in part and dissenting in part)) (internal quotation marks omitted). *Levin* then distinguished the Supreme Court's decision in *Smith,* which found that the Individuals with Disabilities Education Act ("IDEA"), Pub.L. 94-142, precluded suit under § 1983 for a Constitutional violation, explaining that the IDEA was passed to address the *constitutional* requirement to provide a public education for handicapped children. *Id.* at 619. Without express language addressing preclusion, and "absent any additional indication from Congress," the *Levin* Court declined to infer an intent to preclude constitutional claims of discrimination. *Id.* at 620. The court in *Levin* then

compared the rights and protections offered by the ADEA and the Equal Protection Clause, and found several significant differences: first, an ADEA plaintiff may sue only an employer, employment agency, or labor organization, whereas a § 1983 plaintiff is free to sue any individual who "caused or participated in the alleged deprivation of the plaintiff's constitutional rights"; second, the ADEA limits claims by certain individuals, such as elected officials, who are not exempted from bringing suit under § 1983; and third, unlike under § 1983, state employees are effectively barred from bringing suit under the ADEA because their employers are shielded by Eleventh Amendment immunity. *Id.* at 621. In light of these differences, and in the absence of express congressional intent to the contrary, the *Levin* court concluded that the ADEA is not the exclusive remedy for age discrimination claims. *Id.* at 621-22.

3.

We agree with the *Levin* court that the issue of whether the ADEA precludes a § 1983 cause of action for age discrimination in employment presents a "close call." *Id.* at 617. Contrary to *Levin,* however, we conclude that, on balance, the relevant considerations weigh in favor of finding that the ADEA does indeed bar such § 1983 claims.

The Supreme Court has consistently indicated that the comprehensiveness of a statute's remedial scheme is the primary factor in determining congressional

intent. *See Fitzgerald,* 555 U.S. at 253, 129 S.Ct. 788 ("[W]e have placed *primary emphasis* on the nature and extent of [a] statute's remedial scheme.") (emphasis added). *Fitzgerald* reaffirms the Court's jurisprudence on this issue as articulated in *Sea Clammers, Smith,* and *Rancho Palos Verdes. Id.* at 254, 129 S.Ct. 788 (observing that, in each of prior cases, "[o]ffering plaintiffs a direct route to court via § 1983 would have circumvented [the relevant statute's comprehensive] procedures."). Indeed, *Fitzgerald* cited with approval the Court's statement in *Sea Clammers* that, "[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, *they may suffice* to demonstrate congressional intent to preclude the remedy of suits under § 1983." *Id.* at 253, 129 S.Ct. 788 (quoting *Sea Clammers,* 453 U.S. at 20, 101 S.Ct. 2615) (emphasis added). To be sure, *Fitzgerald's* analysis of the different substantive protections afforded by Title IX and the Equal Protection Clause provides an additional framework for determining whether a section 1983 cause of action is foreclosed. Nevertheless, we do not believe it disturbed the basic principle that, absent indications to the contrary, we may infer that Congress intended to preclude § 1983 claims when it provides a sufficiently comprehensive remedial scheme for the vindication of a federal constitutional right.

Thus, we cannot agree with *Levin* that Congress must provide some "additional indication" of its intent. *Levin,* 692 F.3d at 619. *Fitzgerald* does not suggest the need for a statement of "clear or manifest

congressional intent in either the language of the statute or the legislative history," as *Levin* requires. *See Levin,* 692 F.3d at 621. Rather, *Fitzgerald* reaffirmed the principle that, where a statute imposes procedural requirements or provides for administrative remedies, permitting a plaintiff to proceed directly to court via § 1983 would be "inconsistent with Congress' carefully tailored scheme." *Fitzgerald,* 555 U.S. at 255, 129 S.Ct. 788 (quoting *Smith,* 468 U.S. at 1012, 104 S.Ct. 3457).

Here, there can be no debate that the ADEA provides a comprehensive remedial scheme. Under the ADEA, it is unlawful for an employer to, among other things, "fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1). The ADEA expressly provides a private right of action to employees. *Id.* § 626(c). Before an employee may file suit under the ADEA, however, a plaintiff is required to exhaust administrative remedies by filing a charge of discrimination with the EEOC. *Id.* § 626(d)(1). The EEOC is then directed to notify all respondents named in the employee's charge of discrimination and to "promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." *Id.* § 626(d)(2). Unless the EEOC elects to file suit to enforce the employee's claim, an employee may commence suit sixty days after filing a charge. *Id.* §§ 626(c)(1), (d)(1). In light of these requirements, we agree with the majority of our sister

Courts of Appeals that this scheme would be undermined if plaintiffs could sue directly under § 1983. *See, e.g., Zombro,* 868 F.2d at 1366 ("[Under § 1983, the] plaintiff would have direct and immediate access to the federal courts, the comprehensive administrative process would be bypassed, and the goal of compliance through mediation would be discarded.").

Moreover, we do not believe that the rights and protections of the ADEA and the Equal Protection Clause differ in such significant ways as to demonstrate congressional intent to allow parallel § 1983 claims alleging age discrimination. The ADEA is intended to "promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). Under the Equal Protection Clause, age classifications receive only rational basis review. *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 83, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000) ("States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest."). By prohibiting "arbitrary age discrimination," the ADEA encompasses the protections afforded by the Fourteenth Amendment, while significantly expanding prohibitions on age discrimination elsewhere.

Although, as the *Levin* court emphasizes, the potential defendants are different under the ADEA

and § 1983,[1] we do not believe this distinction significant enough to demonstrate congressional intent to permit both claims. Additionally, we think the fact that certain government employees are either exempted from the ADEA, or limited to certain remedies, *see* 29 U.S.C. §§ 623(j), 630(f), demonstrates congressional intent to specifically define the rights of those employees rather than to permit such employees to circumvent these limitations by filing directly under § 1983. *See Sea Clammers,* 453 U.S. at 15, 101 S.Ct. 2615 ("In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate.").

"We do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for a substantial equal protection claim." *Smith,* 468 U.S. at 1012, 104 S.Ct. 3457. Because we believe, however, that § 1983 suits are "inconsistent with Congress' carefully tailored scheme," *id.,* we join the majority of Courts of Appeals in concluding that Congress intended the ADEA to be the exclusive remedy for claims of age discrimination in employment. Accordingly, we will affirm the District Court's dismissal of Hildebrand's § 1983 claim of age discrimination.

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[1] Under the ADEA, a plaintiff may sue his employer, an employment agency, or a labor organization. 29 U.S.C. § 623. In contrast, a § 1983 plaintiff can sue an individual whose actions caused a deprivation of his constitutional rights. *Kuhn v. Goodlow,* 678 F.3d 552, 555-56 (7th Cir.2012).

B. Hildebrand's § 1983 Retaliation Claims

Hildebrand seeks vindication for two additional alleged violations under § 1983, contending that he was retaliated against for his use of the internal grievance process in violation of the First and Fourteenth Amendments, and that he was retaliated against on the basis of his political patronage in violation of the First Amendment. The District Court dismissed these allegations along with Hildebrand's § 1983 age discrimination claim, finding that he had failed to adequately plead that the County adopted a custom or practice of such discrimination. The District Court also found, albeit in a footnote, that Hildebrand's amended complaint "fail[ed] to pinpoint with any clarity which of his Constitutional rights were negatively impacted by [Allegheny County]," that the allegations of First and Fourteenth Amendment violations were conclusory in nature, and that they therefore "fail[ed] to meet the *Iqbal/Twombly* standard." (A. 313 n. 5.) As to the claims of retaliation, we agree with the District Court's analysis.

Hildebrand brought each of these claims against Allegheny County under a theory of municipal liability, which requires him to demonstrate either that the County officially adopted a "policy," or unofficially adopted a "custom," of unconstitutional discrimination. *See Monell v. Dept. of Soc. Servs. of City of New York,* 436 U.S. 658, 690-91, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Hildebrand concededly proceeded on all § 1983 claims under a "custom" theory. "A plaintiff may establish a custom . . . by showing that a given

course of conduct, although not specifically endorsed or authorized by law, is so well-settled and permanent as virtually to constitute law." *Watson v. Abington Twp.,* 478 F.3d 144, 155-56 (3d Cir.2007) (citing *Andrews v. City of Philadelphia,* 895 F.2d 1469, 1480 (3d Cir.1990) (internal quotation marks omitted)).

In his amended complaint, Hildebrand made the following averments of retaliation: he alleged that he was retaliated against by the Chief Detective and the Assistant Chief Detective at the DA's Office after he made a good faith report expressing concerns about a fellow detective (A. 136 ¶¶ S-T); that he was similarly retaliated against by the same individuals after reporting a concern about the Office's procedure for charging drug crimes (*Id.* 138 ¶ X); that he was retaliated against by the Assistant Chief Detective after he filed an internal grievance against him alleging age-based harassment (*Id.* 139-40 ¶¶ BB-DD); that he was subsequently demoted in retaliation for his complaints about the drug charging procedures (*Id.* 142 ¶ JJ); and that he was harassed after members of the DA's Office learned that he had previously made political contributions to Joan Orie Melvin in her candidacy for the Pennsylvania Supreme Court (*Id.* 145-46 ¶ WW). Notwithstanding these allegations of retaliation and harassment on the part of certain high-ranking officials at the DA's Office, Hildebrand does not allege that Allegheny County established a custom of retaliating against supporters of Ms. Melvin, or against Hildebrand or

other employees who utilized the internal grievance process.

While Hildebrand's brief on appeal reasserts his claim of retaliation, it does not point to any facts demonstrating that there existed a custom in Allegheny County to retaliate against employees on these bases. Rather, the portion of Hildebrand's brief dedicated to discussing his allegations in support of municipal liability relate solely to his claims of age discrimination. We therefore agree with the District Court that Hildebrand failed to set forth a plausible claim for relief against Allegheny County for retaliation, and we will affirm their dismissal on that basis.

C. Hildebrand's ADEA Claims

Having determined that Hildebrand's § 1983 claims were properly dismissed, we now turn to the District Court's dismissal of Hildebrand's ADEA claim.

1. Whether the *Iqbal*/*Twombly* Pleading Standards Apply to Fed.R.Civ.P. 9(c)

A plaintiff seeking relief under the ADEA must exhaust his or her administrative remedies as mandated by 29 U.S.C. § 626(d). Section 626(d) requires plaintiffs in "deferral states" such as Pennsylvania, which have a state agency with authority to investigate claims of employment discrimination, to file charges with the EEOC within 300 days of the last

date of alleged discrimination. 29 U.S.C. §§ 626(d)(2) & 633(b); *Watson v. Eastman Kodak Co.,* 235 F.3d 851, 854 (3d Cir.2000). A plaintiff's obligation to timely file with the EEOC is a condition precedent to filing suit under the ADEA. *Seredinski v. Clifton Precision Prods. Co., Div. of Litton Sys., Inc.,* 776 F.2d 56, 64 (3d Cir.1985) (Sarokin, J., concurring in part and dissenting in part).

The pleading of a condition precedent is governed by Federal Rule of Civil Procedure 9(c), which provides:

> Conditions Precedent. In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.

Fed.R.Civ.P. 9(c).

Here, Hildebrand's original complaint alleged:

> All conditions precedent to jurisdiction under section 706 of Title VII, have occurred or been complied with. Plaintiff filed a claim of employment discrimination with the [EEOC]. The EEOC issued a Notice of Right to Sue. This complaint is filed within 90 days of such Notice of Right to Sue.

(A.2.)

The District Court dismissed Hildebrand's ADEA claim, holding that he failed to sufficiently plead the satisfaction of this condition precedent. Specifically, the District Court applied the pleading standards set forth in *Twombly* and *Iqbal,* which held that Federal Rule of Civil Procedure 8(a) requires a plaintiff to allege "enough facts to state a claim to relief that is plausible on its face." *Twombly,* 550 U.S. at 570, 127 S.Ct. 1955; *see also Iqbal,* 556 U.S. at 678, 129 S.Ct. 1937.

The District Court erred by applying *Iqbal* and *Twombly* to Hildebrand's pleading of the conditions precedent to filing suit under the ADEA. *Iqbal and Twombly* interpreted Federal Rule of Civil Procedure 8(a), which governs the standard for pleading a claim for relief. The pleading of conditions precedent is governed by Rule 9(c), not Rule 8(a). Neither *Iqbal* nor *Twombly* purport to alter Rule 9. We see no indication that those cases sought to override the plain language of Rule 9(c), and we therefore conclude that the pleading of conditions precedent falls outside the strictures of *Iqbal* and *Twombly.*

2. The Intake Questionnaire

Our conclusion that the District Court erred in applying *Iqbal* and *Twombly* to the pleading of conditions precedent does not end our inquiry. Following the dismissal of his first complaint, Hildebrand filed an amended complaint, which alleged his satisfaction of the ADEA's conditions precedent in greater detail.

Specifically, Hildebrand alleged that he had filed a charge with the EEOC within 300 days of the last date of discrimination. He attached his charge of discrimination to his amended complaint.

In their motions to dismiss the amended complaint, Appellees contested Hildebrand's asserted final date of discrimination, contending that the last date of discrimination was his February 18, 2011 termination. Under this reasoning, Hildebrand's charge of discrimination, which he filed on January 11, 2012, would be untimely. In response to the motions to dismiss, Hildebrand argued that the EEOC Intake Questionnaire, which he filed on December 1, 2011, constituted a timely-filed charge of discrimination.

The District Court dismissed Hildebrand's ADEA claims with prejudice, concluding that the last date of discrimination was February 18, 2011, and that the January 11, 2012 charge was therefore untimely. The District Court did not consider the Intake Questionnaire.[2] We agree that Hildebrand's Intake Questionnaire constitutes a timely filed charge.

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[2] Hildebrand concedes that the Intake Questionnaire was not attached to his amended complaint. He did, however, submit the questionnaire as an exhibit to his response to Allegheny County's motion to dismiss. While a court is limited to considering the pleadings in deciding a Rule 12(b)(6) motion, we are satisfied that the Intake Questionnaire was properly before the District Court. There was no dispute as to its authenticity, and it directly corroborated Hildebrand's claim that he had satisfied

(Continued on following page)

An EEOC filing constitutes a charge of discrimination if it satisfies the requirements of 29 C.F.R. § 1626.6, and can "reasonably [be] construed as a request for [the EEOC] to take remedial action to protect the employee's rights." *Fed. Express Corp. v. Holowecki,* 552 U.S. 389, 402, 128 S.Ct. 1147, 170 L.Ed.2d 10 (2008). In *Holowecki,* the Supreme Court adopted a "permissive" interpretation of the charge requirement, explaining that a "wide range of documents," including an intake questionnaire, "may be classified as charges." *Id.* at 402, 128 S.Ct. 1147.

Following *Holowecki,* the EEOC revised its Intake Questionnaire to require claimants to check a box to request that the EEOC take remedial action. This box, commonly referred to as "Box 2," states:

> I want to file a charge of discrimination, and I authorize the EEOC to look into the discrimination I described above. I understand that the EEOC must give the employer, union, or employment agency that I accuse of discrimination information about the charge, including my name. . . .

(A.262, 291). Under the revised form, an employee who completes the Intake Questionnaire and checks

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the conditions precedent to filing suit under the ADEA. *See Mayer v. Belichick,* 605 F.3d 223, 230 (3d Cir.2010) ("In deciding a Rule 12(b)(6) motion, a court must consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents.").

Box 2 unquestionably files a charge of discrimination. Hildebrand did precisely this. Additionally, Hildebrand's questionnaire is dated December 1, 2011, which is within 300 days of the February 18, 2011 letter of suspension and notice of termination. Thus, it was timely filed.

The Intake Questionnaire did not, however, preserve Hildebrand's claim against Allegheny County. As the County observes, Hildebrand's EEOC Intake Questionnaire names "Allegheny County District Attorney's Office" as the only respondent. Thus, it fails to allege any discrimination on the part of the County. We will therefore vacate the District Court's dismissal of Hildebrand's ADEA claim as to the DA's Office because the Intake Questionnaire was a timely filed charge of discrimination, but we will affirm dismissal of the ADEA claim against Allegheny County, because the Intake Questionnaire demonstrates that Hildebrand failed to timely exhaust his administrative remedies as to the County.

III.

For the foregoing reasons, we will affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13-1321

ANTHONY HILDEBRAND,

Appellant

v.

ALLEGHENY COUNTY, a political entity; ALLEGHENY COUNTY DISTRICT ATTORNEY'S OFFICE

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civ. No. 2-12-cv-01122)
District Judge: Honorable Arthur J. Schwab

Argued November 7, 2013

Before: GREENAWAY, JR., VANASKIE and ROTH, *Circuit Judges*

JUDGMENT

(Filed Jun. 27, 2014)

This cause came to be considered on the record from the United States District Court for the Western

District of Pennsylvania and was argued on November 7, 2013. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the order of the District Court entered January 4, 2013 be and the same is hereby, AFFIRMED in part and VACATED in part. Costs shall not be taxed in this matter. All of the above in accordance with the Opinion of this Court.

ATTEST:

s/ Marcia M. Waldron,
Clerk

Dated: June 27, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

ANTHONY HILDEBRAND,

Plaintiff,

v.

ALLEGHENY COUNTY, ALLEGHENY COUNTY DISTRICT ATTORNEY'S OFFICE,

Defendants.

12cv1122
ELECTRONICALLY FILED

MEMORANDUM OPINION

(Filed Jan. 4, 2013)

For the second time, there are two separate Motions to Dismiss before this Court. This time, the Motions seek dismissal of Plaintiff's Amended Complaint (doc. no. 15) which was filed subsequent to this Court's prior Opinion and Order (doc. nos. 13 and 14) granting in part Defendants' prior Motions to Dismiss, but allowing Plaintiff the opportunity to file an Amended Complaint. Plaintiff filed his Amended Complaint on December 13, 2012. Doc. no. 15.

Defendant Allegheny County ("AC") and Defendant Allegheny County District Attorney's Office ("DA's Office") filed their respective Motions to Dismiss the Amended Complaint in its entirety under Fed.R.Civ.P. 12(b)(6). *See* doc nos. 16 and 17, respectively. Plaintiff filed a Brief in Opposition to each

Motion to Dismiss. *See* doc. nos. 21 and 23, respectively.

The matters are now ripe for adjudication.

I. STANDARD OF REVIEW

In considering a Rule 12(b)(6) motion, federal courts require notice pleading, as opposed to the heightened standard of fact pleading. Fed. R. Civ. P. 8(a)(2) requires only "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds on which it rests.'" *Bell Atlantic Corp. v. Twombly,* 550 U.S. 554, 555 (2007) (quoting *Conley v. Gibson,* 355 U.S. 41, 47 (1957)).

Building upon the landmark United States Supreme Court decisions in *Twombly* and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009), the United States Court of Appeals for the Third Circuit explained that a District Court must undertake the following three steps to determine the sufficiency of a complaint:

> First, the court must "tak[e] note of the elements a plaintiff must plead to state a claim." Second, the court should identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." Third, "whe[n] there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to

> an entitlement for relief." This means that our inquiry is normally broken into three parts: (1) identifying the elements of the claim, (2) reviewing the Complaint to strike conclusory allegations, and then (3) looking at the well-pleaded components of the Complaint and evaluating whether all of the elements identified in part one of the inquiry are sufficiently alleged.

Malleus v. George, 641 F.3d 560, 563 (3d Cir. 2011) (quoting *Iqbal,* 556 U.S. at 675, 679).

The third step of the sequential evaluation requires this Court to consider the specific nature of the claims presented and to determine whether the facts pled to substantiate the claims are sufficient to show a "plausible claim for relief." *Fowler,* 578 F.3d at 210. "While legal conclusions can provide the framework of a Complaint, they must be supported by factual allegations." *Id.* at 210-11; *see also Malleus,* 641 F.3d at 560.

This Court may not dismiss a Complaint merely because it appears unlikely or improbable that Plaintiff can prove the facts alleged or will ultimately prevail on the merits. *Twombly,* 550 U.S. at 563 n.8. Instead, this Court must ask whether the facts alleged raise a reasonable expectation that discovery will reveal evidence of the necessary elements. *Id.* at 556. Generally speaking, a Complaint that provides adequate facts to establish "how, when, and where" will survive a Motion to Dismiss. *Fowler,* 578 F.3d at

212; *see also Guirguis v. Movers Specialty Servs., Inc.,* 346 F. App'x. 774, 776 (3d Cir. 2009).

In short, a Motion to Dismiss should not be granted if a party alleges facts, which could, if established at trial, entitle him/her to relief. *Twombly,* 550 U.S. at 563 n.8.

II. DISCUSSION – DEFENDANTS' MOTIONS TO DISMISS[1]

A. Count I – Age Discrimination ("ADEA")

Defendant AC argues that Count I of the Complaint – Plaintiff's ADEA claim – should be dismissed because: (1) Plaintiff filed his EEOC charge against the DA's Office, not AC; and (2) Plaintiff failed to timely file his EEOC charge within three hundred days of the last discriminatory act thereby failing to exhaust his administrative remedies prior to filing this lawsuit. Defendant DA's Office similarly argues that Plaintiff's ADEA claim should be dismissed

[1] As noted in its prior Opinion, because the Court writes primarily for the parties who are familiar with the details of this case, and because the Court accepts all well-pled facts set forth in Plaintiff's Amended Complaint as true for purposes of deciding these Motions to Dismiss, the Court has declined to provide a separate recitation of the relevant facts as pled by Plaintiff. To the extent the Court found that the recitation of any of the facts was necessary, those facts have been set forth within the individual sub-parts of the "Discussion" section herein.

because he failed to timely file his EEOC complaint within 300 days of the last discriminatory act.

Because both parties raised the timeliness of the filing of Plaintiff's EEOC charge as one of the bases upon which to dismiss Plaintiff's ADEA claim, the Court will address that matter first. As this Court previously noted, a party seeking relief for employment discrimination under Title VII must first establish that he timely filed a charge with the Equal Employment Opportunity Commission ("EEOC"), that he received a right to sue letter, and that he filed his Complaint in Federal Court within ninety days of his receipt of a Notice of Right to Sue letter from the EEOC. *See Burgh v. Borough Council of the Borough of Montrose,* 251 F.3d 465, 470 (3d Cir. 2001). The ADEA requires a person to file a "charge of discrimination" with the EEOC:

> (A) within 180 days after the alleged unlawful practice occurred; or
>
> (B) in a case to which section 633(b) of this Title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination proceedings under state law, whichever is earlier.

29 U.S.C. § 626(d). "Like Title VII, [the] ADEA has deferral provisions and the time for filing a charge depends on whether deferral applies. In deferral states, such as Pennsylvania, the charge must be filed within 300 days of the allegedly illegal act."

Ruehl v. Viacom, Inc., 500 F.3d 375, 382-3 (3d Cir. 2007), quoting *Seredinski v. Clifton Precision Prods. Co.,* 776 F.2d 56, 63 (3d Cir. 1985) (footnote omitted).

Thus, a judicial complaint under the ADEA will be dismissed for failure to exhaust administrative remedies if the supporting EEOC charge was not filed within 300 days of notification to the employee of the adverse employment action.

Turning to this case, the Court begins by noting that in its prior Memorandum Opinion, the Court stated it would issue an Order granting Defendant AC's Motion to Dismiss the ADEA claim because Plaintiff had merely pled a legal conclusion asserting that he met "all conditions precedent" to filing an ADEA claim. *See* doc. no. 13, p. 4. However, in this same portion of the Opinion, this Court clearly indicated that despite the fact it was granting Defendant AC's Motion to Dismiss the ADEA claim, it was doing so "without prejudice to allow Plaintiff time to file an Amended Complaint establishing the factual basis to support the legal conclusion that he has exhausted his administrative remedies." *Id.*

Plaintiff's Amended Complaint (doc. no. 15), which was filed shortly after the Court issued its prior Opinion, contains the following facts relevant to the exhaustion and timeliness issue now re-raised by Defendant AC and raised by Defendant DA's Office:

10. On February 18, 2011, the [DA's Office] and AC terminated [Plaintiff's] employment.

* * *

[12.] NNN. On February 18, 2011, [Plaintiff] was suspended for five (5) days without pay. [Plaintiff] filed a grievance with Dawn Botsford on March 8, 2011. The hearing lasted twenty (20) minutes. Botsford affirmed the five (5) day suspension of [Plaintiff] without pay. . . .

* * *

[12.] PPP. On March 31, 2011[,] the union voted not to appeal [Plaintiff's] grievance and he was terminated on May 7, 2011.

* * *

The Termination of Detective Hildebrand

13. On or about February 1, 2011, [Plaintiff] was suspended without pay for unauthorized use of a government vehicle. The automobile use resulted in [Plaintiff's] termination on or about February 18, 2011.

14. [Plaintiff] was given no reason for his termination in the February 18, 2011 letter discharging him sent by Logan.

15. A March 14, 2011 letter sent [to] [Plaintiff] by Dawn Botsford is when Hildbrand first heard he was discharged for lying to his supervisors in addition to his

> personal use of the DA supplied motor vehicle. Prior to this date, [Plaintiff] was advised he was terminated only for unauthorized use of a DA issued vehicle.

Doc. no. 15, ¶¶ 10, 12 NNN, 12 PPP, 13-15.

Plaintiff attached to his Amended Complaint, several documents which this Court may also consider. Relevant to the exhaustion and timeliness argument are his EEOC Charge of Discrimination (hereinafter "Charge") (Exhibit 1 to the Amended Complaint, doc. no. 15-1), and a letter from Dennis Logan, Chief of Detectives, County of Allegheny, Office of the District Attorney, dated February 18, 2011 (hereinafter "February 18, 2011 Letter"). Exhibit 3 to the Amended Complaint, doc. no. 15-3.

The Charge, prepared by Plaintiff and/or his counsel, indicates that the document was filed on Jan 11, 2012. Doc. no. 15-1, p. 1. The document also identifies the earliest date of discrimination as "02-01-2011," and the latest date of discrimination as "04-30-2011." *Id.* The relevant "particulars" set forth within the Charge read as follows:

> 2. On February 18, 2011, Chief Dennis Logan suspended me for five (5) days without pay for unauthorized use of a government vehicle. On April 30, 2011, Chief Dennis Logan told me I was discharged for being untruthful.

Id.

The February 18, 2011 Letter, signed by Chief Dennis Logan, reads in pertinent part as follows:

> I suspended you for five (5) days without pay, pending discharge, effective February 11, 2011 for charges outlined in the Disciplinary Action Report ("DAR"), a copy of which I gave to you on February 1, 2011. You were given five (5) work days to respond in writing stating the reason or reasons why you should not be discharged. I have received and read your response letter and find it unsatisfactory. Therefore, you are terminated from employment with the Allegheny County District Attorney's Office effective February 18, 2011. . . .

Doc. No. 15-3.

As is evident from the statements made within the four corners of Plaintiff's Amended Complaint, as well as within those documents attached to the Amended Complaint, inconsistencies exist with respect to the actual date of Plaintiff's termination.[2] However, this Court notes that paragraphs 10, 13 and 14 of the Amended Complaint (quoted above) all indicate that Plaintiff was terminated on February

[2] In deciding Motions to Dismiss pursuant to Rule 12(b)(6), courts generally consider only the allegations in the Complaint, exhibits attached to the Complaint, matters of public record, and documents that form the basis of a claim. *See In re Burlington Coat Factory Sec. Litig.,* 114 F.3d 1410, 1426 (3d Cir. 1997); accord *Lum v. Bank of America,* 361 F.3d 217, 221 n.3 (3d Cir. 2004).

18, 2011, and these statements are corroborated by the statement set forth within the February 18, 2011 Letter, attached to the Amended Complaint.

However, Plaintiff provided a few dates which post-date Plaintiff's February 18, 2011 termination. These can be found at paragraphs "12. NNN." and "12. PPP." of the Amended Complaint as well as the April 30, 2011 date set forth in the Charge. *See* doc no. 15, ¶¶ 12. NNN. and 12. PPP.; and doc. no. 15-1. The Court notes that Plaintiff failed to provide any facts in his Amended Complaint related to the April 30, 2011 date, which he identified in his Charge as the "latest" date discrimination took place. In fact, there is no mention of the April 30, 2011 date in the Amended Complaint. Thus, the only information related to the April 30, 2011 date is Plaintiff's statement found within the Charge where Plaintiff indicated that "Chief Dennis Logan told me I was discharged for being untruthful." Doc. No. 15-1. Plaintiff fails to explain how this statement allegedly made on April 30, 2011 can be construed as an act of age discrimination against Plaintiff.

In addition, sub-paragraphs "12. NNN." and "12. PPP." provide facts concerning Plaintiff's termination date which conflict with facts stated elsewhere in the Amended Complaint and in the exhibits attached to the Amended Complaint. Sub-paragraph "12. NNN." indicates Plaintiff was suspended for five days on February 18, 2011 – not terminated. Sub-paragraph "12. PPP." reads that Plaintiff was terminated on May 7, 2011.

Because this Court has already provided Plaintiff with an opportunity to file an Amended Complaint establishing the requisite factual basis upon which an ADEA claim could survive a Motion to Dismiss for failure to exhaust administrative remedies, and given what counsel for Plaintiff has submitted, this Court finds that there is no plausible basis upon which Plaintiff's ADEA claim can proceed.

First, most of the assertions made by Plaintiff in his Amended Complaint allege that the last act of discriminatory conduct arose on February 18, 2011 – the date Plaintiff was terminated from his employment – and this is corroborated by the February 18, 2011 Letter which Plaintiff attached to his Amended Complaint.

Next, the Court further finds that the other, seemingly contradictory, allegations concerning the date of the last discriminatory act which Plaintiff asserts in his Amended Complaint (and one of which is set forth in his Charge), are either non-discriminatory acts (*i.e.,* Chief Logan stating to Plaintiff on April 30, 2011, that he was discharged for being untruthful) and/or are merely dates for which Plaintiff provided no corroboration (*i.e.,* the termination date of May 7, 2011).

Thus, in light of the *Iqbal/Twombly* standard, the Court finds that Plaintiff's Amended Complaint and attached documentation fail to adequately plead that a timely ADEA claim was filed within three hundred (300) days of the date of the last act of the alleged

discrimination – Plaintiff's February 18, 2011 termination. In light of the factual assertions made by Plaintiff in his Amended Complaint, the Court finds that allowing Plaintiff an opportunity to amend his Complaint a second time would be futile.[3]

Accordingly, the Court is constrained to concur with Defendants AC and DA's Office that Plaintiff's Amended Complaint fails to provide facts necessary to establish that he fimely [sic] filed is EEOC claim within three hundred days of February 18, 2011. Accordingly, the Court will grant Defendants' Motions to Dismiss Count I of the Complaint, with prejudice.[4]

B. Count III – Section 1983 Claim

This Court cited the following law in its prior Opinion, and finds that a discussion of this law will

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[3] Defendant's Motion to Dismiss will be granted with prejudice. *See*, *In re Burlington Coat Factory Sec. Litig.,* 114 F.3d 1410, 1434 (3d Cir.1997) (" . . . a district court may exercise its discretion and deny leave to amend on the basis of . . . futility.").

[4] In light of this determination, the Court will not address Defendant AC's argument wherein it contends that because Plaintiff failed to file the EEOC Charge against Defendant AC, Defendant AC cannot be held legally liable for any viable ADEA claim filed by Plaintiff. Similarly, the Court will not address Defendant DA's argument that Plaintiff's Complaint was filed with this Court two days too late, and thus, not timely filed within ninety (90) days from the day he received his Right to Sue Notice.

again be revelant [sic] to the Defendants' Motions, and thus, restates same herein:

> Title 42 of the United States Code, § 1983 states that, "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ." 42 U.S.C. § 1983. In *Kneipp v. Tedder,* the United States Court of Appeals for the Third Circuit explained that "[s]ection 1983 does not, by its own terms, create substantive rights; it provides only remedies for deprivations of rights established elsewhere in the Constitution or federal laws[,]" and held that "[i]n order to establish a section 1983 claim, a plaintiff must demonstrate a violation of a right secured by the Constitution and the laws of the United States [and] that the alleged deprivation was committed by a person acting under color of state law." *Kneipp,* 95 F.3d 1199, 1204 (3d Cir. 1996) (internal quotes and citations omitted).
>
> Municipalities, such as Defendant AC, can be subject to § 1983 liability. *See Monell v. Dept. of Soc. Svcs. of City of New York,* 436 U.S. 658, 690 (1978) (Local governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief

where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.). "[A]lthough the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 'person,' by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." *Id.* at 690-91. However, Section 1983 "did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort[,] [i]n particular, we conclude that a municipality cannot be held liable solely because it employs a tortfeasor – or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Id.* at 691.

In essence, *Monell* created a "two-path track" to municipal liability, depending on whether a plaintiff's Section 1983 claim is premised on a municipal policy or a custom. *See Beck v. City of Pittsburgh,* 89 F.3d 966, 971 (3d Cir. 1996). In *Andrews v. City of Philadelphia,* 895 F.2d 1469 (3d Cir. 1990), the United States Court of Appeals for the Third Circuit provided greater clarity concerning on these two sources of liability:

> Policy is made when a "decisionmaker possess[ing] final authority to establish municipal policy with respect to the action" issues an official proclamation, policy, or edict. . . . A course of conduct is considered to be a "custom" when, though not authorized by law, "such practices of state officials [are] so permanent and well-settled" as to virtually constitute law.

Id. at 1480 (*quoting Monell,* 436 U.S. at 690) (internal citations omitted).

> Under either the policy or the custom track, "a plaintiff must show that an official who has the power to make policy is responsible for either the affirmative proclamation of a policy or acquiescence in a well-settled custom." *Bielevicz v. Dubinon,* 915 F.2d 845, 850 (3d Cir. 1990) (*citing Andrews,* 895 F.2d at 1480); *see also, Watson v. Abington Twnshp.,* 478 F.3d 144, 156 (3d Cir. 2007). In order to determine who has policymaking responsibility, "a court must determine which official has final, unreviewable discretion to make a decision or take an action." *Andrews,* 895 F.2d at 1481.

Doc. no. 13, pp. 8-9.

1. Liability – Defendant DA Office

In its prior Opinion, this Court acknowledged in a footnote that Defendant DA's Office had argued that

it was *not* a separate entity from Defendant AC for purposes of Section 1983 liability and cited caselaw in support of this argument. *Id.*, pp. 10-11, n.2. The Court also noted that Plaintiff did not directly address this argument and requested that "both parties . . . more fully brief the specific issue of whether Defendant DA's Office can be subject to Section 1983 liability." Defendant DA's office renewed this argument in its current Brief in Support of its Motion to Dismiss (*see* doc. no. 18, p. 7), and Plaintiff, acknowledging that Defendant DA re-raised this issue, has now conceded that the United States Court of Appeals for the Third Circuit has "held that local prosecutorial offices are not legal entities separate from the local governments of which they are a part . . . and consequently, cannot be sued under [Section] 1983." Doc. no. 23, p. 11, citing *Briggs v. Moore,* 251 Fed. Appx. 77, 79 (3d Cir. 2007); *cert. den.,* 553 U.S. 1057 (2008).

Accordingly, based on the law of this Circuit, Defendant DA's Office cannot be sued under Section 1983.

2. Liability – Defendant AC

Plaintiff's Section 1983 claim may only be asserted against Defendant AC, the municipal entity. As noted above, there are two means of demonstrating the required causal link between a municipal "policy" and an alleged constitutional violation. First, a "policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's

officers" will suffice. *City of St. Louis v. Praprotnik,* 485 U.S. 112, 121 (1988). Second, even if a policy has not received approval through "official decisionmaking channels," customs or practices may be the basis for municipal liability if they are so permanent and well settled that they operate as law. *See Kelly v. Borough of Carlisle,* 622 F.3d 248, 263 (3d Cir. 2010); *Jiminez v. All Am. Rathskeller, Inc.,* 503 F.3d 247, 250 (3d Cir. 2007). That is, "acquiescence in a long-standing practice or custom" that "constitutes the standard operating procedure of the local governmental entity" is grounds for holding a municipality liable. *Jett v. Dallas Independent Sch. Dist.,* 491 U.S. 701, 737 (1989), abrogated on other grounds by statute, 42 U.S.C. §§ 1981, 1977(a).

Applied here, Plaintiff had to set forth facts in his Amended Complaint to plausibly allege that either: (1) a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers violated his constitutional rights, or (2) no "policy" received approval through "official decisionmaking channels," but Defendant AC had customs or practices which were "so permanent and well settled" that they operated as law.

Because Plaintiff's initial Complaint failed to make these requisite allegations, the Court granted Defendants' respective Motions to Dismiss but allowed Plaintiff to amend his Complaint to make the necessary changes to preserve his Section 1983 claim. *See* doc. no. 13, p. 6. Defendant AC now contends that the Amended Complaint fails to allege the necessary

facts to establish a plausible claim under Section 1983. Doc. no. 19, pp. 9-11. This Court agrees.

Plaintiff's Amended Complaint did set forth the names and positions of those who created and enforced the allegedly illegal custom or practice of Defendant AC. The Amended Complaint identified Dawn Botsford, Dennis Logan, and Richard Ealing as "top decisionmakers" within the DA's Office concerning personnel and disciplinary matters, and it claims they were involved in terminating Plaintiff. Doc. no. 15, ¶ 12 C.-E. Plaintiff also alleged that each of these three individuals were employees of Defendant AC. *Id.*

The law is clear that Defendant AC cannot be held liable merely because it employed the three individuals whom Plaintiff has identified. *Monell,* 436 U.S at 691. There were two ways in which Plaintiff's Amended Complaint could assert a Section 1983 violation against Defendant AC. First, Plaintiff's Amended Complaint could have set forth facts to plausibly establish that these "decisionmakers" were officers of Allegheny County who officially adopted and promulgated a policy statement, ordinance, regulation or decision on behalf of Allegheny County which violated Plaintiff's constitutional rights. *Andrews,* 895 F.2d at 1480 and *City of St. Louis* 485 U.S. at 121. Plaintiff's Amended Complaint does not so allege. *See* doc. no. 15.

Second, under *Monell* and its progeny, Plaintiff could have alleged facts to plausibly establish that

Defendant AC's three employees engaged in a "course of conduct" which came to be considered "a custom." *Id.* Plaintiff would also have had to allege that, although not authorized by law, the practices of the three "officials [were] so permanent and well-settled" as to virtually constitute law. *Id.*

Defendant AC contends that Plaintiff's Amended Complaint fails to make the necessary factual assertions described above. In response, Plaintiff argues that the three AC employees (Botsford, Logan, and Ealing), "engaged in a campaign, [via an] unwritten policy/custom to 'rid the [DA's Office] and AC offices of older employees." Doc. no. 21, p. 9. Plaintiff claims his Amended Complaint alleges that this "campaign" was "widespread" in that younger workers were given overtime, as well as better work areas and vehicles. *Id.* The Court notes that Plaintiff's Brief in Opposition does not cite any paragraphs within his Amended Complaint pinpointing where he provides facts in support of these assertions.

Moreover, the Court notes that upon its own review of the Amended Complaint, in sub-paragraphs "12. ZZ." through "12. CCC.," Plaintiff alleges that Defendant AC (through two employees, Logan and Ealing) assigned overtime to "younger employees" and further alleges that this was done purely for retaliatory and discriminatory reasons despite Plaintiff's seniority and "right of first refusal" to accept an overtime assignment. Doc. no. 15, ¶ 12. ZZ.-CCC. Plaintiff offers no further details concerning how frequently Plaintiff's overtime work was assigned to

younger employees (which would have established the persistence of the alleged course of conduct), nor does he provide any specific facts to indicate how many other "older" employees were subject to this treatment (which would have established the pervasiveness of the alleged course of conduct). Thus, Plaintiff has not provided enough facts to support the legal conclusion that the practices of the three "officials [were] so permanent and well-settled" as to virtually constitute law.

Accordingly, the Court finds that Plaintiff failed to plead a plausible claim under Section 1983 against Defendant AC given the less than adequate facts necessary to establish a plausible claim. The Court finds that the allegations set forth in Plaintiff's Amended Complaint in this regard are largely conclusory in nature and thus, fail to meet the *Iqbal/Twombly* standard.[5]

Because the Court finds that Plaintiff's Section 1983 cannot be prosecuted against Defendant DA's

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[5] In addition, although the Court has determined that Plaintiff's Amended Complaint falls short of asserting facts necessary to assert a plausible claim against Defendant AC under *Monell* and its progeny, the Court also notes that Plaintiff's Amended Complaint fails to pinpoint with any clarity which of his Constitutional rights were negatively impacted by Defendant AC. Doc. no. 15, ¶¶ 30-33. The Court finds that the allegations made by Plaintiff claiming violations of his Fourteenth and First Amendment rights to be conclusory in nature, and such assertions also fail to meet the *Iqbal/Twombly* standard.

Office, because it is not an entity separate from Defendant AC for Section 1983 purposes, and because the Court finds that Plaintiff's Section 1983 allegations raised against Defendant AC fall short of meeting the *Iqbal/Twombly* standard, the Court will grant both Defendants' Motions to Dismiss this claim.

C. All Remaining Claims (Count II – Pennsylvania's Whistleblower Law, and Counts IV and V – Pennsylvania Human Relations Act Violations)

Because Plaintiff's only remaining claims are state-law based claims under the Pennsylvania's Whistleblower Law and the PHRA, jurisdiction may be relinquished by this Court. The Court declines to exercise supplemental jurisdiction over the remaining state law claims. The state courts are intimately familiar and regularly adjudicate claims pertaining to the Whistleblower Law and the PHRA. Accordingly, said state law claims will be dismissed pursuant to 28 U.S.C. § 1367(c)(3), albeit without prejudice to Plaintiff's ability to re-file these claims in state court. Also, the dismissal of Plaintiff's state law claims should not work to Plaintiff's disadvantage. *See* 28 U.S.C. § 1367(d) (providing for at least a thirty-day tolling of any applicable statute of limitation after the claim is dismissed so as to allow Plaintiff the necessary time to re-file his state law claims in state court).

IV. CONCLUSION

Based on the foregoing law and authority, the Court will enter an appropriate Order consistent with this Opinion wherein the Court has held as follows:

(1) Defendants' respective Motions to Dismiss the Amended Complaint will be GRANTED, WITH PREJUDICE, as to: (1) Count I, Plaintiff's ADEA claim; and (2) Count III, Plaintiff's Section 1983 claim for the reasons set forth above.

(2) Defendants' respective Motions to Dismiss the Amended Complaint will be GRANTED, WITHOUT PREJUDICE, as to Count II (Plaintiff's Pennsylvania Whistleblower Law claim), Count IV and Count V (Plaintiff's PHRA claims), because this Court declines to exercise supplemental jurisdiction over these remaining state law claims. Plaintiff's ability to re-file these claims in state court will not impaired by this dismissal, as 28 U.S.C. § 1367(d) provides for at least a thirty-day tolling of any applicable statute of limitation after the claim is dismissed.

s/ Arthur J. Schwab
Arthur J. Schwab
United States District Judge

cc: All Registered ECF Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

ANTHONY HILDEBRAND,

Plaintiff,

v.

ALLEGHENY COUNTY, ALLEGHENY COUNTY DISTRICT ATTORNEY'S OFFICE,

Defendants.

12cv1122
ELECTRONICALLY FILED

ORDER

(Filed Jan. 4, 2013)

AND NOW, this 4th day of January, 2013, for the reasons discussed in the Court's Memorandum Opinion filed contemporaneously with this Order, and based up on the law and authority cited therein, Defendants' Motions to Dismiss (doc. nos. 16 and 17) will be GRANTED as follows:

1. Defendants' Motions to Dismiss are GRANTED, WITH PREJUDICE, as to Count I, Plaintiff's ADEA claim and Count III, Plaintiff's Section 1983 claim.

2. Defendants' Motions to Dismiss are GRANTED, WITHOUT PREJUDICE, as to Count II (Plaintiff's Pennsylvania Whistleblower Law claim), Count IV and Count V (Plaintiff's PHRA claims), because this

Court declines to exercise supplemental jurisdiction over these remaining state law claims.

s/ Arthur J. Schwab
Arthur J. Schwab
United States District Judge

cc: All Registered ECF Counsel

2012 WL 6093798
Only the Westlaw citation is currently available.
United States District Court,
W.D. Pennsylvania.

Anthony HILDEBRAND, Plaintiff,
v.
ALLEGHENY COUNTY, Allegheny County District Attorney's Office, Defendants.

No. 12cv1122. | Dec. 7, 2012.

MEMORANDUM OPINION

ARTHUR J. SCHWAB, District Judge.

Before the Court are two separate Motions to Dismiss Plaintiff's Complaint. Defendant Allegheny County ("AC") has filed a Motion to Dismiss the Complaint in its entirety under Fed.R.Civ.P. 12(b)(6), while Defendant Allegheny County District Attorney's Office ("DA's Office") filed a Partial Motion to Dismiss (seeking dismissal of Counts II, III and IV) under Fed.R.Civ.P. 12(b)(6) and Fed.R.Civ.P. 12(f). *See* doc nos. 7 and 5, respectively. Plaintiff filed a Brief in Opposition to each Motion to Dismiss. *See* doc. nos. 12 and 9, respectively.

The matters are now ripe for adjudication.

I. STANDARD OF REVIEW

A. The Motions Filed Under Fed.R.Civ.P. 12(b)(6)

In considering a Rule 12(b)(6) motion, federal courts require notice pleading, as opposed to the heightened standard of fact pleading. Fed.R.Civ.P. 8(a)(2) requires only "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds on which it rests.'" *Bell Atlantic Corp. v. Twombly,* 550 U.S. 554, 555 (2007) (quoting *Conley v. Gibson,* 355 U.S. 41, 47 (1957)).

Building upon the landmark United States Supreme Court decisions in *Twombly* and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009), the United States Court of Appeals for the Third Circuit explained that a District Court must undertake the following three steps to determine the sufficiency of a complaint:

> First, the court must "tak[e] note of the elements a plaintiff must plead to state a claim." Second, the court should identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." Third, "whe[n] there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief." This means that our inquiry is normally broken into three parts: (1) identifying the elements of the

> claim, (2) reviewing the Complaint to strike conclusory allegations, and then (3) looking at the well-pleaded components of the Complaint and evaluating whether all of the elements identified in part one of the inquiry are sufficiently alleged.

Malleus v. George, 641 F.3d 560, 563 (3d Cir.2011) (quoting *Iqbal,* 556 U.S. at 675, 679).

The third step of the sequential evaluation requires this Court to consider the specific nature of the claims presented and to determine whether the facts pled to substantiate the claims are sufficient to show a "plausible claim for relief." *Fowler,* 578 F.3d at 210. "While legal conclusions can provide the framework of a Complaint, they must be supported by factual allegations." *Id.* at 210-11; *see also Malleus,* 641 F.3d at 560.

This Court may not dismiss a Complaint merely because it appears unlikely or improbable that Plaintiff can prove the facts alleged or will ultimately prevail on the merits. *Twombly,* 550 U.S. at 563 n. 8. Instead, this Court must ask whether the facts alleged raise a reasonable expectation that discovery will reveal evidence of the necessary elements. *Id.* at 556. Generally speaking, a Complaint that provides adequate facts to establish "how, when, and where" will survive a Motion to Dismiss. *Fowler,* 578 F.3d at 212; *see also Guirguis v. Movers Specialty Servs., Inc.,* 346 F. App'x. 774, 776 (3d Cir.2009).

In short, a Motion to Dismiss should not be granted if a party alleges facts, which could, if established at trial, entitle him/her to relief. *Twombly,* 550 U.S. at 563 n. 8.

B. The Motion Filed Under Fed.R.Civ.P. 12(f)

Federal Rule of Civil Procedure 12(f) permits a party to seek to have stricken from any pleading "an insufficient defense or any redundant, immaterial, impertinent or scandalous matter."

II. DISCUSSION – DEFENDANTS' MOTIONS TO DISMISS[1]

A. Count I – Age Discrimination ("ADEA")

A party seeking relief for employment discrimination under Title VII must first establish that he timely filed a charge with the Equal Employment Opportunity Commission ("EEOC"), that he received a right to sue letter, and that he filed his Complaint in Federal Court within ninety days of a [sic] his

[1] Because the Court writes primarily for the parties who are familiar with the details of this case, and because the Court accepts all well-pled facts set forth in Plaintiff's Complaint as true for purposes of deciding these Motions to Dismiss, the Court has declined to provide a separate recitation of the relevant facts as pled by Plaintiff. To the extent the Court found that the recitation of ay [sic] of the facts was necessary, those facts have been set forth within the individual sub-parts of the "Discussion" section herein.

receipt of a Notice of Right to Sue letter from the EEOC. *See Burgh v. Borough Council of the Borough of Montrose,* 251 F.3d 465, 470 (3d Cir.2001). The ADEA requires a plaintiff to file a charge of discrimination with the EEOC within three hundred days of the alleged discriminatory act.

Defendant AC argues that Count I of the Complaint – Plaintiff's ADEA claim under Title VII – should be dismissed because Plaintiff failed to exhaust his administrative remedies prior to filing this lawsuit. Plaintiff counters by arguing that his Complaint, specifically paragraph three, alleges enough factual information under the *Iqbal/Twombly* standard to survive this Motion to Dismiss.

Paragraph three of the Complaint reads as follows:

> All conditions precedent to jurisdiction under section 706 of Title VII, have occurred or been complied with. Plaintiff filed a claim of employment discrimination with the [EEOC]. The EEOC issued a Notice of Right to Sue. The Complaint is filed within 90 days of such Notice of Right to Sue.

Doc. no. 1, ¶ 3. A copy of the Right to Sue letter was not attached to the Complaint.

Because paragraph three and the remainder of the Complaint fails to provide any facts, *i.e.* specific dates, as to when Plaintiff raised his claim with the EEOC and when the EEOC issued its right to sue letter to Plaintiff, and because Plaintiff failed to

attach his Right to Sue to the Complaint, this Court is constrained to concur with Defendant AC that the Complaint falls short of providing the facts to establish whether he has adequately exhausted his administrative remedies. Accordingly, the Court will grant Defendant AC's Motion to Dismiss Count I of the Complaint, but will do so without prejudice to allow Plaintiff time to file an Amended Complaint establishing the factual basis to support the legal conclusion that he has exhausted his administrative remedies.

B. Count II – Pennsylvania's Whistleblower Law

The pertinent sections of Pennsylvania's Whistleblower Law read as follows:

> (a) Persons not to be discharged.-No employer may discharge, threaten or otherwise discriminate or retaliate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because the employee or a person acting on behalf of the employee makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste.
>
> (b) Discrimination prohibited.-No employer may discharge, threaten or otherwise discriminate or retaliate against an employee regarding the employee's compensation,

terms, conditions, location or privileges of employment because the employee is requested by an appropriate authority to participate in an investigation, hearing or inquiry held by an appropriate authority or in a court action.

43 Pa.C.S.A. § 1423.

The following words and phrases when used in this act shall have the meanings given to them in this section unless the context clearly indicates otherwise:

* * *

"Good faith report." A report of conduct defined in this act as wrongdoing or waste which is made without malice or consideration of personal benefit and which the person making the report has reasonable cause to believe is true.

* * *

"Whistleblower." A person who witnesses or has evidence of wrongdoing or waste while employed and who makes a good faith report of the wrongdoing or waste, verbally or in writing, to one of the person's superiors, to an agent of the employer or to an appropriate authority.

"Wrongdoing." A violation which is not of a merely technical or minimal nature of a Federal or State statute or regulation, of a political subdivision ordinance or regulation or of a code of conduct or

> ethics designed to protect the interest of the public or the employer.

43 Pa.C.S.A. § 1422.

Each of the Defendants contend that Plaintiff's Complaint fails to adequately assert a cause of action for violation of Pennsylvania's Whistleblower Law, 43 Pa.C.S.A. §§ 1421 *et seq*. However, each Defendant has a slightly different basis for their respective position.

Defendant AC suggests that Plaintiff's Complaint fails to allege facts which establish "wrongdoing" and/or "good faith report" within the meaning of the Whistleblower Law.

Defendant DA's Office contends that: (1) the facts alleged by Plaintiff in support of the "wrongdoing" prong of the Whistleblower Law do not constitute "wrongdoing" as that term is defined; (2) the Complaint itself demonstrates that Plaintiff failed to make a "good faith report" within the meaning of the Whistleblower Law; and (3) Plaintiff failed to assert the causal connection between his whistleblowing and his termination.

In response to the arguments made by both Defendants, Plaintiff contends that paragraph 11, at subparagraphs H-I, L, S-Y, and DDD of his Complaint provide the requisite facts necessary to support a plausible claim under Pennsylvania's Whistleblower Law.

This Court does not entirely agree with either Plaintiff or Defendants.

First, this Court acknowledges that the Whistleblower Law's definition of "wrongdoing" encompasses more than technical violation of a Federal or State statute. It can also encompass a violation of a regulation, a code of conduct, or ethics "designed to protect the interest of the public or the employer." Although a violation can be inferred, generally, from the allegations set forth in paragraph 11 of the Complaint (when read as a whole), the law under *Iqbal* and *Twombly* requires more than that. To be in compliance with *Iqbal,* Plaintiff's Complaint needs to definitively state what statute, regulation, code of conduct, or ethics code was violated by one or both Defendants.

Second, Plaintiff's Complaint falls short of clearly drawing the causal connection between the alleged good faith report of the alleged wrongdoing and the Defendants' alleged reprisal. Although it can be inferred that the alleged good faith reports preceded the alleged reprisal, the Complaint is not clear on this point, and precision and clarity are required by the *Iqbal/Twombly* standard.

Finally, because the "good faith" component of the Whistleblower Law is driven, in part, by the definition of wrongdoing, it is premature to determine whether Plaintiff's allegations that he made alleged "good faith" reports of wrongdoing are sufficient under *Iqbal/Twombly.* For all of these reasons, the Court will grant the Defendants' Motions to Dismiss

Count II of the Complaint, but will do so without prejudice to allow Plaintiff time to file an Amended Complaint.

C. Count III – Title VII of Civil Rights Act: Retaliation

The United States Court of Appeals for the Third Circuit has recently summarized the body of law surrounding Title VII as follows:

> Title VII prohibits discriminatory employment practices based upon an individual's "race, color, religion, sex, or national origin." *See* 42 U.S.C.

§ 2000e-2(a). A plaintiff carries the initial burden of establishing a *prima facie* case. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). To establish a prima facie case, a Title VII plaintiff must demonstrate that: 1) he belongs to a protected class; 2) he was qualified for the position; 3) he was subject to an adverse employment action; and 4) the adverse action was under circumstances giving rise to an inference of discrimination. *Sarullo v. U.S. Postal Serv.,* 352 F.3d 789, 797 (3d Cir.2003). A defendant can rebut the claim by presenting a legitimate, non-discriminatory reason for the employment action. *Id.* The plaintiff must then "establish by a preponderance of the evidence that the employer's proffered reasons were merely a pretext for discrimination." *Id*.

Young v. School Dist. of Philadelphia 427 Fed.Appx. 150, 153 (3d Cir.2011).

In their Briefs in Support of Dismissal, both Defendants correctly noted that Title VII applies to those individuals who believe they suffered some form of discrimination due to race, color, religion, sex, or national origin. Doc. No. 8, p. 5, and Doc. No. 6, p. 3. Both Defendants argue that Plaintiff does not allege any discriminatory acts on the part of either Defendant predicated upon Plaintiff's race, color, religion, sex, or national origin. *Id.* Plaintiff conceded in one of his Briefs in Opposition that he incorrectly asserted his retaliation claim under Title VII. Doc. No. 10, p. 9.

Accordingly, the Court will grant Defendants' Motion to Dismiss Plaintiff's Retaliation claim predicated upon Title VII.

D. Count IV – First and Fourteenth Amendments: Equal Protection

Title 42 of the United States Code, § 1983 states that, "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ." 42 U.S.C. § 1983. In *Kneipp v. Tedder,* the United States Court of

Appeals for the Third Circuit explained that "[s]ection 1983 does not, by its own terms, create substantive rights; it provides only remedies for deprivations of rights established elsewhere in the Constitution or federal laws[,]" and held that "[i]n order to establish a section 1983 claim, a plaintiff must demonstrate a violation of a right secured by the Constitution and the laws of the United States [and] that the alleged deprivation was committed by a person acting under color of state law." *Kneipp,* 95 F.3d 1199, 1204 (3d Cir.1996) (internal quotes and citations omitted).

Municipalities, such as Defendant AC, can be subject to § 1983 liability. *See Monell v. Dept. of Soc. Svcs. of City of New York,* 436 U.S. 658, 690 (1978) (Local governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.). "[A]lthough the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 'person,' by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." *Id.* at 690-91. However, Section 1983 "did not intend municipalities to be held liable unless

action pursuant to official municipal policy of some nature caused a constitutional tort[,][i]n particular, we conclude that a municipality cannot be held liable solely because it employs a tortfeasor – or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Id.* at 691.

In essence, *Monell* created a "two-path track" to municipal liability, depending on whether a plaintiff's Section 1983 claim is premised on a municipal policy or a custom. *See Beck v. City of Pittsburgh,* 89 F.3d 966, 971 (3d Cir.1996). In *Andrews v. City of Philadelphia,* 895 F.2d 1469 (3d Cir.1990), the United States Court of Appeals for the Third Circuit provided greater clarity concerning on these two sources of liability:

> Policy is made when a "decisionmaker possess[ing] final authority to establish municipal policy with respect to the action" issues an official proclamation, policy, or edict. . . . A course of conduct is considered to be a "custom" when, though not authorized by law, "such practices of state officials [are] so permanent and well-settled" as to virtually constitute law.

Id. at 1480 (quoting Monell, 436 U.S. at 690) (internal citations omitted).

Under either the policy or the custom track, "a plaintiff must show that an official who has the power to make policy is responsible for either the affirmative proclamation of a policy or acquiescence in a

well-settled custom." *Bielevicz v. Dubinon,* 915 F.2d 845, 850 (3d Cir.1990) (*citing Andrews,* 895 F.2d at 1480); *see also, Watson v. Abington Twnshp.,* 478 F.3d 144, 156 (3d Cir.2007). In order to determine who has policymaking responsibility, "a court must determine which official has final, unreviewable discretion to make a decision or take an action." *Andrews,* 895 F.2d at 1481.

Here, both Defendants argue that the Complaint fails to allege facts which could support either theory – *i.e.,* that a policy or a custom was in place which violated Plaintiff's First and Fourteenth Amendment rights. Defendant DA's Office also contends that it is not a "person" under Section 1983, and further argues that Plaintiff failed to allege a causal connection between his termination and his exercise of his First Amendment rights.

In his Briefs in Opposition to the Defendants' respective Motions to Dismiss, Plaintiff relies on the allegations found in paragraph eleven to support his contention that he has adequately identified a policy or custom which violated Plaintiffs' First and Fourteenth Amendment rights. Doc. No. 10, p. 11 and Doc. No. 12, p. 10. Plaintiff's Complaint contains an allegation whereby various, specifically-identified individuals, one of whom is classified as Plaintiff's "direct supervisor," "began an official campaign to rid the [Defendants'] offices of older employees. . . ." Doc. No. 1, ¶ 11(B). Plaintiff's Complaint also alleges that Plaintiff's direct supervisor and one other specifically-identified individual failed to provide him with

overtime and "better" work space and automobiles due to his age and made "public comments in the office about needing to get rid of the older employees." Doc. No. 1, ¶¶ 11(FF)-(II). However, the Complaint fails to allege or identify a specific policy the name of the person who terminated Plaintiff's employment. *See* Doc. No. 1, ¶ 10, ("On February 18, 2011, the [Defendants] terminated [Plaintiff's] employment.").

Moreover, nowhere in his Complaint does Plaintiff allege that either of these individuals are "decisionmakers" with the final authority to establish a policy. Similarly, Plaintiff fails to allege which of these individuals (if either of them) had the power to acquiesce to the alleged well-settled custom of discriminating against older employees. Accordingly, the Court finds that the Complaint is deficient with regard to his Section 1983 claim, and will grant both of the Defendants' Motions to Dismiss, without prejudice, in this regard.[2]

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[2] The Court acknowledges Defendant DA Office's argument that it is not a separate entity from Defendant County and thus, not a separate entity subject to Section 1983 liability. In support of this position, Defendant DA's Office cited caselaw. The Court notes that Plaintiff did not directly address this argument nor the caselaw cited in his Brief in Opposition. If Plaintiff chooses to file an Amended Complaint and continues to assert the Section 1983 claim against Defendant DA's Office, and if Defendant DA's Office files a Motion to Dismiss the Section 1983 claim from the Amended Complaint, the Court would urge both parties to more fully brief the specific issue of whether Defendant DA's Office can be subject to Section 1983 liability. At this point in time, the Court declines to rule on the issue of whether

(Continued on following page)

E. Counts V and VI – Pennsylvania Human Relations Act Violations

Defendant AC was the only Defendant to file a Motion to Dismiss Counts V and VI of the Complaint, both of which allege that Plaintiff's rights under the Pennsylvania Human Relations Act ("PHRA") were violated. Defendant AC notes that nowhere in either of these two Counts does the Plaintiff assert any allegations against Defendant AC.

Plaintiff concurs that Counts V and VI "inadvertently refer to only [Defendant DA's Office] and not [Defendant AC]." Doc. No. 12, p. 12. However, Plaintiff argues that by incorporating all prior averments he has preserved his PHRA claims against Defendant AC. *Id.*

The Court will grant Defendant AC's Motion to Dismiss these two Counts, without prejudice, thereby allowing Plaintiff time to amend his pleading in this regard should he choose to do so.

F. Punitive Damages

Both Defendants contend that Plaintiff is not entitled to recover punitive damages under the ADEA, Title VII, or Pennsylvania's Whistleblower

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Defendant DA's Office is an entity subject to Section 1983 liability, due to the fact that it has decided that Plaintiff's Complaint currently lacks enough factual information to sustain a plausible cause of action against either Defendant.

Law. In addition, both Defendants claim they are immune from punitive damages under Section 1983.[3]

Plaintiff concedes the following: (1) punitive damages are unavailable to him under Pennsylvania's Whistleblower Law; (2) Defendants are immune from punitive damages under Section 1983; and (3) he has no viable Title VII claim. Doc. No. 10, pg. 9 and Doc. no. 12, p. 13. Given these concessions, Plaintiff's recovery of any punitive damage award against either Defendant would be limited to his ADEA claim.

In this regard, Plaintiff concedes that the United States Court of Appeals for the Third Circuit has not ruled on whether punitive damages are available under the ADEA. Thus, this Court may obtain guidance from other courts within the Third Circuit and the body of case law on this issue from other Circuits.

Recently, in *Kelly v. U.S. Steel Corp.,* 2011 WL 3607458, (W.D .Pa. August 16, 2011), Judge McVerry noted the following when granting U.S. Steel's Motion to Dismiss Kelly's punitive damages from his ADEA claim:

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[3] Plaintiff did not seek punitive damages under his PHRA claims, presumably because such damages are unavailable under the PHRA. *See*, *Hoy v. Angelone,* 720 A.2d 745, 749 (Pa.1998) ("While punitive damages also serve to deter, simply put, we do not consider punitive damages to be consistent with the remedial nature of the Act.").

> Defendant likewise contends that Kelly may not recover punitive damages under the ADEA. Although the United States Court of Appeals for the Third Circuit has not addressed this issue, all of the courts of appeals which have done so have denied claims for punitive damages in ADEA cases. *See Bruno v. Western Elec. Co.,* 829 F.2d 957, 966-67 (10th Cir.1987) (collecting cases from other circuits). Several members of this Court and a number of our sister courts within the Third Circuit have denied claims for punitive damages under the ADEA as well. *See, e.g., Zurik v. Woodruff Family Services,* 2009 WL 4348826, at *1 (2009 W.D. Pa. Dec. 1, 2009); *Baldwin v. Peake,* 2009 WL 1911040, at *3 (2009 W.D. Pa. July 1, 2009); *Steward v. Sears Roebuck & Co.,* 312 F.Supp.2d 719, 730 (E.D.Pa.2004). The Court finds those decisions persuasive and agrees that the ADEA does not authorize claims for punitive damages.

Kelly at *3.

Based on Plaintiff's concessions, coupled with this Court's Opinion that punitive damages are not available to Plaintiff under the ADEA, the Court finds that Plaintiff may not pursue punitive damages against either Defendant. Accordingly, Defendants' Motions to Dismiss punitive damages from this case will be granted.

F. Compensatory Damages

Both Defendants argue, and Plaintiff concedes, that Plaintiff cannot recover compensatory damages for pain, suffering, humiliation, emotional distress, and anxiety under the ADEA. *See Watcher v. Pottsville Area Emerg. Med. Svcs., Inc.,* 248 Fed.Appx. 272, 277 (3d Cir.2007) (a plaintiff cannot recover liquidated damages for pain and suffering under the ADEA), *citing Rodriguez v.. Taylor,* 569 F.2d 1231 (3d Cir.1977). *See also Rogers v. Exxon Research & Engineering Co.,* 550 F.2d 834, 841-42 (3d Cir.1977) (" . . . we hold that damages for 'pain and suffering' or emotional distress cannot properly be awarded in ADEA cases.").

Accordingly, Defendants' Motions to Dismiss Plaintiffs' claim for compensatory damages pursuant to the ADEA will be granted.

III. DISCUSSION – DEFENDANT'S MOTION TO STRIKE

Rule 12(f) of the Federal Rules of Civil Procedure provides: "[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed.R.Civ.P. 12(f).

As two Courts in this district have noted:

> The purpose of a motion to strike is to clean up the pleadings, streamline litigation, and avoid unnecessary forays into immaterial matters." *Natale v. Winthrop Resources Corp.,*

> Civil Action No. 07-4686, 2008 WL 2758238 at *14 (E.D.Pa. July 9, 2008) (*quoting McInerney v. Moyer Lumber and Hardware, Inc.,* 244 F.Supp.2d 393, 402 (E.D.Pa.2002). While "[a] court possesses considerable discretion in disposing of a motion to strike under Rule 12(f)," such motions are "not favored and usually will be denied unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties, or if the allegations confuse the issues in the case." *Id.* (*quoting River Road Devel. Corp. v. Carlson Corp.,* Civ. A. No. 89-7037,1990 WL 69085, at *2 (E.D.Pa. May 23, 1990). Striking some or all of a pleading is therefore considered a "drastic remedy to be resorted to only when required for the purposes of justice." *Id.* (*quoting DeLa Cruz v. Piccari Press,* 521 F.Supp.2d 424, 428 (E.D.Pa.2007) (quotations omitted).

See Thornton v. UL Enterprises, 2010 WL 1004998, at *1 (W.D.Pa. March 16, 2010) (Cohill, J.), *quoting Adams v. County of Erie, Pa.,* 2009 WL 4016636, at *1 (W.D.Pa. Nov, 19, 2009) (McLaughlin, J.).

Turning to the facts of this case, Defendant DA's office contends that paragraph 11, subparagraphs (ZZ) through (CCC) should be stricken because they do not contain information pertinent to any of the claims alleged by Plaintiff. These paragraphs read as follows:

> ZZ. In early January 2010, Hildebrand overheard a conversation between ADA Claus

and Investigator Graber where Claus made incriminating statements concerning the Senator Jane Orie case. Claus and Graber knew Hildebrand overheard this conversation because they got quiet after they first saw Hildebrand and moved away from him.

AAA. In December, 2009 an informal memo was issued by DAs office that any and all political files on DA's computers were to be a [sic] erased. Hildebrand spoke with ADA Darryl Parker who advised Hildebrand he was ordered by Zappala personally to come in on December 24, 2009 to delete his political files by the DA himself. It is believed and averred this action was taken in response to a freedom of information request filed by Jane Orie's attorney seeking to have all political files on the district attorney's office computers be produced under the freedom of information act.

BBB. In January 2010 the DA computers were to be sanitized from political references by outside consultant, Fran Zovko. This was done to double check and make sure all political files contained on the DA's computers would be removed before Ms. Botsford responded to the freedom of information request made by Jane Orie or her attorneys.

CCC. Darryl Parker advised Hildebrand he complained to Dawn Botsford that the DA's practice of wiping clean political references from computers was an obstruction of justice and was wrong and should not be done. Darryl

> Parker was advised to keep his mouth shut and just do as he was told. Hildebrand had no political files on his computer and did not need to comply with the DA's request.

Doc. No. 1, ¶ 11(ZZ)-(CCC).

In response to Defendant DA Office's argument, Plaintiff contends that once his contributions to the Orie family became known to his superiors in the workplace the harassment and discrimination against him intensified. *See* Doc. No. 10, p. 15. Plaintiff claims the averments found in subparagraphs 1 1(ZZ) through (CCC) bear "reasonable relations" to support Plaintiff's First Amendment and Whistleblower claims. Doc. No. 10, p. 15. However, aside from making this blanket statement, Plaintiff's Brief in Opposition to Defendant DA Office's Motion to Strike fails to provide any clear explanation of how the allegations found in these four subparagraphs support his First Amendment or his Pennsylvania Whistleblower Law claim.

The Court notes that Plaintiff's Complaint alleges that Defendants hired Plaintiff in 2005 to work as a detective for the Allegheny County District Attorney's Investigation Unit. Doc. No. 1, ¶ 9. Plaintiff claims that starting in 2009, Defendants "began an official campaign to rid [Defendants'] offices of older employees. . . ." *Id.* ¶ 11(B). The majority of the remaining subparagraphs to paragraph 11 of Plaintiff's Complaint provide additional details and allegations concerning what Defendants did and did not do

to "rid [Defendants'] offices of older employees[,]" and Plaintiff in particular. *See* ¶ 11(C)-(YY).

Recalling that the purpose of a motion to strike is to "clean up the pleadings, streamline litigation, and avoid unnecessary forays into immaterial matters," and while this Court is (generally) not inclined to grant a Motion to Strike under Rule 12(f), facts pled here in subparagraphs 11(ZZ) through 11(CCC) appear to have no relation to the controversy. In addition, the Court finds that these allegations may cause prejudice to Defendant DA's Office and confuse the overarching issues and claims presented by Plaintiff in the case.

For these reasons, the Court will grant Defendant DA Office's Motion to Strike subparagraphs 11(ZZ) through (CCC).

IV. CONCLUSION

Based on the foregoing law and authority, the Court will enter an appropriate Order consistent with this Opinion wherein the Court has held as follows:

(1) Defendants' Motions to Dismiss will be GRANTED WITH PREJUDICE as to: (1) Count III, Plaintiff's Title VII Claim; (2) Plaintiff's demand for a punitive damage award; and (3) Plaintiff's demand for compensatory damages under the ADEA.

(2) Defendants' respective Motions to Dismiss will be GRANTED, WITHOUT PREJUDICE as to Count I (Plaintiff's ADEA claim), Count II (Plaintiff's

Pennsylvania's Whistleblower Law claim), Count IV (Plaintiff's Section 1983 claim) and Counts V and VI (Plaintiff's PHRA claims) of the Complaint.

(3) Defendant DA's Office Motion to Strike subparagraphs 11(ZZ) through (CCC) will also be GRANTED.

42 U.S.C. § 1983. Civil action for deprivation of rights

Effective: October 19, 1996

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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42 U.S.C. § 1988. Proceedings in vindication of civil rights

Effective: September 22, 2000

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil

rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless

such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

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29 U.S.C. § 211. Collection of data

(a) Investigations and inspections

The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter. Except as provided in section 212 of this title and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 212 of this title, the Administrator shall

bring all actions under section 217 of this title to restrain violations of this chapter.

(b) State and local agencies and employees

With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Secretary of Labor may, for the purpose of carrying out their respective functions and duties under this chapter, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Records

Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder. The employer of an employee who performs substitute work described in section 207(p)(3) of this title may not be required under this subsection to keep a record of the hours of the substitute work.

(d) Homework regulations

The Administrator is authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this chapter, and all existing regulations or orders of the Administrator relating to industrial homework are continued in full force and effect.

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29 U.S.C. § 216. Penalties

Effective: May 21, 2008

(a) Fines and imprisonment

Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an

additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this

subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

(c) Payment of wages and compensation; waiver of claims; actions by the Secretary; limitation of actions

The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless

such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

(d) Savings provisions

In any action or proceeding commenced prior to, on, or after August 8, 1956, no employer shall be subject to any liability or punishment under this chapter or the Portal-to-Portal Act of 1947 [29 U.S.C.A. § 251 et seq.] on account of his failure to comply with any provision or provisions of this chapter or such Act (1) with respect to work heretofore or hereafter performed in a workplace to which the exemption in section 213(f) of this title is applicable, (2) with respect to work performed in Guam, the Canal Zone or Wake Island before the effective date of this amendment of

subsection (d), or (3) with respect to work performed in a possession named in section 206(a)(3) of this title at any time prior to the establishment by the Secretary, as provided therein, of a minimum wage rate applicable to such work.

(e)(1)(A) Any person who violates the provisions of sections 212 or 213(c) of this title, relating to child labor, or any regulation issued pursuant to such sections, shall be subject to a civil penalty not to exceed –

(i) $11,000 for each employee who was the subject of such a violation; or

(ii) $50,000 with regard to each such violation that causes the death or serious injury of any employee under the age of 18 years, which penalty may be doubled where the violation is a repeated or willful violation.

(B) For purposes of subparagraph (A), the term "serious injury" means –

(i) permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation);

(ii) permanent loss or substantial impairment of the function of a bodily member, organ, or mental faculty, including the loss of all or part of an arm, leg, foot, hand or other body part; or

(iii) permanent paralysis or substantial impairment that causes loss of movement or mobility of an arm, leg, foot, hand or other body part.

(2) Any person who repeatedly or willfully violates section 206 or 207, relating to wages, shall be subject to a civil penalty not to exceed $1,100 for each such violation.

(3) In determining the amount of any penalty under this subsection, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of any penalty under this subsection, when finally determined, may be –

(A) deducted from any sums owing by the United States to the person charged;

(B) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor; or

(C) ordered by the court, in an action brought for a violation of section 215(a)(4) of this title or a repeated or willful violation of section 215(a)(2) of this title, to be paid to the Secretary.

(4) Any administrative determination by the Secretary of the amount of any penalty under this subsection shall be final, unless within 15 days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance

with section 554 of Title 5, and regulations to be promulgated by the Secretary.

(5) Except for civil penalties collected for violations of section 212 of this title, sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provision of section 9a of this title. Civil penalties collected for violations of section 212 of this title shall be deposited in the general fund of the Treasury.

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29 U.S.C. § 217. Injunction proceedings

The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title).

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29 U.S.C. § 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer –

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

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

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

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization –

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for

employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

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

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer

or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization –

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section –

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual

specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan –

> **(i)** where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or
>
> **(ii)** that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) Repealed. Pub.L. 101-239, Title VI, § 6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233

(h) Practices of foreign corporations controlled by American employers; foreign employers not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the –

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control,

of the employer and the corporation.

(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of

normal retirement age; compliance; highly compensated employees

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits –

> **(A)** in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or
>
> **(B)** in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan –

> **(A)** if distribution of benefits under such plan with respect to such employee has commenced as

of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056(a)(3) of this title and section 401(a)(14)(C) of Title 26, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title or section 411(a)(3)(B) of Title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of Title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of Title 26.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals or it is a plan permitted by subsection (m) of this section..[1]

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of Title 26 and subparagraphs (C) and (D) of section 411(b)(2) of Title 26 shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the requirements of such sections 411(b)(1)(H) and 411(b)(2).

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[1] So in original.

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 1002(24)(B) of this title and section 411(a)(8)(B) of Title 26.

(9) For purposes of this subsection –

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

(B) The term "compensation" has the meaning provided by section 414(s) of Title 26.

(10) Special rules relating to age

(A) Comparison to similarly situated younger individual

(i) In general

A plan shall not be treated as failing to meet the requirements of paragraph (1) if a participant's accrued benefit, as determined as of any date under the terms of the plan, would be equal to or greater than that of any similarly situated, younger individual who is or could be a participant.

(ii) Similarly situated

For purposes of this subparagraph, a participant is similarly situated to any other individual if such participant is identical to such other individual in every respect (including

period of service, compensation, position, date of hire, work history, and any other respect) except for age.

(iii) Disregard of subsidized early retirement benefits

In determining the accrued benefit as of any date for purposes of this clause, the subsidized portion of any early retirement benefit or retirement-type subsidy shall be disregarded.

(iv) Accrued benefit

For purposes of this subparagraph, the accrued benefit may, under the terms of the plan, be expressed as an annuity payable at normal retirement age, the balance of a hypothetical account, or the current value of the accumulated percentage of the employee's final average compensation.

(B) Applicable defined benefit plans

(i) Interest credits

(I) In general

An applicable defined benefit plan shall be treated as failing to meet the requirements of paragraph (1) unless the terms of the plan provide that any interest credit (or an equivalent amount) for any plan year shall be at a rate which is not greater than a market rate of return. A plan shall not be treated as failing to meet the requirements of this subclause merely because the plan provides for a

reasonable minimum guaranteed rate of return or for a rate of return that is equal to the greater of a fixed or variable rate of return.

(II) Preservation of capital

An interest credit (or an equivalent amount) of less than zero shall in no event result in the account balance or similar amount being less than the aggregate amount of contributions credited to the account.

(III) Market rate of return

The Secretary of the Treasury may provide by regulation for rules governing the calculation of a market rate of return for purposes of subclause (I) and for permissible methods of crediting interest to the account (including fixed or variable interest rates) resulting in effective rates of return meeting the requirements of subclause (I). In the case of a governmental plan (as defined in the first sentence of section 414(d) of Title 26, a rate of return or a method of crediting interest established pursuant to any provision of Federal, State, or local law (including any administrative rule or policy adopted in accordance with any such law) shall be treated as a market rate of return for purposes of subclause (I) and a permissible method of crediting interest for purposes of meeting the requirements of subclause (I), except that

this sentence shall only apply to a rate of return or method of crediting interest if such rate or method does not violate any other requirement of this chapter.

(ii) Special rule for plan conversions

If, after June 29, 2005, an applicable plan amendment is adopted, the plan shall be treated as failing to meet the requirements of paragraph (1)(H) unless the requirements of clause (iii) are met with respect to each individual who was a participant in the plan immediately before the adoption of the amendment.

(iii) Rate of benefit accrual

Subject to clause (iv), the requirements of this clause are met with respect to any participant if the accrued benefit of the participant under the terms of the plan as in effect after the amendment is not less than the sum of –

(I) the participant's accrued benefit for years of service before the effective date of the amendment, determined under the terms of the plan as in effect before the amendment, plus

(II) the participant's accrued benefit for years of service after the effective date of the amendment, determined under the terms of the plan as in effect after the amendment.

(iv) Special rules for early retirement subsidies

For purposes of clause (iii)(I), the plan shall credit the accumulation account or similar amount with the amount of any early retirement benefit or retirement-type subsidy for the plan year in which the participant retires if, as of such time, the participant has met the age, years of service, and other requirements under the plan for entitlement to such benefit or subsidy.

(v) Applicable plan amendment

For purposes of this subparagraph –

(I) In general

The term "applicable plan amendment" means an amendment to a defined benefit plan which has the effect of converting the plan to an applicable defined benefit plan.

(II) Special rule for coordinated benefits

If the benefits of 2 or more defined benefit plans established or maintained by an employer are coordinated in such a manner as to have the effect of the adoption of an amendment described in subclause (I), the sponsor of the defined benefit plan or plans providing for such coordination shall be treated as having adopted such a plan amendment as of the date such coordination begins.

(III) Multiple amendments

The Secretary of the Treasury shall issue regulations to prevent the avoidance of the purposes of this subparagraph through the use of 2 or more plan amendments rather than a single amendment.

(IV) Applicable defined benefit plan

For purposes of this subparagraph, the term "applicable defined benefit plan" has the meaning given such term by section 1053(f)(3) of this title.

(vi) Termination requirements

An applicable defined benefit plan shall not be treated as meeting the requirements of clause (i) unless the plan provides that, upon the termination of the plan –

(I) if the interest credit rate (or an equivalent amount) under the plan is a variable rate, the rate of interest used to determine accrued benefits under the plan shall be equal to the average of the rates of interest used under the plan during the 5-year period ending on the termination date, and

(II) the interest rate and mortality table used to determine the amount of any benefit under the plan payable in the form of an annuity payable at normal retirement age shall be the rate and table specified under the plan for such purpose as of the termination date, except

that if such interest rate is a variable rate, the interest rate shall be determined under the rules of subclause (I).

(C) Certain offsets permitted

A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the plan provides offsets against benefits under the plan to the extent such offsets are allowable in applying the requirements of section 401(a) of Title 26.

(D) Permitted disparities in plan contributions or benefits

A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the plan provides a disparity in contributions or benefits with respect to which the requirements of section 401(l) of Title 26 are met.

(E) Indexing permitted

(i) In general

A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the plan provides for indexing of accrued benefits under the plan.

(ii) Protection against loss

Except in the case of any benefit provided in the form of a variable annuity, clause (i) shall not apply with respect to any indexing which results in an accrued benefit less than the accrued benefit determined without regard to such indexing.

(iii) Indexing

For purposes of this subparagraph, the term "indexing" means, in connection with an accrued benefit, the periodic adjustment of the accrued benefit by means of the application of a recognized investment index or methodology.

(F) Early retirement benefit or retirement-type subsidy

For purposes of this paragraph, the terms "early retirement benefit" and "retirement-type subsidy" have the meaning given such terms in section 1053(g)(2)(A) of this title.

(G) Benefit accrued to date

For purposes of this paragraph, any reference to the accrued benefit shall be a reference to such benefit accrued to date.

(j) Employment as firefighter or law enforcement officer

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken –

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual

was discharged after the date described in such section, and the individual has attained –

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

(B)(i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; or

(ii) if applicable State or local law was enacted after September 30, 1996, and the individual was discharged, the higher of –

(I) the age of retirement in effect on the date of such discharge under such law; and

(II) age 55; and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

(k) Seniority system or employee benefit plan; compliance

A seniority system or employee benefit plan shall comply with this chapter regardless of the date of adoption of such system or plan.

(l) Lawful practices; minimum age as condition of eligibility for retirement benefits; deductions from severance pay; reduction of long-term disability benefits

Notwithstanding clause (i) or (ii) of subsection (f)(2)(B) of this section –

(1)(A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because –

(i) an employee pension benefit plan (as defined in section 1002(2) of this title) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

(ii) a defined benefit plan (as defined in section 1002(35) of this title) provides for –

(I) payments that constitute the subsidized portion of an early retirement benefit; or

(II) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42 U.S.C. 401 et seq.), and that do not exceed such old-age insurance benefits.

(B) A voluntary early retirement incentive plan that –

(i) is maintained by –

(I) a local educational agency (as defined in section 7801 of Title 20, or

(II) an education association which principally represents employees of 1

or more agencies described in subclause (I) and which is described in section 501(c)(5) or (6) of Title 26 and exempt from taxation under section 501(a) of Title 26, and

(ii) makes payments or supplements described in subclauses (I) and (II) of subparagraph (A)(ii) in coordination with a defined benefit plan (as so defined) maintained by an eligible employer described in section 457(e)(1)(A) of Title 26 or by an education association described in clause (i)(II),

shall be treated solely for purposes of subparagraph (A)(ii) as if it were a part of the defined benefit plan with respect to such payments or supplements. Payments or supplements under such a voluntary early retirement incentive plan shall not constitute severance pay for purposes of paragraph (2).

(2)(A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because following a contingent event unrelated to age –

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii);

are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in section 501(c)(17) of Title 26) that –

(i) constitutes additional benefits of up to 52 weeks;

(ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and

(iii) is discontinued once the individual becomes eligible for an immediate and unreduced pension.

(D) For purposes of this paragraph and solely in order to make the deduction authorized under this paragraph, the term "retiree health benefits" means benefits provided pursuant to a group health plan covering retirees, for which (determined as of the contingent event unrelated to age) –

(i) the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits provided under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.);

(ii) the package of benefits provided by the employer for the retirees who are age 65 and above is at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII of such Act; or

(iii) the package of benefits provided by the employer is as described in clauses (i) and (ii).

(E)(i) If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a rate of $3,000 per year for benefit years before age 65, and $750 per year for benefit years beginning at age 65 and above.

(ii) If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of $48,000 for individuals below age 65, and $24,000 for individuals age 65 and above.

(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on October 16, 1990, and shall be adjusted on an annual basis, with respect to

a contingent event that occurs subsequent to the first year after October 16, 1990, based on the medical component of the Consumer Price Index for all-urban consumers published by the Department of Labor.

(iv) If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required to pay.

(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The relief shall be in addition to any other remedies provided under Federal or State law.

(3) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because an employer provides a bona fide employee benefit plan or plans under which long-term disability benefits received by an individual are reduced by any pension benefits (other than those attributable to employee contributions) –

(A) paid to the individual that the individual voluntarily elects to receive; or

(B) for which an individual who has attained the later of age 62 or normal retirement age is eligible.

(m) Voluntary retirement incentive plans

Notwithstanding subsection (f)(2)(b) of this section, it shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because a plan of an institution of higher education (as defined in section 1001 of Title 20) offers employees who are serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) supplemental benefits upon voluntary retirement that are reduced or eliminated on the basis of age, if –

(1) such institution does not implement with respect to such employees any age-based reduction or cessation of benefits that are not such supplemental benefits, except as permitted by other provisions of this chapter;

(2) such supplemental benefits are in addition to any retirement or severance benefits which have been offered generally to employees serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure), independent of any early retirement or exit-incentive plan, within the preceding 365 days; and

(3) any employee who attains the minimum age and satisfies all non-age-based conditions for receiving a benefit under the plan has an opportunity lasting not less than 180 days to elect to retire and to receive the maximum benefit that could then be elected by a younger but otherwise similarly situated employee, and the plan does

not require retirement to occur sooner than 180 days after such election.

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29 U.S.C.A. § 626. Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided,* That liquidated damages shall be payable only in cases of willful violations of this

chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of

whether equitable relief is sought by any party in such action.

(d)(1) No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed –

> **(A)** within 180 days after the alleged unlawful practice occurred; or
>
> **(B)** in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

(2) Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(3) For purposes of this section, an unlawful practice occurs, with respect to discrimination in compensation in violation of this chapter, when a discriminatory compensation decision or other practice is adopted, when a person becomes subject to a discriminatory compensation decision or other practice, or when a person is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is

paid, resulting in whole or in part from such a decision or other practice.

(e) Reliance on administrative rulings; notice of dismissal or termination; civil action after receipt of notice

Section 259 of this title shall apply to actions under this chapter. If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

(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.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum –

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a

waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

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29 U.S.C. § 631. Age limits

(a) Individuals at least 40 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

(b) Employees or applicants for employment in Federal Government

In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

(c) Bona fide executives or high policymakers

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate

nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Equal Employment Opportunity Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

U.S. Constitution

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.