

March 2017

Panel: Age Discrimination Issues in Higher Education

Jason Walta
NEA Senior Counsel

Follow this and additional works at: <https://thekeep.eiu.edu/jcba>



Part of the [Collective Bargaining Commons](#), and the [Higher Education Commons](#)

Recommended Citation

Walta, Jason (2017) "Panel: Age Discrimination Issues in Higher Education," *Journal of Collective Bargaining in the Academy*: Vol. 0, Article 46.

DOI: <https://doi.org/10.58188/1941-8043.1698>

Available at: <https://thekeep.eiu.edu/jcba/vol0/iss12/46>

This Proceedings Material is brought to you for free and open access by the Journals at The Keep. It has been accepted for inclusion in *Journal of Collective Bargaining in the Academy* by an authorized editor of The Keep. For more information, please contact tabruns@eiu.edu.

**NATIONAL CENTER
FOR THE STUDY OF COLLECTIVE BARGAINING IN
HIGHER EDUCATION AND THE PROFESSIONS**

44th Annual National Conference

PANEL: AGE DISCRIMINATION ISSUES IN HIGHER EDUCATION

AGE DISCRIMINATION — THE UNION PERSPECTIVE

March 28, 2017

Jason Walta, Senior Counsel
Amanda Shapiro, Law Fellow
National Education Association
1201 Sixteenth St., NW
Washington DC 20036

I. Background: Legal Prohibitions against Age-Based Discrimination in Employment

A. Statutory protections

The Age Discrimination in Employment Act (ADEA) 1967 (“ADEA”) is a federal law that prohibits discrimination against individuals who are at least 40 years of age in private and public employment. 29 U.S.C. § 621-34. The ADEA covers employers with more than 20 employees, *id.* § 630(b), and restricts age-based discrimination in hiring, termination, compensation, and other terms and conditions of employment, *id.* § 623(a)(1). However, even for individuals who otherwise fall within the ADEA's protected class (40 years and older), the ADEA does not protect against “reverse” discrimination—*i.e.*, when younger workers are treated less favorably than older ones. *See Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581 (2004) (concluding that a collective-bargaining agreement that preserved health benefits for retired employees over 50 years old while discontinuing such benefits for younger employees did not violate the ADEA).

Many states and localities also have laws prohibiting age discrimination in employment, and some of them have protections that are more expansive than the ADEA's. *See, e.g.*, N.Y. Exec. Law § 296(1) (prohibiting age discrimination against employees 18 years or older, and extending this prohibition to employers with 4 or more employees); N.Y.C. Admin. Code § 8-107, subd. 1(a) (prohibiting age discrimination in employment without any age threshold); *Tappe v. All. Capital Mgmt., L.P.*, 198 F. Supp. 2d 368 (S.D.N.Y. 2001) (acknowledging that the New York and New York City age-discrimination laws prohibit discrimination that favors older workers over younger ones); *McLean Trucking Co. v. State Human Rights Appeal Bd.*, 437 N.Y.S.2d 309 (1981) (same), *aff'd*, 55 N.Y.2d 910, 433 N.E.2d 1277 (1982).

B. Administration and enforcement of the ADEA

The ADEA charges the EEOC with administration and enforcement responsibilities, including the authority to “issue such rules and regulations as it may consider necessary or appropriate for carrying out” its duties. 29 U.S.C. § 628.

The ADEA provides both for private rights of action and for enforcement proceedings brought by the EEOC. *See id.* § 626. Where the EEOC brings suit on an individual's behalf, the individual's right to sue "terminate[s] upon the commencement" of the EEOC action. *Id.*

Even though states and their political subdivisions are included within the ADEA's definition of an "employer," *id.* § 630(b), an individual employee may not bring an ADEA suit against any government entity that qualifies as an "arm of the state" for purposes of the Eleventh Amendment. *See Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (holding that the ADEA did not validly abrogate the states' sovereign immunity). However, state employers are not immune from suits brought by the EEOC. *See, e.g., EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 179 (4th Cir. 2011).

In order to bring a claim under the ADEA, an employee must file a timely and charge with the EEOC. The charge must be filed with the EEOC within 180 days after the alleged unlawful practice occurred if there is no state deferral agency. If, however, the state has a deferral agency, the charge must be filed within 300 days after the alleged unlawful practice occurred or 30 days after receipt of notice of termination of proceedings under state law, whichever is earlier. *Id.* § 626(d). Under limited circumstances, this limitations period may be subject to equitable tolling.

In addition, the claimant must file a charge with a state deferral agency, if such an agency exists. *Id.* § 633(b). Although filing a charge with the state deferral agency is mandatory, the failure to file in a timely manner is not fatal to a later ADEA action. *See Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979).

A charge is substantively adequate if "the filing, taken as a whole, should be construed as a request by the employee for the agency to take whatever action is necessary to vindicate her rights." *Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 398 (2008); *see also* 29 C.F.R. §§ 1626.6, 1626.8.

Claimants may commence a civil action no earlier than 60 days after filing an EEOC charge and no later than 90 days after receiving notice of dismissal or termination of EEOC proceedings. 29 U.S.C. § 626(d)-(e).

C. Prohibited practices for employers and labor organizations under the ADEA

The ADEA identifies a number of prohibited practices. For an employer, it is unlawful:

- (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
- (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
- (3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. § 623(a).

For a labor organization, it is unlawful to:

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

Id. § 623(c).

In addition, the ADEA prohibits employers and labor organizations from discriminating against an individual because such individual has opposed any prohibited practice, made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under the Act. *Id.* § 623(d). The ADEA also prohibits employers and labor organizations from publishing any notice or advertisement relating to employment or membership that indicates an age-based preference, limitation, or specification. *Id.* § 623(e); *see also* 29 C.F.R. § 1625.4(a) (noting that

prohibited advertisements include those containing age-based “trigger words,” such as “age 25 to 35,” “young,” or “recent college graduate”).

D. Proving ADEA Claims

i. Disparate Treatment

The most common approach to establishing an ADEA violation is to prove “disparate treatment,” where the central issue is whether an adverse employment action was motivated by discriminatory intent. The plaintiff may prove discriminatory intent by direct or circumstantial evidence.

Direct evidence of discriminatory intent—such as a “smoking-gun” statement that by a supervisor that he was discharging the plaintiff because of his age—is often hard to come by. *But cf. Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) (noting that direct evidence of discrimination can come from a policy that his age-discriminatory “on its face”). If such evidence is unavailable, an ADEA plaintiff proceeding under a disparate treatment theory is therefore left to prove intentional discrimination by circumstantial evidence under the traditional framework established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 113 (1981), and *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502 (1993). Under that framework, the plaintiff must first establish a prima facie case of intentional age discrimination by proving that:

- (1) he or she is a member of the protected age group;
- (2) he or she was qualified;
- (3) he or she was adversely affected; and
- (4) a younger individual was not similarly affected.¹

¹ An ADEA plaintiff needn’t show that the younger individual was also young enough to be outside the ADEA’s protected class (*i.e.*, younger than 40); however, the difference in age must be great enough to permit an inference of discrimination. *See O’Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 313 (1996)
(continued...)

Once a plaintiff has established this prima facie case, the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its action (such as poor job performance). If the defendant meets this fairly minimal burden, the plaintiff must ultimately persuade the factfinder that the challenged employment action was motivated by discriminatory intent. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 153 (2000). This is often done by showing that the defendant's proffered explanation for its actions was false and pretextual. *See id.* ("Proof that the defendant's explanation is unworthy of credence is . . . one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive.").

ADEA plaintiffs cannot proceed on a so-called "mixed motive" approach to proving disparate treatment. Under Title VII, a plaintiff can succeed by proving that a prohibited consideration such as race or sex was a "motivating factor" behind an adverse employment action, *see* 42 U.S.C. § 2000e-2(m), but the remedies for the violation will be limited if the defendant can prove that it would have taken the same action without the prohibited consideration, *see id.* § 2000e-5(g)(2)(B). *See generally Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). However, in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), the Supreme Court held that—due to material differences in the language of the two statutory schemes—a "mixed motive" approach is not available under the ADEA. Rather, the Court held that, unlike a plaintiff in a Title VII case, an ADEA plaintiff alleging disparate treatment must show that age was the "but-for" cause of the challenged action. *Id.*; *but see Gonska v. Highland View Manor, Inc.*, No. CV126030032S, 2014 WL 3893100 (Conn. Super. Ct. June 26, 2014) (rejecting the *Gross* analysis as applied to discrimination claims under state law).

(observing that an inference of discrimination "cannot be drawn from the replacement of one worker with another worker insignificantly younger").

ii. Disparate Impact

In *Smith v. City of Jackson*, 544 U.S. 228 (2005), the Supreme Court confirmed that current employees may bring “disparate impact” claims under the ADEA. A disparate impact claim permits a plaintiff to establish liability without showing that the adverse action was necessarily based on an age-discriminatory motive. Rather, she need only show that:

- (1) she was 40 years of age or older at the time of the adverse action (in other words, that she was in the ADEA’s protected class);
- (2) the defendant used a specific test, requirement, practice, selection criterion, etc. that had a significantly adverse or disproportionate impact on employees 40 years of age or older; and
- (3) the challenged test, requirement, practice, selection criterion, etc. resulted in adverse action that harmed the plaintiff.

The defendant in such an action may then attempt to prove one of several affirmative defenses (discussed below).

It is currently unsettled, however, whether *applicants for employment*—as opposed to current employees—may bring disparate impact claims under the ADEA. The EEOC has interpreted the ADEA as permitting job applicants to bring disparate impact claims, *see* 29 C.F.R. § 1625.7(c), and this approach has been followed by some courts, *see, e.g., Rabin v. PricewaterhouseCoopers LLP*, No. 16-cv-02276-JST, 2017 WL 661354 (N.D. Cal. Feb. 17, 2017). However, the Eleventh Circuit sitting en banc recently rejected the EEOC’s regulation and held that a disparate impact claim was not available to a plaintiff suing for age discrimination in hiring. *See Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958 (11th Cir. 2016), *petition for cert. filed*, No. 16-971, 2017 WL 491053 (Feb. 2, 2017). The court reasoned that the text of the ADEA only makes such claims available to those with “status as an employee.” *Id.* (quoting 29 U.S.C. § 623(a)(2)). A petition for certiorari in *Villarreal* is currently pending before the Supreme Court.

E. Defenses

i. Reasonable factor other than age (RFOA)

The ADEA allows a defendant to prove as an affirmative that an otherwise discriminatory “differentiation is based on reasonable factors other than age.” 29 U.S.C. § 623(f)(1). This RFOA defense applies to disparate impact claims, *see Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84 (2008), but not to claims of disparate treatment, *see* 29 C.F.R. § 1625.7(d).

The EEOC’s regulations explain that a RFOA is a “non-age factor that is objectively reasonable when viewed from the position of a prudent employer mindful of its responsibilities under the ADEA under like circumstances.” *Id.* § 1625.7(e)(1). To establish the RFOA defense, an employer must show that “the employment practice was both reasonably designed to further or achieve a legitimate business purpose and administered in a way that reasonably achieves that purpose in light of the particular facts and circumstances.” *Id.* Whether a particular differentiation qualifies for the RFOA defense is a case-by-case determination, and the relevant considerations include (but are not limited to):

- (i) the extent to which it is related to the a stated business purpose;
- (ii) the extent to which it was accurately defined and fairly applied;
- (iii) the extent to which it limited the discretion to assess or select employees for adverse action based on subjective criteria or negative age-based stereotypes;
- (iv) the extent to which the adverse impact on older workers was assessed; and
- (v) the degree of the harm to individuals within the protected age group, in terms of both the extent of injury and the numbers of persons adversely affected, and the extent to which reasonable steps were taken to reduce the harm.

Id. § 1625.7(e)(2).

Importantly, the EEOC regulations declare that the RFOA defense is not available for a “differentiation based on the average cost of employing older employees as a group,” except for certain employee benefit plans that qualify for an exemption under another provision of the ADEA (discussed below). *Id.* at § 1625.7(f). There is significant tension, however, between EEOC’s position

and the conclusion of some court that “concern with the elevated costs of senior employees does not constitute age discrimination.” *James v. N.Y. Racing Ass’n*, 233 F.3d 149, 153 (2d Cir. 2000); *see also Cerni v. J.P. Morgan Securities LLC*, 15-CV-5389 (AJN), 2016 WL 5805300 (S.D.N.Y. Sept. 20, 2016) (holding that terminating higher paid employees does not violate the ADEA, even if such a practice has a disparate impact on older employees). In particular, in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), the Supreme Court held that firing a worker with the intent of preventing his pension benefits from vesting did not violate the ADEA. The Court’s reasoned that, “[b]ecause age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily ‘age-based.’”

ii. Bona fide occupational qualification (BFOQ)

The ADEA allows for an affirmative defense where age is a bona fide occupational qualification. 29 U.S.C. § 623(f)(1). In order for an age-based qualification to be a bona fide, it must also be “reasonably necessary to the normal operation of the particular business.” 29 U.S.C. § 623(f)(1). A defendant asserting a BFOQ defense has the burden of proving that:

- (1) the age limit is reasonably necessary to the essence of the business, and
- (2) either:
 - (a) all or substantially all individuals excluded by the limit involved are in fact unqualified, or
 - (b) some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age.

29 C.F.R. § 1625.6(b)

Where the BFOQ is asserted to be a measure protecting public safety, the defendant “must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact.” *Id.*

iii. Bona fide seniority systems (BFSS)

It is a defense to an ADEA claim that the adverse action the plaintiff complains of was taken pursuant to “the terms of a bona fide seniority system.” 29 U.S.C. § 623(f)(2)(A). A seniority system is not bona fide if it is “intended to evade the purposes” of the ADEA, nor can it “require or permit the involuntary retirement” of most individuals covered by the ADEA. *Id.*

To pass muster as a BFSS, a seniority system “may be qualified by such factors as merit, capacity, or ability,” but it “must be based on length of service as the primary criterion for the equitable allocation of available employment opportunities and prerogatives among younger and older workers.” 29 C.F.R. § 1625.8(a). The seniority system need not be collectively bargained in order to qualify as a BFSS, but it must be “communicated to the affected employees” and “applied uniformly.” *Id.* § 1625.8(c). Systems that give “those with longer service lesser rights, and results in discharge or less favored treatment to those within the protection of the Act, may, depending upon the circumstances, be a ‘subterfuge to evade the purposes.’” *Id.* § 1625.8(b).

F. Remedies

Generally speaking, the ADEA incorporates the remedial provisions of the Fair Labor Standards Act. 29 U.S.C. § 626(b). The ADEA's enforcement mechanisms permit the EEOC to bring a suit on behalf of an aggrieved individual, or the aggrieved individual may commence a civil action “for such legal or equitable relief as will effectuate the purposes of” the Act. *Id.* at § 626(c)(1). In either case, the ADEA provides the right to a jury trial. *Id.* at § 626(c)(2). Equitable remedies available under the ADEA include injunctive relief, reinstatement, instatement, and promotion. *See id.* § 626(b). Legal remedies include back pay, front pay, liquidated damages for willful violations, attorneys' fees, and interest—but not compensatory damages for pain and suffering. *See Collazo v. Nicholson*, 535 F.3d 41 (5th Cir. 2008).

II. A Union's Role in Age Discrimination Claims

A. Opposing discrimination

CBAs can frequently contain nondiscrimination provisions that include age as a prohibited basis for adverse action by the employer. For example, Marymount Manhattan College's CBA with its adjunct faculty includes a non-discrimination provision with the following language: "Neither the College nor the Union shall discriminate against any adjunct faculty member on the basis of race, color, religion, gender, sexual orientation, ethnic or national origin, disability, age, veterans' status, union activity, lack of union activity, or any other protected status. Any violation of this Article may be grieved under the grievance procedure as defined in the contract." Collective Bargaining Agreement Between Marymount Manhattan College and Marymount Adjunct Collective, Local 7946, NYSUT, AFT, NEA, AFL-CIO, at 3 (Sept. 1, 2014 – Aug. 31, 2017), <https://www.mmm.edu/live/files/844-adjunct-union-contract--september-2012>. Provisions like this allow a union to grieve and potentially arbitrate age-discriminatory action by the employer.

However, such antidiscrimination provisions must be negotiated with care and an eye toward their possible effect on individual unit members' right to pursue discrimination claims independently through the courts. The Supreme Court has held that CBA provisions "clearly and unmistakably" requiring bargaining unit members to arbitrate ADEA are valid and enforceable. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009); *see also Savant v. APM Terminals*, 776 F.3d 285 (5th Cir. 2014). Such provisions cannot, however, be invoked against the EEOC if it brings suit pursuing victim-specific judicial relief on behalf of a bargaining unit employee. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

In the context of settling a unit member's grievance, the employer may sometimes seek a waiver of any statutory claims the member may have against the employer—including claims under the ADEA. To effectuate a valid waiver, the Union must ensure that certain statutory requirements are followed, including:

- (1) the waiver is part of an agreement between the worker and the employer that is written in a manner calculated to be understood by the worker;
- (2) the waiver specifically refers to rights or claims arising under the ADEA;
- (3) the worker does not waive rights or claims that may arise after the date the waiver is executed;
- (4) the worker waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;
- (5) the worker is advised in writing to consult with an attorney prior to executing the waiver; and
- (6) the worker is given a period of time to consider the waiver (normally 21 days, but 45 days if the waiver involves an exit incentive or other employment termination program offered to a group or class of employees);
- (7) the waiver gives the worker at least 7 days following its execution to revoke the agreement; and
- (8) if the waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the worker receives detailed information about the program.

29 U.S.C. § 626(f)(1); *see also* 29 C.F.R. § 1625.22 (noting that a waiver’s wording must “take into account such factors as the level of comprehension and education of typical participants” and avoid “technical jargon” and “long, complex sentences”).

B. Participating in discrimination

As noted above, the ADEA has provisions that explicitly apply to unions and their operations. *See* 29 U.S.C. § 623(c). A labor organization, for example, cannot “exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age.” *Id.* § 623(c)(1). It further cannot “limit, segregate, or classify its membership, or . . . 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 . . . because of such individual’s age.” *Id.* § 623(c)(2). Furthermore, a labor organization cannot be *complicit* in an employer’s discrimination: to that effect, the union cannot “cause or attempt to cause an employer to discriminate against an individual in violation of [the ADEA].” *Id.* § 623(c)(3).

In addition, a union with a sufficient number of paid staff will qualify as an “employer” for purposes of the ADEA, *see id.* § 630(b), and must abide by the requirements of the ADEA in relation to its employees.

i. Discriminatory CBAs

The terms of a CBA could be age-discriminatory on their face (leading to potential disparate treatment claims) or have a disproportionately adverse effect on older workers (leading to potential disparate impact claims). *See, e.g., EEOC v. Bd. of Governors*, 957 F.2d 424 (7th Cir. 1992) (CBA provision stating that grievances could not proceed to arbitration if employee brought age discrimination claim violated the ADEA). The language and effects of proposed provisions are therefore something unions and employers must keep in mind when negotiating a CBA. *But cf. Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84 (2008) (holding that it is an affirmative defense to a disparate-impact claim that the challenged action is “based on reasonable factors other than age”).

A string of cases involving teachers have dealt with whether a union and a school district violate the ADEA by imposing or altering a salary systems. For example, the court in *EEOC v. Governor Mifflin School District*, 623 F. Supp. 734, 743 (E.D. Pa. 1985), held that the school district and the union did not violate the ADEA by “compacting” their salary step schedule into fewer steps, even if the highest paid (and usually oldest) teachers received “a lower salary increase than those below them on the salary ladder.” And, in *Davidson v. Board of Governors*, 920 F.2d 441 (7th Cir. 1990), the Seventh Circuit held that a CBA that provided for individual negotiation of faculty salaries was not a violation of the ADEA.

In another set of cases, teachers asserted that the CBA or (in the non-unionized context) the school’s hiring practice, mandating more pay based on experience, discriminated against more experienced (older) teachers from being *hired* in the first place: *Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980); *EEOC v. Newport Mesa Unified Sch. Dist.*, 893 F. Supp. 927 (C.D. Cal. 1995). Both cases involved the school essentially expressing a policy preference of hiring less experienced teachers as

a cost-saving measure. *Geller*, in the non-unionized context, and *Newport Mesa*, in the unionized context, reached opposite conclusions. The Second Circuit in *Geller* found that the private school's policy to hire less experienced teachers showed a disparate impact against older teachers, as the plaintiff had presented compelling statistical evidence of how the policy would affect older applicants. The district court in *Newport Mesa*, however, held that considering an applicant's potential salary is a "reasonable factor other than age," and thus did not violate the ADEA.

ii. CBA provisions relating to benefit and/or retirement plans

Benefit and retirement plans often have age-based components. Accordingly, the ADEA contains special provisions for "bona fide employee benefit plans" *see* 29 U.S.C. § 623(f)(2)(B), and certain employee pension plans, *see id.* § 623(i).

An employee benefit plan is "bona fide"—and therefore exempt from the ADEA's normal prohibitions—if under terms of the plan "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" or the plan is "a voluntary early retirement incentive plan consistent with" the purposes of the ADEA.² *Id.* § 623(f)(2)(B)(i)-(ii). Plans that do not meet these requirements—such as those that impose a "cliff" for early retirement benefits at a specific age—may be found unlawful. *EEOC v. Minn. Dep't of Corr.*, 648 F.3d 910 (8th Cir. 2011) (early-retirement provision of CBA giving only those employees who retire at 55 a continuation of the employer's contribution toward health and dental insurance premiums violates the ADEA). At the same time, the Supreme Court has upheld benefit policies plans that are seemingly hard-to-square with the ADEA's requirements. In particular, the Court relied on *Hazen Paper* to uphold Kentucky's retirement plan for employees in hazardous occupations did not discriminate based on age, even though employees who became disabled before the standard

² In the higher education context, certain voluntary retirement incentive plans are also expressly permitted ADEA. *See* 29 U.S.C. § 623(m). An "institution of higher education" may offer "employees who are serving 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 . . ." *Id.* However, such a plan must meet stringent requirements. *See id.*

retirement age could receive credit for years they did not work, but employees who worked past that age and then became disabled could not. *See Kentucky Ret. Sys. v. EEOC*, 554 U.S. 135 (2008). The Court majority reasoned that the EEOC had not shown enough evidence that Kentucky's plan actually intended to discriminate against older workers, or that it had relied on impermissible stereotypes about such workers.

The ADEA has detailed provisions concerning pension plans. *See* 29 U.S.C. § 623(i). These provisions harmonize the ADEA with the requirements for pensions plans laid out in the Employee Retirement Income Security Act (ERISA). Generally speaking, employers and unions are prohibited from establishing a pension plan that requires or permits:

- (1) 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
- (2) 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.

Id. § 623(i)(1). At the same time, pension plans may impose, 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 that are taken into account for purposes of determining benefit accrual under the plan. *Id.* § 623(i)(2).

**C. Stuck in the middle of claims of discrimination —
the duty of fair representation (DFR)**

The DFR “requires a union to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. A union must discharge its duty both in bargaining with the employer and in its enforcement of the resulting collective-bargaining agreement.” *Teamsters Local No. 391 v. Terry*, 494 U.S. 558 (1990); *see also Vaca v. Sipes*, 386 U.S. 171 (1967). The DFR, however, does not prevent a union from “taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another ...

[because] conflict between employees represented by the same union is a recurring fact.”

Humphrey v. Moore, 375 U.S. 335 (1964).

A unit member who experiences age-based discrimination at the hands of the employer would potentially have a DFR claim against a union that failed to act reasonably in investigating and grieving the discrimination in accordance with the collective-bargaining agreement. In addition, a unit member might claim a violation of the DFR if the union accedes to an employer’s change in the terms or conditions of employment that adversely affects older workers. *See, e.g., Northwest Airlines, Inc. v. Phillips*, No. CIV.07-4803(JNE/JJG), 2009 WL 1287497, at *4 (D. Minn. May 7, 2009)

The situation can become even more complicated when the alleged discrimination is done—not by management—but by a fellow bargaining unit member. There is a particular risk of this in the higher education context, where tenure decisions are often a process in which colleagues—and therefore, other unit members—are heavily involved. *See, e.g., Colleen Flaherty, Too Old for Tenure*, INSIDE HIGHER ED (Aug. 4, 2015),

<https://www.insidehighered.com/news/2015/08/04/two-american-u-professors-say-they-didnt-get-tenure-due-their-age>.

Given the union’s duty of fair representation to all members of the bargaining unit, what’s the union’s duty if members may have discriminated against one or more other members in violation of the ADEA? There is a dearth of published cases addressing this duty in the context of age discrimination, but it has come up in the sexual-harassment context, involving member-on-member gender discrimination in violation of Title VII. These can largely viewed as a model for the ADEA.

In the sexual harassment context, “[a] union owes a duty of fair representation to both a victim of alleged harassment and to the worker accused of harassment, if they are members of the collective bargaining unit.” *See Mary K. O’Melveny, Negotiating the Minefields: Selected Issues for Labor Unions Addressing Sexual Harassment Complaints By Represented Employees*, 15 LAB. LAW. 321,

322(2000); *see also* *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847 (D. Minn. 1993). One way for a union to avoid breaching their duty is to investigate the underlying circumstances and make a credibility determination, and pursue the grievance and/or represent the interests of the credible employee. *See Hellums v. Quaker Oats, Co.*, 760 F.2d 202 (8th Cir. 1985); *see also* *Tate v. Teamsters*, No. 90-CV-93, 1990 WL 424984 (E.D. Va. Oct. 9, 1990), *aff'd*, 952 F.2d 397 (4th Cir. 1992). Another option is for the union to provide separate representation to both parties. *See Marshall v. Ormet Corp.*, 736 F. Supp. 1462 (S.D. Ohio 1990).