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The Age Discrimination in Employment Act at Thirty: Where It's Been, Where It Is Today, Where It's Going

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ARTICLES

THE AGE DISCRIMINATION IN EMPLOYMENT ACT AT THIRTY: WHERE IT'S BEEN, WHERE IT IS TODAY, WHERE IT'S GOING

*Howard C. Eglit**

*Cast me not off in the time of old age.
Psalms 71:9*

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I. INTRODUCTION

Thirty-three years ago, in the course of debating the legislation that eventually was enacted into law as the Civil Rights Act of 1964,¹ Congress began—albeit very tentatively—to address age discrimination in the workplace.² While it rejected attempts to amend the 1964 bill³ to include age within the then-pending menu of proscribed bases for workplace decision-making, i.e., race, color, national origin, religion, and sex,⁴ Congress did direct the Secretary of Labor to undertake a study to ascertain the nature and extent of age bias in employment and to make recommendations for dealing with this discrimination, if it in fact existed.⁵

1. 42 U.S.C. §§ 2000e to 2000e-17 (1996).

2. Actually, there had been some efforts at the federal level to prohibit arbitrary age discrimination as far back as the 1950s. See *Age Discrimination in Employment Hearings Before the Subcomm. on Labor, Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 23 (1967) (statement of Sen. Javits).

While obviously not engaged in a legislative effort, President Johnson did issue Executive Order No. 11141, 3 C.F.R. §§ 117-118 (1964), reprinted in 5 U.S.C. § 3301 app. at 401-02 (1996) (entitled *Discrimination on the Basis of Age*). The order condemned age discrimination in employment and directed that government contractors were not, either in solicitations or advertisements for workers, to specify a maximum age limit unless such limit was based on a bona fide occupational qualification, retirement plan, or statutory requirement. This order was supplanted on September 25, 1965, by a broader order, Executive Order No. 11246 (set out as a note under 42 U.S.C. § 2000e) that purported to bar discrimination in employment by federal government contractors on the bases of race, color, religion, sex, and national origin. Age was nowhere mentioned in the 1965 order. In any event, the predecessor Executive Order No. 11141 had had little more than hortatory significance, since it contained no mechanism for its enforcement. Any prospect of an enforcement mechanism external to Executive Order No. 11141 being developed was dashed in *Kodish v. United Air Lines*, 628 F.2d 1301, 1303 (10th Cir. 1980), in which the court held that a private right of action could not be implied from the order. See generally HOWARD EGLIT, 3 AGE DISCRIMINATION § 11.18 (2d ed. 1994 & Supp.) [hereinafter EGLIT].

3. The House of Representatives rejected an amendment offered by Representative Dowdy by a vote of 123 to 94. See 110 CONG. REC. 2596-99 (1964). In the Senate an amendment offered by Senator Smathers was rejected by a 63 to 28 vote. See 110 CONG. REC. 9911-13, 13490-92 (1964).

4. Title VII's prohibitions regarding decisions and actions based on the sex of an individual were added to the House bill on the same day, February 8, 1964, that the proposed addition of age to the list of forbidden decision-making criteria was rejected by the House.

5. See Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 287, 316 (superseded by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 10, 86 Stat. 111, 132).

The Secretary responded with a report in which he announced his conclusions that age bias in the workplace indeed was a reality; that it was in particular a significant problem insofar as hiring practices were concerned; and that federal action was warranted to combat it.⁶ He went on, however, to suggest that age discrimination in employment was of a different, less pernicious, dimension than other instances of characteristic-based prejudice:

[W]e find no significant evidence of . . . the kind of dislike or intolerance that sometimes exists in the case of race, color, religion, or national origin, and which is based on considerations entirely unrelated to ability to perform a job.

We do find substantial evidence of . . . discrimination based on unsupported general assumptions about the effect of age on ability . . . in hiring practices that take the form of specific age limits applied to older workers as a group.

We find that . . . [with regard to] decisions made about aging and the ability to perform in individual cases, there may or may not be arbitrary discrimination on the basis of age, depending on the individual circumstances.

Individual circumstances may similarly lead to arbitrary discrimination . . . [in the context of] institutional arrangements which operate indirectly to restrict the employment of older workers.⁷

The Secretary concluded with a general recommendation for a national effort involving several components:

First: *Action* to eliminate arbitrary discrimination in employment.

Second: *Action* to adjust institutional arrangements which work to the disadvantage of older workers.

Third: *Action* to increase the availability of work for older workers.

6. See SECRETARY OF LABOR, THE OLDER AMERICAN WORKER—AGE DISCRIMINATION IN EMPLOYMENT, REPORT TO CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964 (1965) [hereinafter THE OLDER AMERICAN WORKER].

7. *Id.* at 5.

Fourth: *Action* to enlarge educational concepts and institutions to meet the needs and opportunities of older age.⁸

In 1966 Congress directed the Secretary to submit specific legislative recommendations.⁹ In relatively short order President Johnson, on January 23, 1967, called upon the Congress to enact the legislation we know today as the Age Discrimination in Employment Act of 1967 (ADEA):¹⁰

Hundreds of thousands not yet old, not yet voluntarily retired, find themselves jobless because of arbitrary age discrimination. Despite our present low rate of unemployment, there has been a persistent average of 850,000 people age 45 and over. They comprise 27 percent of all the unemployed, and 40 percent of the long-term unemployed.

. . . In 1965, the Secretary of Labor reported to the Congress and the President that approximately half of all private job openings were barred to applicants over fifty-five; a quarter were closed to applicants over forty-five.

In economic terms, this is a serious—and senseless—loss to a nation on the move. But, the greater loss is the cruel sacrifice in happiness and well-being which joblessness imposes on these citizens and their families.¹¹

Congress responded affirmatively. The legislation was debated in November and December of 1967, and was enacted into law on December 15, 1967.¹² (It did not actually go into effect until June 12, 1968, however).¹³ This article, and the symposium of which it is a part, mark the thirtieth anniversary of that legislation.¹⁴

8. *Id.* at 21.

9. See Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 606, 80 Stat. 830, 845.

10. See Pub. L. No. 90-202, 81 Stat. 602 (codified at 29 U.S.C. §§ 621-634).

11. "Aid for the Aged," Message from the President of the United States, Jan. 23, 1967, printed at 113 CONG. REC. 1089-90 (Jan. 23, 1967).

12. See Pub. L. No. 90-202, 81 Stat. 602.

13. Pursuant to Pub. L. No. 90-202, § 15, 81 Stat. 602, 606-07, the Act became effective 180 days after enactment. This meant, given that 1968 was a leap year, that the effective date was June 12, 1968. See *Hodgson v. First Fed. Sav. & Loan*, 455 F.2d 818, 821 (5th Cir. 1972).

14. Not surprisingly, the Act has undergone a number of changes over the years, although its core focus, i.e., discrimination in the workplace on the basis of age, has

There are several matters to take up—not necessarily by means of a seamless web of graceful transitions—in this article, with the author being mindful that by virtue of its celebratory nature the article's appropriate mode is more one of generalities than intricate doctrinal analysis.

First, I undertake a very brief and admittedly very superficial historical review of the statute's first twenty or so years—its infancy and youth, so to speak.¹⁵

remained the same. There have been a number of amendments, some relatively minor, some quite significant. Included in the latter category are the following:

In 1974 federal employees, applicants for jobs with the federal government, and former federal employees were brought within the Act's coverage. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28, 88 Stat. 55, 74-75 (codified as amended at 29 U.S.C. § 633a).

In 1974 state and local governmental employees were brought within the coverage of the Act. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28, 88 Stat. 55, 74 (codified as amended at 29 U.S.C. § 630(b)).

In 1978 the Act was amended in several regards:

- the age cap, or ceiling, which was set at age sixty-five when the statute was enacted in 1967, was increased to seventy for most nonfederal employees;
- the age cap was removed entirely for federal employees;
- a guarantee of jury trials was established;
- involuntary retirement prior to age seventy was absolutely barred, thus foreclosing employers' efforts to invoke the terms of the Act's bona fide benefit plan exception as a basis for pre-age seventy mandatory retirement.

See Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189.

In 1984 the Act was amended to provide extraterritorial protection to Americans working abroad for American-owned or American-controlled companies. *See* Older Americans Act Amendments of 1984, Pub. L. No. 98-459, § 802, 98 Stat. 1767, 1792 (codified at 29 U.S.C. §§ 623(f)(1), (h) and 630(f)).

In 1986 the age-seventy cap on protection for private sector employees was removed (subject to a couple of exceptions). *See* Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 2(c), 100 Stat. 3342, at 3342.

In 1990 the Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978, *as amended by* Pub. L. No. 101-521, 104 Stat. 2278 (1990), made changes regarding:

- the ADEA's defense concerning bona fide employee benefit plans;
- the ADEA's defense concerning seniority systems;
- the legitimizing of voluntary retirement plans; and
- the requirements for valid releases of liability.

15. It is appropriate, given the genre, to look back; but there has been so much

Second, I devote much more attention to the current state of affairs, thirty years after the natal event. My focus is on empirical data, i.e., information concerning demographic trends, labor force participation figures, and—most extensively—objective data extracted from the cases, rather than on doctrinal and interpretive issues.

Third, I address some of the demographic and scientific data regarding the numbers, age ranges, and competencies of, and costs attributable to, older men and women who are in the work force today and/or who will be work force participants in the coming twenty or more years.

Finally, I highlight what in my view are some of the key doctrinal and structural issues that promise to occupy the attention of employees, employers, lawyers, courts, and maybe even legislators in the next five, ten, even fifteen years. (Beyond that, I will await the Act's fiftieth birthday commemoration before venturing new predictions.)

II. THE ADEA IN EARLIER YEARS

There has never been a period of any perceptible duration during which ADEA courts have not been called upon to reach the substantive merits of plaintiffs' claims and defendants' responses to those claims. Still, it is safe to say that in the early years a very considerable percentage of the reported cases generated by the ADEA (certainly more so than today) involved the resolution of issues other than the substantive question of whether, in a given situation, illegal age discrimination had or had not occurred. Confirming this perception, Michael Schuster, Joan Kaspin, and Christopher Miller, the authors of a comprehensive unpublished study that addressed the first eighteen years of the ADEA's life, reported as follows:

The first 11 years of the legislation (1968-1978) account for only 25.4 percent of the *substantive* cases [decided during

litigation, and so much written on the ADEA by this author and others, that it would be both extremely laborious and pointlessly duplicative to go through the exercise once again. See generally 1-3 EGLIT, *supra* note 2.

the 1968-1986 period], with the remaining 74.6 percent resolved in the period 1979-1986. [This is because] [i]n the early years of the ADEA, the federal courts were required to establish many procedural rules.¹⁶

A review of a few areas of judicial attention in the ADEA's earlier years buttresses the observations of Schuster, Kaspin, and Miller. The statute, for example, requires that an administrative charge (initially called a "notice of intent to sue") of discrimination be filed with the ADEA enforcement agency, i.e., the Equal Employment Opportunity Commission (EEOC), within a set time period (either 180 or 300 days of the occurrence of the alleged discriminatory event or decision).¹⁷ The failure of grievants either to comply at all with the requirement or, much more commonly, their failure to comply in a timely manner, generated a large body of cases during the Act's earlier years that focused on a variety of issues concerning charge-filing:

- the consequence of a failure to file;¹⁸
- determination of when the time period for filing began to accrue;¹⁹

16. Michael Schuster, Joan A. Kaspin, & Christopher S. Miller, *The Age Discrimination in Employment Act: An Evaluation of Federal and State Enforcement, Employer Compliance and Employee Characteristics*, A Final Report to the NRTA-AARP Andrus Foundation iii-iv (unpublished June 30, 1987) [hereinafter Schuster-Kaspin-Miller Study].

17. See 29 U.S.C. § 626(d) (1994).

18. See, e.g., *Vaught v. R.R. Donnelly & Sons Co.*, 745 F.2d 407, 410 (7th Cir. 1984).

19. See, e.g., *Kephart v. Institute of Gas Tech.*, 581 F.2d 1287, 1288 n. 1 (7th Cir. 1978); *Moses v. Falstaff Brewing Corp.*, 525 F.2d 92 (8th Cir. 1975). Eventually, the basic principle was established that the charge-filing period begins to accrue when the grievant knows, or reasonably should know, that an unlawful action has occurred or an unlawful decision has been made. This rule, given the stamp of approval in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), a case arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17, has been fully embraced in the ADEA context. See, e.g., *Sawchik v. E.I. duPont deNemours & Co.*, 783 F.2d 635 (6th Cir. 1986); *Price v. Litton Bus. Sys., Inc.*, 694 F.2d 963, 965 (4th Cir. 1982). Of course, there still remains much opportunity for a variety of issues to arise in applying this rule. See, e.g., *Smallwood v. United Air Lines, Inc.*, 661 F.2d 303, 309 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982) (ambiguity of employer's notice to employee sufficient to delay accrual of discrimination claim, and therefore commencement of charge-filing period). See generally 1 EGLIT, *supra* note 2, §§ 6.08-6.21.

- whether a failure to timely file was a jurisdictional prerequisite to suit, or simply a failing that could be overcome through equitable tolling or estoppel principles;²⁰

- what constituted adequate justification for equitable tolling of the filing period;²¹ and

- what constituted sufficient warrant to equitably estop an employer from raising the untimeliness issue.²²

Other courts (although much fewer in number) had to address the question of whether a charge of discrimination (or its predecessor, the notice of intent to sue) had to be in writing or could be made orally.²³ The substance of the charge also occupied courts' attention.²⁴ In earlier years numerous courts also were called upon to decide other procedural matters, far afield

20. Compare *Hiscott v. General Elec. Co.*, 521 F.2d 632 (6th Cir. 1975) (jurisdictional prerequisite) with *Slatin v. Stanford Research Inst.*, 590 F.2d 1292 (4th Cir. 1979) (charge-filing period is subject to equitable tolling or estoppel). The issue was laid to rest years ago. The courts are now in accord, and have been for some time, that the position embraced in rulings such as *Slatin* is the correct one. See, e.g., *Kale v. Combined Ins. Co. of Am.*, 861 F.2d 746, 752 (1st Cir. 1988); *Dillman v. Combustion Eng'g, Inc.*, 784 F.2d 57, 59 (2d Cir. 1986); see generally 1 EGLIT, *supra* note 2, § 6.08.

21. See *Quina v. Owens-Corning Fiberglass Corp.*, 575 F.2d 1115 (5th Cir. 1978); *Powell v. Southwestern Bell Tel. Co.*, 494 F.2d 485, 490 (5th Cir. 1974); *Downie v. Electric Boat Div.*, 504 F. Supp. 1082, 1086 (D. Conn. 1980). See generally 1 EGLIT, *supra* note 2, §§ 6.17-6.21.

22. See generally *Kriegesmann v. Barry-Wehmiller Co.*, 739 F.2d 357 (8th Cir.), *cert. denied*, 469 U.S. 1036 (1984) (effort by employer to mitigate harshness of termination decision); *Bonham v. Dresser Indus., Inc.*, 569 F.2d 187, 193 (3d Cir. 1977), *cert. denied*, 439 U.S. 821 (1978) (failure to post required notice of rights under the ADEA); *Baruah v. Young*, 536 F. Supp. 356 (D. Md. 1982) (fraud or misrepresentation on employer's part); *Griffin v. First Pa. Bank*, 443 F. Supp. 563, 567 (E.D. Pa. 1977) (same); *Woerner v. Bell Helicopter*, 16 Fair Empl. Prac. Cas. (BNA) 480 (N.D. Tex. 1977) (failure by federal agency to inform grievant of need to submit proper filing).

23. See generally *Reich v. Dow Badische Co.*, 575 F.2d 363 (2d Cir.), *cert. denied*, 439 U.S. 1006 (1978) (oral notice insufficient); *Woodford v. Kinney Shoe Corp.*, 369 F. Supp. 911 (N.D. Ga. 1973) (oral notice sufficient). The generally accepted position today is that the charge of unlawful discrimination must be in writing. See generally *Greene v. Whirlpool Corp.*, 708 F.2d 128, 130 (4th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984); *Salazar v. AT & T Corp.*, 715 F. Supp. 351 (S. D. Fla. 1989).

24. See generally *Dartt v. Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976), *aff'd by an equally divided Court*, 434 U.S. 99 (1977); *Burgett v. Cudahy Co.*, 361 F. Supp. 617 (D. Kan. 1973); 1 EGLIT, *supra* note 2, § 6.04.

from the matter of charges, such as whether prevailing plaintiffs could recover punitive damages²⁵ and/or compensatory damages.²⁶

Of course, it should not be concluded that procedural issues do not commonly arise anymore. Indeed, just in the past year or so the Supreme Court has handed down several decisions dealing with technical aspects either of Title VII of the Civil Rights Act of 1964²⁷—the interpretations of which commonly are looked to by ADEA courts for persuasive analogical guidance²⁸—or of the ADEA, itself.²⁹ In a similar vein, a number of the decisions noted in the succeeding discussion of cases published in 1996 address procedural or definitional (as opposed to age-substantive) issues.³⁰ Still and all, decisions defining the

25. See generally *Murphy v. American Motor Sales Corp.*, 570 F.2d 1226 (5th Cir. 1978); *Looney v. Commercial Union Assurance Cos.*, 428 F. Supp. 533 (E.D. Mich. 1977). The universally accepted position of the courts today is that such damages are not recoverable. See *Kolb v. Goldring, Inc.*, 694 F.2d 869, 872 (1st Cir. 1982); *Pfeiffer v. Essex Wire Corp.*, 682 F.2d 684 (7th Cir.), cert. denied, 459 U.S. 1039 (1982); see generally 2 EGLIT, *supra* note 2, § 8.42.

26. See generally *Naton v. Bank of Cal.*, 649 F.2d 691 (9th Cir. 1981); *Vazquez v. Eastern Air Lines, Inc.*, 579 F.2d 107 (1st Cir. 1978). The universally accepted judicial position today is that such damages are not recoverable. See generally *Wehr v. Burroughs Corp.*, 619 F.2d 276 (3d Cir. 1980); *Perrell v. FinanceAmerica Corp.*, 726 F.2d 654 (10th Cir. 1984); 2 EGLIT, *supra* note 2, § 8.39.

27. 42 U.S.C. §§ 2000e to 2000e-17 (1994).

28. See *infra* note 54 and accompanying text.

29. The ADEA only applies to employers having at least 20 employees for each calendar day in 20 or more calendar weeks in the year in which the alleged discrimination occurred, or in the preceding year. See 29 U.S.C. § 630(b) (1994). Title VII has a similar requirement, although the requisite minimum number of employees is 15, rather than 20. 42 U.S.C. § 2000e(b) (1994). In *Walters v. Metropolitan Educational Enterprises, Inc.*, 117 S. Ct. 660 (1997), a Title VII case, the Court resolved the lower court split that had existed as to how to go about counting part-time employees for the purpose of determining whether the numerosity requirement was satisfied in a given case. It embraced the so-called "payroll" method, i.e., the method of counting employees whereby any person who receives a paycheck is counted, even if he or she was a part-time employee who did not work a full week. In *Robinson v. Shell Oil Co.*, 117 S. Ct. 843 (1997), another Title VII case, the Court addressed the issue of whether a former employee (as opposed to an individual currently working for an employer) could maintain a cause of action for unlawful retaliation against his former employer, which had provided a negative reference about him to a potential employer. The Court held in the affirmative. In *Lockheed Corp. v. Spink*, 116 S. Ct. 1783 (1996), the Court addressed—and answered in the negative—the question of whether a 1986 amendment to the ADEA dealing with pension plans should be applied retroactively.

30. See *infra* Part III.

contours, as opposed to fleshing out the application, of procedural requirements certainly do not make up as great a portion of the total rulings as they did in the early years.

It also should not be concluded that substantive issues were of insignificant dimension during the formative and maturing years of the ADEA. Indeed, most of the case law addressing the requisites for establishing claims of discriminatory treatment³¹ and discriminatory impact³² was devised in this era. The same is true regarding judicial fashioning of the defendants' tasks in these cases.³³ The ADEA's bona fide occupational qualification defense³⁴ also was fleshed out during this time,³⁵ as were numerous other substantive matters. Here, too, a cautionary note is to be sounded: this "quick-and-dirty" drive-by of substantive issues in no way should be read as implying that key substantive rulings are historical phenomena—the legal artifacts of the now-mature ADEA's youth. Quite the contrary. Employment discrimination law today continues to be in considerable ferment. For example, the Supreme Court in recent years has issued major decisions dealing with discriminatory impact analysis,³⁶ mixed motives analysis,³⁷ the relevance of decision-making criteria that are argued to be proxies for age,³⁸ and the question of whether an ADEA plaintiff who is seeking to establish a prima facie violation must be able to identify some-

31. The classic formulation was set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a case arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17. Hundreds of ADEA courts have looked to *McDonnell Douglas* as setting the applicable formula. See, e.g., *Goodman v. Heublein, Inc.*, 645 F.2d 127 (2d Cir. 1981); *Smithers v. Bailar*, 629 F.2d 892 (3d Cir. 1980); *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979). The Supreme Court has never held that *McDonnell Douglas* applies to the ADEA, although in *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307, 1310 (1996), the Court assumed for the purposes of the decision that it did.

32. See *infra* Part IV.D.3.

33. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (case arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17, and followed by many ADEA courts in which defendant's burden in discriminatory treatment case was re-stated); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (Title VII case followed by numerous ADEA courts in which defendant's burden in disparate impact case was prescribed).

34. See 29 U.S.C. § 623(f)(1) (1994).

35. See generally 1 EGLIT, *supra* note 2, §§ 5.02-5.13.

36. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

37. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

38. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).

one outside the ADEA-protected class as having replaced him or her.³⁹ (Some of these recent doctrinal developments, and their significance for the future, are discussed in Part IV of this article.) And certainly the lower courts have been, and continue to be, busy dealing with substantive issues, as the ADEA cases discussed in Part III of this article help to confirm.

As for demographic and statistical data, Schuster, Kaspin, and Miller—in focusing on 280 cases decided on substantive grounds between 1968 and 1986—arrived at several findings that are of interest in and of themselves, as well by reason of their use for purposes of comparison in the ensuing discussion regarding present-day ADEA litigants and litigation:⁴⁰

- 84.1% of the claims arising during the ADEA's first eighteen years were made by white males;⁴¹

- 59.3% of the cases were filed by managerial and professional employees;⁴²

- 54% of the cases were filed by individuals between the ages of fifty and fifty-nine;⁴³

- various forms of discharge and involuntary retirement accounted for 67.5% of the cases;⁴⁴ and

- employers won in 67.7% of the cases.⁴⁵

III. THE 1996 STATISTICAL ANALYSIS

I thought it would be interesting—and maybe even, *mirable dictu*, useful beyond the end of pure academic inquiry—to gather current empirical data regarding ADEA litigants and ADEA litigation. Perhaps some insights might be gained about the nature of the age discrimination litigation enterprise: who wins and who loses; how are the wins and losses chalked up; and so on. Accordingly, I endeavored to collect every decision (federal

39. See *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307 (1996).

40. See Schuster-Kaspin-Miller Study, *supra* note 16, at iii-iv.

41. See *id.* at iii.

42. See *id.*

43. See *id.*

44. See *id.* at iv.

45. See *id.*

and state) addressing a claim made under the ADEA that was published in 1996.⁴⁶ The information I distilled from this effort is addressed below. Before, however, I turn to the data—which indeed do prove to be quite revealing as to ADEA litigation and ADEA litigants—I want to highlight some significant caveats which build up to the necessary disclaimer that this effort, while informative, is undeniably at bottom a compromised undertaking.

Let me be more specific.

A. *The Caveats*

There is little reason to believe that reported cases are an accurate reflection of the actual incidence of age discrimination in the workplace.⁴⁷ For one, it is a pretty sure bet (although, concededly, I do not have the empirical data to document factual bases for my conclusion) that many people who are (or may be) the victims of unlawful discrimination are simply unaware that a statutory violation has (or at least may have) occurred.⁴⁸ In other words, they know that adverse workplace decisions were made or actions were taken, but they do not suspect—whether because of ignorance, misleading excuses of-

46. Another survey of cases, involving the ADEA over a 20-year period, was recently published. This study, *Employment Discrimination Against Midlife and Older Women: How Courts Treat Sex-And-Age Discrimination Cases* (Women's Legal Defense Fund 1996), focused on individuals who brought combined age/gender discrimination claims. Because this study was concerned only with these dual claims involving both age and gender, it is difficult to mesh its findings with those here. Accordingly, I did not look to this study as a useful basis for comparisons, or for the buttressing (or refuting) of the data set forth *infra*.

47. A researcher who examined the statistical records of the Federal Judicial Center for all employment discrimination cases that were litigated in federal court and terminated during the period from June 1, 1992, to May 31, 1994, reported that "only 8% of the[se] cases filed in federal courts ultimately proceeded to trial, which is about the same rate as in civil litigation generally." William J. Howard, *Arbitrating Claims of Employment Discrimination*, 50 DISP. RESOL. J. 40, 42 (1995) [hereinafter *Arbitrating Claims of Employment Discrimination*].

48. The statute requires the posting in conspicuous places in each ADEA-covered workplace of a notice describing workers' rights under the ADEA. See 29 U.S.C. § 627 (1994). The existence of such a notice is no guarantee, however, that a given individual who has been subjected to an adverse employment decision will suspect that he or she is the victim of wrongdoing in violation of the Act.

ferred by the decision makers, or whatever—that a forbidden criterion, i.e., age, was an animating force for those decisions.

What is more, some people likely are not even going to be aware that an unfavorable decision was made. Suppose, for example, an employer knows that a vacancy for a vice presidency is going to arise within a couple of months. Rather than soliciting applicants, the employer decides to first consider employees from within the company. In the course of discussions among the senior officers as to who might be promoted, these individuals consider, but reject, assistant vice president Jones, who would not be a naturally expectable candidate for the job by virtue of her working in another department and therefore being outside the normal promotional flow pattern for this particular position. They conclude, and openly so state (among themselves), that she is too old for the job. Eventually the announcement is made that assistant vice president Smith is being promoted. Jones has no reason to believe that she had been rejected for the promotion. After all, she had not submitted an application for the job (given that there had been no disclosure that an opening was going to become available). Moreover, she has little or no reason to suspect that she even was considered for the post, since she works in another department and typically cross-departmental promotions have not been made in her company.

Moving beyond these scenarios involving lack of knowledge or absence of suspicion on the part of the potential grievant, there are, I am convinced (although again I cannot proffer empirical data), many instances when job applicants, employees or former employees, while indeed suspecting or even firmly believing that they have been wronged, do not pursue legal redress.⁴⁹ A variety of reasons can explain one or more individual instances of such inaction. The grievant may not have the financial resources to undertake legal action.⁵⁰ He may lack the psycholog-

49. Of course, underreporting of legally cognizable grievances is not unique to the employment discrimination context. See Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 27-28 n.99 (1996).

50. In response to a question concerning litigation expenses, a survey sample made up of 330 members of the Labor and Employment Law Section of the American Bar Association reported that the average management attorney's fee in litigating

ical strength or will to challenge a supervisor's employment decision.⁵¹ Or a discharged worker simply may not care: she

employment discrimination cases was \$96,000. *See Arbitrating Claims of Employment Discrimination*, *supra* note 47, at 44. The same researcher, reporting on the responses of a sample group of 321 plaintiffs' attorneys, asserted that these attorneys typically handled their cases on a contingent fee basis and for this reason, apparently, they did not articulate any specific fee figures. *See id.* *See also* Ruth Simon, *Too Damn Old*, *MONEY*, July 1996, at 118, 125 ("A typical age-discrimination lawsuit can easily cost [the plaintiff] \$25,000 or more and last two to five years.") It is true that one can easily file a charge of unlawful discrimination with the ADEA enforcement agency, the EEOC, without the aid of an attorney or the expenditure of any money. The EEOC is authorized to investigate the grievant's claim. *See* 29 U.S.C. § 626(a) (1994). It also is authorized to file suit on behalf of grievants, as well as to initiate its own suits. *See* 29 U.S.C. § 626(b) (1994).

In fact, however, the agency's investigatory efforts regarding grievant's claims are scanty. *See* UNITED STATES GEN. ACCOUNTING OFFICE, EQUAL EMPLOYMENT OPPORTUNITY—EEOC AND STATE AGENCIES DID NOT FULLY INVESTIGATE DISCRIMINATION CHARGES (1988). With regard to suits filed to enforce all of the statutes for which it has enforcement responsibility—i.e., the ADEA; the Equal Pay Act, 29 U.S.C. § 206(d) (1994); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1994); and the Americans with Disabilities Act, 42 U.S.C. §§ 12101 to 12213 (1996)—the EEOC filed 398 cases in fiscal year (FY) 1993, 373 cases in FY 1994, 322 in FY 1995, and 160 in FY 1996. (The federal fiscal year runs from October 1 through September 30). We do have some specifics regarding ADEA suits: in FY 1990 the EEOC filed 138 ADEA suits; it filed 102 in FY 1991; 84 in FY 1992; 114 in FY 1993; and 73 in FY 1994. *See Drop in Fiscal 1995 EEOC Activity*, *FAIR EMPL. PRAC.* (BNA), Apr. 8, 1996, at 37. Just 37 were filed in FY 1995, and the number dropped to twelve in FY 1996. *See EEOC Backlog Down, Money Obtained Up*, *FAIR EMPL. PRAC.* (BNA), Apr. 7, 1997, at 97. In a recent interview conducted by the Bureau of National Affairs the chair of the EEOC was reported to have expressed discouragement with the agency's lackluster litigation efforts:

EEOC Chairman Gilbert Casellas said he is frustrated by the low number and "quality" of suits filed by the EEOC since it set new enforcement priorities last year. The EEOC's three other commissioners share with him some frustration over the EEOC's litigation activities, Casellas added.

Interview with EEOC Chairman Casellas: Frustrations and Future Plans, *FAIR EMPL. PRAC.* (BNA), Jan. 9, 1997, at 3.

As a practical matter, then, an individual who believes himself or herself to be a victim of a violation of the ADEA is going to have to pursue recourse on his or her own.

51. Kristin Bumiller reviewed a survey that was conducted in 1980 whereby a sample of 560 discrimination claims was obtained from a sample of approximately 5,000 households. The "[r]espondents were asked whether they had experienced 'illegal or unfair treatment' because of their 'race, age, sex, handicaps, union membership, or other things.'" KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY* 26 (1988). Ms. Bumiller reported the following:

Preliminary analysis indicated that approximately half of the aggrieved individuals did not make a claim to the other party, nearly two-thirds did nothing further to rectify their perceived mistreatment, and only a very small percentage had achieved successful resolution of their claims.

didn't like the job anyway. The grievant also may have consulted an attorney, found out that the money she was making on her new job would offset any back pay award she might win if she went forward with her discrimination claim,⁵² and concluded that the financial equation did not justify pursuing a legal claim which, even if successful, would produce no monetary recovery.

There are still other factors that increase the gap between the number of incidents of actionable workplace discrimination in a given time period, on the one hand, and the number of

Discrimination grievances had a significantly lower rate of escalation into court cases than other civil matters such as contract disputes and landlord-tenant problems.

Id. (endnote omitted). Ms. Bumiller then noted that the individuals who perceived that they had been the victims of discrimination but had done nothing about it were asked to explain their inaction. She concluded, on the basis of their responses, that "people do not take action because they assume that their complaints will not be taken seriously." *Id.* at 29. She further wrote as follows:

The model of legal protection would suggest that the failure of persons to use the law stems from the victims' inability to serve their own needs: lack of information and knowledge about their rights and their limited resources for using legal channels. But these persons were not rejected by unresponsive agencies, deterred by the cost and unavailability of lawyers, or barred from pursuing legal claims by technicalities. Although the anticipation of these factors played a role in their decision-making, they did not take action primarily because they legitimized their own defeat. For the most part, the problem is never conceptualized in terms of public action. In this universe of discrimination problems far removed from legal forums, the labeling of acts as discriminatory and the eventual deflation of the conflict by apology or self-blame serve as coping mechanisms for suppressing burgeoning discontent.

Id. at 28-29.

52. The case law establishes that there is a mitigation requirement imposed on ADEA plaintiffs: a person who is discharged must seek other, comparable, employment, and his or her earnings from that other job will be deducted from the back pay award. See *Payne v. Security Sav. & Loan Ass'n*, 924 F.2d 109, 110 (7th Cir. 1991); *Hansard v. Pepsi-Cola Metro. Bottling Co., Inc.*, 865 F.2d 1461, 1468 (5th Cir.), *cert. denied*, 493 U.S. 842 (1989). If the plaintiff does not seek other employment, and the defendant can prove that with the exercise of reasonable diligence the plaintiff would have been able to secure employment comparable to the job from which he or she was discharged, the amount of money the plaintiff would have earned had he or she sought and secured that job will offset the back pay award even if the plaintiff did not actually receive that income because he or she did not actually secure that other job. See *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 796 (3d Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986); *Coleman v. City of Omaha*, 714 F.2d 804, 808 (8th Cir. 1983).

reported judicial rulings that actually result from those incidents, on the other. People who initially were willing and able to go through the legal process in its entirety may be discouraged by initial erroneous or unreceptive decisions made by the administrative agencies with which they file their charges of discrimination—to wit, the EEOC and/or a state anti-discrimination agency—and so what could have turned out to be winning claims of discrimination, if only pursued to their legal ends, suffer unwarranted demise. Much more significant for assessing the accuracy of reported cases as being reliable indicators of the actual incidence of discrimination is the settlement factor. Claims that are clearly meritorious (and even claims that, albeit dubious, are potentially meritorious) raise for the alleged wrongdoers specters of litigation expense, institutional and personal stress, unfavorable publicity, and potential findings of liability. Consequently, such claims very likely will elicit settlement offers sufficiently generous to induce the grievants to forego pursuing redress through public channels. The result is that the most unequivocal instances of discrimination disappear before they ever become subject to public attention, let alone formal recordation in reported judicial opinions.⁵³ And because settlement agreements typically contain confidentiality provisions barring grievants from discussing even the existence of the settlements, not to mention their terms, members of the public generally—and even more relevant, other potential claimants—are left in the dark.

53. As to the settling of legal claims generally, see Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 2-3 (1996). A recent survey of attorneys practicing in the employment discrimination area reveals just how prevalent settlements are. The researcher surveyed 321 members of the National Employer Lawyers Association, as well as 330 members of the Section of Labor and Employment Law of the American Bar Association. Employment law made up 80% of their practices. The defense attorneys estimated that 79% of their cases were settled prior to final adjudication, and the plaintiffs' attorneys gave an estimate of 84% of employment discrimination cases being settled prior to final adjudication. See *Arbitrating Claims of Employment Discrimination*, *supra* note 47, at 43-44.

One must take care in interpreting these data. They should not be read as suggesting that 79% or 84% of all claims, no matter how shallow or specious, generate settlements. These figures presumably only refer to those matters that make it past the initial screening that any reputable plaintiff's attorney undertakes. (I state "presumably" because the researcher from whose article these data are extracted did not provide further detail.)

Another point. Even if a claim does get to court, juries do not write opinions and so, absent a written (and published) court ruling on a losing litigant's motion for judgment notwithstanding the law or a court's indirect reference to a jury determination, such as in the course of a court's post-trial consideration of issues involving relief, ADEA jury cases are going to escape the collator's awareness. And finally, it must be noted that not all judicial rulings are reported; thus, a given determination may not be captured by an observer of the process because it simply is not a matter of readily retrievable record.

All the appropriate cautionary notes having been sounded, I now can proceed.

B. *The Data Set*

I did not include in my survey cases in which reference—whether passing or more substantial—was made to the ADEA in the context of a court's addressing a lawsuit arising under another statute. Typically, for example, courts considering claims litigated under Title VII look to ADEA decisions for analogical guidance, as noted earlier. This well-established practice flows from the facts that the two statutes share both common language and a common goal, i.e., eradication of discrimination from the workplace.⁵⁴ A Title VII court's discussion of ADEA doctrine, or of the meaning or interpretation of an ADEA decision or statutory provision, would be mere dictum, however. And so I did not deem such references to the ADEA to be sufficiently focused on ADEA claims, *per se*, to justify the inclusion of non-ADEA cases.⁵⁵

I used the two main reporting systems—West Publishing Company's Supreme Court reports, Court of Appeals reports, and Federal Supplement, and the Bureau of National Affairs' Fair Employment Practices Cases (FEP)—to collect all decisions published in 1996. I did not survey the other reporter system

54. See *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755-58 (1978).

55. See generally *Pitak v. Bell Atl. Network Servs.*, 928 F. Supp. 1354 (D. N.J. 1996); *Dubisar-Dewberry v. District Attorney's Office*, 927 F. Supp. 1479 (M.D. Ala. 1996); *Wisch v. Whirlpool Corp.*, 927 F. Supp. 1092 (N.D. Ill. 1992).

for employment discrimination cases, i.e., Employment Practices Decisions (EPD), nor did I take account of rulings that only may be found through one or more of the computerized data bases, i.e., Lexis and Westlaw. Concededly, I thereby likely missed a few additional decisions that do not appear in either the West reporters or in the FEP reporter. Still, there typically is a tremendous degree of replication: the opinions that appear in EPD appear in FEP and/or in the West reporters. Thus, I am confident that only a few rulings, if any at all, have been missed. I also excluded decisions that had been published in one or the other of the reporter systems prior to 1996. For example, if—as not uncommonly happens—a case that was decided in late 1995 was not published in Federal Supplement until 1996, but had been published in FEP in 1995, I did not count it.

More important than the reader's being apprised of the foregoing ministerial aspects of collation is appreciation of the fact—an obvious one, but one needful of recitation nonetheless—that even though a decision was published in 1996, it does not follow that it was decided in that year. Indeed, a number of 1995 rulings did not appear on the publicly available printed page until the following year. Since, for my sampling purposes, *publication* in 1996 was key, it follows that these 1995 decisions are included in the data set (unless, as just noted, they were earlier published in 1995). By the same token, there are 1996 decisions that were not, or will not, be published until some time in 1997 and these are not included in the data base. The result is that one has a picture, more or less, of a twelve-month period of decision-making,⁵⁶ with published cases that were decided in 1995 (but certainly not the majority of that year's rulings) making up some of that picture and most, but not all, published cases that were decided in 1996 (since some will not be published until 1997 or even later) making up the rest of the picture.⁵⁷ (In those very rare instances in-

56. Since the same lag times regarding publication apply to any calendar year, with some decisions handed down in year A not being published until year B, and some cases decided in year B not being published until year C, this 12-month period is representative of any 12-month calendar year.

57. There were a few instances of 1994 decisions not being published until 1996. See, e.g., *Bell v. Specialty Packing Prod.*, 935 F. Supp. 475 (W.D. Tex. 1994); *Dickson v. Amoco Performance Prods., Inc.*, 910 F. Supp. 629 (N.D. Ga. 1994); *Chester v. AT*

volving a federal district court opinion that was affirmed or reversed within the same period by a court of appeals, I only included the higher court's ruling. However, in those slightly less rare instances of a district court's issuing two (or more) opinions over the course of the year,⁵⁸ I included each of the rulings for some data-gathering purposes; where I in fact counted only one of the rulings involving the same parties, such as with regard to the collation of the ages, genders and occupations of plaintiffs and of data regarding the fields of activity of defendants, that single counting is noted *infra*.)

Two additional notes. There were two Supreme Court cases decided and published in 1996: *O'Connor v. Consolidated Coin Caterers Corp.*⁵⁹ and *Lockheed Corp. v. Spink*.⁶⁰ Seven state court rulings also were published in that year.⁶¹ I have not included these nine decisions in the compilations of data discussed below. My view is that the Supreme Court rulings are

& T Co., 907 F. Supp. 982 (N.D. Tex. 1994); *Zemel v. Board of Governors of Fed. Reserve Bd.*, 918 F. Supp. 8 (D.D.C. 1994); *Milwaukee Fire Fighters v. City of Milwaukee*, 72 Fair Empl. Prac. Cas. (BNA) 121 (E.D. Wis. 1994); *Thompson v. Runyon*, 69 Fair Empl. Prac. Cas. (BNA) 1619 (W.D. Mo.), *aff'd without opinion*, 31 F.3d 1172 (8th Cir. 1994). *Gilbert v. Essex Group, Inc.*, 930 F. Supp. 683 (D.N.H. 1993), was an even older case that was not published until 1996. I concluded that if I wanted a snapshot, so to speak, of a year in the life of the ADEA, the inclusion of these 1993 and 1994 rulings would unduly blur the picture.

58. See, e.g., *Moses v. K-Mart Corp.*, 922 F. Supp. 600 (S.D. Fla. 1996), and *Moses v. K-Mart Corp.*, 905 F. Supp. 1054 (S.D. Fla. 1995); *Henderson v. AT & T Corp.*, 933 F. Supp. 1326 (S.D. Tex. 1996), and *Henderson v. AT & T Corp.*, 918 F. Supp. 1059 (S.D. Tex. 1996); *Carlson v. WPLG-TV/10*, 72 Fair Empl. Prac. Cas. (BNA) 646 (S.D. Fla. 1996), and *Carlson v. WPLG-TV/10*, 70 Fair Empl. Prac. Cas. (BNA) 1596 (S.D. Fla. 1996); *Sperling v. Hoffman LaRoche, Inc.*, 924 F. Supp. 1396 (D.N.J. 1996), and *Sperling v. Hoffman LaRoche, Inc.*, 924 F. Supp. 1346 (D.N.J. 1996); *Dalal v. Alliant Techs.*, 927 F. Supp. 1383 (D. Colo. 1996), and *Dalal v. Alliant Techs.*, 927 F. Supp. 1374 (D. Colo. 1996); *Kraemer v. Franklin & Marshall College*, 941 F. Supp. 479 (E.D. Pa. 1996), and *Kraemer v. Franklin & Marshall College*, 909 F. Supp. 268 (E.D. Pa. 1995).

59. 116 S. Ct. 1307 (1996).

60. 116 S. Ct. 1783 (1996).

61. See *Cunningham v. Ardrex, Inc.*, 663 N.E.2d 577 (Mass. App. Ct. 1996); *Farrell v. Dolce*, 648 N.Y.S.2d 511 (Sup. Ct. 1996); *American Mgmt. Ass'n v. Atlantic Mut. Ins. Co.*, 641 N.Y.S.2d 802 (Sup. Ct. 1996); *Brayley v. Doehler-Jarvis Castings Div. of NL Indus.*, 637 N.Y.S.2d 909 (Sup. Ct. 1996); *Jubic v. City of Troy City Corp.*, 633 N.Y.S.2d 720 (Sup. Ct. 1995); *City of Phila. v. Pennsylvania Human Relations Comm'n*, 684 A.2d 204 (Penn. 1996); *Newsom v. Textron Aerostructures*, 924 S.W.2d 87 (Tenn. Ct. App. 1995).

sufficiently *sui generis* that no generalizations, even as to gross statistical factors such as the gender of the plaintiffs, ought to be based on them. As for the state court rulings, they are the decisions of courts of different levels, from different states, and so they are simply too frail a base on which to build, or even buttress, any generalizations.

To summarize: there were 325 ADEA decisions handed down in 1995 and 1996 that were published for the first time in 1996. Of these, 316 make up the relevant data set—94 federal court of appeals decisions and 222 federal district court rulings. (All 325 decisions are listed in Appendix I, at the end of this article.)⁶²

C. Plaintiffs' Ages

The ages of the grievants—at the time of the alleged wrongful acts which gave rise to their lawsuits—were identified in a majority of the ninety-four court of appeals decisions that were published in 1996. There were a total of seventy-three such plaintiffs whose ages were indicated.⁶³ (In some instances there was more than one plaintiff in a given case, and so the seventy-three age-identified plaintiffs do not correlate with seventy-three separate opinions.) Collection of the age data establishes a median age of fifty-four for those age-identified individuals who were plaintiffs (or who were represented by the

62. It seems tedious to list each case. However, I have found that in attempting to parse other studies, such as the Schuster-Kaspin-Miller Study, *supra* note 16, and the study done by Chief Judge Richard Posner of the Court of Appeals for the Seventh Circuit that is reported in RICHARD A. POSNER, *AGING AND OLD AGE* (1995) [hereinafter POSNER], and which is discussed *infra*, the ability to check my figures against theirs was foreclosed in some instances by those studies' lack of case-by-case detail. I hope that someone will find the data base I have prepared useful as the starting point for further work; to facilitate that possibility, it is necessary to identify each case.

63. In one instance the same plaintiff generated two reported appellate court decisions: *Rhodes v. Guiberson Oil Tools Div.*, 82 F.3d 615 (5th Cir. 1996), dealing with damages issues, and *Rhodes v. Guiberson Oil Tools Div.*, 75 F.3d 989 (5th Cir. 1996), which dealt with the issue of liability. For the statistical purpose of recording the numbers and ages of age-identified plaintiffs, the *Rhodes* plaintiff is only counted once here.

EEOC in suits filed by that agency on their behalf).⁶⁴ The distribution of ages is set forth in Table 1.⁶⁵

TABLE 1
AGE DISTRIBUTION OF APPELLATE COURT
LITIGANTS WHO WERE PLAINTIFFS
IN THE TRIAL COURT

<u>AGE</u>	<u>NUMBER</u>
40+	1
EARLY 40'S	1
42	1
44	3
45	1
46	4
47	3
48	3
50	1
51	8
52	3
53	5
54	4
55	4
56	3
57	4
58	5
59	1
60	3
61	3
62	4
63	1
64	1
65	3
65+	1
66	1
68	1

64. In some instances the EEOC was the plaintiff. Obviously, this entity has no age in the sense that a human being does. However, if the age of the person on whose behalf the agency was suing could be identified, that datum is included in arriving at the figures in the text.

65. The age of each specific plaintiff is set forth, case by case, in Appendix II, which appears at the end of this article.

There were 222 federal district court opinions issued by courts deciding cases that arose under the ADEA and that were published for the first time in 1996. In a considerable number of instances it was not possible (as was also the case regarding the appellate court decisions) to identify the ages, at the times of the alleged wrongs, of the plaintiffs. It also must be noted that, as in the instance of appellate court opinions, there is not a one-for-one correlation between the number of rulings and the number of age-identified plaintiffs, since in some cases there were multiple plaintiffs.⁶⁶ (Indeed, there was one case which had the potential to really skew the totals: in *Equal Employment Opportunity Commission v. McDonnell Douglas Corp.*⁶⁷ the court noted that there were 431 plaintiffs, all age fifty-five and over.⁶⁸ In another case—*Bryson v. Fluor Corp.*⁶⁹—there were forty-four plaintiffs; their ages were not specified, however.) The age distribution for the 561 age-identified plaintiffs (including the 431 individuals in *McDonnell Douglas*) is set forth in Table 2.⁷⁰

66. In those instances where one lawsuit generated more than one published decision, I have only counted that suit once for the purposes of this tabulation.

67. 72 Fair Empl. Prac. Cas. (BNA) 769 (E.D. Mo. 1996).

68. Class actions conducted pursuant to Federal Rule of Civil Procedure 23 may not be maintained under the ADEA. See generally *Price v. Maryland Casualty Co.* 561 F.2d 609 (5th Cir. 1977); *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286 (5th Cir. 1975); 1 EGLIT, *supra* note 2, § 6.45. But representative actions may be pursued, whereby those individuals who wish to be represented by the party in court can (indeed must) affirmatively opt into a named plaintiff's lawsuit. This follows from § 7(b) of the ADEA, 29 U.S.C. § 626(b) (1994), incorporating § 16, 29 U.S.C. § 216 (1994), of the Fair Labor Standards Act, 29 U.S.C. §§ 200-219 (1994). Section 16 provides for an opt-in representative action approach.

69. 914 F. Supp. 1292 (D.S.C. 1995).

70. The specific ages for each of the age-identified plaintiffs in the district court cases are set forth in Appendix III, which appears at the end of this article.

TABLE 2
AGE DISTRIBUTION OF PLAINTIFFS IN
FEDERAL DISTRICT COURT CASES

<u>AGE</u>	<u>NUMBER</u>
40-50	1
40	1
41	3
42	2
43	3
44	3
45	4
46	3
47	8
48	2
49	5
LATE 40's	1
50	6
51	6
52	5
53	6
54	5
55+	431
MID-50's	1
56	4
57	9
58	4
59	8
60	5
60+	1
61	10
62	7
63	6
65	1
66	2
67	4
68	1
70	1
73	1
78	1

The median age for the 131 age-identified plaintiffs (excluding all but one of the 431 age fifty-five plaintiffs, who of course could range across the age spectrum from fifty-five up) is fifty-five—very close, obviously, to that for the age-identified plaintiffs in the appellate court rulings.

In the earlier noted Schuster-Kaspin-Miller Study⁷¹ the researchers found that, in the 280 cases they identified as having been decided over an eighteen-year period on substantive grounds, 54% of the 219 age-identified plaintiffs—118 in total—were between ages fifty and fifty-nine.⁷² Thirty-nine of the 219 age-identified plaintiffs, i.e., 18%, were between the ages of forty and forty-nine; and sixty-two plaintiffs, or 28%, were between ages sixty and seventy. Of the 204 age-identified plaintiffs in the 1996 cases (i.e., seventy-three plaintiffs whose cases wound up being addressed by appellate courts, plus 131 plaintiffs in the non-appealed district court rulings), ninety-three plaintiffs (including only one of the 431 age fifty-five plus plaintiffs from the representative action suit)—or 45.6%—fit within the fifty to fifty-nine age band. There were fifty-three plaintiffs between ages forty and forty-nine, i.e., 25.5%. And fifty-five plaintiffs, amounting to 27%, were between ages sixty and seventy. (There were three plaintiffs who were over age seventy.)

In sum, a comparison of the 1996 figures with the data developed for the period 1968-1986 reveals some notable changes. Obviously, the sample sizes here are not particularly large, and so it would be dangerous to draw any firm conclusions from the numbers. Still, it is reasonable to take note, first, of the very significant rise in the percentage of younger plaintiffs—an increase of 41% more (25.5% of the total of age-identified plaintiffs in 1996 as compared to 18% in the earlier period) in their forties, and, second, of the decline of 18% in the percentage of plaintiffs in their fifties (45.6% of the total of age-identified plaintiffs in 1996 as compared to 54% in the earlier period).⁷³

71. See Schuster-Kaspin-Miller Study, *supra* note 16, at 39.

72. Because the researchers who conducted the Schuster-Kaspin-Miller Study, *supra* note 16, did not separately set forth each plaintiff's age, it is not possible to extract a median age from their data.

73. It must be acknowledged that these numbers are somewhat inaccurate since they do not include the 430 uncounted age 55 plaintiffs in the earlier-noted EEOC

In contrast, the percentage of plaintiffs in their sixties only declined by 4% (27% of the age-identified plaintiffs in 1996 as compared to 28% in the earlier period). What might explain the shift towards younger plaintiffs (assuming that there is something more than normal statistical variation here and assuming, further, that it is a legitimate tack to ignore the 431-plaintiff *McDonnell Douglas* suit, save for one of its 431 plaintiffs)?⁷⁴

The most apparent explanation is related to the fact that the layoff rate for younger ADEA-protected workers, i.e., those in their forties and early fifties, has increased dramatically in recent years. Indeed, a study by Harvard University economics professor James L. Medoff, published in 1993, showed that workers ages thirty-five to fifty-four were 45% more likely during the 1980s to suffer permanent job loss than was true during the 1970s.⁷⁵ In a subsequent study Professor Medoff compared the permanent layoff rates for middle-aged males (thirty-five to fifty-four) in 1980, when the civilian unemployment rate was 7.1%, and in 1992, when the civilian unemployment rate was a comparable 7.4%. He found that the layoff rate more than doubled, from just under 5% in 1980 to 11% in 1992.⁷⁶

The more elusive matter is explaining why it is that middle-aged workers have come to increasingly populate the ranks of

lawsuit, *EEOC v. McDonnell Douglas Corp.*, 72 Fair Empl. Prac. Cas. (BNA) 769 (E.D. Mo. 1996). Their exclusion seems reasonable, however, since but for the fortuity of the case having been pursued by the EEOC, there would likely have been only one plaintiff or perhaps a few, rather than 431 (unless the remaining 430 had opted into the named plaintiff's suit, which, concededly, would be a viable possibility). In any event, this massive multi-plaintiff suit is so unusual (although not unique) that not to discount it would be to allow a legal rarity to swallow up a legitimate effort to make sense of the remaining data. One more point: the actual plaintiff in the *McDonnell Douglas* case was the EEOC, and so I could have just counted it—devoid of any age, of course—as the plaintiff to be recorded in this tabulation effort. (The Schuster-Kaspin-Miller Study, *supra* note 16, which I am using for comparison purposes here, does not indicate how the researchers handled EEOC suits for their tabulation purposes).

74. See *supra* note 73.

75. See James L. Medoff, *Middle-Aged and Out of Work*, NSC REPORT SERIES (National Study Center), Apr. 15, 1993.

76. See James L. Medoff, *The Mid-Life Job Crisis—Growing Unemployed Due to Permanent Layoff Among Middle-Aged American Men*, NSC REPORT SERIES 2 (National Study Center), May 12, 1994.

the involuntarily unemployed. Professor Medoff offers as the fundamental answer for the ouster of middle-aged male workers from their jobs a cost-benefit analysis: middle-aged male workers are paid significantly more than other workers, yet (1) on a given job men do not rate higher in performance than do lesser-paid women; (2) on a given job, senior employees do not receive better performance ratings than do their younger, lesser-paid counterparts; and (3) voluntary attrition of middle-aged male workers is slight.⁷⁷ Given these three factors, employers that are interested in saving money see middle-aged male workers as producing less benefit for the costs incurred than can be produced by cheaper younger workers and female workers, and so it is these thirty-five to fifty-four year olds who increasingly bear the brunt of both individually targeted terminations and larger-scale downsizing undertakings.⁷⁸ Discharges in turn pro-

77. *See id.*

78. The New York Times in 1996 listed the 15 companies accounting for the elimination of the most jobs in the years 1992-1996:

COMPANY	JOBS CUT	SHARE OF COMPANY'S WORK FORCE (PERCENT)
AT & T	123,000	30
IBM	122,000	35
General Motors	99,400	29
Boeing	61,000	37
Sears, Roebuck	50,000	15
Digital Equipment	29,800	26
Lockheed Martin	29,100	17
BellSouth	21,200	23
McDonnell Douglas	21,000	20
Pacific Telesis	19,000	19
Delta Airlines	18,800	26
GTE	18,400	14
Nynex	17,400	33
Eastman Kodak	16,800	13
Baxter International	16,000	28

See Louis Uchitelle & N. R. Kleinfeld, *On the Battlefields of Business, Millions of Casualties*, N.Y. TIMES, Mar. 3, 1996, at 14. The cited article was part of a series done by the newspaper on the effects of downsizing. Based on its analysis of Department of Labor and Bureau of Labor Statistics figures, the newspaper reported that of office workers who lost their jobs in the years 1991-1993, 25% of the people laid off were under age 30 and another 56% were between 30 and 50. Among factory workers, 40% were under age 30 and 44% were between ages 30 and 50. *See* Patrick J. Lyons & Josh Barbanell, *More Than 43 Million Jobs Lost, Reaching Every Walk of Life . . .*, N.Y. TIMES, Mar. 3, 1996, at 14.

Reductions in force have generated a considerable number of ADEA suits. *See generally* 2 EGLIT, *supra* note 2, §§ 7.20-23.

duce disgruntled former employees, and thus we see an increase in the numbers of younger ADEA plaintiffs.⁷⁹

D. Gender Data Regarding Plaintiffs

The figures are more complete regarding the genders of the 1996 plaintiffs than they are regarding age, although again, information could not be extracted from every ruling. Insofar as the ninety-four court of appeals rulings are concerned, of the 113 litigants who were plaintiffs below (or were individuals on whose behalf the EEOC sued)⁸⁰ and whose genders were identified in these decisions,⁸¹ eighty-six were males and twenty-seven were females.⁸² In percentage terms, then, 76% of the litigants who were plaintiffs below (or were represented by the EEOC) were men and 24% were women. The numbers of course are larger for the district court plaintiffs, given that there were 222 published decisions.⁸³ The genders of 232 plaintiffs were

79. There clearly are correlations, albeit not perfect ones, between years on the job, age, and wages. See *infra* Part IV.D.2. In other words, a veteran employee is likely to be receiving a larger salary than that paid to a short-tenured worker, and a longer-tenured worker is likely to be older than one who has been on the job a short period of time. Given these correlations, one might reason that an employer that adopts a policy or pursues a practice of terminating employees who are deemed to be earning too much is effectively terminating, in the main, older workers. Wages, in other words, are a proxy for age. At one time this argument was a winning one, albeit not in every instance. Perhaps the best-known decision embracing this wage-age proxy analysis and applying it to hold an employer liable for violation of the ADEA is *Metz v. Transit Mix, Inc.*, 828 F.2d 1202 (7th Cir. 1987). *Metz* was pretty much consigned to desuetude by the Court in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), a decision in which the Court not only debunked *Metz* but also seriously undermined age-proxy analysis generally. See *infra* Part IV.D.2.

80. In some instances the EEOC was the plaintiff. Obviously, this government agency has no gender, but if the gender of the person on whose behalf the agency was suing could be identified, that datum is included in the foregoing figures.

81. Because some cases involved multiple plaintiffs, the number of gender-identified plaintiffs, i.e., 113, exceeds the actual number of published appellate court opinions.

82. The gender of each plaintiff is identified, case by case, in Appendix II, which appears at the end of this article. In one instance the same plaintiff generated two reported appellate court decisions: *Rhodes v. Guiberson Oil Tools Div.*, 82 F.3d 615 (5th Cir. 1996), dealing with damages issues, and *Rhodes v. Guiberson Oil Tools Div.*, 75 F.3d 989 (5th Cir. 1996), which dealt with the issue of liability. For the statistical purpose of counting the number of gender-identified plaintiffs, the plaintiff in *Rhodes* is only counted once.

83. In those instances where one lawsuit generated more than one published decision, I have only counted that suit once for the purposes of this particular tabulation.

identified.⁸⁴ Of these 147, or 63%, were men; 85 individuals, equivalent to 37% of the total, were women.

Obviously, the district court figures differ considerably from those for the appellate court decisions: the percentage of women plaintiffs at the trial court level is more than 50% greater than it is in the court of appeals cases. This disparity may be nothing more than a statistical fluke. Or it simply may be attributable to a bigger sample size, the larger number of district court opinions being more reliable than the smaller data set of appellate court cases. On the other hand, the disparity may have more substantive significance. If so, it then is worth conjecturing as to what may account for the decline from 37% of the plaintiffs at the trial court level being women to their being only 24% of the total gender-identified plaintiffs in appellate court cases.

Closer examination might reveal, for example, that generally the jobs at stake in the appellate court rulings were both particularly remunerative and prestigious—and therefore more worth fighting for—than the general run of jobs seen in the district court cases. Given the oft-noted ‘glass ceiling’ that impedes the opportunities of women to attain high level management positions in the work world,⁸⁵ we would expect fewer women (1) to have had those jobs and to thence have been discharged from them or (2) to have been in line for promotion to them. Ergo, we would expect to see fewer women litigants going

84. Because some cases involved multiple plaintiffs, the number of gender-identified plaintiffs exceeds the actual number of cases. However, it should be stressed that it was not possible to identify the genders of the grievants in all 222 cases. The gender of each plaintiff who could be so identified is set forth in Appendix III, which appears at the end of this article.

85. See The Glass Ceiling Act of 1991, Pub. L. No. 102-166, § 202(a)(1), 105 Stat. 1081, 1081: “despite a dramatically growing presence in the workplace, women and minorities remain underrepresented in management and decisionmaking positions in business.” See generally Amy E. Decker, *Women in Corporate Law: Rewriting the Rules*, 4 AM. U. J. GENDER & L. 511 (1996); Deborah L. Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163 (1988).

forward after having lost at the trial court level, given that cost-benefit analysis now would cut against further effort.⁸⁶

There is another, related factor as well: since women generally are more likely to be occupying lower level, lower paying positions, they would be less likely to have the financial resources to pursue extended litigation, even if they wanted to, than would their higher paid male counterpart plaintiffs. And one more possibility: since a woman is more likely to be a victim of gender discrimination than is a man, she may win on a claim made under Title VII, even while losing on the ADEA claim.⁸⁷ If she does prevail on her Title VII gender discrimination cause of action, she will have less incentive to appeal the

86. The standard economic model for determining when a given individual is likely to sue instructs us that a person will be most likely to do so when the expected return exceeds the expected cost. See Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 28 (1996). Professor Selmi provides a useful list of the literature concerning economic analyses of litigation decisions. See *id.* at 28 n.101, citing RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 21.5 (4th ed. 1992); Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes & Their Resolution*, 27 J. ECON. LIT. 1067 (1989); Earl Johnson Jr., *Lawyers' Choice: A Theoretical Appraisal of Litigation Investment Decisions*, 15 LAW & SOC'Y 567 (1981); Janice Madden & Jennifer Wissink, *Achieving Title VII Objective at Minimum Social Costs: Optimal Remedies and Awards*, 37 RUTGERS L. REV. 997 (1985).

87. According to a survey of 335 cases decided between January 1, 1975, and September 30, 1995, involving claims of both age and sex discrimination, the plaintiffs who invoked both the ADEA and Title VII prevailed about 34% of the time. See *Employment Discrimination Against Midlife and Older Women*, *supra* note 46, at 26. The significance of this datum is obscured, unfortunately, by the fact that "the 'win' may have been on claims other than the ADEA or Title VII claims." *Id.* For example, the actual basis for the decision could have been a state statutory or common law claim or another federal statute, such as the Equal Pay Act. 29 U.S.C. § 206(d) (1994).

The success rate for women plaintiffs in ADEA suits is discussed *infra*. See *infra* Part III.K.5.

ADEA loss⁸⁸ than would a losing male plaintiff, who either prevails or fails solely on his ADEA claim.

Comparisons between the appellate court and district court decisions aside, the foregoing data, when combined, establish that of the 345 plaintiffs whose genders were identified, 233—or 68%—were men and 112, amounting to 32%, were women. These findings reveal a notable change from the data reported in the Schuster-Kaspin-Miller Study of 280 cases decided on substantive grounds between 1968 and 1986.⁸⁹ In that study the researchers identified 84% of the plaintiffs as being men, while only 16% were women.⁹⁰ Thus, as compared to the first eighteen years of the ADEA's life, we see today a dramatic 100% increase, from 16% to 32%, in the percentage of women plaintiffs, while at the same time there has been a 20% de-

88. Double recoveries are not allowed. *See generally* Olitsky v. Spencer Gifts, Inc., 964 F.2d 1471 (5th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993) (appellate court noted, but did not directly address, fact that trial court had acted to bar recovery of lost pension benefits under both ADEA and Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (1994)). Thus, a plaintiff who prevails under Title VII is not going to be able to recover a back pay award to compensate her for the wages she lost as a result of the Title VII violation, and then recover the same back pay if she prevails on her ADEA claim.

Still, given that liquidated damages in an amount equal to the back pay recovery may be obtained by a prevailing plaintiff under the ADEA but not under Title VII, there is some incentive for a prevailing Title VII plaintiff to pursue her ADEA claim in the hope of obtaining a liquidated damages award. 29 U.S.C. § 626(b) (1994) provides that "[a]mounts owing . . . shall be deemed to be unpaid minimum wages or overtime compensation for purposes of sections 216 [§ 16] or 217 [§ 17] of" the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 200-219 (1994), and in turn § 16(b) of the FLSA, 29 U.S.C. § 216(b) (1994), provides that an employer shall be liable for unpaid minimum wages or unpaid overtime compensation "and an additional equal amount as liquidated damages."

Cutting against a plaintiff's ability to actually secure liquidated damages is the fact that establishing entitlement to them is difficult because 29 U.S.C. § 626(b) (1994) requires the plaintiff to prove that the defendant acted willfully. (The Supreme Court most recently addressed the willfulness requirement in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).) In any event, the advantage that the ADEA provides by authorizing such awards is offset by the fact that punitive damages—which until Title VII was amended by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, were not available under that statute—now can be recovered by the prevailing Title VII plaintiff (although the task of satisfying the statutory requirements is a difficult one). In contrast, punitive damages are not recoverable under the ADEA. *See supra* note 25.

89. *See* Schuster-Kaspin-Miller Study, *supra* note 16, at iii.

90. These percentages were based on there having been 239 individuals whose genders could be identified: 201 males and 38 females.

crease in the percentage of plaintiffs who are male.⁹¹ What might account for this striking rise in women seeking ADEA relief?

A first-stage explanation involves the increased number of women in the work force. In 1982 52.6% of women sixteen years of age and older were in the civilian labor force; by 1993 that percentage had increased to 57.9%.⁹² Much more significant are the statistics regarding women who fall within the ADEA's protection, i.e., those ages forty and over. As revealed in Table 3, the numbers of ADEA-protected women increased dramatically in terms of labor force participation: between 1982 and 1993 the number of women ages thirty-five through forty-four grew by 63%, and the increase for women ages forty-five through fifty-four was 53.5%. In absolute numbers the total in-

91. The 1996 published cases also depart considerably, although not to as great a degree, from the figures reported by Judge Posner in his study of 430 ADEA cases decided during an 18-month period in 1993 and 1994. He reported that 24.9% of the plaintiffs were women. See POSNER, *supra* note 62, at 346 n.49.

Some, if not all, of the variances between my data and that reported in the Schuster-Kaspin-Miller Study, *supra* note 16, and the Posner study, *supra* note 62, may be explained by the fact that I counted all identifiable plaintiffs, so that if there were four women plaintiffs in one case, each one was counted in arriving at the total number of women plaintiffs. In the other studies, it is possible that no matter how many women might have been plaintiffs in a given suit, the researchers only counted the lawsuit, itself, rather than the number of litigants. So one suit, with five plaintiffs, would be counted as "one" for the purposes of establishing the number of female plaintiffs. But that difference in approach (as to the existence of which I can only speculate, since the authors did not address this matter, so far as I can tell) at best could account for only a small portion of the variances, since there were only a few cases with multiple female plaintiffs in my study: *Mitchell v. Sisters of Charity of the Incarnate Word*, 934 F. Supp. 793 (S.D. Tex. 1996) (two); *EEOC v. Sara Lee Corp.*, 923 F. Supp. 994 (E.D. Mich. 1995) (three); *Henderson v. AT & T Corp.*, 918 F. Supp. 1059 (S.D. Tex. 1996) (five); *Crossman v. Crosson*, 905 F. Supp. 90 (E.D.N.Y. 1995), *aff'd. without opinion*, 101 F.3d 684 (2d Cir. 1996) (four). Moreover, these multiple female plaintiff situations in any event were offset (for the purposes of computing percentages of men and women plaintiffs) by multiple male plaintiff cases, for which I counted—as with the women—each individual plaintiff in arriving at my totals. See *MacPherson v. University of Montevallo*, 938 F. Supp. 785 (N.D. Ala. 1996) (two); *Falbaum v. Pomerantz*, 72 Fair Empl. Prac. Cas. (BNA) 141 (S.D.N.Y. 1995) (five); *Ligon v. Triangle Pac. Corp.*, 935 F. Supp. 936 (M.D. Tenn. 1996) (two); *Golombiewski v. Johnson*, 934 F. Supp. 849 (E.D. Mich. 1996) (two); *Dittman v. General Motors Corp.-Delco Chassis Div.*, 941 F. Supp. 284 (D. Conn. 1996) (four); *Moses v. K-Mart Corp.*, 905 F. Supp. 1054 (S.D. Fla. 1995) (two); *Derthick v. Bassett-Walker, Inc.*, 904 F. Supp. 510 (W.D. Va. 1995) (two); *Pollard v. Azeon Corp.*, 904 F. Supp. 762 (N.D. Ill. 1995) (three).

92. See Howard N. Fullerton, Jr., *The 2005 labor force: growing, but slowly*, 118 MONTHLY LAB. REV., Nov. 1995, at 29, 39.

crease for these two age groups of women was approximately ten million.

TABLE 3⁹³
LABOR FORCE PARTICIPATION BY WOMEN

AGE GROUP	PARTICIPATION RATE			LEVEL (1000's)			CHANGE (%)	ANNUAL GROWTH RATE
	1982	1993	1994	1982	1993	1994	1982-93	1982-93
16-19	51.4	49.8	51.3	4,056	3,261	3,585	-19.6	-2.0
20-24	69.8	71.3	71.0	7,477	6,393	6,692	-14.5	-1.4
25-34	68.0	73.6	74.0	13,393	15,412	15,499	-15.1	1.3
35-44	68.0	76.7	77.1	9,651	15,727	16,259	63.0	4.5
45-54	61.6	73.5	74.6	7,105	10,907	11,357	53.5	4.0
55-64	41.8	47.3	48.9	4,888	5,228	5,289	7.0	.6
65+	7.9	8.2	9.2	1,185	1,479	1,658	24.8	2.0

Elementary logic readily supports the conclusion that the presence of more women workers in the workplace creates more potential occasions for women to be the subjects of discriminatory practices and decisions. Add to this demographic change another factor: by 1996, as compared to 1986, there were more women—both in absolute and relative numbers—who had been in the work force long enough to have risen to positions of relative importance within their companies and agencies, or who by dint of seniority and experience at least had the potential for being promoted to such positions.⁹⁴ Since, as noted *in-*

93. *See id.*

94. A front page article appearing in the February 10, 1997, edition of The Wall Street Journal is apropos here:

A growing cadre of women who launched careers in the 1970s are breaking through cracks in the glass ceiling, landing top front-line corporate jobs once monopolized by men.

Just in the past few weeks, there have been several high-profile ascensions

Of course, none of this means that American corporations have suddenly become level playing fields after years of male domination. The New York research group Catalyst made headlines last fall with a study showing that just 2% of senior executives at large corporations are

fra,⁹⁵ management level and white collar nonmanagement level employees typically are the individuals who confront (or at least claim to be the victims of) age-based discrimination, increased numbers of women of the right ages and at the right places in corporate structures are going to increase the potential for more age discrimination lawsuits.

Perhaps, also, there is an increasing willingness among women today to sue, in contrast to their (hypothetically) more compliant and unassuming counterparts of the '70s and early '80s who expected less by way of fairness in the workplace and so more readily (albeit likely begrudgingly) accepted what they thought was the inescapable natural order of things. Or, musings about female workers' psychology aside, perhaps the facts are that more women today are suing because they have greater resources, i.e., money and/or willing attorneys, with which to mount courtroom battles. Fifteen years ago, a woman who was consigned to a low-level, low-paying, ministerial position would have had neither much incentive nor the financial ability to sue if she were discharged from that post or if she were denied advancement to some only mildly better, but still uninspiring, job slot. There was both little to gain, and considerable exposure to litigation expenses which, if she lost, she would not be able to recover. Today, in contrast, there are more women, at higher levels, whose denials of promotion, or discharges, or demotions, mean much more in terms of lost prestige, lost income, and lost power. Thus, the incentive to sue is stronger because the loss is greater, and the financial gains to be won make suing more attractive from the economic perspective of both the potential plaintiff and, particularly importantly, her age discrimination-sensitized contingent fee attorney.

women.

But, at the same time, it would be a mistake to ignore obvious evidence that something important is beginning to happen. The same Catalyst study, after all, also found that a "breakthrough generation" of women is beginning to attain power

Joseph B. White & Carol Hymowitz, *Watershed Generation of Women Executives is Rising to the Top*, WALL ST. J., Feb. 10, 1997, at A1, A6.

95. See *infra* Part III.F.

E. *Plaintiffs' Race*

The racial categorizations of plaintiffs elicited mention so rarely in the appellate court and trial court rulings which I collected that this meager data is of no statistical significance here.⁹⁶

F. *Plaintiffs' Occupations*

In most (but not all) of the ninety-four published court of appeals decisions the occupations of the litigants who were plaintiffs below (or on whose behalf the EEOC filed suit) were reported. In generalizing, rather than detailing each plaintiff's job individually, I have used broad categories which do not conform to any official dictionary of occupations.⁹⁷ There likely could be disagreement, then, as to my rough-and-ready approach. Nonetheless, I think the exercise adequate to provide clear, although not finely tuned, compilations of the plaintiffs' occupational roles, which compilations are set forth in Tables 4 and 5.⁹⁸

TABLE 4
PLAINTIFFS' OCCUPATIONS IN
APPELLATE COURT CASES

MANAGEMENT	43
WHITE COLLAR, NONMANAGEMENT	30
BLUE COLLAR	9
SALES	6
PUBLIC SAFETY OFFICERS	4
EDUCATORS	4
FLIGHT ATTENDANTS	2 ⁹⁹

96. In the Schuster-Kaspin-Miller Study, *supra* note 16, at 38, the researchers reported that the race of the plaintiff was noted in only 26 out of the 280 cases they studied.

97. At any rate, the details of the plaintiffs' jobs typically were not fully described; thus, in a number of instances one could not, with confidence, match the plaintiffs with official job categories, even if one tried to do so.

98. A plaintiff-by-plaintiff identification of work activity is provided in Appendix II, which appears at the end of this article.

99. The total of 95 occupations listed exceeds the total of cases published because in some cases there were multiple plaintiffs. In one instance, the same plaintiff generated two reported appellate court decisions: *Rhodes v. Guiberson Oil Tools Div.*, 82

The numbers obviously are higher for the 222 published federal district court rulings, but the areas of activity are pretty much the same.¹⁰⁰

TABLE 5
PLAINTIFFS' OCCUPATIONS IN
FEDERAL DISTRICT COURT CASES

MANAGEMENT	55
WHITE COLLAR, NONMANAGEMENT	47
BLUE COLLAR	31
EDUCATORS	12
SALES	11
PUBLIC SAFETY	8
PHYSICIAN	4
NURSE	2
ATTORNEY	1
TRUCK DRIVER	1
TV NEWS ANCHOR	1
DEBT COLLECTOR	1
CORPORATION	1

G. *Defendants' Ages*

Out of ninety-four published court of appeals decisions, there were only three instances in which the ages of the defendants (or of the individual employees of the defendants who were responsible for the decisions that gave rise to the lawsuits) were identified. These ages were forty-two, forty-six, and sixty.¹⁰¹ The data are no more elucidating in the instance of the 222 federal district court rulings: the age of the employer or decision maker was identified in only three cases. In one, the

F.3d 615 (5th Cir. 1996), dealing with damages issues, and *Rhodes v. Guiberson Oil Tools Div.*, 75 F.3d 989 (5th Cir. 1996), which dealt with the issue of liability. For the purpose of tabulating plaintiffs' occupations, *Rhodes* was only counted once.

100. In those instances where one lawsuit generated more than one published decision, I have only counted that suit once for this tabulation.

101. See *Greene v. Safeway Stores, Inc.*, 98 F.3d 554 (10th Cir. 1996) (age 42); *Burns v. AAF-McQuay, Inc.*, 96 F.3d 728 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 247 (1997) (age 46); *Brown v. CSC Logic, Inc.*, 82 F.3d 651 (5th Cir. 1996) (age 60).

employer or decision maker was identified as being age forty; in a second he was identified as being age sixty-plus; and in the third case the three decision makers were identified as being ages forty-four, forty-four, and fifty-two.¹⁰² Thus, while the data set—93 appellate court rulings plus 216 district court decisions,¹⁰³ for a total of 309 decisions—would seem to afford an adequate base for drawing generalizations, the specific data provided regarding defendants' ages are far too meager to venture anything but the mere reporting of the handful of figures to be gleaned from the decisions.

What makes this lack of data regarding the ages of decision makers worthy of note here is its relevance to the position staked out by Chief Judge Richard Posner of the Court of Appeals for the Seventh Circuit regarding the ADEA. Judge Posner has addressed issues involving age and the law in *Aging and Old Age*,¹⁰⁴ in which he announces the sweeping conclusion that the ADEA is "at once inefficient, regressive, and harmful to the elderly."¹⁰⁵ In partial support of his general position he relies (without apparent empirical support, as it turns out) upon the ages of decision makers as an important linchpin in his analysis. In this regard he makes the observation that there are two types of discrimination—statistical discrimination, i.e., stereotyping,¹⁰⁶ and animus-based discrimination, which

102. See *Walker v. Southern Holdings, Inc.*, 934 F. Supp. 197 (M.D. La. 1996) (three decision makers, ages 44, 44, and 52); *Stratton v. Department for the Aging for City of N.Y.*, 922 F. Supp. 857 (S.D.N.Y. 1996) (age 40); *Waldemar v. American Cancer Soc'y*, 70 Fair Empl. Prac. Cas. (BNA) 1411 (N.D. Ga. 1996) (age 60).

103. In those instances where one lawsuit generated more than one published decision, I have only counted that suit once for the purposes of this tabulation. Thus, the number of appellate court rulings counted here is 93, since two opinions involved the same litigants. See *supra* note 99. Likewise, with regard to the data set of 222 published district court decisions, there were six instances in which the pairs of litigants generated two reported opinions, for a total of 12 opinions. See *supra* note 58. Counting each of these sets of multiple rulings only once, the total number of district court rulings reduces down—for the purposes of the instant tabulation—to 216.

104. See POSNER, *supra* note 62. This book has received both excessively effusive praise, see Thomas S. Ulen, *The Land and Economics of the Elderly*, 4 ELDERLAW J. 99 (1996), and more balanced criticism, see Paul H. Brietzke & Linda S. Whitton, *An Old(er) Master Stands on the Shoulders of Ageism to Stake Another Claim for Law and Economics*, 31 VALPARAISO UNIV. L. REV. 89 (1996).

105. POSNER, *supra* note 62, at 319.

106. This type of discrimination entails "the failure or refusal, normally motivated by the costs of information, to distinguish a particular member of a group from the average member." *Id.* at 322. The phenomenon of stereotyping is, in Judge Posner's

he defines as "a systematic undervaluation, motivated by ignorance, viciousness, or irrationality, of the value of older people in the work place."¹⁰⁷ Judge Posner rejects the latter type of discrimination as a credible explanation for the supposed disadvantages older workers confront:

[T]he people who make employment policies for corporate and other employers and most of those who carry out those policies by making decisions about hiring or firing specific workers are at least 40 years old and often much older Employers—who have a direct financial stake in correctly evaluating the abilities of their employees and for the most part are not young themselves—are unlikely to harbor either serious misconceptions about the vocational capacities of the old . . . or a generalized antipathy toward old people.

To put the point differently, the kind of "we-they" thinking that fosters racial, ethnic, and sexual discrimination is unlikely to play a large role in the treatment of the elderly worker. Not because a young person will (in all likelihood) someday be old But because the people who do the hiring and firing are generally as old as the people they hire and fire and are therefore unlikely to mistake those people's vocational abilities.¹⁰⁸

Granted, there is a superficial perspicacity to Judge Posner's off-the-cuff ventures into demographic and psychological analysis. But actual facts—i.e., the 1996 data—are more persuasive. One set of data, discussed *supra*, establishes that the median ages of age-identified plaintiffs in the appellate court and dis-

view, "more plausible and better substantiated than animus discrimination against the old," and he explains how such stereotyping operates to disadvantage competent individuals:

[T]here is a great deal of variance in the capacities, behaviors, and attitudes of persons in particular age groups and, partly as a result, great overlap between the capacities of persons in different age groups. People age at different rates and from different levels of capacity. So if age is used as a proxy for attributes desired or disliked by an employer, some people who are entirely competent to perform to the employer's specifications will not be hired, or will be fired or forced to retire to make away [sic] for young people who actually are less able.

Id. at 322-23.

107. *Id.* at 320.

108. *Id.* at 320-21.

district court rulings were fifty-four and fifty-five, respectively. At the appellate court level fifty-seven of the seventy-three age-identified plaintiffs—77% were ages fifty or older. And at the district level ninety-five, or 73%, of the 131 age-identified plaintiffs (with only one of the 431 plaintiffs in the earlier-discussed representative action suit being counted)¹⁰⁹ were ages fifty and above. Given these data, it seems reasonable to conjecture that a considerable number of the decision makers who made the decisions that brought the ADEA plaintiffs to court in the cases that were published in 1996 were years younger than the plaintiffs. To make the same point with more hortatory rhetoric: the ‘up-and-comers’ who, after a corporate buy-out, are intent upon discarding the ‘over the hill’ managers who ran Company X under the previous ownership, or the newly promoted vice president at Company Y who regards her new subordinates (who also happen to be long-term employees) as not being ‘on the same page’ as she is and so wants to promote her own team members, quite likely are going to be in the thirty- and forty-something age ranges and thus are not going to be contemporaries of those fifty-something men and women who they fire, demote or reject.

In sum, Judge Posner’s hypothesizing as to the motivations that prompt decision makers in dealing with older employees and job applicants can be countered by an equally reasonable counter hypothesis. (Remember, also, that the data as to the ages of decision makers, although painfully meager, largely refute Judge Posner’s basic assumption, i.e., that decision makers are the same age as those as to whom the decisions are made: the eight decision makers whose ages were identified in the 1996 cases were, as pointed out earlier, forty, forty-two, forty-four, forty-four, forty-six, fifty-two, sixty, and sixty-plus. Of these eight, the first six were younger than the large majority of ADEA plaintiffs identified in the 1996 published cases. And the first five—those whose ages were identified as forty, forty-two, forty-four, forty-four, and forty-six—were considerably younger.) To the extent, then, that Judge Posner’s argument dismissing age-based animus discrimination as playing a significant role in the workplace is grounded on the proposition that

109. See *supra* notes 67 and 68 and accompanying text.

the decision makers in scenarios that wind up in the courts as ADEA-based disputes are contemporaries of the plaintiffs—and, indeed, his argument concerning animus as a motivating force does rest in significant measure on that proposition—Judge Posner simply does not have the data to support his analysis.

Make no mistake, however, about the depth of my disagreement with Judge Posner's tack. My criticism of his assumption-based, as opposed to data-based, assessment of the dynamics of employer decision making does not lead me to further posit that he is wrong in discounting animus, e.g., hatred, fear, loathing, as being the dark, mean-spirited source of ageism in the workplace. In fact, I agree with him in considerable degree. I do not think that the same ugly psychological apparatus which attends racism also accompanies, or accounts for, ageism. But that is not because it is fifty-year-olds who are firing other fifty-year-olds. Rather, it is because the whole culturally pervasive syndrome of ageism—whether manifested in the workplace, or by way of the possible discounting of the veracity of older witnesses in the courtroom,¹¹⁰ or in the condescension, stereotyping, and use of caricatures that commonly accompany younger peoples' interactions with, and/or depictions of, the

110. See generally A. Daniel Yarmey, *Accuracy and Credibility of the Elderly Witness*, 3 CAN. J. AGING 79 (1984).

old¹¹¹—is milder in its generative forces and its expressions than some other “isms.”¹¹²

111. Dr. Robert Butler, in *WHY SURVIVE? GROWING OLD IN AMERICA* 6-7 (1975), recited a litany of the demeaning and inaccurate stereotypes often inflicted upon older adults:

An older person thinks and moves slowly. He does not think as he used to, nor as creatively. He is bound to himself and to his past and can no longer change or grow. He can neither learn well nor swiftly, and even if he could, he would not wish to . . . Tied to his personal traditions and growing conservatism, he dislikes innovations and is not disposed to new ideas. Not only can he not move forward, he often moves backwards. He enters a second childhood, caught often in increasing egocentricity and demanding more from his environment than he is willing to give to it. Sometimes he becomes more like himself, a caricature of a lifelong personality. He becomes irritable and cantankerous, yet shallow and enfeebled. He lives in his past. He is behind the times. He is aimless and wandering of mind, reminiscing and garrulous. Indeed, he is a study in decline. He is the picture of mental and physical failure. He has lost and cannot replace friends, spouse, jobs, status, power, influence, income. He is often stricken by diseases which in turn restrict his movement, his enjoyment of food, the pleasures of well being. His sexual interest and activity decline. His body shrinks; so, too, does the flow of blood to his brain. His mind does not utilize oxygen and sugar at the same rate as formerly. Feeble, uninteresting, he awaits his death, a burden to society, to his family, and to himself.

See also GEORGIA M. BARROW & PATRICIA A. SMITH, *AGING, AGEISM AND SOCIETY* 74 (1979); Erdman A.B. Palmore, *Attitudes Toward Aging as Shown by Humor*, 12 *GERONTOLOGIST* 181 (1971).

112. This is not the forum in which to expound upon the possible factors that account, either generally or in specific contexts, for age bias. Let me here offer just some sketchy observations.

For one, I think it important to appreciate that age bias (like other biases) is in part situational: what a bigot may find offensive in the workplace may not trouble him in the least in his home setting. In other words, an age discriminator may reject a 60-year-old for a job, while welcoming her as a neighbor or tenant. Second, there seem to be a bunch of diffuse possible explanations for negative attitudes regarding older people (again, however, one must understand that those attitudes may not exist in each and every setting):

- Old age generally is accompanied by declines in physical well-being, which few find enviable.
- The incidence of certain types of intellectual and cognitive disorders increases with age, and again one has to strain mightily to find anything positive in dementia. (It is erroneous to think that dementia or senility are every old person's inevitable fate. The sad fact is, however, that the lifetime risk of developing Alzheimer's Disease, which is the most common cause of debilitating dementia, is 15%; more to the point here, the prevalence of the disease doubles every five years after age 65, so that 40% of the population age 85 and over will have the disease. Steven G. Post et al., *The Clinical Introduction of Genetic Testing for Alzheimer Disease*, 277 *JAMA* 832, 832 (1997).
- As a cultural matter, Americans value productivity and accomplishment, and so to the extent that older people are unproductive, i.e., not working, we deval-

H. *The Defendants' Fields of Activity*

Insofar as types of activities are concerned, the entities whose actions or decisions gave rise to ADEA suits in the ninety-four appellate court cases published in 1996 exhibited the

ue them.

▫ Perhaps the old, because they are closer to the ends of their lives than are the young, trigger negative responses because of the personal anxieties and fears most of us have regarding death, itself.

▫ There are data supporting the view that the elderly have fared better economically in recent decades than have the young; there is, in addition, a growing perception that the elderly are consuming more than their fair share of public financial resources. Envy, resentment, even hostility, can flow from such data and perceptions. See generally Howard Eglit, *Health Care Allocation for the Elderly: Age Discrimination by Another Name?*, 26 HOUS. L. REV. 813, 823-32 (1989).

For a further exploration of the roots of ageism, see *Thomas R. Cole, THE JOURNEY OF LIFE* xxvi (1993):

One psychological explanation [for the denigration of old age] is self-concept. Someone having a positive self-concept may be less prone to believe the negative stereotypes of other groups. And when that person ages, he or she may well choose to accept only positive stereotypes of age. We find support for this hypothesis in a study which showed that those who accept negative attitudes toward old people tend toward self derogation Psychologists use the term "projection" here. If we feel negative about ourselves, we project it onto others. This might explain why prejudice against elders correlates with one's personal degree of anxiety about death

Three well-known theories to explain racism may also explain ageism . . . : 1) "The Authoritarian Personality," in which less-educated, rigid, untrusting, insecure persons are the ones who hold prejudices; 2) "the Frustration—Aggression" hypothesis, in which those who are frustrated, perhaps by poverty and low status, take it out in aggression towards others; and 3) "Selective Perception" in which we see what we expect to see and selectively ignore what we don't expect to see. Our perceptions then confirm our stereotypes. For example, we may "see" only old drivers driving badly. We don't "see" young drivers mishandling a vehicle. Nor do we "see" all the older drivers who do well

Of course, much of the foregoing does not really explain bias in the workplace against men and women in their forties and fifties and maybe even sixties; these individuals are just too young to be characterized as elderly and then subjected to the stereotyping that goes along with that label. But recognition of this fact is not inconsistent either with my position or Judge Posner's regarding age bias in the workplace: we both are of the view that invidious animus plays a minor role, at most, in explaining the difficulties older men and women confront in the workplace (although we certainly disagree as to whether these difficulties should be denominated as reflecting illegal discrimination and, more importantly, should serve as the bases for legal redress).

usual range of business and governmental niches.¹¹³ Not surprisingly, the vast majority—sixty—were corporations;¹¹⁴ they engaged in a variety of activities: the manufacture and sale of pharmaceuticals; the production of furniture; the processing and marketing of petroleum products; and much more. There were thirteen governmental defendants, ranging from United States government agencies to city governments; these thirteen entities included one public hospital and one entity acting as an employment agency. Educational institutions (one of which was a medical school) constituted eight of the defendants. There were five non-governmental health care providers, four of which were hospitals; five financial institutions, four of which were banks; one trade association; and one accounting firm.

Examination of the 222 nonappealed district court rulings revealed a similar group of defendants.¹¹⁵

113. The individually identified entities are set forth in Appendix II, which appears at the end of this article. Of the entities which made decisions that gave rise to the ADEA suits which ultimately wound up in federal appellate courts, there were no labor organizations and only one employment agency. All the rest were entities accused of wrongdoing in the context of their roles as employers. In one instance, the same plaintiff generated two reported appellate court decisions: *Rhodes v. Guiberson Oil Tools Div.*, 82 F.3d 615 (5th Cir. 1996), dealing with damages issues, and *Rhodes v. Guiberson Oil Tools Div.*, 75 F.3d 989 (5th Cir. 1996), which dealt with the issue of liability. For the statistical purpose of identifying the nature of the defendant's activity, *Rhodes* is only counted once.

114. The ADEA applies only to entities that have at least 20 or more employees for 20 or more weeks for each working day in the current or preceding calendar year (i.e., the year in which the alleged discrimination occurred). 29 U.S.C. § 630(b) (1994). Thus, in ascertaining the size of the corporate defendants in the reported cases, one can confidently infer that these defendants at least satisfied the 20-employee criterion since satisfaction of the numerosity requirement was not at issue in these rulings. Beyond that, however, it was difficult in many instances to readily determine whether the entity was a small, mid-sized, or large corporation, although sometimes the facts recited in an opinion provided an insight and sometimes a corporation was well known and so one could, without more, conclude that it was indeed a large operation. In any event, for my purposes I did not think it necessary to engage in research to parse out the sizes of the numerous corporations that appeared as defendants either in cases that were appealed or in the non-appealed federal district court decisions.

115. In those instances where one lawsuit generated more than one published decision, I only counted that suit once for the purposes of this tabulation.

TABLE 6
DEFENDANTS' ACTIVITIES IN
FEDERAL DISTRICT COURT DECISIONS

CORPORATIONS	76
GOVERNMENTAL AGENCIES OR CORPORATIONS	38
MANUFACTURERS	20
INSTITUTIONS OF HIGHER EDUCATION (INCLUDING 7 PRIVATE AND 1 PUBLIC UNIVERSITY, 1 MEDICAL COLLEGE, AND 1 ADDITIONAL INSTITUTION)	11
HEALTH CARE PROVIDERS (INCLUDING 5 HOSPITALS)	11
INSURANCE COMPANIES	9
BANKS	4
ADVERTISING AGENCIES	3
PRIVATE UTILITY COMPANIES	3
HOTELS	2
AIRLINES	2
BROKERAGE HOUSES	2
CREDIT UNION	2
NOT-FOR-PROFIT SCIENTIFIC ORGANIZATIONS	2
BEER BREWERS	2
DEBT COLLECTION AGENCIES	2
CONSTRUCTION COMPANY	1
ENERGY COMPANY	1
CLOTHING RETAILER	1
CREDIT CARD COMPANY	1
JEWELRY COMPANY	1
TV STATION	1
SECURITIES DEALER	1
LABOR ORGANIZATION	1
SECURITY SERVICE	1
PUBLIC SCHOOL	1
PRIVATE SCHOOL	1
CHARITABLE NOT-FOR-PROFIT ORGANIZATION	1 ¹¹⁶

116. Judge Posner, writing in POSNER, *supra* note 62, at 334 argues that employers "have their own incentives, unrelated to law, to avoid firing competent employees of any age, even if replacements are available," since the "employer has invested in the employee, and if the employee is still productive the employer is continuing to earn a return on the investment." From this perception Judge Posner proceeds to posit that the ADEA may be of little effect in the private sector:

The analysis to this point suggests that insofar as the age discrimination law forbids discrimination against individual employees, as distinguished from discrimination against age-defined classes of employees (mainly through mandatory retirement at fixed ages . . .), it may . . .

I. *Underlying Claims*

The federal appellate court opinions which were published in 1996 that dealt with claims made in cases filed under the ADEA involved a number of issues, almost all of which are familiar to students of the statute. Not uncommonly, however, the alleged substantive wrong giving rise to the ADEA lawsuit in the first instance was not the issue actually addressed by the court. For example, while an allegedly discriminatory discharge may have prompted a given plaintiff to sue, the issue presented on appeal could have been whether the defendant's motion to dismiss—based on the trial court's conclusion that the plaintiff

have little effect. The abuse against which it is directed, the arbitrary treatment of older workers, would be rare, at least in private markets, even without the law. It would be rare because . . . employers have market incentives to avoid the abuse.

Id. Judge Posner then goes on to note that his analysis, while apt (in his view) regarding the private labor market, would not necessarily hold up with respect to the public and not-for-profit sectors:

Public and not-for-profit employers can be expected to discriminate more than private for-profit employers, for two reasons. They face fewer market pressures to minimize their labor costs; and the constraint on their obtaining profits gives them an incentive to substitute nonpecuniary for pecuniary income, and one form of nonpecuniary income is avoiding undesired personal associations.

Id. Judge Posner goes on to report that in the 256 cases in his sample from which he was able to extract the necessary information, "23 percent were brought against government employers and 7.8 percent against nonprofit employers." *Id.* at 335. These percentages, he recounts, "greatly exceed the percentages for the labor force for which these two classes of employer account." *Id.*

Judge Posner's data jibe, more or less, with those set out in the text for the 1996 published cases. But while he attributes the higher ADEA case rate for government employers to the lack of market forces and the concomitant willingness of these employers to fire useful older workers in order to achieve removal of people with whom younger people do not wish to associate, the more plausible explanation (and one which need not rely on undocumented psychological speculation as to "avoiding undesired personal associations") looks to the well-known public antipathy regarding paying taxes, and to a more generalized public hostility toward, and distrust of, government. This resistance to paying taxes, combined with that hostility and distrust, produce cutbacks both in existing personnel (i.e., downsizing) and in the number of higher level job slots available for potential promotees. (Supportive of this scenario is a recent article in *The New York Times* reporting that "[b]etween 1979 and 1993, 454,000 public service jobs vanished." Louis Uchitelle & N. R. Kleinfield, *On the Battlefields of Business, Millions of Casualties*, N.Y. TIMES, Mar. 3, 1996, at 1, 14, 16.) Shrinking governmental agencies produce disgruntled men and women who, having been terminated or having been denied the promotions they desired, proceed to seek legal redress.

had failed to timely file the required administrative charge of discrimination with the EEOC¹¹⁷—had properly been granted.

What follows in Table 7 is a list of the claims that in the first instance gave rise to the lawsuits that ultimately made their way into the appellate courts.¹¹⁸ In Part III.J. I list the actual bases for dispositions by the appellate courts.¹¹⁹

117. See *supra* notes 17-22 and accompanying text.

118. The totals confirm what anyone who has read even a few appellate opinions knows: more than one issue can, and often does, arise in a given appeal. Thus, the number of issues identified exceeds the number of published rulings. The individual cases, with the issues initially giving rise to the lawsuits that culminated in these appeals being specifically identified, are listed in Appendix II, which appears at the end of this article.

119. This is not to say, however, that I identified every aspect of legal analysis that was utilized in the course of a court's disposition of a case. For example, in deciding *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (10th Cir.), *cert. denied*, 116 S. Ct. 2500 (1996), the Court of Appeals for the Tenth Circuit ruled that disparate impact analysis is inapplicable to ADEA claims. While that ruling was relevant to resolution of the ultimate issue, the issue that in fact was presented for ultimate disposition by the court was whether the employee had violated the ADEA by refusing to hire the plaintiff. Thus, disparate impact analysis is not included in Table 7 as one of the issues presented for resolution by the appellate courts.

TABLE 7
CLAIMS INITIALLY GIVING RISE TO SUIT
IN CASES DECIDED BY COURTS OF APPEALS

DISCHARGE (INCLUDING 3 RETALIATORY DISCHARGES, BUT EXCLUDING CONSTRUCTIVE DISCHARGES) ¹²⁰	60
DEMOTION	8
CONSTRUCTIVE DISCHARGE	7
REFUSAL TO PROMOTE	7
RETALIATION (NOT INCLUDING 3 RETALIATORY DISCHARGES OR 1 RETALIATORY DEMOTION)	5
REFUSAL TO HIRE OR RE-HIRE	5
REFUSAL TO TRANSFER	2
REMOVAL OF PLAINTIFF FROM BOARD OF DIRECTORS	2
PRIVILEGES OF EMPLOYMENT (FAILURE TO ASSIST PLAINTIFF IN FINDING NEW JOB; NONSELECTION OF PLAINTIFF FOR SABBATICAL)	2
HOSTILE ENVIRONMENT; HARASSMENT	2
BENEFITS	1
INVOLUNTARY TRANSFER	1
MANDATORY RETIREMENT POLICY	1
EEOC'S INVESTIGATORY AUTHORITY	1
DISCRIMINATORY TESTING BY STATE EMPLOYMENT AGENCY	1
COMPENSATION	1
DENIAL OF TENURE	1

120. I did not make a distinction between (1) a discharge based on an alleged failing of an individual employee, such as his or her inability to perform the job; (2) a discharge made in the context of a reduction in force, where the employer typically claims that economic imperatives were the animating force in its decision to fire the individual; and (3) a retaliatory discharge, i.e., a discharge allegedly resulting from an employee's (a) having earlier opposed the employer's alleged wrongdoing or (b) having participated in enforcement of the ADEA—typically by filing a charge of unlawful discrimination with the EEOC. I did separate out constructive discharges (i.e., a discharge flowing from an employee quitting a position when he or she felt, so he or she later claimed, that the job situation was an intolerable one). I concede that a case could be made for greater precision. Indeed, I hope that the data base set forth in this article will assist future researchers in looking more deeply. For my purposes, I thought it sufficient simply to identify those cases in which the plaintiff claimed that he or she was the victim of age-based discrimination that ultimately manifested itself in his or her being ousted from the job.

Thus, in ninety-two collated appellate court rulings¹²¹ discharge claims (including claims of constructive discharge)—gave rise to suit in sixty-seven, or 73%,¹²² of the cases.¹²³ To look

121. In one instance it was not possible to determine what gave rise to the suit. See *Nowd v. Rubin*, 76 F.3d 25 (1st Cir. 1996). This case is thus excluded from the computations here. In another instance, the same parties generated two reported appellate court decisions: *Rhodes v. Guiberson Oil Tools Div.*, 82 F.3d 615 (5th Cir. 1996), dealing with damages issues, and *Rhodes v. Guiberson Oil Tools Div.*, 75 F.3d 989 (5th Cir. 1996), which dealt with the issue of liability. For the statistical purpose of identifying the issues giving rise to suit, *Rhodes* is only counted once. Thus, the total data set here is reduced down to 92 cases.

122. If one were to look more broadly—as it certainly would be legitimate to do—to involuntary terminations generally, one would add three more cases: the two involving removals of employees from their companies' boards of directors, i.e., *Adam-Mellang v. Apartment Search, Inc.*, 96 F.3d 297 (8th Cir. 1996), and *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529 (2d Cir. 1996), as well as the case involving a state mandatory retirement policy, *EEOC v. Kentucky State Police Department*, 80 F.3d 1086 (6th Cir.), *cert. denied*, 117 S. Ct. 385 (1996). Thereby, one would arrive at a total of 70 cases, or 76%, in which involuntary ouster from a position was the underlying issue giving rise to suit.

123. DISCHARGE: *EEOC v. Texas Instruments, Inc.*, 100 F.3d 1173 (5th Cir. 1996); *Simpson v. Ernst & Young*, 100 F.3d 436 (6th Cir. 1996); *Marfia v. T.C. Ziraat Bankasi*, 100 F.3d 243 (2d Cir. 1996); *Smith v. City of Des Moines*, 99 F.3d 1466 (8th Cir. 1996); *Denisi v. Dominick's Finer Foods*, 99 F.3d 860 (7th Cir. 1996); *Mulero-Rodriguez v. Ponte, Inc.*, 98 F.3d 670 (1st Cir. 1996); *Greene v. Safeway Stores, Inc.*, 98 F.3d 554 (10th Cir. 1996); *Testerman v. EDS Technical Prods. Corp.*, 98 F.3d 297 (7th Cir. 1996); *Lawrence v. National Westminster Bank*, 98 F.3d 61 (3d Cir. 1996); *Murff v. Professional Med. Ins. Co.*, 97 F.3d 289 (8th Cir. 1996); *Gathright v. Teachers' Credit Union*, 97 F.3d 266 (8th Cir. 1996); *Kehoe v. Anheuser-Busch, Inc.*, 96 F.3d 1095 (8th Cir. 1996); *Noreuil v. Peabody Coal Co.*, 96 F.3d 254 (7th Cir. 1996); *MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437 (10th Cir. 1996); *Burger v. New York Inst. of Tech.*, 94 F.3d 830 (2d Cir. 1996); *Wohl v. Spectrum Mfg., Inc.*, 94 F.3d 353 (7th Cir. 1996); *Panaras v. Liquid Carbonic Indus.*, 94 F.3d 338 (7th Cir. 1996); *Kelly v. Drexel Univ.*, 94 F.3d 102 (3d Cir. 1996); *Armstrong v. Martin Marietta Corp.*, 93 F.3d 1505 (11th Cir. 1996); *Woodhouse v. Magnolia Hosp.*, 92 F.3d 248 (5th Cir. 1996); *Dranchak v. Azko Nobel, Inc.*, 88 F.3d 457 (7th Cir. 1996); *Hopper v. Hallmark Cards, Inc.*, 87 F.3d 983 (8th Cir. 1996); *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311 (8th Cir. 1996); *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328 (8th Cir. 1996); *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270 (7th Cir. 1996); *O'Connor v. Consolidated Coin Caterers Corp.*, 84 F.3d 718 (4th Cir.), *cert. denied*, 117 S. Ct. 608 (1996); *Sherlock v. Montefiore Med. Ctr.*, 84 F.3d 522 (2d Cir. 1996); *Atkinson v. Denton Publ'g Co.*, 84 F.3d 144 (5th Cir. 1996); *Mills v. First Fed. Sav. & Loan Ass'n of Belvidere*, 83 F.3d 833 (7th Cir. 1996); *Fuka v. Thomson Consumer Elecs.*, 82 F.3d 1397 (7th Cir. 1996); *Furr v. Seagate Tech., Inc.*, 82 F.3d 980 (10th Cir. 1996); *Doan v. Seagate Tech., Inc.*, 82 F.3d 974 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 684 (1997); *Brown v. CSC Logic, Inc.*, 82 F.3d 651 (5th Cir. 1996); *Pages-Cahue v. Iberia Lineas Aereas de Espana*, 82 F.3d 533 (1st Cir. 1996); *Haun v. Ideal Indus., Inc.*, 81 F.3d 541 (5th Cir. 1996); *Ford v. Bernard Fineson Dev. Ctr.*, 81 F.3d 304 (2d Cir. 1996); *Nichols v. Loral Vaught Sys. Corp.*, 81 F.3d 38 (5th Cir. 1996); *Hall v. Gillman, Inc.*, 81 F.3d 35 (5th Cir. 1996); *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406 (9th Cir.), *cert. denied*, 117 S. Ct. 295 (1996); *Grayson v. K-Mart*

at a different set of figures, of the total of 107 underlying claims that could be identified in the ninety-two cases, the sixty-seven discharge claims made up 63% of the total—still a very considerable majority.¹²⁴

In the 222 federal district court rulings a familiar array of underlying claims, i.e., claims giving rise to suit in the first instance, again is seen, as set forth in Table 8. Again, one must be mindful that the issue giving rise to the plaintiff's claim may not have been the one addressed in the reported decision. Table 8 addresses the basic issues giving rise to the law-

Corp., 79 F.3d 1086 (11th Cir.), *cert. denied*, 117 S. Ct. 447 (1996); O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756 (9th Cir. 1996); Weisbrot v. Medical College of Wis., 79 F.3d 677 (7th Cir. 1996); Slathar v. Sather Trucking Corp., 78 F.3d 415 (8th Cir.), *cert. denied*, 117 S. Ct. 179 (1996); Shaw v. HCA Health Servs. of Midwest, Inc., 79 F.3d 99 (8th Cir. 1996); Wolf v. Buss (Am.), Inc., 77 F.3d 914 (7th Cir.), *cert. denied*, 117 S. Ct. 175 (1996); Garner v. Arvin Indus., 77 F.3d 255 (8th Cir. 1996); Stults v. Conoco, Inc., 76 F.3d 651 (5th Cir. 1996); Marx v. Schnuck Mkts., Inc., 76 F.3d 324 (10th Cir.), *cert. denied*, 116 S. Ct. 2552 (1996); Rhodes v. Guiberson Oil Tools Div., 75 F.3d 989 (5th Cir. 1996); Nelson v. J.C. Penney Co., Inc., 75 F.3d 343 (8th Cir.), *cert. denied*, 117 S. Ct. 61 (1996); Smith v. Cook County, 74 F.3d 829 (7th Cir. 1996); *Americanos v. Carter*, 74 F.3d 138 (7th Cir.), *cert. denied*, 116 S. Ct. 1853 (1996); Swaim v. Moltan Co., 73 F.3d 711 (7th Cir. 1996); Sutera v. Schering Corp., 73 F.3d 13 (2d Cir. 1995); Brewer v. Quaker State Oil Ref. Corp., 72 F.3d 326 (3d Cir. 1995); Duart v. FMC Wyoming Corp., 72 F.3d 117 (10th Cir. 1995); Matthews v. Rollins Hudig Hall Co., 72 F.3d 50 (7th Cir. 1995); Gadsby v. Norwalk Furniture Corp., 71 F.3d 1324 (7th Cir. 1995); Cheney v. Anchor Glass Container Corp., 71 F.3d 848 (11th Cir. 1996).

CONSTRUCTIVE DISCHARGE: *Burns v. AAF-McQuay, Inc.*, 96 F.3d 728 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1247 (1997); *Parrish v. Immanuel Med. Ctr.*, 92 F.3d 727 (8th Cir. 1996); *Rabinovitz v. Pena*, 89 F.3d 482 (7th Cir. 1996); *Diez v. Minnesota Mining & Mfg.*, 88 F.3d 672 (8th Cir. 1996); *Burks v. Oklahoma Publ'g Co.*, 81 F.3d 975 (10th Cir.), *cert. denied*, 117 S. Ct. 302 (1996); *Stults v. Conoco, Inc.*, 76 F.3d 651 (5th Cir. 1996); *Blistein v. St. John's College*, 74 F.3d 1459 (4th Cir. 1996).

This prevalence of discharge claims is consistent with what is seen in the case law developed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17. See John J. Donohue, III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1015 (1991). Professors Donohue and Siegelman reason that the higher the wages attached to the job from which an individual was discharged, the greater his or her willingness to sue. *Id.* at 1006-11.

124. The claim or claims giving rise to each lawsuit are set forth in Appendix II, which appears at the end of this article.

suits;¹²⁵ in Part III.J. I address the grounds on which the cases were actually decided.

TABLE 8
CLAIMS GIVING RISE TO
FEDERAL DISTRICT COURT CASES

DISCHARGE	142
RETALIATION	27
DENIAL OF PROMOTION	27
REFUSAL TO HIRE	18
DEMOTION	14
CONSTRUCTIVE DISCHARGE	11
BENEFITS	5
HARASSMENT	5
INVOLUNTARY TRANSFER	5
REFUSAL TO TRANSFER	4
COMPENSATION	3
TERMS AND CONDITIONS OF EMPLOYMENT	2
INVOLUNTARY RETIREMENT	2
DISCRIMINATORY REASSIGNMENT	1
DISCRIMINATORY PERFORMANCE APPRAISAL	1
LOSS OF SENIORITY	1
CHANGE OF DUTIES	1
REFUSAL TO RECERTIFY ATTORNEY	1
OBLIGATION OF INSURER TO DEFEND INSURED	1
OTHER	1

Not surprisingly, discharges—including constructive discharges—again made up the majority of claims: of 216 reported cases¹²⁶ 158, or 73% (the same percentage derived for the appellate court data), involved a discharge claim. Looking at a differ-

125. The specific claim(s) giving rise to each lawsuit is set forth on a case-by-case basis in Appendix III, which appears at the end of this article. More than one claim could exist in a given lawsuit. For example, a plaintiff may have contended both that she was the victim of a discriminatory demotion and, following that, a discriminatory discharge. Thus, the totals for issues exceed the total number of published rulings. In a few cases, it was not possible to identify the issue generating the lawsuit in the first instance, since the reported opinion focused exclusively on some other matter, such as a motion in limine to exclude certain evidence.

126. In those instances where one lawsuit generated more than one published decision, I only counted that suit once for the purposes of this tabulation. Thus, the data set for this particular compilation is 216 cases, given that there were six instances when the same pair of litigants generated two decisions. See *supra* note 58.

ent set of figures, of the total of 277 identified claims, the 158 discharge claims still made up a majority, i.e., 57%.

By combining the appellate court and district court cases, one finds that in the 308 total cases (92 appellate court rulings plus 216 district court decisions) discharge was an issue in 225, or 73%. Of the total of 384 issues for the two levels of courts, 59% involved discharge.

In the Schuster-Kaspin-Miller Study of 280 cases decided on substantive grounds between 1968 and 1986,¹²⁷ the researchers identified 119 cases, or 42.5%, as ones in which discharge was the principal issue, and another 70 cases, or 25%, in which involuntary retirement was the principal issue.¹²⁸ Thus, 67.5% of the cases, in total, involved age-based ouster from the job. However, inasmuch as involuntary retirement is now virtually outlawed by the ADEA,¹²⁹ the (more, but not exclusively) rel-

127. See Schuster-Kaspin-Miller Study, *supra* note 16, at iii.

128. During the period covered by the researchers' study, involuntary retirement requirements were legal in some instances. At first, the ADEA only covered persons until they attained age 65, and so mandatory retirement on the basis of age could be imposed at that age (or thereafter). See *supra* note 14. The statute was amended in 1978 to raise the age ceiling, or cap, to age 70 (except for federal employees, as to whom the age cap was removed entirely). See *supra* note 14. Therefore, mandatory, or involuntary, retirement still could be imposed outside the federal sector, albeit not until the employee attained age 70. Finally, in 1986 the age cap was lifted (with a couple of exceptions concerning certain high level policy-making executives who can be forcibly retired upon attainment of age 65, 29 U.S.C. § 631(c)(1) (1994), and firefighters and law enforcement personnel, for whom state and local government bodies can impose both age-based mandatory retirement at age 55 or later, as well as age maxima vis-a-vis eligibility for hiring). The retirement provision regarding firefighters and law enforcement personnel expired on December 31, 1993, but it was reintroduced into the ADEA by the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, Div. A, Title I, § 101(a), 110 Stat. 3009. See 29 U.S.C.A. § 623(j) (Supp. 1997).

In addition to involuntary retirement having been an option for employers to pursue in the past simply because at some point in the life of an employee the employer was freed of any constraints imposed by the ADEA, there was another factor that for a time allowed the imposition of involuntary age-based retirement: until the practice was outlawed in 1978 by the Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 2(a), 92 Stat. 189, involuntary retirement could be imposed pursuant to a bona fide benefit plan.

In sum, it could well be that an employer in 1980, let us say, would wait until its employee reached age 70 and then terminate her. Today, we would call that a discharge; then, it would have been termed involuntary retirement. The different nomenclatures do not matter—both discharge and involuntary retirement entailed age-based removal of the employer from his or her job.

129. See *supra* note 128.

evant comparator is the 42.5% figure.¹³⁰ The conclusion readily follows that discharge is an even more dominating generative force for ADEA claims today than it was in the eighteen-year period covered by the Schuster-Kaspin-Miller Study.

J. The Procedural Postures of the Cases, and the Substantive Bases for Disposition

1. Appellate Court Rulings

In the majority of the ninety-four published appellate court decisions, i.e., fifty-five, the appellate courts addressed trial court rulings on motions for summary judgment.¹³¹ Five ap-

130. Concededly, one can surmise that employers today, being largely barred from forcibly retiring employees at age 65 or 70, as they could in the past, may more commonly discharge older employees than they did in the past, when they only would have to wait a few years for the age of legally permissible mandatory retirement to be reached. Nonetheless, the ADEA still constrains employers' freedom and so it is very unlikely that one could further surmise that the now-proscribed practice of imposing involuntary retirement has been supplanted by an exactly equivalent incidence of discharges.

131. See *EEOC v. Texas Instruments, Inc.*, 100 F.3d 1173 (5th Cir. 1996); *Simpson v. Ernst & Young*, 100 F.3d 436 (6th Cir. 1996); *Smith v. City of Des Moines*, 99 F.3d 1466 (8th Cir. 1996); *Denisi v. Dominick's Finer Foods*, 99 F.3d 860 (7th Cir. 1996); *Mulero-Rodriguez v. Ponte, Inc.*, 98 F.3d 670 (1st Cir. 1996); *Testerman v. EDS Technical Prods. Corp.*, 98 F.3d 297 (7th Cir. 1996); *Lawrence v. National Westminster Bank*, 98 F.3d 61 (3d Cir. 1996); *Kalvinskis v. California Inst. of Tech.*, 96 F.3d 1305 (9th Cir. 1996); *Crawford v. Medina Gen. Hosp.*, 96 F.3d 830 (6th Cir. 1996); *Burns v. AAF-McQuay, Inc.*, 96 F.3d 728 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1247 (1997); *Noreuil v. Peabody Coal Co.*, 96 F.3d 254 (7th Cir. 1996); *MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437 (10th Cir. 1996); *Wohl v. Spectrum Mfg., Inc.*, 94 F.3d 353 (7th Cir. 1996); *Kelly v. Drexel Univ.*, 94 F.3d 102 (3d Cir. 1996); *Armstrong v. Martin Marietta Corp.*, 93 F.3d 1505 (11th Cir. 1996); *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529 (2d Cir. 1996); *Roxas v. Presentation College*, 90 F.3d 310 (8th Cir. 1996); *Rabinovitz v. Pena*, 89 F.3d 482 (7th Cir. 1996); *Gallagher v. Croghan Colonial Bank*, 89 F.3d 275 (6th Cir. 1996); *Diez v. Minnesota Mining & Mfg.*, 88 F.3d 672 (8th Cir. 1996); *Adler v. Glickman*, 87 F.3d 956 (7th Cir. 1996); *Hartsel v. Keys*, 87 F.3d 795 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 683 (1997); *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311 (8th Cir. 1996); *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328 (8th Cir. 1996); *Bohac v. West*, 85 F.3d 306 (7th Cir. 1996); *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270 (7th Cir. 1996); *O'Connor v. Consolidated Coin Caterers Corp.*, 84 F.3d 718 (4th Cir.), *cert. denied*, 117 S. Ct. 608 (1996); *Atkinson v. Denton Publ'g Co.*, 84 F.3d 144 (5th Cir. 1996); *Mills v. First Fed. Sav. & Loan Ass'n of Belvidere*, 83 F.3d 833 (7th Cir. 1996); *Fuka v. Thomson Consumer Elecs.*, 82 F.3d 1397 (7th Cir. 1996); *Brown v. CSC Logic, Inc.*, 82 F.3d 651 (5th Cir. 1996); *Pages-Cahue v. Iberia Lineas Aereas de Espana*, 82 F.3d 533 (1st Cir. 1996); *Ford v. Bernard Fineson Dev. Ctr.*, 81 F.3d 304

peals grew out of motions to dismiss.¹³² There were twenty-six appellate court rulings generated by grants or denials of motions for judgment as a matter of law.¹³³

One appeal arose out of a plaintiff's motion to set aside a trial court judgment that had been entered in favor of the de-

(2d Cir. 1996); *Nichols v. Loral Vaught Sys. Corp.*, 81 F.3d 38 (5th Cir. 1996); *Hall v. Gillman, Inc.*, 81 F.3d 35 (5th Cir. 1996); *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406 (9th Cir.), *cert. denied*, 117 S. Ct. 295; *EEOC v. Kentucky State Police Dep't*, 80 F.3d 1086 (6th Cir.), *cert. denied*, 117 S. Ct. 385 (1996); *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954 (4th Cir. 1996); *Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc); *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756 (9th Cir. 1996); *Weisbrot v. Medical College of Wis.*, 79 F.3d 677 (7th Cir. 1996); *Kuhn v. Ball State Univ.*, 78 F.3d 330 (7th Cir. 1996); *Stults v. Conoco, Inc.*, 76 F.3d 651 (5th Cir. 1996); *Wolf v. Buss (Am.), Inc.*, 77 F.3d 914 (7th Cir.), *cert. denied*, 117 S. Ct. 175 (1996); *EEOC v. Massachusetts*, 77 F.3d 572 (1st Cir. 1996); *Garner v. Arvin Indus.*, 77 F.3d 255 (8th Cir. 1996); *Marx v. Schnuck Mkts., Inc.*, 76 F.3d 324 (10th Cir.), *cert. denied*, 116 S. Ct. 2552 (1996); *Jameson v. Arrow Co.*, 75 F.3d 1528 (11th Cir. 1996); *Blistein v. St. John's College*, 74 F.3d 1459 (4th Cir. 1996); *Smith v. Cook County*, 74 F.3d 829 (7th Cir. 1996); *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (10th Cir.), *cert. denied*, 116 S. Ct. 2500 (1996); *Sutera v. Schering Corp.*, 73 F.3d 13 (2d Cir. 1995); *Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326 (3d Cir. 1995); *Duart v. FMC Wyoming Corp.*, 72 F.3d 117 (10th Cir. 1995); *Gadsby v. Norwalk Furniture Corp.*, 71 F.3d 1324 (7th Cir. 1995).

132. See *Murff v. Professional Med. Ins. Co.*, 97 F.3d 289 (8th Cir. 1996); *Panaras v. Liquid Carbonic Indus.*, 94 F.3d 338 (7th Cir. 1996); *Sherlock v. Montefiore Med. Ctr.*, 84 F.3d 522 (2d Cir. 1996); *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690 (3d Cir. 1996); *Americanos v. Carter*, 74 F.3d 138 (7th Cir.), *cert. denied*, 116 S. Ct. 1853 (1996).

133. See *Simpson v. Ernst & Young*, 100 F.3d 436 (6th Cir. 1996); *Koger v. Reno*, 98 F.3d 631 (D.C. Cir. 1996); *Greene v. Safeway Stores, Inc.*, 98 F.3d 554 (10th Cir. 1996); *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436 (11th Cir. 1996); *Gathright v. Teachers' Credit Union*, 97 F.3d 266 (8th Cir. 1996); *Kehoe v. Anheuser-Busch, Inc.*, 96 F.3d 1095 (8th Cir. 1996); *Burger v. New York Inst. of Tech.*, 94 F.3d 830 (2d Cir. 1996); *Parrish v. Immanuel Med. Ctr.*, 92 F.3d 727 (8th Cir. 1996); *Woodhouse v. Magnolia Hosp.*, 92 F.3d 248 (5th Cir. 1996); *Padilla v. Metro-North Commuter R.R.*, 92 F.3d 117 (2d Cir. 1996); *Holt v. JTM Indus., Inc.*, 89 F.3d 1224 (5th Cir. 1996); *Miller v. Butcher Distribs.*, 89 F.3d 265 (5th Cir. 1996); *Dranchak v. Azko Nobel, Inc.*, 88 F.3d 457 (7th Cir. 1996); *Hopper v. Hallmark Cards, Inc.*, 87 F.3d 983 (8th Cir. 1996); *Furr v. Seagate Tech., Inc.*, 82 F.3d 980 (10th Cir. 1996); *Doan v. Seagate Tech., Inc.*, 82 F.3d 974 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 684 (1997); *Burks v. Oklahoma Publ'g Co.*, 81 F.3d 975 (10th Cir.), *cert. denied*, 117 S. Ct. 302 (1996); *Haun v. Ideal Indus., Inc.*, 81 F.3d 541 (5th Cir. 1996); *Kusak v. Ameritech Info. Sys., Inc.*, 80 F.3d 199 (7th Cir. 1996); *Shaw v. HCA Health Servs. of Midwest, Inc.*, 79 F.3d 99 (8th Cir. 1996); *Slathar v. Sather Trucking Corp.*, 78 F.3d 415 (8th Cir.), *cert. denied*, 117 S. Ct. 179 (1996); *Corneveaux v. CUNA Mut. Ins. Group*, 76 F.3d 1498 (10th Cir. 1996); *Nelson v. J.C. Penney Co., Inc.*, 75 F.3d 343 (8th Cir.), *cert. denied*, 117 S. Ct. 61 (1996); *Rhodes v. Guiberson Oil Tools Div.*, 75 F.3d 989 (5th Cir. 1996); *Swaim v. Moltan Co.*, 73 F.3d 711 (7th Cir. 1996); *Fisher v. Vassar College*, 70 F.3d 1420 (2d Cir. 1995).

pendant pursuant to an arbitrator's recommendation;¹³⁴ another arose out of a default judgment entered against the defendant;¹³⁵ a third involved a defendant's motion to compel arbitration;¹³⁶ one concerned a motion for fees;¹³⁷ another arose out of an order directing compliance with a subpoena;¹³⁸ one involved a plaintiff's motion to allow opt-in plaintiffs;¹³⁹ still another arose out of a plaintiff's motion to amend;¹⁴⁰ there was an interlocutory appeal arising out of the denial of a preliminary injunction;¹⁴¹ and there was one case¹⁴² in which the disposition below could not be determined.¹⁴³

In looking at the actual bases for dispositions by the appellate courts, one finds that in twenty-three of the ninety-four published rulings the appellate courts' dispositions were made on non-age grounds,¹⁴⁴ whereas in sixty-six cases the courts

134. See *Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848 (11th Cir. 1996).

135. See *Marfia v. T.C. Ziraat Bankasi*, 100 F.3d 243 (2d Cir. 1996).

136. See *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50 (7th Cir. 1995).

137. See *Nowd v. Rubin*, 76 F.3d 25 (1st Cir. 1996).

138. See *EEOC v. Tire Kingdom, Inc.*, 80 F.3d 449 (11th Cir. 1996).

139. See *Grayson v. K-Mart Corp.*, 79 F.3d 1086 (11th Cir.), *cert. denied*, 117 S. Ct. 447 (1996).

140. See *Pulla v. Amoco Oil Co.*, 72 F.3d 648 (8th Cir. 1995).

141. See *Adam-Mellang v. Apartment Search, Inc.*, 96 F.3d 297 (8th Cir. 1996).

142. See *Rhodes v. Guiberson Oil Tools Div.*, 82 F.3d 615 (5th Cir. 1996).

143. In *Simpson v. Ernst & Young*, 100 F.3d 436 (6th Cir. 1996), the appeal arose out of trial court rulings on both a motion for summary judgment and a motion for judgment as a matter of law. Thus, while there were a total of 94 published rulings, there are 95 dispositions recounted in the text.

144. See *Marfia v. T.C. Ziraat Bankasi*, 100 F.3d 243 (2d Cir. 1996); *Murff v. Professional Med. Ins. Co.*, 97 F.3d 289 (8th Cir. 1996); *Panaras v. Liquid Carbonic Indus.*, 94 F.3d 338 (7th Cir. 1996); *Armstrong v. Martin Marietta Corp.*, 93 F.3d 1505 (11th Cir. 1996); *Gallagher v. Croghan Colonial Bank*, 89 F.3d 275 (6th Cir. 1996); *Diez v. Minnesota Mining & Mfg.*, 88 F.3d 672 (8th Cir. 1996); *Bohac v. West*, 85 F.3d 306 (7th Cir. 1996); *Sherlock v. Montefiore Med. Ctr.*, 84 F.3d 522 (2d Cir. 1996); *Rhodes v. Guiberson Oil Tools Div.*, 82 F.3d 615 (5th Cir. 1996); *Burks v. Oklahoma Publ'g Co.*, 81 F.3d 975 (10th Cir.), *cert. denied*, 117 S. Ct. 302 (1996); *Ford v. Bernard Fineson Dev. Ctr.*, 81 F.3d 304 (2d Cir. 1996); *EEOC v. Tire Kingdom, Inc.*, 80 F.3d 449 (11th Cir. 1996); *EEOC v. Kentucky State Police Dep't*, 80 F.3d 1086 (6th Cir.), *cert. denied*, 117 S. Ct. 385 (1996); *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954 (4th Cir. 1996); *Grayson v. K-Mart Corp.*, 79 F.3d 1086 (11th Cir.), *cert. denied*, 117 S. Ct. 447 (1996); *Slathar v. Sather Trucking Corp.*, 78 F.3d 415 (8th Cir.), *cert. denied*, 117 S. Ct. 179 (1996); *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690 (3d Cir. 1996); *Nowd v. Rubin*, 76 F.3d 25 (1st Cir. 1996); *Americanos v. Carter*, 74 F.3d 138 (7th Cir.), *cert. denied*, 116 S. Ct. 1853 (1996); *Swaim v. Moltan Co.*, 73 F.3d 711 (7th Cir. 1996); *Pulla v. Amoco Oil Co.*, 72 F.3d 648 (8th Cir. 1995); *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50 (7th Cir. 1995); *Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848 (11th Cir. 1996).

disposed of the cases by addressing the age claim alone—either (1) in terms of addressing a motion for judgment as a matter of law, which motion had been made at the end of the plaintiff's case or after a jury verdict was rendered for the nonmoving party, or (2) in terms of addressing the grant or denial of a motion for summary judgment.¹⁴⁵ In the remaining five cases

145. See *EEOC v. Texas Instruments, Inc.*, 100 F.3d 1173 (5th Cir. 1996); *Smith v. City of Des Moines*, 99 F.3d 1466 (8th Cir. 1996); *Denisi v. Dominick's Finer Foods*, 99 F.3d 860 (7th Cir. 1996); *Mulero-Rodriguez v. Ponte, Inc.*, 98 F.3d 670 (1st Cir. 1996); *Koger v. Reno*, 98 F.3d 631 (D.C. Cir. 1996); *Greene v. Safeway Stores, Inc.*, 98 F.3d 554 (10th Cir. 1996); *Testerman v. EDS Technical Prods. Corp.*, 98 F.3d 297 (7th Cir. 1996); *Lawrence v. National Westminster Bank*, 98 F.3d 61 (3d Cir. 1996); *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436 (11th Cir. 1996); *Gathright v. Teachers' Credit Union*, 97 F.3d 266 (8th Cir. 1996); *Kalvinskas v. California Inst. of Tech.*, 96 F.3d 1305 (9th Cir. 1996); *Crawford v. Medina Gen. Hosp.*, 96 F.3d 830 (6th Cir. 1996); *Burns v. AAF-McQuay, Inc.*, 96 F.3d 728 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1247 (1997); *Adam-Mellang v. Apartment Search, Inc.*, 96 F.3d 297 (8th Cir. 1996); *Noreuil v. Peabody Coal Co.*, 96 F.3d 254 (7th Cir. 1996); *MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437 (10th Cir. 1996); *Burger v. New York Inst. of Tech.*, 94 F.3d 830 (2d Cir. 1996); *Wohl v. Spectrum Mfg., Inc.*, 94 F.3d 353 (7th Cir. 1996); *Kelly v. Drexel Univ.*, 94 F.3d 102 (3d Cir. 1996); *Parrish v. Immanuel Med. Ctr.*, 92 F.3d 727 (8th Cir. 1996); *Woodhouse v. Magnolia Hosp.*, 92 F.3d 248 (5th Cir. 1996); *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529 (2d Cir. 1996); *Roxas v. Presentation College*, 90 F.3d 310 (8th Cir. 1996); *Holt v. JTM Indus., Inc.*, 89 F.3d 1224 (5th Cir. 1996); *Rabinovitz v. Pena*, 89 F.3d 482 (7th Cir. 1996); *Miller v. Butcher Distribs.*, 89 F.3d 265 (5th Cir. 1996); *Dranchak v. Azko Nobel, Inc.*, 88 F.3d 457 (7th Cir. 1996); *Hopper v. Hallmark Cards, Inc.*, 87 F.3d 983 (8th Cir. 1996); *Adler v. Glickman*, 87 F.3d 956 (7th Cir. 1996); *Hartsel v. Keys*, 87 F.3d 795 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 683 (1997); *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311 (8th Cir. 1996); *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328 (8th Cir. 1996); *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270 (7th Cir. 1996); *O'Connor v. Consolidated Coin Caterers Corp.*, 84 F.3d 718 (4th Cir.), *cert. denied*, 117 S. Ct. 608 (1996); *Atkinson v. Denton Publ'g Co.*, 84 F.3d 144 (5th Cir. 1996); *Mills v. First Fed. S & L Ass'n of Belvidere*, 83 F.3d 833 (7th Cir. 1996); *Fuka v. Thomson Consumer Elecs.*, 82 F.3d 1397 (7th Cir. 1996); *Furr v. Seagate Tech., Inc.*, 82 F.3d 980 (10th Cir. 1996); *Doan v. Seagate Tech., Inc.*, 82 F.3d 974 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 974 (1997); *Brown v. CSC Logic, Inc.*, 82 F.3d 651 (5th Cir. 1996); *Pages-Cahue v. Iberia Lineas Aereas de Espana*, 82 F.3d 533 (1st Cir. 1996); *Haun v. Ideal Indus., Inc.*, 81 F.3d 541 (5th Cir. 1996); *Nichols v. Loral Vaught Sys. Corp.*, 81 F.3d 38 (5th Cir. 1996); *Hall v. Gillman, Inc.*, 81 F.3d 35 (5th Cir. 1996); *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406 (9th Cir.), *cert. denied*, 117 S. Ct. 295 (1996); *Kusak v. Ameritech Info. Sys., Inc.*, 80 F.3d 199 (7th Cir. 1996); *Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (*en banc*); *Weisbrot v. Medical College of Wis.*, 79 F.3d 677 (7th Cir. 1996); *Shaw v. HCA Health Servs. of Midwest, Inc.*, 79 F.3d 99 (8th Cir. 1996); *Kuhn v. Ball State Univ.*, 78 F.3d 330 (7th Cir. 1996); *Wolf v. Buss (Am.)*, Inc., 77 F.3d 914 (7th Cir.), *cert. denied*, 117 S. Ct. 175 (1996); *EEOC v. Massachusetts*, 77 F.3d 572 (1st Cir. 1996); *Garner v. Arvin Indus.*, 77 F.3d 255 (8th Cir. 1996); *Corneveaux v. CUNA Mut. Ins. Group*, 76 F.3d 1498 (10th Cir. 1996); *Marx v. Schnuck Mkts., Inc.*, 76 F.3d 324 (10th Cir.), *cert. denied*, 116 S. Ct. 2552 (1996); *Jameson v. Arrow Co.*, 75 F.3d 1528

the court resolved the appeal both on age-based and non-age grounds.¹⁴⁶

I term those decisions that focused only on the age discrimination issue "age-substantive," but my terminology should not be understood as meaning that the appellate court actually made a determination that illegal age discrimination indeed had occurred. Rather, in the instance of the summary judgment cases, which make up the large majority of the dispositions,¹⁴⁷ all that an "age-substantive" decision amounted to was a ruling that there either was or was not a genuine issue of material fact outstanding as to whether illegal age discrimination had occurred; no ultimate determination as to the defendant's liability for having violated the ADEA was made. It is really only in those cases that involved motions for judgment as a matter of law that had been made following jury verdicts that one can, in most of the cases, read the appellate court rulings as being dispositions on the ultimate question of legal culpability.

In the sixty-six cases resolved on age-substantive grounds, the party that had been the plaintiff below prevailed at the appellate level in eighteen cases;¹⁴⁸ the party which had been

(11th Cir. 1996); Rhodes v. Guiberson Oil Tools Div., 75 F.3d 989 (5th Cir. 1996); Nelson v. J.C. Penney Co., Inc., 75 F.3d 343 (8th Cir.), *cert. denied*, 117 S. Ct. 61 (1996); Blistein v. St. John's College, 74 F.3d 1459 (4th Cir. 1996); Smith v. Cook County, 74 F.3d 829 (7th Cir. 1996); Ellis v. United Airlines, Inc., 73 F.3d 999 (10th Cir.), *cert. denied*, 116 S. Ct. 2500 (1996); Sutura v. Schering Corp., 73 F.3d 13 (2d Cir. 1995); Brewer v. Quaker State Oil Ref. Corp., 72 F.3d 326 (3d Cir. 1995); Duart v. FMC Wyoming Corp., 72 F.3d 117 (10th Cir. 1995); Gadsby v. Norwalk Furniture Corp., 71 F.3d 1324 (7th Cir. 1995); Fisher v. Vassar College, 70 F.3d 1420 (2d Cir. 1995).

146. See Simpson v. Ernst & Young, 100 F.3d 436 (6th Cir. 1996); Kehoe v. Anheuser-Busch, Inc., 96 F.3d 1095 (8th Cir. 1996); Padilla v. Metro-North Commuter R.R., 92 F.3d 117 (2d Cir. 1996); O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756 (9th Cir. 1996); Stults v. Conoco, Inc., 76 F.3d 651 (5th Cir. 1996).

147. The increasing use of summary judgment as the mechanism for dispositively addressing employment discrimination claims generally, and age discrimination claims in particular, has been noted. See Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203 (1993); Thomas J. Piskorski, *The Growing Judicial Acceptance of Summary Judgment in Age Discrimination Cases*, 18 EMPLOYEE REL. L. J. 245 (1992). As to summary judgment generally see Gregory A. Gordillo, Note, *Summary Judgment and Problems in Applying the Celotex Trilogy Standard*, 42 CLEVELAND ST. L. REV. 263 (1994).

148. See Mulero-Rodriguez v. Ponte, Inc., 98 F.3d 670 (1st Cir. 1996); Greene v. Safeway Stores, Inc., 98 F.3d 554 (10th Cir. 1996); Lawrence v. National Westminster

the defendant below prevailed in forty-four;¹⁴⁹ and there was a split ruling in the remaining four, with the plaintiff and defendant each prevailing on one or more issues.¹⁵⁰

Bank, 98 F.3d 61 (3d Cir. 1996); Kalvinskas v. California Inst. of Tech., 96 F.3d 1305 (9th Cir. 1996); Burger v. New York Inst. of Tech., 94 F.3d 830 (2d Cir. 1996); Wohl v. Spectrum Mfg., Inc., 94 F.3d 353 (7th Cir. 1996); Parrish v. Immanuel Med. Ctr., 92 F.3d 727 (8th Cir. 1996); Woodhouse v. Magnolia Hosp., 92 F.3d 248 (5th Cir. 1996); EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529 (2d Cir. 1996); Atkinson v. Denton Publ'g Co., 84 F.3d 144 (5th Cir. 1996); Haun v. Ideal Indus., Inc., 81 F.3d 541 (5th Cir. 1996); Hall v. Gillman, Inc., 81 F.3d 35 (5th Cir. 1996); Shaw v. HCA Health Servs. of Midwest, Inc., 79 F.3d 99 (8th Cir. 1996); EEOC v. Massachusetts, 77 F.3d 572 (1st Cir. 1996); Jameson v. Arrow Co., 75 F.3d 1528 (11th Cir. 1996); Rhodes v. Guiberson Oil Tools Div., 75 F.3d 989 (5th Cir. 1996); Sutera v. Schering Corp., 73 F.3d 13 (2d Cir. 1995); Brewer v. Quaker State Oil Ref. Corp., 72 F.3d 326 (3d Cir. 1995).

149. See EEOC v. Texas Instruments, Inc., 100 F.3d 1173 (5th Cir. 1996); Smith v. City of Des Moines, 99 F.3d 1466 (8th Cir. 1996); Denisi v. Dominick's Finer Foods, 99 F.3d 860 (7th Cir. 1996); Koger v. Reno, 98 F.3d 631 (D.C. Cir. 1996); Testerman v. EDS Technical Prods. Corp., 98 F.3d 297 (7th Cir. 1996); Isenbergh v. Knight-Ridder Newspaper Sales, Inc., 97 F.3d 436 (11th Cir. 1996); Gathright v. Teachers' Credit Union, 97 F.3d 266 (8th Cir. 1996); Crawford v. Medina Gen. Hosp., 96 F.3d 830 (6th Cir. 1996); Adam-Mellang v. Apartment Search, Inc., 96 F.3d 297 (8th Cir. 1996); Noreuil v. Peabody Coal Co., 96 F.3d 254 (7th Cir. 1996); MacDonald v. Delta Air Lines, Inc., 94 F.3d 1437 (10th Cir. 1996); Kelly v. Drexel Univ., 94 F.3d 102 (3d Cir. 1996); Roxas v. Presentation College, 90 F.3d 310 (8th Cir. 1996); Holt v. JTM Indus., Inc., 89 F.3d 1224 (5th Cir. 1996); Rabinovitz v. Pena, 89 F.3d 482 (7th Cir. 1996); Miller v. Butcher Distribs., 89 F.3d 265 (5th Cir. 1996); Dranchak v. Azko Nobel, Inc., 88 F.3d 457 (7th Cir. 1996); Hopper v. Hallmark Cards, Inc., 87 F.3d 983 (8th Cir. 1996); Adler v. Glickman, 87 F.3d 956 (7th Cir. 1996); Hartsel v. Keys, 87 F.3d 795 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 683 (1997); Aucutt v. Six Flags Over Mid-America, Inc., 85 F.3d 1311 (8th Cir. 1996); Rothmeier v. Investment Advisers, Inc., 85 F.3d 1328 (8th Cir. 1996); O'Connor v. Consolidated Coin Caterers Corp., 84 F.3d 718 (4th Cir.), *cert. denied*, 117 S. Ct. 608 (1996); Mills v. First Fed. Sav. & Loan Ass'n of Belvidere, 83 F.3d 833 (7th Cir. 1996); Fuka v. Thomson Consumer Elecs., 82 F.3d 1397 (7th Cir. 1996); Furr v. Seagate Tech., Inc., 82 F.3d 980 (10th Cir. 1996); Doan v. Seagate Tech., Inc., 82 F.3d 974 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 684 (1997); Brown v. CSC Logic, Inc., 82 F.3d 651 (5th Cir. 1996); Pages-Cahue v. Iberia Lineas Aereas de Espana, 82 F.3d 533 (1st Cir. 1996); Nichols v. Loral Vaught Sys. Corp., 81 F.3d 38 (5th Cir. 1996); Kusak v. Ameritech Info. Sys., Inc., 80 F.3d 199 (7th Cir. 1996); Douglass v. United Servs. Auto Ass'n, 79 F.3d 1415 (5th Cir. 1996) (en banc); Weisbrot v. Medical College of Wis., 79 F.3d 677 (7th Cir. 1996); Kuhn v. Ball State Univ., 78 F.3d 330 (7th Cir. 1996); Wolf v. Buss (Am.), Inc., 77 F.3d 914 (7th Cir.), *cert. denied*, 117 S. Ct. 175 (1996); Garner v. Arvin Indus., 77 F.3d 255 (8th Cir. 1996); Marx v. Schnuck Mkts., Inc., 76 F.3d 324 (10th Cir.), *cert. denied*, 116 S. Ct. 2552 (1996); Nelson v. J.C. Penney Co., Inc., 75 F.3d 343 (8th Cir.), *cert. denied*, 117 S. Ct. 61 (1996); Blistein v. St. John's College, 74 F.3d 1459 (4th Cir. 1996); Smith v. Cook County, 74 F.3d 829 (7th Cir. 1996); Ellis v. United Airlines, Inc., 73 F.3d 999 (10th Cir.), *cert. denied*, 116 S. Ct. 2500 (1996); Duarte v. FMC Wyoming Corp., 72 F.3d 117 (10th Cir. 1995); Gadsby v. Norwalk Furniture Corp., 71 F.3d 1324 (7th Cir. 1995); Fisher v. Vassar College, 70 F.3d 1420 (2d Cir. 1995).

150. See Burns v. AAF-McQuay, Inc., 96 F.3d 728 (4th Cir. 1996), *cert. denied*, 117

Confining attention to the sixty-two cases in which there was a single winner on appeal, the party that was the plaintiff below prevailed 29% of the time on appeal (i.e., eighteen wins out of sixty-two cases) and the defendant below prevailed in 71% of the cases (i.e., forty-four wins out of sixty-two cases).

In the twenty-three cases in which the appeal turned on a non-age-substantive issue (such as the question whether the plaintiff was an employee for the purposes of the Act,¹⁵¹ or whether there had been compliance with the procedural requirements applicable to federal employees' suits)¹⁵² the party that was the plaintiff below prevailed at the appellate level in ten cases,¹⁵³ the defendant prevailed in ten,¹⁵⁴ and there were three in which each of the parties prevailed on one or more issues.¹⁵⁵ Thus, in the non-age-substantive category, if one excludes the split rulings, the litigants who were plaintiffs below won in 50% of the twenty cases and the defendants likewise prevailed in 50% of the appeals.

S. Ct. 1247 (1997); *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270 (7th Cir. 1996); *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406 (9th Cir.), *cert. denied*, 117 S. Ct. 295 (1996); *Corneveaux v. CUNA Mut. Ins. Group*, 76 F.3d 1498 (10th Cir. 1996).

151. *See, e.g., Americanos v. Carter*, 74 F.3d 138 (7th Cir.), *cert. denied*, 116 S. Ct. 1853 (1996).

152. *See Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326 (3d Cir. 1995).

153. *See Murff v. Professional Med. Ins. Co.*, 97 F.3d 289 (8th Cir. 1996); *Panaras v. Liquid Carbonic Indus.*, 94 F.3d 338 (7th Cir. 1996); *Armstrong v. Martin Marietta Corp.*, 93 F.3d 1505 (11th Cir. 1996); *Burks v. Oklahoma Publishing Co.*, 81 F.3d 975 (10th Cir.), *cert. denied*, 117 S. Ct. 302 (1996); *Ford v. Bernard Fineson Dev. Ctr.*, 81 F.3d 304 (2d Cir. 1996); *EEOC v. Tire Kingdom, Inc.*, 80 F.3d 449 (11th Cir. 1996); *Grayson v. K-Mart Corp.*, 79 F.3d 1086 (11th Cir.), *cert. denied*, 117 S. Ct. 447 (1996); *Nowd v. Rubin*, 76 F.3d 25 (1st Cir. 1996); *Swaim v. Moltan Co.*, 73 F.3d 711 (7th Cir. 1996); *Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848 (11th Cir. 1996).

154. *See Marfia v. T.C. Ziraat Bankasi*, 100 F.3d 243 (2d Cir. 1996); *Gallagher v. Croghan Colonial Bank*, 89 F.3d 275 (6th Cir. 1996); *Diez v. Minnesota Mining & Mfg.*, 88 F.3d 672 (8th Cir. 1996); *Bohac v. West*, 85 F.3d 306 (7th Cir. 1996); *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954 (4th Cir. 1996); *Slathar v. Sather Trucking Corp.*, 78 F.3d 415 (8th Cir.), *cert. denied*, 117 S. Ct. 179 (1996); *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690 (3d Cir. 1996); *Americanos v. Carter*, 74 F.3d 138 (7th Cir.), *cert. denied*, 116 S. Ct. 1853 (1996); *Pulla v. Amoco Oil Co.*, 72 F.3d 648 (8th Cir. 1995); *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50 (7th Cir. 1995).

155. *See Sherlock v. Montefiore Med. Ctr.*, 84 F.3d 522 (2d Cir. 1996); *Rhodes v. Guiberson Oil Tools Div.*, 82 F.3d 615 (5th Cir. 1996); *EEOC v. Kentucky State Police Dep't*, 80 F.3d 1086 (6th Cir.), *cert. denied*, 117 S. Ct. 385 (1996).

In sum, plaintiffs fared much better, e.g., they had a 50% win rate, in appeals concerning non-age-substantive issues than they did in appeals addressing age-substantive issues, where they only had a 29% win rate. (Of course, the more useful data concern how many of the litigants who lost at the trial court level were able to secure reversals on appeal, or, to put the same proposition differently, how many of the litigants who prevailed at the trial court level were able to preserve their victories in appeals pursued by the losing party. These data are discussed *infra*, in Part III.K.)

2. District Court Rulings

In terms of the procedural postures of the district court litigants in the 222 nonappealed district court rulings,¹⁵⁶ 128 involved dispositions of motions for summary judgment.¹⁵⁷ There were forty-three cases in which the courts addressed motions to dismiss.¹⁵⁸ Three opinions were published in cases involving

156. These data are set forth for each case in Appendix III, which appears at the end of this article. The totals derived exceed the total of 222 cases because some cases involved resolution of more than one issue.

157. These data are set forth for each individual case in Appendix III, which appears at the end of this article. What follows are the abbreviated citations to these cases, whose names and citations are set forth in full in Appendix III: *Agugliaro*, *Allen*, *Armbruster v. Erie Civic Ctr. Auth.*, *Barvick*, *Bedwell*, *Bern*, *Blackburn*, *Boyd*, *Bozner*, *Brazier*, *Brown v. McDonnell Douglas Corp.*, *Bryson*, *Bumstead*, *Camacho*, *Carlson*, *Carlson*, *Causey*, *Caussade*, *Cecilio*, *Chastain*, *Chenoweth*, *Chiaramonte*, *Collier*, *Crossman*, *Day*, *Denman*, *Denty*, *Derthick*, *Dittman v. Ireco, Inc.*, *Douglas*, *Dryden*, *Duffy*, *Dungee*, *Dunn*, *Elguindy*, *EEOC v. Doremus & Co.*, *EEOC v. Sara Lee Corp.*, *Faix*, *Farmer*, *Figuerola*, *Forren*, *Francescon*, *Fries*, *Fronduiti*, *Giannopoulos*, *Gallo*, *Golder*, *Gosnell*, *Goss*, *Grinnell v. General Elec. Co.*, *Hartley*, *Henderson* (933 F. Supp.), *Herrero*, *Hidalgo*, *Hill*, *Huff*, *Hurd*, *Kelleher* (71 Fair Empl. Prac. Cas.), *Kennedy*, *Kerber*, *Kern*, *Knox v. Brundidge Shirt Corp.*, *Kotas*, *Kotlowski*, *Kramer*, *Lamb*, *Lewis*, *Ligon*, *Luis*, *Majahad*, *Mania*, *Manos*, *Matthews*, *McDonald*, *McKenny*, *Mississippi Power & Light Co.*, *Moebus*, *Morrow*, *Metsopoulos*, *Nakai*, *Newsome*, *Odaiyappa*, *Odunmbaku*, *O'Keefe*, *Orisek*, *Paquin*, *Patterson*, *Payne*, *Perdas*, *Penchesin*, *Philippeaux*, *Pina*, *Pollard*, *Posey*, *Pouncey*, *Rivers*, *Roemer*, *Rogic*, *Saeli*, *Sastri*, *Shapiro*, *Sharkey*, *Shaver*, *Shenker*, *Shivers*, *Simon*, *Smith v. Chrysler Corp.*, *Smith v. CIBA-Geigy Corp.*, *Smith v. Midland Brake, Inc.*, *Sorenson*, *Sperling* (924 F. Supp. 1346), *Stahlke*, *Taylor v. Brown*, *Taylor v. Washington Metro. Transit Auth.*, *Tipsword*, *Tobin*, *Tucker*, *Waldemar*, *Walker*, *Wanamaker*, *Washington*, *Wester*, *Whitchurch*, *Wilde*, *Wilvers*, *Woythal*, *Young v. Easter Enter., Inc.*, *Young v. Lincoln Nat'l Corp.*

158. See *Walsh v. City of Auburn*, 942 F. Supp. 788 (N.D.N.Y. 1996); *DeJoy v. Comcast Cable Communications, Inc.*, 941 F. Supp. 468 (D.N.J. 1996); *McNulty v. New York State Dep't of Finance*, 941 F. Supp. 452 (S.D.N.Y. 1996); *Thomas v. Held*, 941 F. Supp. 444 (S.D.N.Y. 1996); *Dittman v. General Motors Corp.-Delco Chassis*

bench trials,¹⁵⁹ and eleven involved rulings, typically on motions for judgment as a matter of law, that followed either closure of the plaintiffs' cases or jury verdicts.¹⁶⁰ Four opinions

Div., 941 F. Supp. 284 (D. Conn. 1996); Tsai v. Helfer, 940 F. Supp. 597 (S.D.N.Y. 1996); MacPherson v. University of Montevallo, 938 F. Supp. 785 (N.D. Ala. 1996); Graboski v. Giuliani, 937 F. Supp. 258 (S.D.N.Y. 1996); Fernandez v. Community Asphalt, Inc., 934 F. Supp. 418 (S.D. Fla. 1996); Vitello v. Liturgy Training Publications, 932 F. Supp. 1093 (N.D. Ill. 1996); Guadagno v. Wallack Ader Levithan Assoc., 932 F. Supp. 94 (S.D.N.Y. 1996); Elias v. Naperville Eye Assocs., Ltd., 928 F. Supp. 757 (N.D. Ill. 1996); Nixon v. New York City Hous. Auth., 72 Fair Empl. Prac. Cas. (BNA) 674 (S.D.N.Y. 1996); Walaszek v. Reinke Wholesale Supply Co., 72 Fair Empl. Prac. Cas. (BNA) 162 (N.D. Ill. 1996); Falbaum v. Pomerantz, 72 Fair Empl. Prac. Cas. (BNA) 141 (S.D.N.Y. 1995); Storr v. Anderson Sch., 919 F. Supp. 144, 107 (S.D.N.Y. 1996); Amos v. Housing Auth. of Birmingham Dist., 927 F. Supp. 416 (N.D. Ala. 1996); Kelleher v. Aerospace Community Credit Union, 927 F. Supp. 361 (E.D. Mo. 1996); Secrist v. Burns Internat'l Sec. Servs., 926 F. Supp. 823 (E.D. Wis. 1996); Swartzbaugh v. State Farm Ins. Cos., 924 F. Supp. 932 (E.D. Mo. 1995); Wray v. Edward Blank Assocs., Inc., 924 F. Supp. 498 (S.D.N.Y. 1996); Jungels v. State Univ. College of N.Y., 922 F. Supp. 779 (W.D.N.Y. 1996); Mukhtar v. Castleton Serv. Corp., 920 F. Supp. 934 (S.D. Ind. 1996); Tomasello v. Rubin, 920 F. Supp. 4 (D.D.C. 1996); Koslow v. Hundt, 919 F. Supp. 18 (D.D.C. 1995); Cadelinia v. Hilton Internat'l, 71 Fair Empl. Prac. Cas. (BNA) 1602 (S.D.N.Y. 1996); Collins v. Old Republic Title Co., 71 Fair Empl. Prac. Cas. (BNA) 1584 (D. Kan. 1996); Brown v. IBM Corp., 71 Fair Empl. Prac. Cas. (BNA) 898 (E.D. Pa. 1996); Metsopoulos v. Runyon, 918 F. Supp. 851 (D.N.J. 1996); Vakharia v. Little Co. of Mary Hosp. & Health Care Ctrs., 917 F. Supp. 1282 (N.D. Ill. 1996); Gallo v. Board of Regents of Univ. of Cal., 916 F. Supp. 1005 (S.D. Cal. 1995); Robins v. Max Mara, USA, Inc., 914 F. Supp. 1006 (S.D.N.Y. 1996); Pardasani v. Rack Room Shoes, 912 F. Supp. 187 (M.D.N.C. 1996); Gregor v. Derwinski, 911 F. Supp. 643 (W.D.N.Y. 1996); Stafford v. Radford Community Hosp., Inc., 908 F. Supp. 1369 (W.D. Va. 1995); Johnson v. Cadillac Plastics Group, 908 F. Supp. 847 (D. Colo. 1995); Gorman v. Hughes Danbury Optical Sys., 908 F. Supp. 107 (D. Conn. 1995); Caldwell v. Federal Express Corp., 908 F. Supp. 29 (D. Me. 1995); Gerzog v. London Fog Corp., 907 F. Supp. 590 (E.D.N.Y. 1995); Zellars v. Liberty Nat'l Life Ins. Co., 907 F. Supp. 355 (M.D. Ala. 1995); Ford v. City of Oakwood, 905 F. Supp. 1063 (N.D. Ga. 1995); Griswold v. Alabama Dep't of Indus. Relations, 903 F. Supp. 1492 (M.D. Ala. 1995). In a couple of instances a court addressed both a motion to dismiss and a motion for summary judgment.

159. See Diehl v. Xerox Corp., 933 F. Supp. 1157 (W.D.N.Y. 1996); Ellis v. Provident Life & Accident Ins. Co., 926 F. Supp. 417 (S.D.N.Y. 1996); Brook v. City of Montgomery, 916 F. Supp. 1193 (M.D. Ala. 1996).

160. See Finch v. Hercules, Inc., 941 F. Supp. 1395 (D. Del. 1996); Phuong v. National Academy of Sciences, 927 F. Supp. 487 (D.D.C. 1996); Kirsch v. Fleet Street, Ltd., 71 Fair Empl. Prac. Cas. (BNA) 1413 (S.D.N.Y. 1996); Fine v. Interpublic Group, 71 Fair Empl. Prac. Cas. (BNA) 354 (S.D.N.Y. 1996); Shea v. Icelandair, 925 F. Supp. 1014 (S.D.N.Y. 1996); Minetos v. City Univ. of N.Y., 925 F. Supp. 177 (S.D.N.Y. 1996); Mitchell v. Sisters of Charity of the Incarnate Word, 924 F. Supp. 793 (S.D. Tex. 1996); Stratton v. Department for the Aging for City of N.Y., 922 F. Supp. 857 (S.D.N.Y. 1996); Nembhard v. Memorial Sloan-Kettering Cancer Ctr., 918 F. Supp. 784 (S.D.N.Y.), *aff'd without opinion*, 104 F.3d 353 (2d Cir. 1996); Newhouse v. McCormick & Co., 910 F. Supp. 1451 (D. Neb. 1996); Mulqueen v. Dalea, Inc., 909 F. Supp. 86 (N.D.N.Y. 1995), *aff'd without opinion*, 104 F.3d 351 (2d Cir. 1996).

were generated by motions for judgment on the pleadings.¹⁶¹ There were a variety of other rulings, as well, including four on motions to compel arbitration;¹⁶² seven on motions in limine regarding the exclusion of evidence;¹⁶³ three involving motions to remand removed cases to state court;¹⁶⁴ twelve involving motions or requests regarding relief, fees, and/or costs;¹⁶⁵ and numerous others.¹⁶⁶

In the 222 cases a ruling of an age-substantive nature (as opposed to one addressed to a procedural matter or to a matter tangential to the actual claim of discrimination, such as a motion to compel arbitration or a motion in limine to exclude certain evidentiary material) was rendered in 125 decisions,¹⁶⁷

161. See *Mennella v. Office of Court Admin.*, 938 F. Supp. 128 (E.D.N.Y. 1996); *Golombiewski v. Johnson*, 934 F. Supp. 849 (E.D. Mich. 1996); *Maher v. Runyon*, 70 Fair Empl. Prac. Cas. (BNA) 387 (S.D.N.Y. 1996); *Wray v. Edward Blank Assocs., Inc.*, 924 F. Supp. 498 (S.D.N.Y. 1996).

162. See *Topf v. Warnaco, Inc.*, 942 F. Supp. 762 (D. Conn. 1996); *Durkin v. Cigna Property & Cas. Corp.*, 942 F. Supp. 481 (D. Kan. 1996); *Alcaraz v. Avnet*, 933 F. Supp. 1025 (D. N. Mex. 1996); *Smith v. Lehman Bros.*, 71 Fair Empl. Prac. Cas. (BNA) 1494 (S.D.N.Y. 1996).

163. See *Kunzman v. Enron Corp.*, 941 F. Supp. 853 (N.D. Iowa 1996); *Sperling v. Hoffman-LaRoche, Inc.*, 924 F. Supp. 1396 (D.N.J. 1996); *Armbruster v. Unisys Corp.*, 914 F. Supp. 1153 (E.D. Pa. 1996); *Burruss v. Sears Roebuck & Co.*, 71 Fair Empl. Prac. Cas. (BNA) 1582 (S.D. Ohio 1996); *Burger v. Litton Indus.*, 70 Fair Empl. Prac. Cas. (BNA) 696 (S.D.N.Y. 1996); *Knox v. First Nat'l Bank of Chicago*, 909 F. Supp. 569 (N.D. Ill. 1995); *Kraemer v. Franklin & Marshall College*, 909 F. Supp. 268 (E.D. Pa. 1995).

164. See *Brown v. Intercity Federal Bank*, 72 Fair Empl. Prac. Cas. (BNA) 318 (N.D. Miss. 1996); *Heckelmann v. Piping Cos.*, 904 F. Supp. 1257 (N.D. Okla. 1995); *Cook v. Travelers Cos.*, 904 F. Supp. 841 (N.D. Ill. 1995).

165. See *Kraemer v. Franklin & Marshall College*, 941 F. Supp. 479 (E.D. Pa. 1996); *Caraballo v. South Stevedoring, Inc.*, 932 F. Supp. 1462 (S.D. Fla. 1996); *Biggins v. Hazen Paper Co.*, 932 F. Supp. 382 (D. Mass. 1996); *Pollis v. New Sch. for Soc. Research*, 930 F. Supp. 899 (S.D.N.Y. 1996); *Dalal v. Alliant Techs.*, 927 F. Supp. 1383 (D. Colo. 1996); *Dalal v. Alliant Techs.*, 927 F. Supp. 1374 (D. Colo. 1996); *LeFevre v. Harrison Group*, 71 Fair Empl. Prac. Cas. (BNA) 449 (E.D. Pa. 1996); *Shea v. Icelandair*, 925 F. Supp. 1014 (S.D.N.Y. 1996); *Reynolds v. Octel Communications Corp.*, 924 F. Supp. 743 (N.D. Tex. 1995); *Stratton v. Department for the Aging for City of N.Y.*, 922 F. Supp. 857 (S.D.N.Y. 1996); *Nembhard v. Memorial Sloan-Kettering Cancer Ctr.*, 918 F. Supp. 784 (S.D.N.Y.), *aff'd without opinion*, 104 F.3d 353 (2d Cir. 1996); *Moses v. K-Mart Corp.*, 905 F. Supp. 1054 (S.D. Fla. 1995).

166. See Appendix III, which appears at the end of this article.

167. These data are set forth for each individual case in Appendix III, which appears at the end of this article. What follows are the abbreviated citations to these cases, whose names and citations are set forth in full in Appendix III: *Agugliaro*, *Allen*, *Amos*, *Armbruster v. Erie Civic Ctr. Auth.*, *Barvick*, *Bedwell*, *Bern*, *Blackburn*, *Boyd*, *Brazier*, *Brook*, *Brown v. McDonnell Douglas Corp.*, *Bumstead*, *Camacho*,

which is equivalent to 54.5% of the cases. The defendants prevailed in eighty-six of these rulings, i.e., 69%.¹⁶⁸ The plaintiffs won in thirty-one, constituting 25% of the rulings.¹⁶⁹ In eight

Carlson, Carlson, Causey, Caussade, Cecilio, Chastain, Chenoweth, Chiaramonte, Collier, Day, Denman, Diehl, Dittman v. General Motors Corp., Douglas, Dryden, Duffy, Dungee, Dunn, Elguindy, Ellis, EEOC v. Doremus, Faix, Farmer, Finch, Forren, Francescon, Fries, Giannapoulos, Golder, Gosnell, Goss, Griswold v. Alabama Dep't of Indus. Relations, Hartley, Henderson (933 F. Supp.), Herrero, Hidalgo, Hill, Huff, Hurd, Kelleher (71 Fair Empl. Prac. Cas.), Kennedy, Kerber, Kern, Kirsh, Knox v. Brundidge Shirt Corp., Kotas, Kotlowski, Kramer, Lamb, Lewis, Ligon, Luis, Maher, Majahad, Mania, Manos, Matthews, McDonald, McNulty, Metsopoulos, Minetos, Mitchell, Morrow, Mulqueen, Nakai, Nembhard, Odumbaku, O'Keefe, Orisek, Paquin, Patterson, Payne, Pendas, Penchisen, Philippeaux, Phuong, Pina, Pollard, Posey, Roemer, Rogic, Saeli, Sastri, Shapiro, Shenker, Shivery, Smith v. Chrysler Corp., Smith v. CIBA-Geigy Corp., Smith v. Midland Brake, Inc., Sorenson, Sperling, Sperling, Stahlke, Stratton, Taylor v. Brown, Taylor v. Washington, Tipsword, Tucker, Vakharia, Waldemar, Walker, Walsh, Wanamaker, Washington, Wester, Whitchurch, Wilde, Wilvers, Woythal, Young v. Lincoln Nat'l Corp.

168. These data are set forth for each individual case in Appendix III, which appears at the end of this article. What follows are the abbreviated citations to these cases, whose names and citations are set forth in full in Appendix III: *Agugliaro, Allen, Amos, Armbruster v. Erie Civic Ctr. Auth., Bedwell, Bern, Blackburn, Boyd, Braziel, Brook, Brown v. McDonnell Douglas Corp., Bumstead, Causey, Caussade, Cecilio, Chenoweth, Chiaramonte, Collier, Day, Denman, Diehl, Dittman v. General Motors Corp., Douglas, Dryden, Duffy, Dungee, Dunn, Ellis, Faix, Farmer, Finch, Forren, Giannapoulos, Golder, Goss, Hartley, Herrero, Hidalgo, Hill, Huff, Kelleher (71 Fair Empl. Prac. Cas.), Kennedy, Kerber, Knox v. Brundidge Shirt Corp., Kotlowski, Kramer, Lamb, Lewis, Luis, Maher, Majahad, Mania, Matthews, McDonald, Minetos, Nakai, Orisek, Paquin, Patterson, Payne, Penchisen, Pina, Pollard, Rogic, Saeli, Shenker, Shivers, Smith v. Chrysler Corp., Smith v. CIBA-Geigy Corp., Smith v. Midland Brake, Inc., Sorenson, Sperling (924 F. Supp. 1346), Stahlke, Stratton, Taylor v. Brown, Tipsword, Tucker, Vakharia, Wilde, Waldemar, Walker, Wanamaker, Washington, Wester, Woythal, Young v. Lincoln Nat'l Corp.*

169. *See Barvick v. Cisneros*, 941 F. Supp. 1007 (D. Kan. 1996); *McNulty v. New York State Dep't of Finance*, 941 F. Supp. 452 (S.D.N.Y. 1996); *Camacho v. Sears Roebuck de Puerto Rico*, 939 F. Supp. 113 (D.P.R. 1996); *Ligon v. Triangle Pac. Corp.*, 935 F. Supp. 936 (M.D. Tenn. 1996); *Henderson v. AT & T Corp.*, 933 F. Supp. 1326 (S.D. Tex. 1996); *Pendas v. Runyon*, 933 F. Supp. 187 (N.D.N.Y. 1996); *Carlson v. WPLG/TV-10*, 72 Fair Empl. Prac. Cas. (BNA) 646 (S.D. Fla. 1996); *Odumbaku v. New York Blood Ctr.*, 72 Fair Empl. Prac. Cas. (BNA) 202 (S.D.N.Y. 1996); *Kirsch v. Fleet Street, Ltd.*, 71 Fair Empl. Prac. Cas. (BNA) 1413 (S.D.N.Y. 1996); *Shapiro v. Kelly*, 71 Fair Empl. Prac. Cas. (BNA) 351 (E.D. La. 1996); *Carlson v. WPLG/TV-10*, 70 Fair Empl. Prac. Cas. (BNA) 1596 (S.D. Fla. 1996); *Kotas v. Waterman Broad.*, 927 F. Supp. 1547 (M.D. Fla. 1996); *Phuong v. National Academy of Sciences*, 927 F. Supp. 487 (D.D.C. 1996); *Gosnell v. Runyon*, 926 F. Supp. 493 (M.D. Pa. 1995); *Sperling v. Hoffman-LaRoche, Inc.*, 924 F. Supp. 1396 (D.N.J. 1996); *Mitchell v. Sisters of Charity of the Incarnate Word*, 924 F. Supp. 793 (S.D. Tex. 1996); *Hurd v. JCB Int'l Credit Card Co.*, 923 F. Supp. 492 (S.D.N.Y. 1996); *EEOC v. Doremus & Co.*, 921 F. Supp. 1048 (S.D.N.Y. 1995); *Nembhard v. Memorial Sloan-Kettering Cancer Ctr.*, 918 F. Supp. 784 (S.D.N.Y.), *aff'd without opinion*, 104 F.3d 353 (2d Cir. 1996); *O'Keefe v. General Accident Ins. Co.*, 918 F. Supp. 115 (S.D.N.Y.

cases, representing 6%, both parties won on one or more of several age-substantive issues on which the courts ruled.¹⁷⁰

In the ninety-five cases in which a disposition was rendered exclusively or primarily on a non-age-substantive issue,¹⁷¹ such as the question of whether the charge of discrimination had been timely filed with the EEOC¹⁷² or a damages question,¹⁷³ defendants did not fare as well: they won in fifty-sev-

1996); *Whitchurch v. Apache Prods. Co.*, 916 F. Supp. 809 (N.D. Ill. 1996); *Fries v. Northside Distribs.*, 70 Fair Empl. Prac. Cas. (BNA) 1293 (W.D. Mo. 1996); *Wilvers v. DDB Needham Worldwide Inc.*, 70 Fair Empl. Prac. Cas. (BNA) 255 (S.D.N.Y. 1996); *Roemer v. Public Serv. Co. of Colo.*, 911 F. Supp. 464 (D. Colo. 1996); *Kern v. Westinghouse Elec. Corp.*, 69 Fair Empl. Prac. Cas. (BNA) 1468 (W.D. Pa. 1995); *Posey v. Anheuser-Busch*, 69 Fair Empl. Prac. Cas. (BNA) 1465 (E.D. La. 1996); *Mulqueen v. Dalea, Inc.*, 909 F. Supp. 86 (N.D.N.Y. 1995), *aff'd without opinion*, 104 F.3d 351 (2d Cir. 1996); *Griswold v. Alabama Dep't of Indus. Relations*, 903 F. Supp. 1492 (M.D. Ala. 1995); *Elguindy v. Commonwealth Edison Co.*, 903 F. Supp. 1260 (N.D. Ill. 1995); *Chastain v. USF & G Corp.*, 69 Fair Empl. Prac. Cas. (BNA) 1443 (W.D. Okla. 1996); *Manos v. Bunzl-Papercraft, Inc.*, 69 Fair Empl. Prac. Cas. (BNA) 1189 (N.D. Ill. 1995).

170. See *Walsh v. City of Auburn*, 942 F. Supp. 788 (N.D.N.Y. 1996); *Morrow v. City of Jacksonville*, 941 F. Supp. 816 (E.D. Ark. 1996); *Francescon v. Fairmont Hotel*, 70 Fair Empl. Prac. Cas. (BNA) 582 (E.D. La. 1996); *Taylor v. Washington Metro. Transit Auth.*, 922 F. Supp. 665 (D.D.C. 1996); *Philippeaux v. County of Nassau*, 921 F. Supp. 1000 (E.D.N.Y. 1996); *Metsopoulos v. Runyon*, 918 F. Supp. 851 (D.N.J. 1996); *Sastri v. KLM Royal Dutch Airlines*, 69 Fair Empl. Prac. Cas. (BNA) 1537 (S.D.N.Y. 1995).

171. These data are set forth for each individual case in Appendix III, which appears at the end of this article. What follows are the abbreviated citations to these cases, whose names and citations are set forth in full in Appendix III: *Alcaraz*, *Armbruster v. Unisys Corp.*, *Biggins*, *Bozner*, *Brown v. IBM Corp.*, *Brown v. Intercity Federal Bank*, *Bryson*, *Burger*, *Burress*, *Cadelinia*, *Caldwell*, *Caraballo*, *Carr*, *Collins*, *Cook*, *Crossman*, *Dalal*, *Dalal*, *D'Anna*, *DeJoy*, *Denty*, *Derthick*, *DiRussa*, *Dittman v. Ireco, Inc.*, *Durkin*, *Elias*, *EEOC v. Lockheed Martin Marietta*, *McDonnell*, *EEOC v. Sara Lee Corp.*, *Falbaum*, *Fernandez*, *Figueroa*, *Fine*, *Ford*, *Fronduiti*, *Gallo*, *Gerzog*, *Golder*, *Golombiewski*, *Gorman*, *Grabowski*, *Gregor*, *Grinnell v. General Elec. Co.*, *Griswold v. New Madrid County Group Practice, Inc.*, *Guadagno*, *Hawes*, *Heckelmann*, *Henderson* (917 F. Supp.), *Hodge*, *Johnson*, *Jungels*, *Kelleher* (927 F. Supp.), *Knox v. First Nat'l Bank of Chicago*, *Koslow*, *Kraemer*, *Kraemer*, *Kunzman*, *LeFevre*, *MacPherson*, *McGreevy*, *McKenny*, *Mennella*, *Mississippi Power & Light Co.*, *Moebius*, *Moses* (905 F. Supp.), *Mukhtar*, *Newhouse*, *Nixon*, *Odaiyappa*, *Pardasani*, *Pollis*, *Reado*, *Reynolds*, *Rivers*, *Robins*, *Secrist*, *Sharkey*, *Shaver*, *Shea*, *Simon*, *Smith v. Lehman Bros.*, *Stafford*, *Stratton*, *Swartzbaugh*, *Teichgraeber*, *Thomas*, *Tobin*, *Tomasello*, *Topf*, *Tsai*, *Tyson*, *Vitello*, *Walaszek*, *Wray*, *Young v. Easter Enters., Inc.*, *Zellers*.

172. See *Collins v. Old Republic Title Co.*, 71 Fair Empl. Prac. Cas. (BNA) 1584 (D. Kan. 1996); *Crossman v. Crosson*, 905 F. Supp. 90 (E.D.N.Y. 1995), *aff'd without opinion*, 101 F.3d 684 (2d Cir. 1996).

173. See *Dalal v. Alliant Techs.*, 927 F. Supp. 1383 (D. Colo. 1996).

en, i.e., 60%, of these cases.¹⁷⁴ Plaintiffs did no better, howev-

174. See *Simon v. Safelite Glass Corp.*, 943 F. Supp. 261 (E.D.N.Y. 1996); *Topf v. Warnaco, Inc.*, 942 F. Supp. 762 (D. Conn. 1996); *Durkin v. Cigna Property & Cas. Corp.*, 942 F. Supp. 481 (D. Kan. 1996); *DeJoy v. Comcast Cable Communications, Inc.*, 941 F. Supp. 468 (D.N.J. 1996); *Thomas v. Held*, 941 F. Supp. 444 (S.D.N.Y. 1996); *Tsai v. Helfer*, 940 F. Supp. 597 (S.D.N.Y. 1996); *Hodge v. New York College of Podiatric Med.*, 940 F. Supp. 579 (S.D.N.Y. 1996); *Figueroa v. Mateco, Inc.*, 939 F. Supp. 106 (D.P.R. 1996); *MacPherson v. University of Montevallo*, 938 F. Supp. 785 (N.D. Ala. 1996); *Mennella v. Office of Court Administration*, 938 F. Supp. 128 (E.D.N.Y. 1996); *Moebus v. Ob-Gyn Assocs., Inc.*, 937 F. Supp. 867 (E.D. Mo. 1996); *Graboski v. Giuliani*, 937 F. Supp. 258 (S.D.N.Y. 1996); *Tobin v. Haverford Sch.*, 936 F. Supp. 284 (E.D. Pa. 1996); *Shaver v. Corry Hiebert Corp.*, 936 F. Supp. 313 (W.D. Pa. 1996); *DiRussa v. Dean Witter Reynolds, Inc.*, 936 F. Supp. 104 (S.D.N.Y. 1996); *Bozner v. Sweetwater County Sch. Dist. No. 1*, 935 F. Supp. 1230 (D. Wyo. 1996); *Golombiewski v. Johnson*, 934 F. Supp. 849 (E.D. Mich. 1996); *Fernandez v. Community Asphalt, Inc.*, 934 F. Supp. 418 (S.D. Fla. 1996); *Odaiyappa v. Board of Supervisors of La. State Univ.*, 933 F. Supp. 575 (E.D. La. 1996); *Teichgraeber v. Memorial Union Corp. of Emporia State Univ.*, 932 F. Supp. 1263 (D. Kan. 1996); *Biggins v. Hazen Paper Co.*, 932 F. Supp. 382 (D. Mass. 1996); *Guadagno v. Wallack Ader Leviathan Assoc.*, 932 F. Supp. 94 (S.D.N.Y. 1996); *Fronduiti v. Trinity Indus.*, 928 F. Supp. 1107 (M.D. Ala. 1996); *Elias v. Naperville Eye Assocs., Ltd.*, 928 F. Supp. 757 (N.D. Ill. 1996); *Dalal v. Alliant Techs.*, 927 F. Supp. 1383 (D. Colo. 1996); *Dalal v. Alliant Techs.*, 927 F. Supp. 1374 (D. Colo. 1996); *Kelleher v. Aerospace Community Credit Union*, 927 F. Supp. 361 (E.D. Mo. 1996); *Secrist v. Burns Internat'l Sec. Servs.*, 926 F. Supp. 823 (E.D. Wis. 1996); *Reynolds v. Octel Communications Corp.*, 924 F. Supp. 743 (N.D. Tex. 1995); *McKenny v. John V. Carr & Son*, 922 F. Supp. 967 (D. Vt. 1996); *Griswold v. New Madrid County Group Practice, Inc.*, 920 F. Supp. 1046 (E.D. Mo. 1996); *Tyson v. Pitt County Gov't*, 919 F. Supp. 205 (E.D.N.C. 1996); *Koslow v. Hundt*, 919 F. Supp. 18 (D.D.C. 1995); *Mississippi Power & Light Co. v. Locals 605 & 985*, 72 Fair Empl. Prac. Cas. (BNA) 771 (S.D. Miss.), *aff'd without opinion*, 102 F.3d 551 (5th Cir. 1996); *Nixon v. New York City Hous. Auth.*, 72 Fair Empl. Prac. Cas. (BNA) 674 (S.D.N.Y. 1996); *Brown v. Intercity Fed. Bank*, 72 Fair Empl. Prac. Cas. (BNA) 318 (N.D. Miss. 1996); *Armbruster v. Unisys Corp.*, 914 F. Supp. 1153 (E.D. Pa. 1996); *Falbaum v. Pomerantz*, 72 Fair Empl. Prac. Cas. (BNA) 141 (S.D.N.Y. 1995); *McGreevy v. CSS Indus.*, 71 Fair Empl. Prac. Cas. (BNA) 1644 (E.D. Pa. 1996); *Collins v. Old Republic Title Co.*, 71 Fair Empl. Prac. Cas. (BNA) 1584 (D. Kan. 1996); *Smith v. Lehman Bros.*, 71 Fair Empl. Prac. Cas. (BNA) 1494 (S.D.N.Y. 1996); *Golder v. Lockheed Sanders, Inc.*, 71 Fair Empl. Prac. Cas. (BNA) 1425 (D.N.H. 1996); *Rivers v. Northwest Airlines*, 71 Fair Empl. Prac. Cas. (BNA) 1217 (E.D. Mo. 1995); *Brown v. IBM Corp.*, 71 Fair Empl. Prac. Cas. (BNA) 898 (E.D. Pa. 1996); *Young v. Easter Enters., Inc.*, 915 F. Supp. 58 (S.D. Ind. 1995); *Robins v. Max Mara, USA, Inc.*, 914 F. Supp. 1006 (S.D.N.Y. 1996); *Pardasani v. Rack Room Shoes*, 912 F. Supp. 187 (M.D.N.C. 1996); *Gregor v. Derwinski*, 911 F. Supp. 643 (W.D.N.Y. 1996); *Knox v. First Nat'l Bank of Chicago*, 909 F. Supp. 569 (N.D. Ill. 1995); *Gorman v. Hughes Danbury Optical Sys.*, 908 F. Supp. 107 (D. Conn. 1995); *Denty v. SmithKline Beecham Corp.*, 907 F. Supp. 879 (E.D. Pa. 1995); *Grinnell v. General Elec. Co.*, 907 F. Supp. 544 (N.D.N.Y. 1995); *Zellars v. Liberty Nat'l Life Ins. Co.*, 907 F. Supp. 355 (M.D. Ala. 1995); *Ford v. City of Oakwood*, 905 F. Supp. 1063 (N.D. Ga. 1995); *Crossman v. Crosson*, 905 F. Supp. 90 (E.D.N.Y. 1995), *aff'd without opinion*, 101 F.3d 684 (2d Cir. 1996); *Derthick v. Bassett-Walker, Inc.*, 904 F. Supp. 510 (W.D. Va. 1995); *D'Anna v. M/A-Com, Inc.*, 903 F. Supp. 889

er—they prevailed in twenty-four cases, constituting 25% of the total, which is the same percentage that was derived for age-substantive rulings.¹⁷⁵ There were fifteen rulings, i.e., 16% of the total, in which each of the parties won on one or more issues.¹⁷⁶ The various bases on which the district courts grounded their rulings are set forth in Table 9.

(D. Md. 1995).

175. See *Alcaraz v. Avnet*, 933 F. Supp. 1025 (D.N. Mex. 1996); *Carr v. Allegheny Health, Educ. & Research Found.*, 933 F. Supp. 485 (W.D. Pa. 1996); *Caraballo v. South Stevedoring, Inc.*, 932 F. Supp. 1462 (S.D. Fla. 1996); *Pollis v. New School for Soc. Research*, 930 F. Supp. 899 (S.D.N.Y. 1996); *Dalal v. Alliant Techs.*, 927 F. Supp. 1383 (D. Colo. 1996); *Shea v. Icelandair*, 925 F. Supp. 1014 (S.D.N.Y. 1996); *EEOC v. McDonnell Douglas Corp.*, 72 Fair Empl. Prac. Cas. (BNA) 769 (E.D. Mo. 1996); *EEOC v. Sara Lee Corp.*, 923 F. Supp. 994 (E.D. Mich. 1995); *Mukhtar v. Castleton Serv. Corp.*, 920 F. Supp. 934 (S.D. Ind. 1996); *Bryson v. Fluor Corp.*, 914 F. Supp. 1292 (D.S.C. 1995); *Burruss v. Sears Roebuck & Co.*, 71 Fair Empl. Prac. Cas. (BNA) 1582 (S.D. Ohio 1996); *LeFevre v. Harrison Group*, 71 Fair Empl. Prac. Cas. (BNA) 449 (E.D. Pa. 1996); *Fine v. Interpublic Group*, 71 Fair Empl. Prac. Cas. (BNA) 354 (S.D.N.Y. 1996); *EEOC v. Lockheed Martin Marietta Corp.*, 70 Fair Empl. Prac. Cas. (BNA) 1457 (D. Md. 1996); *Burger v. Litton Indus.*, 70 Fair Empl. Prac. Cas. (BNA) 696 (S.D.N.Y. 1996); *Newhouse v. McCormick & Co.*, 910 F. Supp. 1451 (D. Neb. 1996); *Kraemer v. Franklin & Marshall College*, 909 F. Supp. 268 (E.D. Pa. 1995); *Johnson v. Cadillac Plastics Group.*, 908 F. Supp. 847 (D. Colo. 1995); *Caldwell v. Federal Express Corp.*, 908 F. Supp. 29 (D. Me. 1995); *Sharkey v. Lasmo (AUL Ltd)*, 906 F. Supp. 949 (S.D.N.Y. 1995); *Moses v. K-Mart Corp.*, 905 F. Supp. 1054 (S.D. Fla. 1995); *Heckelmann v. Piping Cos.*, 904 F. Supp. 1257 (N.D. Okla. 1995); *Cook v. Travelers Cos.*, 904 F. Supp. 841 (N.D. Ill. 1995); *Dittmann v. Ireco, Inc.*, 903 F. Supp. 347 (N.D.N.Y. 1995).

176. See *Walaszek v. Reinke Wholesale Supply Co.*, 72 Fair Empl. Prac. Cas. (BNA) 162 (N.D. Ill. 1996); *Kunzman v. Enron Corp.*, 941 F. Supp. 853 (N.D. Iowa 1996); *Kraemer v. Franklin & Marshall College*, 941 F. Supp. 479 (E.D. Pa. 1996); *Hawes v. Johnson & Johnson*, 940 F. Supp. 697 (D.N.J. 1996); *Vitello v. Liturgy Training Publications*, 932 F. Supp. 1093 (N.D. Ill. 1996); *Reado v. Texas Gen. Land Office*, 929 F. Supp. 1046 (E.D. Tex. 1996); *Cadelinia v. Hilton Internat'l*, 71 Fair Empl. Prac. Cas. (BNA) 1602 (S.D.N.Y. 1996); *Swartzbaugh v. State Farm Ins. Cos.*, 924 F. Supp. 932 (E.D. Mo. 1995); *Wray v. Edward Blank Assocs., Inc.*, 924 F. Supp. 498 (S.D.N.Y. 1996); *Jungels v. State Univ. College of N.Y.*, 922 F. Supp. 779 (W.D.N.Y. 1996); *Tomasello v. Rubin*, 920 F. Supp. 4 (D.D.C. 1996); *Henderson v. AT & T Corp.*, 918 F. Supp. 1059 (S.D. Tex. 1996); *Gallo v. Board of Regents of Univ. of Cal.*, 916 F. Supp. 1005 (S.D. Cal. 1995); *Stafford v. Radford Community Hosp., Inc.*, 908 F. Supp. 1369 (W.D. Va. 1995); *Gerzog v. London Fog Corp.*, 907 F. Supp. 590 (E.D.N.Y. 1995).

TABLE 9
FEDERAL DISTRICT COURT ACTUAL BASES
FOR DISPOSITIONS OF ADEA CASE

LIABILITY OF INDIVIDUALS	18
TIMELINESS OF EEOC CHARGE	15
LACK OF EMPLOYEE-EMPLOYER RELATIONSHIP (INCLUDING ISSUES OF STATUS OF PLAINTIFF AS EMPLOYEE AND DEFENDANT AS EMPLOYER)	12
ADEQUACY OF EEOC CHARGE (NOT INCLUDING ISSUE OF FAILING TO NAME DEFENDANT)	6
FAILURE TO NAME DEFENDANT IN EEOC CHARGE	6
EVIDENCE ISSUES	6
ARBITRABILITY	5
ATTORNEY'S FEES AND COSTS	5
STATUTE OF LIMITATIONS FOR FILING SUIT	4
REMAND OF REMOVED CASE TO STATE COURT	3
FAILURE TO FILE CHARGE WITH EEOC (INCLUDING REPRESENTATIVE ACTION ISSUES)	3
VALIDITY OF RELEASE OF LIABILITY	3
BENEFITS ISSUES	3
SOVEREIGN IMMUNITY OF FEDERAL GOVERNMENT	2
DISCOVERY	2
EXHAUSTION OF STATE REMEDIES	2
SEPARATE TRIALS FOR MULTIPLE PLAINTIFFS	2
SUBPOENA	2
RES JUDICATA ISSUES	2
ELEVENTH AMENDMENT IMMUNITY	2
LACK OF JURISDICTION OVER DEFENDANT	2
SEPARATE TRIALS FOR LIABILITY AND DAMAGES	1
CONCILIATION REQUIREMENT IMPOSED ON EEOC	1
FAILURE TO ALLEGE AWAITING 60 DAYS BEFORE FILING SUIT	1
RELATION OF ADEA TO STATE REMEDY	1
PRECLUSIVE EFFECT OF PLAINTIFF'S APPLYING FOR SOCIAL SECURITY DISABILITY BENEFITS	1
AVAILABILITY OF 42 U.S.C. §1985 (3) TO MAINTAIN ADEA SUIT	1
SURVIVAL OF DAMAGES CLAIMS FOLLOWING DEATH OF PLAINTIFF	1
EXHAUSTION OF REMEDIES	1
TRANSFER OF PLAINTIFF'S CASE TO ANOTHER JUDICIAL DISTRICT	1
PREEMPTION OF CITY ORDINANCE BY ADEA	1
AVAILABILITY OF 42 U.S.C. §1983 TO MAINTAIN ADEA SUIT	1
APPOINTED COUNSEL CLAIM	1
WRIT OF EXECUTION	1
IN FORMA PAUPERIS PETITION	1
UNPROTECTED STATUS OF GOVERNMENT EMPLOYEES HOLDING CONFIDENTIAL POSITIONS	1

AVAILABILITY OF JURY TRIAL IN SUIT AGAINST FEDERAL GOVERNMENT	1
SOVEREIGN IMMUNITY OF CITY GOVERNMENT	1
ENFORCEABILITY OF COLLECTIVE BARGAINING AGREEMENT PROVISIONS	1
EXTRATERRITORIAL REACH OF ADEA	1
AVAILABILITY OF 42 U.S.C. §1983 AS A BASIS FOR ADEA SUIT	1
REPRESENTATIVE ACTION ISSUE	1
VALIDITY OF ARBITRAL AWARD	1

K. *The Win-Loss Ratios*

1. Appellate Court Dispositions

In seventy-one of the ninety-four published appellate court rulings, judgment had been entered for the defendant at the trial court level. In twenty-one cases the plaintiffs won below. In two additional instances, both the plaintiff and the defendant won on one or more of their issues.¹⁷⁷ For simplicity's sake, I have focused only on the ninety-two single victor decisions.

In these ninety-two decisions, the entity that was the defendant below prevailed on appeal in fifty-six of the cases;¹⁷⁸ the

177. See *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529 (2d Cir. 1996); *EEOC v. Kentucky State Police Dep't*, 80 F.3d 1086 (6th Cir.), *cert. denied*, 117 S. Ct. 385 (1996).

178. See *EEOC v. Texas Instruments, Inc.*, 100 F.3d 1173 (5th Cir. 1996); *Marfia v. T. C. Ziraat Bankasi*, 100 F.3d 243 (2d Cir. 1996); *Smith v. City of Des Moines*, 99 F.3d 1466 (8th Cir. 1996); *Denisi v. Dominick's Finer Foods*, 99 F.3d 860 (7th Cir. 1996); *Koger v. Reno*, 98 F.3d 631 (D.C. Cir. 1996); *Testerman v. EDS Technical Prods. Corp.*, 98 F.3d 297 (7th Cir. 1996); *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436 (11th Cir. 1996); *Gathright v. Teachers' Credit Union*, 97 F.3d 266 (8th Cir. 1996); *Crawford v. Medina Gen. Hosp.*, 96 F.3d 830 (6th Cir. 1996); *Adam-Mellang v. Apartment Search, Inc.*, 96 F.3d 297 (8th Cir. 1996); *Noreuil v. Peabody Coal Co.*, 96 F.3d 254 (7th Cir. 1996); *MacDonald v. Delta Air Lines, Inc.*,

plaintiff below prevailed on appeal in thirty cases;¹⁷⁹ and in

94 F.3d 1437 (10th Cir. 1996); *Kelly v. Drexel Univ.*, 94 F.3d 102 (3d Cir. 1996); *Roxas v. Presentation College*, 90 F.3d 310 (8th Cir. 1996); *Holt v. JTM Indus., Inc.*, 89 F.3d 1224 (5th Cir. 1996); *Rabinovitz v. Pena*, 89 F.3d 482 (7th Cir. 1996); *Gallagher v. Croghan Colonial Bank*, 89 F.3d 275 (6th Cir. 1996); *Miller v. Butcher Distribs.*, 89 F.3d 265 (5th Cir. 1996); *Diez v. Minnesota Mining & Mfg.*, 88 F.3d 672 (8th Cir. 1996); *Dranchak v. Azko Nobel, Inc.*, 88 F.3d 457 (7th Cir. 1996); *Hopper v. Hallmark Cards, Inc.*, 87 F.3d 983 (8th Cir. 1996); *Adler v. Glickman*, 87 F.3d 956 (7th Cir. 1996); *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328 (8th Cir. 1996); *Hartsel v. Keys*, 87 F.3d 795 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 683 (1997); *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311 (8th Cir. 1996); *Nelson v. J.C. Penney Co., Inc.*, 85 F.3d 343 (8th Cir.), *cert. denied*, 117 S. Ct. 61 (1996); *Bohac v. West*, 85 F.3d 306 (7th Cir. 1996); *Blistein v. St. John's College*, 84 F.3d 1459 (4th Cir. 1996); *O'Connor v. Consolidated Coin Caterers Corp.*, 84 F.3d 718 (4th Cir.), *cert. denied*, 117 S. Ct. 608 (1996); *Mills v. First Fed. Sav. & Loan Ass'n of Belvidere*, 83 F.3d 833 (7th Cir. 1996); *Fuka v. Thomson Consumer Elecs.*, 82 F.3d 1397 (7th Cir. 1996); *Furr v. Seagate Tech., Inc.*, 82 F.3d 980 (10th Cir. 1996); *Doan v. Seagate Tech., Inc.*, 82 F.3d 974 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 684 (1997); *Brown v. CSC Logic, Inc.*, 82 F.3d 651 (5th Cir. 1996); *Pages-Cahue v. Iberia Lineas Aereas de Espana*, 82 F.3d 533 (1st Cir. 1996); *Nichols v. Loral Vaught Sys. Corp.*, 81 F.3d 38 (5th Cir. 1996); *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954 (4th Cir. 1996); *Kusak v. Ameritech Info. Sys., Inc.*, 80 F.3d 199 (7th Cir. 1996); *Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc); *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756 (9th Cir. 1996); *Weisbrot v. Medical College of Wis.*, 79 F.3d 677 (7th Cir. 1996); *Slathar v. Sather Trucking Corp.*, 78 F.3d 415 (8th Cir.), *cert. denied*, 117 S. Ct. 179 (1996); *Kuhn v. Ball State Univ.*, 78 F.3d 330 (7th Cir. 1996); *Wolf v. Buss (Am.), Inc.*, 77 F.3d 914 (7th Cir.), *cert. denied*, 117 S. Ct. 175 (1996); *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690 (3d Cir. 1996); *Garner v. Arvin Indus.*, 77 F.3d 255 (8th Cir. 1996); *Stults v. Conoco, Inc.*, 76 F.3d 651 (5th Cir. 1996); *Marx v. Schnuck Mkts., Inc.*, 76 F.3d 324 (10th Cir.), *cert. denied*, 116 S. Ct. 2552 (1996); *Smith v. Cook County*, 74 F.3d 829 (7th Cir. 1996); *Americanos v. Carter*, 74 F.3d 138 (7th Cir.), *cert. denied*, 116 S. Ct. 1853 (1996); *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (10th Cir.), *cert. denied*, 116 S. Ct. 2500 (1996); *Pulla v. Amoco Oil Co.*, 72 F.3d 648 (8th Cir. 1995); *Duart v. FMC Wyoming Corp.*, 72 F.3d 117 (10th Cir. 1995); *Matthews v. Rollings Hudig Hill Co.*, 72 F.3d 50 (7th Cir. 1995); *Gadsby v. Norwalk Furniture Corp.*, 71 F.3d 1324 (7th Cir. 1995); *Fisher v. Vassar College*, 70 F.3d 1420 (2d Cir. 1995).

179. See *Simpson v. Ernst & Young*, 100 F.3d 436 (6th Cir. 1996); *Mulero-Rodriguez v. Ponte, Inc.*, 98 F.3d 670 (1st Cir. 1996); *Greene v. Safeway Stores, Inc.*, 98 F.3d 554 (10th Cir. 1996); *Lawrence v. National Westminster Bank*, 98 F.3d 61 (3d Cir. 1996); *Murff v. Professional Med. Ins. Co.*, 97 F.3d 289 (8th Cir. 1996); *Kalvinskis v. California Inst. of Tech.*, 96 F.3d 1305 (9th Cir. 1996); *Kehoe v. Anheuser-Busch, Inc.*, 96 F.3d 1095 (8th Cir. 1996); *Burger v. New York Inst. of Tech.*, 94 F.3d 830 (2d Cir. 1996); *Wohl v. Spectrum Mfg., Inc.*, 94 F.3d 353 (7th Cir. 1996); *Panaras v. Liquid Carbonic Indus.*, 94 F.3d 338 (7th Cir. 1996); *Armstrong v. Martin Marietta Corp.*, 93 F.3d 1505 (11th Cir. 1996); *Parrish v. Immanuel Med. Ctr.*, 92 F.3d 727 (8th Cir. 1996); *Woodhouse v. Magnolia Hosp.*, 92 F.3d 248 (5th Cir. 1996); *Padilla v. Metro-North Commuter R.R.*, 92 F.3d 117 (2d Cir. 1996); *Atkinson v. Denton Publ'g Co.*, 84 F.3d 144 (5th Cir. 1996); *Burks v. Oklahoma Publ'g Co.*, 81 F.3d 975 (10th Cir.), *cert. denied*, 117 S. Ct. 302 (1997); *Haun v. Ideal Indus., Inc.*, 81 F.3d 541 (5th Cir. 1996); *Ford v. Bernard Fineson Dev. Ctr.*, 81 F.3d

six cases there was a mixed ruling, with the plaintiff and defendant below each prevailing on one or more issues at the appellate court level.¹⁸⁰ More useful is an analysis of affirmances and reversals.

In forty-eight of the seventy-one cases in which the defendants had won below, the courts of appeals straightforwardly affirmed the judgments that had been entered for them.¹⁸¹ In

304 (2d Cir. 1996); *Hall v. Gillman, Inc.*, 81 F.3d 35 (5th Cir. 1996); *EEOC v. Tire Kingdom, Inc.*, 80 F.3d 449 (11th Cir. 1996); *Grayson v. K-Mart Corp.*, 79 F.3d 1086 (11th Cir.), *cert. denied*, 117 S. Ct. 447 (1996); *Shaw v. HCA Health Servs. of Midwest, Inc.*, 79 F.3d 99 (8th Cir. 1996); *EEOC v. Massachusetts*, 77 F.3d 572 (1st Cir. 1996); *Nowd v. Rubin*, 76 F.3d 25 (1st Cir. 1996); *Jameson v. Arrow Co.*, 75 F.3d 1528 (11th Cir. 1996); *Rhodes v. Guiberson Oil Tools Div.*, 75 F.3d 989 (5th Cir. 1996); *Swaim v. Moltan Co.*, 73 F.3d 711 (7th Cir. 1996); *Sutera v. Schering Corp.*, 73 F.3d 13 (2d Cir. 1995); *Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326 (3d Cir. 1995); *Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848 (11th Cir. 1996).

180. See *Burns v. AAF-McQuay, Inc.*, 96 F.3d 728 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1247 (1997); *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270 (7th Cir. 1996); *Sherlock v. Montefiore Med. Ctr.*, 84 F.3d 522 (2d Cir. 1996); *Rhodes v. Guiberson Oil Tools Div.*, 82 F.3d 615 (5th Cir. 1996); *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406 (9th Cir.), *cert. denied*, 117 S. Ct. 295 (1996); *Cornevaux v. CUNA Mut. Ins. Group.*, 876 F.3d 1498 (10th Cir. 1996).

181. See *EEOC v. Texas Instruments, Inc.*, 100 F.3d 1173 (5th Cir. 1996); *Smith v. City of Des Moines*, 99 F.3d 1466 (8th Cir. 1996); *Denisi v. Dominick's Finer Foods*, 99 F.3d 860 (7th Cir. 1996); *Koger v. Reno*, 98 F.3d 631 (D. C. Cir. 1996); *Testerman v. EDS Technical Prods. Corp.*, 98 F.3d 297 (7th Cir. 1996); *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436 (11th Cir. 1996); *Gathright v. Teachers' Credit Union*, 97 F.3d 266 (8th Cir. 1996); *Crawford v. Medina Gen. Hosp.*, 96 F.3d 830 (6th Cir. 1996); *Adam-Mellang v. Apartment Search, Inc.*, 96 F.3d 297 (8th Cir. 1996); *Noreuil v. Peabody Coal Co.*, 96 F.3d 254 (7th Cir. 1996); *MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437 (10th Cir. 1996); *Kelly v. Drexel Univ.*, 94 F.3d 102 (3d Cir. 1996); *Roxas v. Presentation College*, 90 F.3d 310 (8th Cir. 1996); *Rabinovitz v. Pena*, 89 F.3d 482 (7th Cir. 1996); *Gallagher v. Croghan Colonial Bank*, 89 F.3d 275 (6th Cir. 1996); *Miller v. Butcher Distribs.*, 89 F.3d 265 (5th Cir. 1996); *Diez v. Minnesota Mining & Mfg.*, 88 F.3d 672 (8th Cir. 1996); *Dranchak v. Azko Nobel, Inc.*, 88 F.3d 457 (7th Cir. 1996); *Hopper v. Hallmark Cards, Inc.*, 87 F.3d 983 (8th Cir. 1996); *Adler v. Glickman*, 87 F.3d 956 (7th Cir. 1996); *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328 (8th Cir. 1996); *Hartsel v. Keys*, 87 F.3d 795 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 683 (1997); *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311 (8th Cir. 1996); *Bohac v. West*, 85 F.3d 306 (7th Cir. 1996); *Blistein v. St. John's College*, 84 F.3d 1459 (4th Cir. 1996); *O'Connor v. Consolidated Coin Caterers Corp.*, 84 F.3d 718 (4th Cir.), *cert. denied*, 117 S. Ct. 608 (1996); *Mills v. First Fed. Sav. & Loan Ass'n of Belvidere*, 83 F.3d 833 (7th Cir. 1996); *Fuka v. Thomson Consumer Elecs.*, 82 F.3d 1397 (7th Cir. 1996); *Brown v. CSC Logic, Inc.*, 82 F.3d 651 (5th Cir. 1996); *Pages-Cahue v. Iberia Lineas Aereas de Espana*, 82 F.3d 533 (1st Cir. 1996); *Nichols v. Loral Vaught Sys. Corp.*, 81 F.3d 38 (5th Cir. 1996); *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954 (4th Cir. 1996); *Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc); *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756 (9th Cir. 1996); *Weisbrot v. Medical College of*

sixteen cases, the appellate courts straightforwardly reversed or vacated the judgments that had been entered for the defendants below.¹⁸² There were four mixed appellate court rulings, i.e., decisions involving partial affirmances and partial reversals or vacations, that arose out of trial court decisions which had been favorable to the defendants and in which the critical rulings for the defendants below were reversed on appeal.¹⁸³ (In addition, there were three appellate court rulings which arose

Wis., 79 F.3d 677 (7th Cir. 1996); *Slathar v. Sather Trucking Corp.*, 78 F.3d 415 (8th Cir.), *cert. denied*, 117 S. Ct. 179 (1996); *Kuhn v. Ball State Univ.*, 78 F.3d 330 (7th Cir. 1996); *Wolf v. Buss (Am.), Inc.*, 77 F.3d 914 (7th Cir.), *cert. denied*, 117 S. Ct. 175 (1996); *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690 (3d Cir. 1996); *Garner v. Arvin Indus.*, 77 F.3d 255 (8th Cir. 1996); *Stults v. Conoco, Inc.*, 76 F.3d 651 (5th Cir. 1996); *Marx v. Schnuck Mkts., Inc.*, 76 F.3d 324 (10th Cir.), *cert. denied*, 116 S. Ct. 2552 (1996); *Smith v. Cook County*, 74 F.3d 829 (7th Cir. 1996); *Americanos v. Carter*, 74 F.3d 138 (7th Cir.), *cert. denied*, 116 S. Ct. 1853 (1996); *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (10th Cir.), *cert. denied*, 116 S. Ct. 2500 (1996); *Pulla v. Amoco Oil Co.*, 72 F.3d 648 (8th Cir. 1995); *Duart v. FMC Wyoming Corp.*, 72 F.3d 117 (10th Cir. 1995); *Gadsby v. Norwalk Furniture Corp.*, 71 F.3d 1324 (7th Cir. 1995).

182. See *Mulero-Rodriguez v. Ponte, Inc.*, 98 F.3d 670 (1st Cir. 1996); *Greene v. Safeway Stores, Inc.*, 98 F.3d 554 (10th Cir. 1996); *Lawrence v. National Westminster Bank*, 98 F.3d 61 (3d Cir. 1996); *Murff v. Professional Med. Ins. Co.*, 97 F.3d 289 (8th Cir. 1996); *Kalvinskis v. California Inst. of Tech.*, 96 F.3d 1305 (9th Cir. 1996); *Burger v. New York Inst. of Tech.*, 94 F.3d 830 (2d Cir. 1996); *Wohl v. Spectrum Mfg., Inc.*, 94 F.3d 353 (7th Cir. 1996); *Panaras v. Liquid Carbonic Indus.*, 94 F.3d 338 (7th Cir. 1996); *Armstrong v. Martin Marietta Corp.*, 93 F.3d 1505 (11th Cir. 1996); *Ford v. Bernard Fineson Dev. Ctr.*, 81 F.3d 304 (2d Cir. 1996); *Hall v. Gillman, Inc.*, 81 F.3d 35 (5th Cir. 1996); *Nowd v. Rubin*, 76 F.3d 25 (1st Cir. 1996); *Jameson v. Arrow Co.*, 75 F.3d 1528 (11th Cir. 1996); *Sutera v. Schering Corp.*, 73 F.3d 13 (2d Cir. 1995); *Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326 (3d Cir. 1995); *Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848 (11th Cir. 1996).

183. In *Atkinson v. Denton Publishing Co.*, 84 F.3d 144 (5th Cir. 1996), the defendant lost at the appellate stage on the key issue: the trial court's grant of its motion for summary judgment as to the plaintiff's age discrimination claim was reversed. In *Burks v. Oklahoma Publishing Co.*, 81 F.3d 975 (10th Cir.), *cert. denied*, 117 S. Ct. 302 (1996), the court reversed as to an evidentiary issue that had been decided in the defendant's favor. In *Corneveaux v. CUNA Mutual Insurance Group*, 76 F.3d 1498 (10th Cir. 1996), the court reversed the district court's granting of the defendant's motion for judgment as a matter of law, which motion was made after the plaintiff rested her case. In *Sherlock v. Montefiore Medical Center*, 84 F.3d 522 (2d Cir. 1996), the court reversed the trial court's dismissal of the plaintiff's claim as being time-barred, while it affirmed the dismissal of the plaintiff's effort to invoke 42 U.S.C. § 1985(3) as a basis for pursuing her ADEA claim—a mixed result. (Since the § 1985 claim was, given a string of adverse precedents, very dubious to begin with and therefore one that the plaintiff likely did not regard as the core of her suit, one can regard the ruling as essentially being a pro-plaintiff decision since the court ruled in favor of the plaintiff on her main issue.)

out of trial court rulings for the defendants that amounted to draws between the two parties.)¹⁸⁴

In brief, the success rate for defendants in preserving their victories in the sixty-eight cases in which there was a clear winner at the appellate court level was 70%, i.e., forty-eight out of sixty-eight decisions, while the success rate for plaintiffs in securing reversals was 28% (twenty of seventy-one cases).

As for plaintiffs, there were eleven instances in which the judgment won at the trial level was straightforwardly affirmed on appeal,¹⁸⁵ and eight in which the judgment won by the plaintiff below was reversed or vacated on appeal.¹⁸⁶ In addition, there was one case in which the plaintiff had prevailed at the trial court level and in which an appellate court ruling involving mixed results, i.e., a partial affirmance and a partial reversal, amounted to an affirmance in the plaintiff's favor.¹⁸⁷

184. In *Burns v. AAF-McQuay, Inc.*, 96 F.3d 728 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1247 (1997), the court affirmed the trial court's grant of the defendant's motion for summary judgment as to the plaintiff's constructive discharge claim, but reversed as to the trial court's grant of the defendant's summary judgment motion as to the plaintiff's demotion claim. In *Schnidrig v. Columbia Machine, Inc.*, 80 F.3d 1405 (9th Cir. 1996), the court reversed the grant of the defendant's motion for summary judgment as to the plaintiff's denial of promotion claim, but it affirmed as to the court's grant of the defendant's motion regarding the plaintiff's constructive discharge claim. In *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270 (7th Cir. 1996), the court affirmed as to the trial court's grant of the defendant's summary judgment motion regarding the plaintiff's transfer claim, but it reversed as to the trial court's grant of summary judgment regarding the plaintiff's retaliation claim.

185. See *Simpson v. Ernst & Young*, 100 F.3d 436 (6th Cir. 1996); *Kehoe v. Anheuser-Busch, Inc.*, 96 F.3d 1095 (8th Cir. 1996); *Parrish v. Immanuel Med. Ctr.*, 92 F.3d 727 (8th Cir. 1996); *Woodhouse v. Magnolia Hosp.*, 92 F.3d 248 (5th Cir. 1996); *Padilla v. Metro-North Commuter R.R.*, 92 F.3d 117 (2d Cir. 1996); *Haun v. Ideal Indus., Inc.*, 81 F.3d 541 (5th Cir. 1996); *EEOC v. Tire Kingdom, Inc.*, 80 F.3d 449 (11th Cir. 1996); *Shaw v. HCA Health Servs. of Midwest, Inc.*, 79 F.3d 99 (8th Cir. 1996); *EEOC v. Massachusetts*, 77 F.3d 572 (1st Cir. 1996); *Rhodes v. Guiberson Oil Tools Div.*, 75 F.3d 989 (5th Cir. 1996); *Swaim v. Moltan Co.*, 73 F.3d 711 (7th Cir. 1996).

186. See *Marfia v. T.C. Ziraat Bankasi*, 100 F.3d 243 (2d Cir. 1996); *Holt v. JTM Indus., Inc.*, 89 F.3d 1224 (5th Cir. 1996); *Nelson v. J.C. Penney Co., Inc.*, 85 F.3d 343 (8th Cir.), *cert. denied*, 117 S. Ct. 61 (1996); *Furr v. Seagate Tech., Inc.*, 82 F.3d 980 (10th Cir. 1996); *Doan v. Seagate Tech., Inc.*, 82 F.3d 974 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 974 (1997); *Kusak v. Ameritech Info. Sys., Inc.*, 80 F.3d 199 (7th Cir. 1996); *Matthews v. Rollings Hudig Hill Co.*, 72 F.3d 50 (7th Cir. 1995); *Fisher v. Vassar College*, 70 F.3d 1420 (2d Cir. 1995).

187. In *Grayson v. K-Mart Corp.*, 79 F.3d 1086 (11th Cir.), *cert. denied*, 117 S. Ct. 447 (1996), the rulings favorable to the plaintiffs were affirmed on appeal; the reversal did not work to the defendant's favor.

There also was one appellate court ruling which arose out of a trial court ruling for the plaintiff that amounted to a draw between the two parties.¹⁸⁸ Thus, plaintiffs succeeded in preserving on appeal their victories below in twelve of the twenty-one rulings in which there was a clear winner at the appellate level—a success rate of 57%.

In sum, the success rate of defendants in securing reversals was considerably better than was that of plaintiffs: defendants who had lost at the trial court level were able to win on appeal 43% of the time, while losing plaintiffs prevailed on appeal only 30% of the time. To put the same point differently, defendants who won below were able to preserve their victories 70% of the time; plaintiffs who won below were able to do so only 57% of the time.

a. Treatment of Jury Cases by Appellate Courts

There is another aspect of the appellate court decisions that deserves attention: these courts' treatment of jury verdicts. There is, I believe, a general perception that appellate courts increasingly have been willing to overturn jury verdicts in ADEA cases when juries return verdicts for plaintiffs.¹⁸⁹ The

188. In *Rhodes v. Guiberson Oil Tools Div.*, 82 F.3d 615 (5th Cir. 1996), the plaintiff won on some damages issues on appeal and the defendant won on others.

189. In a note published 10 years ago, the author asserted that "[c]onducting jury trials under a burden of proof scheme developed for non-jury Title VII actions [i.e., the decisional framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)] has . . . resulted in a considerable number of . . . reversals on appeal in ADEA cases." Kimberley K. Fayssoux, Note, *The Age Discrimination in Employment Act of 1967 and Trial by Jury: Proposals for Change*, 73 VA. L. REV. 601, 603 (1987). The author supported this assertion in a footnote by citing eight cases in which appellate courts had reversed lower court denials of motions for judgments n.o.v. (now called motions for judgment as a matter of law), and five decisions in which appellate courts had affirmed such judgments. See *id.* at 603 n.15. Later in the article the author reported that "a review of ADEA cases illustrates that the courts are overturning jury verdicts at an alarming rate." *Id.* at 615. She referred back to the same footnote as support for this claim. Some years later the three dissenting Justices in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 292 (1989) (Kennedy, J., joined by Rehnquist, C.J., and Scalia, J., dissenting), a Title VII case concerning mixed motives analysis, cited this article for the proposition that the use of the Title VII framework in ADEA cases accounted for a "high" reversal rate. (It is that reliance by these dissenters that prompts this review of the student note here.)

In fact, the original student note only cited a few decisions (those noted earlier, as well as a handful more, later in the article); no effort was made to provide empir-

data, scanty at best, only somewhat support this assessment; in other words, they do not reveal an overwhelmingly hostile appellate court response to jury verdicts rendered in favor of plaintiffs.

In nineteen of the ninety-four 1996 published appellate court opinions the courts addressed jury verdicts in the context of reviewing the grant or denial of motions for judgment as a matter of law that were made after jury verdicts were rendered.¹⁹⁰ The jury determination was affirmed in eleven of the nineteen cases—an overall affirmance rate of 58%. As is detailed in Table 10, in the seventeen cases in which a jury ver-

ical data to support the assertion that there was even a "considerable" number of reversals, let alone a "high" reversal rate, resulting from the use of Title VII doctrine. Certainly, moreover, the author did not establish that there was generally a high reversal rate in ADEA appellate court rulings. Thus, while the author conceivably may have been right about the general reversal rate, the data was not provided to enable one to determine whether she was or was not. (The author also made no attempt to parse out the difference, if any, as between appellate court treatment of jury verdicts for plaintiffs as compared to jury verdicts for defendants—an issue of concern here.)

190. It was earlier noted in Part III.J.1. that there were actually 26 cases in which defendants had moved for judgment as a matter of law in the trial court. But there were only 19 cases in which the appellate court addressed a jury determination.

In three of the other seven cases a bench trial had been conducted. In *Fisher v. Vassar College*, 70 F.3d 1420 (2d Cir. 1995), the defendant's motion for judgment as a matter of law, made after a ruling for the plaintiff, was denied at the trial court level. This ruling was reversed on appeal, and so the defendant ultimately prevailed. In *Koger v. Reno*, 98 F.3d 631 (D.C. Cir. 1996), the court ruled against the plaintiff after a bench trial, and the ruling was affirmed on appeal. Here, too, then, the defendant prevailed in the appellate court. In *Burger v. New York Institute of Technology*, 94 F.3d 830 (2d Cir. 1996), the judgment handed down for the defendant by the court was reversed on appeal.

In *Corneveaux v. CUNA Mutual Insurance Group*, 76 F.3d 1498 (10th Cir. 1996), the court granted the defendant's motion for judgment as a matter of law, which motion was made after the plaintiff rested her case; the appellate court rendered a split ruling—it affirmed in part, vacated in part, and reversed and remanded in part. In *Greene v. Safeway Stores, Inc.*, 98 F.3d 554 (10th Cir. 1996), the defendant's motion, which the trial court granted, was made at the end of the trial. The appellate court reversed. Likewise, in *Hopper v. Hallmark Cards, Inc.*, 87 F.3d 983 (8th Cir. 1996), the defendant moved for judgment as a matter of law at the close of the trial. It prevailed in both the trial and appellate courts.

In *Swaim v. Moltan Co.*, 73 F.3d 711 (7th Cir. 1996), the defendant's motion was made after entry of a default judgment against it. The appellate court affirmed.

In *Pulla v. Amoco Oil Co.*, 72 F.3d 648 (8th Cir. 1995), in which the jury returned a verdict for the defendant, the plaintiff appealed a negative ruling on its motion to amend the complaint to conform to the evidence; the appellate court affirmed.

dict was rendered for the plaintiff, and the defendant then moved for judgment as a matter of law, the defendant prevailed on the motion at the trial court level in only four instances; in the other thirteen cases the trial court denied the defendant's motion. In both of the two cases in which a jury verdict was rendered for the defendant, the plaintiffs' motions for judgment as a matter of law were denied. On appeal, of the thirteen plaintiffs whose jury verdicts survived defendants' motions at the trial court level, five lost at the appellate level. In other words, five defendants which had lost below prevailed on appeal. Thus, the plaintiffs experienced a 38% reversal rate. (Moreover, in the four cases in which a jury verdict for a plaintiff had been nullified by the trial court's grant of the defendant's motion, only one plaintiff was able to secure a reversal.) In the two cases involving defendants which won their jury cases, the defendants had a 100% success rate at the appellate court level.

TABLE 10
APPELLATE COURT DISPOSITIONS OF
CASES INVOLVING JURY VERDICTS¹⁹¹

JURY AWARD FOR PL.	JURY AWARD FOR DEF.	PL. MOT. FOR J. AS MATTER OF LAW	DEF. MOT. FOR J. AS MATTER OF LAW	APP. CT. DISPOSITION OF TRIAL COURT RULING ON MOT.
<u>Burks</u>			Granted	Rev'd (P wins)
<u>Doan</u>			Denied	Rev'd (D wins)
<u>Dranchak</u>			Granted	Aff'd (D wins)
<u>Furr</u>			Denied	Rev'd (D wins)
	<u>Gathright</u>	Denied		Aff'd (D wins)
<u>Haun</u>			Denied	Aff'd (P wins)
<u>Holt</u>			Denied	Rev'd (D wins)
<u>Isenbergh</u>			Granted	Aff'd (D wins)
<u>Kehoe</u>			Denied	Aff'd (P wins)
<u>Kusak</u>			Denied	Rev'd (D wins)
<u>Miller</u>			Granted	Aff'd (D wins)
<u>Nelson</u>			Denied	Rev'd (D wins)
<u>Padilla</u>			Denied	Aff'd (P wins)
<u>Parrish</u>			Denied	Aff'd (P wins)
<u>Rhodes</u>			Denied	Aff'd (P wins)
(75 F.3d)				
<u>Shaw</u>			Denied	Aff'd (P wins)
<u>Simpson</u>			Denied	Aff'd (P wins)
	<u>Slather</u>	Denied		Aff'd (D wins)
<u>Woodhouse</u>			Denied	Aff'd (P wins)

Obviously, defendants who won in jury cases did far better on appeal than did plaintiffs. However, since the number of cases in which defendants prevailed at the trial court stage was so small, i.e., two, there is no way to arrive at any useful conclusion based on the comparative data.

191. The full names of the cases are set forth in Appendix I, which appears at the end of this article.

2. Trial Court Dispositions

At the trial court level there were 222 published decisions. We also have available to us, from a reading of the ninety-four court of appeals rulings, data regarding those ninety-four dispositions at the trial court level. As already discussed, in the ninety-four cases that went up on appeal, defendants had won at the trial court level in seventy-one instances. Plaintiffs had prevailed in twenty-one cases; and there were two cases in which both litigants had won on one or more issues. For the 222 nonappealed district court rulings the breakdown is as follows: the defendant prevailed in 140, or 63% of the cases; the plaintiff prevailed in 53 cases, or 24%; and in 29, or 13%, of the rulings there was a split decision—the plaintiff prevailed on some issues, the defendant on others.¹⁹²

a. Jury Case Dispositions at the Trial Court Level

No doubt most ADEA jury cases do not generate opinions. Even where there is an opinion, it typically will deal with pre-trial issues and so the student of ADEA litigation still will obtain no insight as to who ultimately prevailed in those cases that actually were decided by juries. Sometimes, however, there will be written rulings on post-trial motions, and from these it may be possible to glean information as to judicial treatment of jury verdicts.

As discussed above, there were nineteen instances in which courts of appeals ruled on the merits of trial court rulings on post-trial motions for judgment as a matter of law.¹⁹³ In four of the seventeen cases in which the jury had rendered a verdict for the plaintiff, the trial court granted the defendant's motion. In the other thirteen the defendant's motion was denied. In the two cases in which the jury had found for the defendant, the plaintiff's post-trial motion was denied. In analyzing the 222 district court rulings, one finds ten in which a post-jury verdict

192. A case-by-case listing is set forth in Appendix III, which appears at the end of this article.

193. See *supra* Table 10.

motion for judgment as a matter of law was made. In nine of these cases a verdict had been returned for the plaintiff.¹⁹⁴ In seven of these nine cases, the trial courts denied outright the defendants' motions for judgment as a matter of law. In one, the court responded to the defendant's motion for a partial new trial on damages or for remittitur by holding that remittitur was appropriate.¹⁹⁵ In another, the court denied the defendant's motion for judgment as a matter of law, and also denied the defendant's motion for a new trial based on excessiveness of the verdict, but did so conditioned on the plaintiff's agreeing to a remittitur.¹⁹⁶ In the tenth case the jury had rendered a verdict for the defendant; the plaintiff moved for a new trial based on *Batson v. Kentucky*,¹⁹⁷ which concerns jury selection; and the court denied the motion.¹⁹⁸

In sum, trial courts typically were very resistant to overturn jury verdicts insofar as the issue of liability was concerned: they did so only in four cases out of twenty-nine (i.e., the nineteen cases of which we have knowledge based on their having been addressed by appellate courts, and the ten non-appealed district court rulings).

Another conclusion can be drawn. Plaintiffs were strikingly successful when they managed to get their claims before juries: the juries found for them in seventeen of the nineteen cases that subsequently were considered by appellate courts, and in nine of the ten district court cases which did not go up on appeal. This is an incredible win rate of twenty-six out of twenty-nine cases, or 90%.¹⁹⁹ (Of course, as noted earlier, in four of

194. See *Finch v. Hercules, Inc.*, 941 F. Supp. 1395 (D. Del. 1996); *Kirsh v. Fleet Street, Ltd.*, 71 Fair Empl. Prac. Cas. (BNA) 1413 (S.D.N.Y. 1996); *Phuong v. National Academy of Sciences*, 927 F. Supp. 487 (D.D.C. 1996); *Shea v. Icelandair*, 925 F. Supp. 1014 (S.D.N.Y. 1996); *Mitchell v. Sisters of Charity of the Incarnate Word*, 924 F. Supp. 793 (S.D. Tex. 1996); *Stratton v. Department for the Aging for City of N.Y.*, 922 F. Supp. 857 (S.D.N.Y. 1996); *Nembhard v. Memorial Sloan-Kettering Cancer Ctr.*, 918 F. Supp. 784 (S.D.N.Y.), *aff'd without opinion*, 104 F.3d 353 (2d Cir. 1996); *Mulqueen v. Dulea, Inc.*, 909 F. Supp. 86 (N.D.N.Y. 1995), *aff'd without opinion*, 104 F.3d 351 (2d Cir. 1996).

195. See *Shea v. Icelandair*, 925 F. Supp. 1014 (S.D.N.Y. 1996).

196. See *Stratton v. Department for the Aging for City of N.Y.*, 922 F. Supp. 857 (S.D.N.Y. 1996).

197. 476 U.S. 79 (1986).

198. See *Minetos v. City Univ. of N.Y.*, 925 F. Supp. 177 (S.D.N.Y. 1996).

199. This figure is very much out of line with another statistic derived by another

the seventeen appealed cases the trial courts granted the defendants' motions for judgment as a matter of law and in so doing nullified the pro-plaintiff jury verdicts.)

What is one to make of these data? One could well conclude that they confirm the views of the management bar (and, actually, the plaintiffs' bar, as well) that juries in ADEA cases are particularly sympathetic to plaintiffs' claims.²⁰⁰ But there is at least one explanation, albeit a not altogether persuasive one, that turns less on assumptions of jury favoritism for older plaintiffs who claim victimization at the hands of domineering bosses (claims which resonate with many people, including jurors) and more on the matter of the merits of the cases that juries address. Remember, very few cases survive preliminary challenges—most typically, defendants' motions for summary judgment and motions to dismiss.²⁰¹ Thus, the cases that are

researcher, who reviewed the statistical records of the Federal Judicial Center for the period June 1, 1992, to May 31, 1994, and reported the following:

Of all dispositions (pre- and post-trial) [in employment discrimination cases generally], employees received some recompense in 71% of the cases. On the other hand, if the case proceeded to trial, employees won only 28% of the cases, and in court (non-jury) trials, only 19% of the cases.

This was in sharp contrast to jury trials where employees prevailed 38% of the time, or twice as frequently as in court trials.

Arbitrating Claims of Employment Discrimination, *supra* note 47, at 42. While the author of this article did not provide a breakdown, chances are that most of the non-jury cases in the sample involved Title VII claims, which are litigated much more frequently than are ADEA claims. However, insofar as the data regarding jury verdicts is concerned, these almost certainly were derived primarily—and maybe even exclusively—from ADEA cases, since until the Civil Rights Act of 1991, Pub. L. No. 101-166, 105 Stat. 1071, went into effect on November 21, 1991, jury trials were not available in Title VII cases (and, in fact, jury trials also were not available as to claims that arose prior to that date. *See Landgraf v. USI Film Prods.*, 114 S. Ct. 1483 (1994).) Thus, the 38% figure for plaintiffs who prevailed in jury cases probably entailed just ADEA cases. Obviously, this figure is enormously far from the 90% figure derived for the 1996 sample.

200. *See Prohibition of Mandatory Retirement and Employment Rights Act of 1982, Hearing before the Subcomm. on Labor of the Comm. on Labor and Human Resources*, 97th Cong., 2d Sess. 83 (1982) (testimony of Charles Bakaly); Thomas J. Piskorski, *The Growing Judicial Acceptance of Summary Judgment in Age Discrimination Cases*, 18 EMPLOYEE REL. L. J. 245, at 245 (1992). *See also* Stephen R. McConnell, *Age Discrimination in Employment*, in POLICY ISSUES IN WORK & RETIREMENT 159, 186-87 (Herbert S. Parnes ed., 1983). The view that juries are particularly sympathetic to plaintiffs is not confined to the ADEA context. *See* Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1127-28 (1992).

201. *See supra* Part III.J.

placed before juries for resolution have run a legal gauntlet the survival of which, if the judges are doing their jobs well (or even if they are doing them in an overly and negatively aggressive manner insofar as plaintiffs' claims are concerned, as some contend),²⁰² presumably ensures that only strong claims for redress reach the juries. Ergo, one sees striking success on the part of plaintiffs in these cases. There is a counter-analysis however. If these claims were so strong, presumably a number of these cases would have been settled. For the defendants presumably would have realized—at least in a good number of them—that their chances of prevailing were sufficiently dubious to warrant, even urge, foregoing the risk of placing their fates in the hands of juries. Therefore, explanation for the dramatic success of plaintiffs before juries becomes less obvious, after all.

Perhaps the best one can hypothesize in response to these countervailing lines of reasoning is that there are going to be some instances where stubborn plaintiffs are determined to go to juries for reasons of principle, or the need to vent their grievances in public fora, or—more likely—because they deem the defendants' settlement offers to be inadequate. And there are going to be stubborn defendants who, for reasons of principle, or to avoid establishing precedents that may spur other employees or former employees to seek redress, or for some other reasons, are going to be unwilling to make offers of settlement sufficient to secure the grievants' acquiescence. These are the cases, one can surmise, that the juries see.

3. Combined Totals

Adding the appellate court decisions and the non-appealed decisions together, the totals are 211 wins for defendants; 74 for plaintiffs; and 31 split decisions. In terms of percentages and based on a total of 316 decisions, these figures translate into a win rate of 67.7% for defendants (which is just one percentage point less than that reported by the Schuster-Kaspin-

202. See Ann McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203 (1993).

Miller Study for the 1968-1986 period)²⁰³ and 23.4% for plaintiffs, with the remaining 10% being split decisions.²⁰⁴

4. The Posner Study

Chief Judge Posner, of the Court of Appeals for the Seventh Circuit, conducted a survey of the 430 ADEA cases that were decided on "other than procedural grounds" over an eighteen-month period in 1993 and 1994.²⁰⁵ He came up with a much more paltry figure of forty-nine plaintiffs' victories, equivalent to 11.4% of the total dispositions. In contrast, I found in my survey that plaintiffs prevailed in 29% of age-substantive cases at the appellate level (i.e., they either secured a reversal of an adverse trial court decision or they preserved their victory won below)²⁰⁶ and in 25% of the age-substantive cases at the trial court level.²⁰⁷ (In non-age-substantive cases, as discussed earlier, plaintiffs prevailed on appeal, i.e., they either secured a reversal of an adverse trial court decision or they preserved their victory won below, in 50% of the cases;²⁰⁸ at the trial level they prevailed in 25% of the cases.)²⁰⁹

203. See Schuster-Kaspin-Miller Study, *supra* note 16, at iv.

204. It is difficult to know what to make of these figures in a larger sense than their revealing information about the world of age discrimination in employment. Professor Eisenberg, reviewing data for the years 1978 to 1985, found that the success rate in employment discrimination cases litigated to judgment was 22%—a figure almost exactly the same as that for the 1996 ADEA cases. See Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1588 (1989). However, the fact that his data included prisoners' rights cases undercuts the usefulness of his findings here. Further mitigating the relevance of his findings is the fact that most of the employment discrimination cases he included in his survey arose under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17. What even further compromises the usefulness of his study is the fact that Professor Eisenberg was looking to cases litigated to judgment. Here, very few of the cases involved disputes that actually went to trial, and most did not dispose of the merits of the discrimination claim.

Professor Selmi reports that "the success rate plaintiffs obtain in most tort-type cases . . . tend[s] to approximate . . . fifty percent." Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 41 (1996). Certainly, that statistic expresses a success rate for plaintiffs far in excess of that in the ADEA context.

205. See POSNER, *supra* note 62, at 330-31.

206. See *supra* Part III.J.1.

207. See *supra* Part III.J.2.

208. See *supra* Part III.J.1.

209. See *supra* Part III.J.2.

No ready explanation is apparent for the disparities between the findings here and Judge Posner's numbers. Judge Posner did not segregate appellate court rulings from trial court decisions. Nor did he explain what he meant by decisions rendered on "other than procedural grounds." While one might conjecture that perhaps he excluded decisions rendered on motions for summary judgment, which decisions I include, that exclusion on his part does not seem possible, given that his total data set of 430 cases simply could not have been derived from just the relatively rare reported decisions involving either bench trial rulings or post-trial motions growing out of jury cases. (Even if some of the cases which I deem to be non-age-substantive here were added to the category of age-substantive cases, which I equate with those decided on other than procedural grounds, that would only raise the win rate for plaintiffs, given the foregoing findings showing higher plaintiffs' win rates in the non-age-substantive 1996 cases, and thus would make the disparity between my figures and Judge Posner's even greater.)

5. The Gender Factor

With regard to the 280 cases decided between 1968 and 1986 that the Schuster-Kaspin-Miller group addressed, they reached the conclusion that "[f]emale plaintiffs had considerably greater success in ADEA suits than their male counterparts."²¹⁰ They

210. Schuster-Kaspin-Miller Study, *supra* note 16, at 47. The researchers offered three suggestions as to why this was so:

First, while none of these cases were decided upon a Title VII sex discrimination claim, the fact that women have been granted the added protection of Title VII is undoubtedly not lost upon the courts. This added expression of legislative concern may lead the courts to be particularly sensitive to personnel actions affecting women, and thus more likely to decide on their behalf

Second, most of [the] cases brought by females (45 percent) involved a job status issue (hiring, promotion, transfer or demotion), while only 20 percent of the male plaintiffs raised a job status issue The courts may be less willing to intrude upon management prerogatives when the personnel action has major financial or productivity-related ramifications, such as discharge or retirement. At the same time, the right to be hired for a job that one is qualified for is a central theme in employment discrimination laws.

In addition, female plaintiffs fell into the clerical occupation category 47 percent of the time, while male plaintiffs were considered clerical-type workers just 4 percent of the time It may be that at the

did not distinguish between appellate court and trial court dispositions, as I have done. Moreover, they focused only on cases that had gone to trial. Here, no such focus for the one-year span of time which I addressed was even attempted. (Had it been, there would have been very few cases left to review.) Still, inquiry as to the gender factor is worth pursuing. As it turns out, female plaintiffs in 1996 did fare better, in some respects, than did their male counterparts:

□ In the seventy-four cases in which the plaintiff was a female, the plaintiff prevailed in seventeen instances—23% of the total, while in the 132 cases in which the plaintiff was male, the plaintiff won in twenty-seven cases—20%. On the win side, then, men and women did about the same.

□ Female plaintiffs lost in forty cases, i.e., 54%. In ninety of the male-plaintiff cases—68%—the male plaintiff lost. Here, clearly, there is a considerable disparity in the loss rates as between female and male plaintiffs.

□ In seventeen female-plaintiff cases, making up 23% of the total, there was a split decision—the plaintiff won on some issues, the defendant on others. In fifteen of the male-plaintiff cases, constituting 11% of the total, there was a split decision—the plaintiff won on some issues, the defendant on others.²¹¹ (Here, there is a considerable difference in results; whether a split decision should be considered a win or a loss, however, is problematic, so I do not draw a conclusion as to whether it could be said that women fared better than men, insofar as these split decision cases are concerned.)

low-paying clerical levels of jobs, companies are not as attentive to performance appraisal issues, or situations that could breed claims of discrimination. Thus[,] the organization is less prepared to defend actions brought by those type employees.

Id. at 47-48.

211. There were four cases in which there was both a male and a female plaintiff. Here, the plaintiffs won in one case, lost in two, and achieved a split ruling in one. In the remainder of the 222 district court rulings it was not possible to identify the gender of the plaintiff, or the plaintiff had no gender. That is, the plaintiff was a government agency, i.e., the EEOC, and the genders of the individuals on whose behalf the agency was suing could not be identified.

a. Jury Cases

In the nineteen jury trial cases in which the appellate courts reviewed grants or denials of motions for judgment as a matter of law, there were five cases in which the plaintiffs below were women, thirteen in which the plaintiffs were men, and one in which there was both a male and a female plaintiff. In the five cases involving solely female plaintiffs, the plaintiffs had won below in two cases²¹² and had lost in three.²¹³ In the two cases in which the female plaintiff had won below, she preserved her victory on appeal. In the three in which she had lost, she succeeded in securing a reversal in one case;²¹⁴ in the other two, she lost.²¹⁵ Thus, the affirmance rate for the meager two cases in which a female plaintiff won before a jury was 100%; the reversal rate in the three cases in which the female plaintiff lost was 33%.

In the thirteen cases involving solely male plaintiffs, the plaintiffs won in ten cases at the trial court level and lost in three. On appeal, the ten male plaintiffs who had prevailed below preserved their victories in six cases²¹⁶ and lost in four.²¹⁷ Thus, the affirmance rate for victorious trial court male plaintiffs was 60%—considerably worse than that for the female plaintiffs (although there were only two of them) who

212. See *Parrish v. Immanuel Med. Ctr.*, 92 F.3d 727 (8th Cir. 1996); *Woodhouse v. Magnolia Hosp.*, 92 F.3d 248 (5th Cir. 1996).

213. See *Gathright v. St. Louis Teacher's Credit Union*, 97 F.3d 266 (8th Cir. 1996); *Miller v. Butcher Distribs.*, 89 F.3d 265 (5th Cir. 1996); *Burks v. Oklahoma Publ'g Co.*, 81 F.3d 975 (10th Cir.), *cert. denied*, 117 S. Ct. 302 (1996).

214. See *Burks v. Oklahoma Publ'g Co.*, 81 F.3d 975 (10th Cir.), *cert. denied*, 117 S. Ct. 302 (1996).

215. See *Gathright v. Teacher's Credit Union*, 97 F.3d 266 (8th Cir. 1996); *Miller v. Butcher Distribs.*, 89 F.3d 265 (5th Cir. 1996).

216. See *Simpson v. Ernst & Young*, 100 F.3d 436 (6th Cir. 1996); *Kehoe v. Anheuser-Busch, Inc.*, 96 F.3d 1095 (8th Cir. 1996); *Padilla v. Metro-North Commuter R.R.*, 92 F.3d 117 (2d Cir. 1996); *Haun v. Ideal Indus., Inc.*, 81 F.3d 541 (5th Cir. 1996); *Shaw v. HCA Health Servs. of Midwest, Inc.*, 79 F.3d 99 (8th Cir. 1996); *Rhodes v. Guiberson Oil Tools Div.*, 75 F.3d 989 (5th Cir. 1996).

217. See *Fuka v. Thomson Consumer Elecs.*, 82 F.3d 1397 (7th Cir. 1996); *Doan v. Seagate Tech., Inc.*, 82 F.3d 974 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 684 (1997); *Kusak v. Ameritech Info. Sys., Inc.*, 80 F.3d 199 (7th Cir. 1996); *Nelson v. J.C. Penney Co., Inc.*, 75 F.3d 343 (8th Cir.), *cert. denied*, 117 S. Ct. 61 (1996).

had prevailed below and then prevailed once again on appeal. In the three cases in which the male plaintiffs had lost at the trial court level,²¹⁸ they lost again on appeal. So, while the three losing women trial court plaintiffs were able to win one out of three appeals, the males won none.

L. *Summing Up*

In large measure the foregoing discussions of particular data speak for themselves. But it is worth summarizing some of the more notable findings—again with the already-articulated cautionary notes that (1) one cannot draw too much from a skewed sample, i.e., grievances that in the first instance are unrepresentative (insofar as the universe of discriminatory workplace practices is concerned) in that they have been litigated, and that are even more unrepresentative because they have been taken all the way through to some sort of courtroom or jury response (as opposed to being settled), in the second instance; and (2) one must be aware that the sample here, apart from presenting a distorted view of workplace reality, also is not an overly large one and so is subject to reliability concerns on that score. Conceding the validity of these disclaimers, what conclusions can be drawn with some respectable degree of certitude? What *do* the (flawed) data show?

- For one, the ADEA appears to be undergoing a “de-aging” process (so long as one discounts the aberrational case in which the EEOC sued on behalf of 431 plaintiffs who were age fifty-five and over).²¹⁹ In other words, there are more younger ADEA plaintiffs (although the median age of ADEA plaintiffs has not dropped) and fewer of the traditional ADEA plaintiffs, i.e., those in their mid-fifties. This change is likely not a one-year aberration, but rather is reflective of larger workplace demographic issues.
- Second, and in contrast, one can glean very little from the cases as to the ages of the individuals—i.e., employers, super-

218. See *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436 (11th Cir. 1996); *Dranchak v. Akzo Nobel, Inc.*, 88 F.3d 457 (7th Cir. 1996); *Slathar v. Sather Trucking Corp.*, 78 F.3d 415 (8th Cir.), *cert. denied*, 117 S. Ct. 179 (1996).

219. See *supra* notes 67, 68 and accompanying text.

visors, and so on—whose decisions prompted pursuit of legal redress.

■ Third, we are seeing a feminization, if you will, of the ADEA. The number of female plaintiffs has increased strikingly. This development is almost certainly no one-year phenomenon, but rather is reflective of changing workplace demographics. Moreover, those demographics suggest that we are going to see even more women mounting ADEA claims.

■ Fourth, the data confirm a fact already known, but perhaps not so strikingly established until now: discharges are by far the most common basis for generating litigation activity.

■ Fifth, the data confirm another fact already known: most ADEA cases are resolved at a stage short of a determination of the ultimate merits of the discrimination claim. More specifically, the summary judgment stage of the case is critical for both plaintiffs and defendants, because that is the stage at which the largest group of claims are resolved.

■ Sixth, the data offer striking support for the commonly held view that federal juries disproportionately render verdicts for ADEA plaintiffs. Indeed, the data far more dramatically confirm this proposition than any I have seen before. Still, one must take care as to how to interpret these data. The numbers do not necessarily reflect jury bias, but rather they *may* simply constitute confirmation of the fact that the rare case that gets to the jury is a very strong one insofar as affirmative evidence of discrimination is concerned.

■ Seventh (increases of women, younger plaintiffs, and whatever other changes aside), the bottom line is that plaintiffs who go to court fare far worse than do defendants. Certainly, this is most dramatically the case with regard to decisions made on substantive or quasi-substantive grounds (as in the instance of motions for summary judgment, where a court is not reaching the ultimate merits but is at least determining whether there is enough in terms of disputed material facts to warrant ending the matter or allowing it to proceed). When substance is at issue, defendants come out ahead. When the matter is a procedural one, the plaintiff has a better chance of winning. But overall, defendants win much

more often than they lose or, to say the same thing differently, plaintiffs lose much more often than they win.

▪ Eighth, in the ADEA's period of youth and adolescence—the first twenty or so years—procedural issues were of particular significance. That has changed to some extent.

IV. 1997 AND BEYOND

What of the future? What can we predict, with some degree of confidence, about the workplace of the next five or ten, maybe even twenty or thirty years, insofar as older men and women are concerned? And what can we foresee, with some modicum of accuracy, about the legal issues that are going to be of dominance over the next five or ten years?

A. *Labor Force Demographics*

There have been striking developments in the demographics of the American workplace in this century insofar as older workers are concerned. For one, there has been a very significant increase in the numbers of individuals departing the workplace at relatively young ages.²²⁰ Second, and this is a key point, in absolute numbers older workers still rank in the multi-millions, as Tables 11 and 12 disclose. Third, and most significant, their numbers—which are set forth in the same tables—are going to greatly increase as the baby boomers, i.e., those men and women born between 1946 and 1964, move into their fifties, sixties and beyond.

These generalizations can be elucidated with more specific data. In 1982 there were 110,204,000 men and women in the

220. In 1950, almost half (46 percent) of all men 65 were in the labor force This figure had dropped to 33 percent by 1960 and to 27 percent by 1970. By 1989, only 17 percent of older men were in the labor force The decrease in male labor force participation extends even to men in their 50s. By 1989, the labor force participation rate among men age 55 to 59 had dropped to 79.5 percent from almost 92 percent in 1960.

UNITED STATES SENATE SPECIAL COMM. ON AGING ET AL., *AGING AMERICA—TRENDS AND PROJECTIONS* 94 (1991 ed.).

civilian labor force. By 1994 the number had risen to 131,056,000 and by 2005 the total—using only moderate rate projections—will be 147,106,000, an increase in the eleven years between 1994 and 2005 of 16,050,000, or a slight 1.1%.²²¹ Obviously, these particular numbers are not notable—they show only slow growth in the labor force. However, the changes in numbers regarding older workers are far different: there are very significant increases, both in absolute numbers and in percentages, for men and women in the prime ADEA-litigating years, i.e., ages forty-five to fifty-four, fifty-five to sixty-four, and sixty-five and up. The following tables set forth the figures.

TABLE 11²²²
LABOR FORCE PARTICIPATION BY MEN

AGE GROUP	PARTICIPATION RATE			LEVEL (1000's)			CHANGE (%)	ANNUAL GROWTH RATE
	1993	1994	2005	1993	1994	2005	'94- 2005	'94- 2005
16-19	53.1	54.1	52	3,564	3,896	4,457	14.4	1.2
20-24	83.1	83.1	81.9	7,164	7,540	8,167	8.3	.7
25-34	93.5	92.6	91.5	19,053	18,854	16,279	-13.7	-1.3
35-44	93.5	92.8	91.4	18,537	18,966	18,787	-9.0	-0.1
45-54	90.1	89.1	87.7	12,634	12,962	17,616	35.9	2.8
55-64	66.5	65.5	65.6	6,639	6,423	9,150	42.5	3.3
65+	15.6	16.9	16.5	2,041	2,177	2,386	9.6	.8

221. Howard N. Fullerton, Jr., *The 2005 labor force: growing, but slowly*, 118 MONTHLY LAB. REV., Nov. 1995, at 29, 43 [hereinafter Fullerton]. A more conservative projection yields a total of 143,642,000, and a high-growth scenario entails a total of 153,390,000. *See id.* For the purpose of the discussion here, I use the middle choice, i.e., the moderate growth figures.

222. *See id.* at 39.

TABLE 12²²³
LABOR FORCE PARTICIPATION BY WOMEN

AGE GROUP	PARTICIPATION RATE			LEVEL (1000's)			CHANGE (%)	ANNUAL GROWTH RATE
	1993	1994	2005	1993	1994	2005	'94- 2005	'94- 2005
16-19	49.8	51.3	50.7	3,261	3,585	4,211	17.5	1.5
20-24	71.3	71.0	70.7	6,393	6,592	7,149	8.5	.7
25-34	73.6	74.0	76.4	15,412	15,499	14,186	-8.5	-.8
35-44	76.7	77.1	80.0	15,727	16,259	17,078	5.0	.4
45-54	73.5	74.6	80.7	10,907	11,357	17,070	50.3	3.8
55-64	47.3	48.9	56.6	5,228	5,289	8,613	62.8	4.5
65+	8.2	9.2	10.2	1,479	1,658	1,956	18.0	1.5

In sum, by 2005 over 56.7 million workers ages forty-five and older are expected to be in the labor force—an increase of 16.7 million over the numbers for comparably aged workers in 1994. This constitutes an overall increase of 41.7% in the numbers of men and women in this age grouping! Those aged fifty-five and over will increase from 15.5 million in 1994 to 22.1 million in 2005—a 36% increase. This enormous growth in the numbers of workers in their mid-forties and up at the least suggests that “major adjustments in employment patterns must occur if these older workers are to find productive employment consistent with their desire for working hours, job conditions, and types of employment.”²²⁴ (Interestingly, despite the large increases in numbers and percentages for middle-aged and older workers, the median age of the work force in fact will be almost exactly the same in 2005, i.e., 40.6 years, as it was in 1962, when it was 40.5 years.²²⁵ This is due to the fact that over the course

223. *See id.*

224. AMERICAN ASS'N OF RETIRED PERSONS, *OLDER WORKERS: HOW DO THEY MEASURE UP? AN OVERVIEW OF AGE DIFFERENCES IN EMPLOYEE COSTS AND PERFORMANCE* iv (Sara E. Rix ed., 1994).

225. As the baby-boom generation entered the labor force, the median age of the labor force decreased; once completely in the labor force, this large group can only age, so the median age has been rising. To illustrate, the median age of the labor force was 40.5 years in 1962, (the highest level

of this century the labor force participation rate of older men has steadily decreased—primarily due to voluntary or health-related departures from the work force—and it is predicted to continue to decline.)²²⁶

It takes no predictive skill to conclude that given the burgeoning numbers of older workers, employers which are disposed to engage in age-biased decision making are going to have an enormous available pool of age-qualified targets for those decisions.

Of course, numbers themselves are not determinative. They cannot tell us, after all, whether the frequency of age discriminatory actions and decisions in the workplace will remain static, or change. Nor, if change in the rate of occurrence of such actions and decisions is to occur, can the demographic data confirm in which direction—up or down—that change will go.

attained before the baby-boomers entered the labor force), it dropped steadily until 1980, and since then, it has been rising. With the labor force participation rates of older men projected to continue dropping as rapidly as in the past, the median age of the labor force in 2005 is projected to just exceed the level reached in 1962 [i.e., it will be 40.6].

Fullerton, *supra* note 221, at 40.

226. With the availability of early retirement, offered when many corporations downsize, and benefits under Social Security, men have been leaving the labor force at younger ages During the 1973-78 period, men 60 to 64 years of age had the most rapid decrease in labor force participation [i.e., -7.1 percent]. This age group continued to experience the greatest drop in participation through 1988. Starting around 1985, participation for men 65 and older started to rise, but . . . this reversal was short lived. For the 1988-93 period, men 55 to 59 had the sharpest rate of decrease in labor force participation [i.e., 1.2 percent].

Id. at 34. See also *supra* note 220. The figures regarding labor force participation for older women present a contrasting picture: for them, the participation rate has been increasing. However, it appears that insofar as retirement is concerned, men and women are very similar:

In general, the magnitude and the pace of the decline in the median age of retirement . . . have to date been similar for men and women. From the early 1950's through the late 1980's, the median age fell 4.3 years among men and 4.9 years among women [T]he pace of decline decelerated considerably beginning in the 1970's. Among men, 80 percent of the total decline occurred by the early 1970's. The comparable figure for women is more than 95 percent. However, the projected labor force participation rates imply a resumption during the late 1990's of the decline, which accelerates during the interval 2000-05.

Murray Gendell & Jacob S. Siegel, *Trends in retirement age by sex, 1950-2005*, 115 MONTHLY LAB. REV., July 1992, at 22, 25.

We can venture some informed speculation, however. One might predict, for example, that the growth in the numbers of older workers may have the salutary effect of changing lingering negative attitudes. Or maybe the 'baby bust,' e.g., the decline in the birth rate that followed the baby boom, combined with other trends—such as increasing numbers of ill-educated immigrants entering the American work force—will make older men and women more attractive in the employment market. Perhaps the merits of older men and women simply will come to be valued more.²²⁷ Or—and indeed this may well be the most likely scenario—perhaps the same misperceptions and negative attitudes that exist today (to greater or lesser degrees, depending upon whose ox is gored and who is doing the goring) will persist. At bottom, of course, these are all realistic, but currently unconfirmable, possibilities. What we *can* get a firmer grip on are data, discussed in the next sections, concerning the incidence and bases of age bias in the workplace today. And we then can use those data to speculate as to whether the phenomena that are disclosed seem to be of such a nature that they are likely to persist.

That speculation, as discussed below, leads to the unfortunate conclusion that the perceived age bias that (1) prompted enactment in 1967 of the Age Discrimination in Employment Act, and that (2) has allegedly motivated employer decisions and actions which in turn have prompted the filing with the EEOC of thousands of charges of discrimination over the years, and that (3) has generated hundreds of cases over the years (as well as uncountable pre-trial settlements) in which ADEA plaintiffs have prevailed, is likely to persist into the foreseeable future.

227. A recent article in the Chicago Tribune reported that Merrill Lynch & Co. was seeking to employ older workers because their experience and expertise were regarded as assets. Andrew Guy Jr., *Older Workers Wielding New Clout in Job Market*, CHIC. TRIB., July 24, 1996, at B1.

B. *Empirical Verification of Age Discrimination in the Workplace*

1. General Data

There are some bases for suggesting that age discrimination in the workplace today is a relatively minor problem. For one, most plaintiffs who claim in the court to be victims of age discrimination in employment in fact lose, as discussed earlier. One also can note data establishing that in recent years older workers have fared better in the job market than have their younger counterparts.²²⁸

But there are countervailing points to be made. Though not constituting a majority, or even a significant plurality, some plaintiffs do win their cases. Moreover, some grievants no doubt secure settlements that cannot simply be dismissed as "chump change" to pay off nuisance claims. What is more, the positive data regarding employment of older workers is somewhat ambiguous.²²⁹ There are other bases for believing that age discrimination in the workplace is operative today, and will be with us tomorrow.²³⁰

228. See *infra* Part IV.B.2.

229. See *infra* Part IV.B.2.

230. One might rest one's case for the prevalence of age bias in employment on the numbers of charges of unlawful discrimination filed with the EEOC, which has had enforcement authority vis-a-vis the ADEA since mid-1979. (Prior to that time, the Act had been administered by the Department of Labor.) In fiscal year (FY) 1980, which was the first full year in which the EEOC had enforcement authority, there were 59,328 charges of unlawful discrimination filed with the agency, which then (and now) also had jurisdiction vis-a-vis Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17, and the Equal Pay Act (EPA), 29 U.S.C. § 206(d) (1994). Of this total, 11,076—18.6%—were ADEA charges. By FY 1986 the total charges amounted to 68,822; of these, 25.3%—17,443—were ADEA claims. Five years later, in FY 1991, there were 17,449 ADEA charges out of a total of 62,806. The next year, of 70,339 charges, 19,253 involved the ADEA. In FY 1993 charges soared to 88,000 due to the EEOC's now having enforcement responsibility as to the newly activated Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213 (1994). In that fiscal year, ADEA claims made up 22.6% of the total. See 1 EGLIT, *supra* note 2, at 2-6. There were 17,425 ADEA charges filed with the EEOC in FY 1995. *Recent EEOC Activity: Older Workers' Forum and ADEA Waivers*, Fair Empl. Prac. (BNA) July 1, 1996, at 75.

The very large majority of these ADEA charges generated no findings of wrongdoing on the part of the accused employers. While this phenomenon would suggest that the volume of charges should not be taken as a barometer of the incidence of

For example, a study published in 1993 by the Fair Employment Council of Greater Washington, Inc., relied upon a testing methodology whereby pairs of resumés—one for a hypothetical fifty-seven-year-old and the other for a hypothetical thirty-two-year-old—were mailed to a random sample of 775 large firms and employment agencies nationwide. Even though the fictional job applicants' resumés set forth equal qualifications, the favorable response rate for older job seekers was 26.5% less than it was for the younger individuals in those instances where the companies actually had job vacancies.²³¹ In similar vein, it was recently reported in a popular journal, *Money Magazine*, that “[n]early five out of 10 executive search firms say that age is a ‘significant and negative factor’ to companies looking at job candidates ages 40 to 50, according to a 1996 survey by Exec-U-Net, a networking group for executives.”²³² Another study—involving a survey of the views of senior human resources managers, who were termed “gatekeepers”—was conducted by the American Association of Retired Persons in 1985 and was updated in 1989. While the individuals surveyed reported generally positive attitudes regarding older workers, the practices of their companies, it turned out, did not parallel the gatekeepers' representations:

discrimination in the workplace, the countervailing factor to consider is the fact that in the very large majority of instances the EEOC has not been able to pursue meaningful investigation of the charging parties' claims because it has lacked the resources to do so. See UNITED STATES GEN. ACCOUNTING OFFICE, EQUAL EMPLOYMENT OPPORTUNITY—EEOC AND STATE AGENCIES DID NOT FULLY INVESTIGATE DISCRIMINATION CHARGES (1988).

Likewise, the fact that the EEOC itself files very few suits should not be read as signifying the agency's view that there is little out there that merits its litigation efforts. Again, lack of resources, along with disinterest on the part of some presidential administrations in aggressively pursuing equal employment opportunity claims, are more apt explanations for the agency's small annual dockets of cases. (With regard to suits filed to enforce all of the statutes for which it has enforcement responsibility, i.e., the ADEA, EPA, Title VII, and the ADA, the EEOC filed 398 cases in FY 1993, 373 cases in FY 1994, 322 in FY 1995, and 160 in FY 1996. Insofar as ADEA suits, specifically, are concerned, in FY 1990 the EEOC filed 138 ADEA suits; it filed 102 in FY 1991, 84 in FY 1992, 114 in FY 1993, 73 in FY 1994, and just 37 in FY 1995. See *Drop in Fiscal 1995 EEOC Activity*, Fair Empl. Prac. (BNA), Apr. 8, 1996, at 37. Only 12 ADEA suits were filed by the agency in FY 1996. See 15 *Employee Relations Weekly* 292 (Mar. 24, 1997).

231. Marc Bendick, Jr., et al., *Employment Discrimination Against Older Workers: An Experimental Study of Hiring Practices* (1993) (monograph distributed by the Fair Employment Council of Greater Washington, Inc.)

232. Ruth Simon, *Too Damn Old*, MONEY, July, 1996, at 118, 122.

Nearly four in five gatekeepers (79%) agreed that their companies were "finding ways to leverage the experience of older workers," . . . but other data from this survey do not support this success in tapping older workers['] skills. One of the most disturbing findings of this study is the reported decline in senior management's formal commitment to utilizing older workers. Although 62 percent of all gatekeepers believe such a commitment would be effective, only one in four (25%) report that their companies have implemented a formal program of senior management commitment. This is down significantly from one in three companies (33%) in 1985. Similarly, six in 10 (58%) of [sic] gatekeepers believe in the effectiveness of educating managers about ways to utilize older workers. Yet, only one in three (28%) companies (a figure similar to 1985) have introduced such a program

Training in 1989 follows a similar pattern to 1985. In 1989, over half of the gatekeepers (55% compared to 48% in 1985) believe that skill training for older employees would be effective in increasing their utilization, but overall, as in 1985, only three in 10 (29%) companies have implemented such programs.²³³

Likewise, it has been pointed out that while "most companies profess to believe that an employee's value to the company rises over time or is dependent on training and that their general policy is to retain all productive employees as long as possible, . . . their actions indicate otherwise"²³⁴

Other authoritative voices also have decried, albeit sometimes without clear documentation, age bias. For example, in *The Untapped Resource*, a report issued by the Americans Over 55 at Work Program of the Commonwealth Fund, the following charges were made:

Age discrimination plays a pernicious role in limiting employment opportunities for older workers. Negative perceptions of older workers persist, and discriminatory practices continue in both subtle and less-than-subtle ways. Discrimi-

233. AMERICAN ASS'N OF RETIRED PERSONS, BUSINESS AND OLDER WORKERS 20 (1989).

234. Michael C. Barth et al., *Corporations and the Aging Workforce*, in BUILDING THE COMPETITIVE WORKFORCE 156, 174 (Philip H. Mirvis ed., 1993).

natory attitudes and practices often reinforce each other. For example, older workers may be passed over for training courses and then evaluated negatively on their flexibility in taking on new assignments, where training might have made them more versatile.²³⁵

In like vein are the following observations:

Stereotypical views depict older workers as potentially less employable than younger persons, particularly for managerial positions. Research findings suggest that older persons are seen as less capable of responding creatively, enthusiastically, or efficiently to job demands. Moreover, age stereotypes depict older employees as less interested in change and less capable of coping with future challenges. To the extent that these stereotypes [which are not borne out by the research as being empirically correct] influence managerial decisions, there are potentially serious consequences for older employees, including lowered motivation, career stagnation, and eventual career obsolescence.²³⁶

2. The Unemployment Rate of Older Workers

Given the burgeoning annual cohorts of men and women who over the next two decades will successively enter and move through their fifties and then enter and move through their sixties, seventies, and beyond, boom times may well be in the offing for attorneys who specialize in pursuing or defending against ADEA-based claims of discrimination. This prospect of millions of more potential ADEA plaintiffs can hardly be a comforting one, however, from the perspective of employers. (In theory, for the employer which disavows ageist employment practices the fear of litigation ought to be registering as a low level menace on the corporate radar screen, but no doubt even the best managers cannot avert every potential grievant from pursuing legal redress.)

235. THE COMMONWEALTH FUND, THE UNTAPPED RESOURCE, THE FINAL REPORT OF THE AMERICANS OVER 55 AT WORK PROGRAM 50 (1993).

236. BENSON ROSEN & THOMAS H. JERDEE, OLDER EMPLOYEES: NEW ROLES FOR VALUED RESOURCES 35-36 (1985). See also Stephen R. McConnell, *Age Discrimination in Employment*, in POLICY ISSUES IN WORK AND RETIREMENT 159 (Herbert S. Parnes ed., 1983).

The fact is, though, that the entry of increasing numbers of men and women into what amounts to prime time for ADEA claims, i.e., the decade of their fifties, need not inevitably signal increased litigation. Indeed, there are some reasons for believing that the massive growth in those fifty and above need not generate an explosion in ADEA lawsuits. How so?

As discussed earlier, we know that the most common basis for ADEA suits today is termination from the job. And we know, further, that the way the ADEA remedial scheme is structured, a discharged former employee's incentive to sue is severely diminished by the mitigation requirement that the courts impose.²³⁷ In other words, if Employee X, making \$75,000 a year, is required—as she indeed is—to seek comparable employment following her discharge by Company A, and if Employee X can readily come up with another job with Company B that pays as much or more, she is not going to have much practical reason to sue, since the income earned working for Company B will offset her claim for back pay from Company A.²³⁸ Thus, if the job market for older workers is a good one, it follows that the confluence of (1) available jobs and (2) the mitigation requirement whereby the income earned on the replacement job serves to reduce any back pay recovery against a discriminatory employer, will result in a situation militating against litigation, or it at least will hold down the increases in legal claims that otherwise might occur.

How, then, are older workers in fact fairing in the job market? Actually, this inquiry is an exceedingly complicated one. Any answers that are based on present-day data can tell us little about the situation that will pertain next year or five or ten years in the future. Moreover, it turns out that clear answers are not readily available even for the current state of affairs.

237. See *supra* note 52.

238. It is true that liquidated damages are recoverable under the ADEA for willful violations of the Act, but these damages are computed on the basis of the back pay award: a successful plaintiff recovers an amount equal to the back pay recovery, or, to put it another way, the back pay award doubled is what the prevailing plaintiff in a willful violation suit obtains. 29 U.S.C. § 626(b) (1994). If the plaintiff recovers no back pay, because the salary she did not receive following discharge by her discriminatory employer is offset by the income earned at the replacement job obtained following discharge, there is no liquidated damages award to recover. In other words, if back pay is \$0, twice \$0 still equals \$0.

Some data suggest that workers ages fifty and over currently are doing pretty well.²³⁹ But those data are problematic.²⁴⁰ And other data suggest that workers in their forties and early fifties—who of course fit within the ambit of the ADEA—have not fared well.²⁴¹ Still other data can be cited to support the

239. The following analysis was set forth in SECRETARY OF LABOR, LABOR MARKET PROBLEMS OF OLDER WORKERS 8-9 (1989):

Prior to the 1970's, the jobless rate for men age 55 and over tended to be higher than the rate for 25- to 54-year-olds. Since then, not only has the situation been reversed, but the gap between the older and younger groups has continued to grow and has tended to widen in recessions and narrow in recoveries. Some possible reasons for the recent differences in the rates of joblessness favoring older men include the following:

▫ Improvements in pension income have made retirement a viable alternative to employment for many older potential jobseekers Thus, some persons who may have had to find a job in the past are now better able to retire (or stay retired).

▫ There has been a considerable increase in the use of early retirement inducements to lower labor costs and avoid layoffs Thus, older persons may avoid further work, and possibly layoff, by retiring, an option not available to younger workers.

▫ Rates of labor force reentry (proportion of workers who were out of the labor force in the previous month who are in the labor force in the current month) for older men are generally down from the late 1960's and early 1970's. That is, retired workers are more likely to stay retired. Thus, there may have been some downward pressure on older workers' jobless rates as fewer persons outside the labor force undertook a job search.

240. The option of being out of the labor force, not feasible for most middle-aged workers (particularly men), complicates unemployment comparisons between age groups in two ways. First, the incidence of unemployment among older persons is limited by labor force withdrawal. For example, a 40-year-old job loser is much more likely to show up in the CPS [Current Population Survey] as unemployed than is a 62-year-old, who may choose to retire rather than undertake a job search. Secondly, duration of unemployment may be lowered by labor force withdrawal after an unsuccessful job search; in other words, a large proportion of the unemployment spells of older persons end in labor force withdrawal rather than employment. Had these persons persisted in their job searches, average durations of unemployment would probably be higher than they are.

Id. at 9-10.

241. 1. From 1967-71 to 1987-92, males have become *much* more vulnerable to unemployment due to permanent layoff than have females. The rate for males of all ages increased by 108 percent, nearly double the 55 percent increase for female workers.

2. From 1967-71 to 1987-92, males aged 35-54 have become *much* more vulnerable to permanent layoff unemployment than males aged 16-34 and males 55 and above. While the rate increased by 133 percent for those aged 35-54, the 16-34 rate grew by 99 percent and the rate for

assertion that insofar as ADEA-protected workers are concerned, it is those men and women ages forty to forty-five who are more likely than their older counterparts to experience employment difficulties.²⁴²

In sum, recent figures offer a mixed picture as to the employment situation of workers whose ages bring them within ADEA coverage. And even though some data support the view that older workers are faring well, one certainly cannot with any confidence predict that this state of affairs will persist in the near or more distant futures.

3. Summary

The past and present are useful predictors for the future—particularly the near-future. And so it seems safe to conclude that to the extent negative attitudes have held sway, and continue to do so today, regarding older men and women who are already in the work force or who are seeking to enter or re-enter it, these attitudes are likely to continue over the next decade (and beyond, as well). True, one cannot know this to a certainty. But certainly there is nothing in the offing to suggest that some sea change in employer attitudes and in their reliance on negative stereotypes is soon to occur. In brief, we can expect more of the same.

those 55 grew by only 48 percent.

James L. Medoff, *The Mid-Life Job Crisis—Growing Unemployment Due to Permanent Layoff Among Middle-Aged American Men*, NSC REPORT SERIES (National Study Center), May 12, 1994.

242. People over 45 years old are far less likely to suffer labor market problems than younger workers. Unemployment rates are lower for workers over 45 than for younger persons in the same groups; and older workers generally earn significantly more than younger workers because the older workers tend to have more work experience and seniority.

NATIONAL COMMISSION FOR EMPLOYMENT POLICY, *OLDER WORKERS: PROSPECTS, PROBLEMS AND POLICIES* 13 (1985).

C. The Generative Forces Underlying Discrimination in the Workplace

1. Ageist Animus

The ways in which attitudes regarding persons fitting within the ADEA-protected class, i.e., those over age thirty-nine, play out are going to vary with the context. For example, an employer's reluctance to retain a sixty-year-old on her job very likely is not going to be paralleled by like reluctance of that older woman's landlord to continue renting an apartment to her. The relative ages of the parties (or at least the characteristics associated to greater or lesser degree with given age ranges) also likely will be relevant to the ways in which attitudes regarding age factor into relationships. A forty-five-year-old woman interested in a romantic attachment is going to react differently, in a social situation, to a sixty-year-old man than she is to a thirty-year-old.

In any event, putting to the side observations regarding general ageist attitudes and age-based or age-related practices, let us focus on the particular locus of concern here, i.e., the workplace. In the earlier-cited 1965 report of the Secretary of Labor that was issued in the birthing days of the ADEA, the Secretary—who emphasized the problems older individuals confronted in being hired (as opposed to concentrating on what in fact has been the far more common basis of complaints, i.e., discharges)—rejected deep-seated animus as the explanation for age bias. In so doing, he contrasted the antipathy directed towards the elderly with what he saw as the much more invidious bias operative in the context of race relations:

Discrimination in employment based on race, religion, color, or national origin is accompanied by and often has its origins in prejudices that originate outside the sphere of employment. There are no such prejudices in American life which apply to older persons and which would carry over so strongly into the sphere of employment.

The process of aging is inescapable, affecting everyone who lives long enough. It is gradual, minimizing and obscuring differences among people. At all times there are people of all ages living in close association rather than in

separate and distinct social or economic environments. The element of intolerance, of such overriding importance in the case of attitudes toward other groups, assumes minimal importance in the case of older people and older workers.

It is true that hiring officials are not immune to the brightness, vigor, and attraction of youth, nor always above exploiting these attributes for commercial advantage. But such choices involve preferences *for* one group, rather than antagonism *against* another.

... The issue of discrimination revolves around the nature of the work and its rewards, in relation to the ability or presumed ability of people at various ages, rather than around the people as such. The issue thus differs greatly from the primary one involved in discrimination on the basis of race, color, religion, or national origin, which is basically unrelated to ability to perform work.²⁴³

In a related vein, it has been observed that "to the extent that age discrimination is occurring in the workplace, it is quite subtle and comes in the form of a bias much less harsh and overt than other forms of discrimination."²⁴⁴

As discussed earlier, the Secretary more or less had it right.²⁴⁵ Ageism is not equivalent, either in its genesis nor its manifestations, to racism. Thus, the eradication of age bias—either generally, or at least in specific settings—is perhaps a more realistic aspiration than is the imminent demise of racist thinking and racist actions. Perhaps in ten, twenty, or thirty years the ADEA will have become a legislative artifact—interesting for what it was and what it did, but no longer necessary. Or perhaps not.

2. Age and the Ability to Perform

In contrast to the rejection in 1965 by the Secretary of Labor of personal animus as an explanation for employers' mistreatment of older workers and job applicants, the Secretary did ascribe merit to a second postulated source of bias, i.e., errone-

243. THE OLDER AMERICAN WORKER, *supra* note 6, at 5-6.

244. AMERICAN ASS'N OF RETIRED PERSONS, VALUING OLDER WORKERS—A STUDY OF COSTS AND PRODUCTIVITY iii-iv (1996) [hereinafter VALUING OLDER WORKERS].

245. See *supra* notes 110-12 and accompanying text.

ous assumptions about the effect of age on the ability to do a job. This the Secretary referred to as "arbitrary" discrimination,²⁴⁶ and he concluded that there was reason to believe that such misassumptions indeed were a real cause of discriminatory treatment.

Whatever the accuracy of the Secretary's perceptions regarding employers' assumptions in 1965, the data today (in contrast to the negative, but empirically less supported, stereotypes prevalent thirty years ago regarding older workers' abilities) in fact do afford some basis for the conclusion that there are correlations between older age and diminished job performance, at least in some contexts and in some respects. This conclusion, however, is a very equivocal one, for a couple of reasons. For one, it is necessary to assess the data with caution: general age/performance correlations do not justify either (1) the conclusion that any particular older man or woman is incompetent, inept, untrainable, or otherwise unable to do the job, or (2) the conclusion that he or she is unable to do it well. The unsurprising, and unimpeachable, fact is that individuals vary as to how they age and how they adapt to aging. "Within the limits of present knowledge there appears to be no single factor governing the rate of human aging and this makes for diversity and individual patterns of aging."²⁴⁷ Second, and putting to the side the matter of taking care to avoid utilizing generalizations as bases for assessing individual characteristics, there is another matter to note here: depending upon whom one looks to, the data may be characterized as either unpersuasive or at the least ambiguous. Expressing the former view are two analysts who, having conducted a meta-analysis of the literature, concluded that there is very little by way of a meaningful relationship between age and job performance:

The relationship between age and job performance has long been of interest to psychologists and industrial gerontologists More recent studies either empirically evaluated the relationship using very large samples of data . . .

246. THE OLDER AMERICAN WORKER, *supra* note 6, at 2.

247. James E. Birren & Wendy L. Loucks, *Age Related Change and the Individual*, 57 CHI.-KENT L. REV. 833, 841 (1981).

or employed meta-analysis to integrate empirically the findings of many smaller studies

Collectively, these studies, which include more than 60,000 subjects, reveal an exceedingly weak relationship between age and performance. While this observation may be counter-intuitive, the large numbers of individuals on which the studies are based and the consistency of the results across reviews allow one to place substantial confidence in it.²⁴⁸

On the other hand, there are unimpeachable data that confirm the existence of age-correlated health changes. For example, we see that as adults grow older, they experience (as a group) increases in the incidence of functional limitations, i.e., hearing loss, the ability to lift, to walk, to use stairs, etc.²⁴⁹ It would seem logical to conclude that, to the extent that functional abilities are correlated with job performance, one could expect to see some relationship (albeit not necessarily a negative one, since a given individual might be able to compensate with experience and reliability for his or her declining physical capacities)²⁵⁰ between an impaired functional ability and job performance. In fact, however, it is not at all clear that age-related health factors do have any effect on job performance.

In some studies . . . where samples are drawn from working populations, various test results show declines in aerobic power and an increase in excessive weight as persons age, but no evidence as to the relevance of these factors to individual productivity. Another study by Shepard . . . did relate the decline in aerobic power to the arduous task of inspecting marine vessels and cargo, but even here reliance

248. Harvey L. Sterns & Michael A. McDaniel, *Job Performance and the Older Worker*, in *OLDER WORKERS: HOW DO THEY MEASURE UP?* 27, 29 (Sara E. Rix ed., 1994).

249. See Monroe Berkowitz, *Functioning Ability and Job Performance as Workers Age*, in *THE OLDER WORKER* 87, 91-92 (Michael E. Borus et al. eds., 1988).

250. The literature on the effects of health and aging on job performance does not yield the answers we seek in an unambiguous fashion. Apart from the measurement problems the studies fail to control for relevant factors, although there is hardly agreement on what is and what is not relevant in this context. The generalizations which seem to hold are that the older worker has assets . . . [of] experience and reliability which may compensate for the deficits in physical functioning

Id. at 111.

was on impressions of performance and logical deductions rather than work performance records.

Robinson . . . notes that the reviews of the limited empirical literature on age and productivity . . . have been inadequate for drawing useful generalizations. However, she notes that, in general, variability in performance within age groups outweighs differences among age groups, but that age differences can be observed more readily in some occupations than in others. But again it is noted that the processes of self-selection and termination tend to reduce age differences in performance among the surviving work force.

Doering, Rhodes, and Schuster . . . review several studies of the age-job performance relationship. In very general terms, they find that the studies provide mixed results. A considerable number of studies showed a nonsignificant relationship. Several studies showed some older workers' performance to be better in terms of accuracy and steadiness of work output and work level, and others showed that performance declined with age.

Among the studies that showed an improvement with age was one of salespersons Older clerical workers were found to be more accurate and to have greater steadiness of output, with performance declining only for those 65 years of age and older Eisenberg . . . found that older examiners and materials handlers in a garment manufacturing plant had higher productivity, whereas the productivity of older sewing machine operators was lower, as measured by piece-rate earnings.

Decreases in performance were reported in 15 studies covering such diverse occupational groups as printers, male production workers, factory workers, mail sorters, and air traffic controllers. For scholars, engineers, and scientists, the studies showed essentially an inverted U-relationship between age and performance.²⁵¹

Insofar as absenteeism is concerned, the data show that while older workers are absent less often than their younger counterparts, when absences do occur there is a positive correlation between higher age and increased length of absence from the job for health-related reasons.²⁵² The data also show, even more clearly, a positive correlation between the severity of on-the-job accidents and increased age. Thus, while the frequency

251. *Id.* at 105-06.

252. *See id.* at 106-07.

of accidents is higher for younger workers, the injuries suffered when older workers do have accidents are more serious than are those suffered by younger workers.²⁵³

Given (1) the correlation between declining functional abilities and advancing age, (2) the increased duration of older workers' absences (albeit absenteeism *per se* is more frequent for younger workers), and (3) the increased severity of older workers' on-the-job injuries (although the frequency of workplace injuries is greater for younger workers), it is understandable that employers have had concerns about hiring older workers. Indeed, according to the researcher from whose work the foregoing excerpts have been quoted, "[t]here would seem to be some basis, of a statistical nature, for discrimination"²⁵⁴

Apart from the matter of the relationship of older workers' physical capacities and their work performance, there also are the relevant matters of intellectual capability and motivation. Here, the commonly held view is that increasing age carries with it the inevitable prospect of intellectual decline, as well as decreasing desire to perform well. The data in good measure

253. While older workers may have lower frequency rates, their severity rates tend to be higher. Older workers apparently have more serious injuries and lose more worker time per injury Both the compensation cost per injury and per unit of exposure was considerably more for the older workers. For the three age groups, the compensation cost per injury was \$789 for the youngest group, \$1,421 for the middle group, and \$2,072 for the oldest. The higher frequency rate among the youngest workers made the compensation cost per unit higher for them (\$18,732) than for the middle group (\$17,585), but the cost was greatest for those 45 years of age and over (\$22,550)

Occupation exerts a strong influence on accident rates and costs For males, there is a strong age profile, but it is less clear cut in the case of females except in the white-collar and service occupations.

Given the finding that severity of accidents increases with age, it should not be surprising to find that there is an age profile for the most severe injuries—those that result in death. Kossoris . . . found that the death rate for the over-50 workers was twice that of the 21 - 25-year-old worker and that the over-60 death rate was three times that for the 21 - 24-year old category. [In 1981,] Root . . . , using workers' compensation data from more states than were available to Kossoris [in 1940], substantiates the nature of the relationship between fatal accidents and age.

Id. at 107-08.

254. *Id.* at 110.

dispute these notions, however. For one, it is not the case that intelligence declines with advancing years *per se*:

The key finding in terms of intelligence is that age-related declines are minimal for many intellectual functions. Current research has documented that where there is a marked decline in the intellectual functioning of an older person, it is usually the result of disease rather than age

Botwinick . . . , in his review of the literature on intellectual abilities, has shown that the distinction between verbal and performance abilities is more complex than originally thought:

A summary of the cross-sectional literature suggests that the age-intelligence relationship tends to be small, with decline not setting in until relatively late in life. When it does, memory, speed of response, and perceptual-integrative functions are involved²⁵⁵

The intellectual capacity to perform on the job also entails the factor of memory, which is defined as the "retention of specific events which occurred at a given time at a given place."²⁵⁶ Here, too, the data caution against embracing the common negative stereotype of the forgetful oldster:

What is important to keep in mind is that, in the absence of illness, age-related declines in memory may indeed be slight and have minimal affect on performance. Furthermore, since memory relates to the process by which information is acquired, attention must be paid to the learning situation in which older workers are presented with new material.²⁵⁷

Of course, learning ability is also related to work performance. But again, there is a positive take on this issue which contradicts the overblown generalization that older workers simply cannot learn new tasks:

255. Dorothy Fleisher & Barbara H. Kaplan, *Characteristics of Older Workers: Implications for Restructuring Work*, in *WORK AND RETIREMENT: POLICY ISSUES* 140, 151 (Pauline K. Ragan ed., 1980) (citations omitted).

256. Fergus I.M. Craik, *Age Differences in Human Memory*, in *HANDBOOK OF THE PSYCHOLOGY OF AGING* 384, 385 (James E. Birren & K. Warner Schaie eds., 1977).

257. Fleisher & Kaplan, *supra* note 255, at 152.

Concerning learning ability, it has been found that those who were deemed capable at a younger age and who continued to use their intellectual abilities maintained their ability to learn in the later years. Where older persons have registered lower performance scores than younger persons in learning new tasks, several explanatory factors have been identified. Because much of the research on learning abilities has been conducted in artificial settings, it means that the tasks older people were required to perform, such as memorizing nonsense syllables, were meaningless to them. Their poor performance did not reflect their ability to learn, but rather their attitudes toward the material presented. Also, older persons perform more slowly to allow time to correct for the possibility of errors. Thus, because older persons are more cautious before responding, they do not do as well as younger persons on timed tests, but when they are given sufficient time to respond, their performance equals that of younger persons.²⁵⁸

Finally, there is the matter of motivation. The data suggest that there is some correlation between age and motivation, but the causes for that linkage, and the inevitability of that linkage, are problematic.²⁵⁹

What has all this to do with predicting employee practices and decisions in the coming near decades?

For one, it is likely that few employers are going to be familiar with the kinds of studies, and the findings of such studies, that are outlined in the foregoing excerpts. And so the inaccurate, detrimental assessments of older workers that exist today are likely to persist into the future.

Second, the data do show that some declines do occur with age. And there is no reason to expect that the physiological and intellectual changes implicated in these declines are not going to continue to be a part of the life cycle for each of us in 1998, 2010, and 2020. In brief, there are no magic cures for the effects of aging (minor though some of these effects may be) on the horizon.

258. *Id.* at 152-53.

259. *See id.* at 153-55.

Third, institutional inertia likewise is likely to persist; accepted mythologies die slowly, at best. And so, ageist attitudes and stereotypes are not going to suddenly disappear. (Of course, this assumes that one accepts the data to the effect that they indeed do exist.)²⁶⁰ In this vein, the authors of a 1989 study by the American Association of Retired Persons reported that even though senior human resources personnel—individuals termed “gatekeepers” in the study—in a number of companies held highly positive views regarding older workers,²⁶¹ and even though they gave older workers high ratings “for compatibility, solid work experience and emotional stability,”²⁶² these gatekeepers “in companies with 1,000 or more employees . . . [were] less likely to give high ratings to older employees on practical knowledge, compatibility, emotional stability and performance in a crisis.”²⁶³

3. The Costs Attributable to Older Workers

There is more to the employer-employee calculus than assumptions (accurate or not) about, and actual evaluations (accurate or not) of, older workers’ job performance. There is also the matter of the financial bottom line. More specifically, there are “the fixed costs of employment that limit the willingness of firms to hire part-time workers or workers who are expected to remain with the firm only a short period of time.”²⁶⁴ Because of these fixed costs “firms will tend to offer part-time employees lower wages, which discourage older workers from applying for these jobs.”²⁶⁵ Other factors also may serve as disincentives to employers hiring older workers, or may result in such workers being paid less than their younger counterparts:

260. See *supra* notes 110-12 and accompanying text.

261. See AMERICAN ASS’N OF RETIRED PERSONS, BUSINESS AND OLDER WORKERS 8-9 (1989). “[O]lder employees receive extraordinarily high ratings for attendance, commitment to quality, good performance, loyalty, practical knowledge and reliability in a crisis.” *Id.* at 8.

262. *Id.* at 8.

263. *Id.* at 9. Older employees of large companies also received low ratings on the critically important issue of ability to cope with new technology.

264. Robert L. Clark, *Employment Costs and the Older Worker*, in OLDER WORKERS: HOW DO THEY MEASURE UP? AN OVERVIEW OF AGE DIFFERENCES IN EMPLOYEE COSTS AND PERFORMANCES 1, 4 (Sara E. Rix ed., 1994).

265. *Id.*

[T]he importance of team work in the production process tends to make firms less likely to offer employment that allows older persons to work at nonstandard hours. Also, specific jobs skills obtained on career jobs may not be relevant at new jobs, so that employment for older workers at new firms may entail lower wages These factors, along with potential higher costs of employee benefits, work against firms offering acceptable employment opportunities to older workers.²⁶⁶

Benefit costs make older workers more expensive employees. For example, the data establish that the health insurance costs associated with older male workers are considerably higher than those for younger individuals—a reflection of the fact that health care utilization increases with age:

. . . In a 1993 report, it was estimate[d] that in 1994 the average employer cost for insured males between the ages of 55 and 64 [would] be \$3,960 [,] compared to \$1,500 for workers 25 to 34. As a percentage of earnings, the health cost for the older male workers [would] be 14.5 percent, while employer expenditures for the younger male workers [was] expected to be only 6.1 percent of salary.²⁶⁷

(The data regarding women produce differing results. One national consulting firm, the Wyatt Company, developed a model which, when applied, showed a steady correlation between increasing age and increasing health insurance costs for both men and women, although the differential between younger and older women was not as extreme as that between younger and older men because of the maternity costs associated with younger females.²⁶⁸ But others have estimated that the cost of female workers ages fifty-five to sixty-four would be less than that for women ages thirty-five to fifty-four.²⁶⁹)

266. *Id.* at 6.

267. *Id.* at 17.

268. *Id.* at 16.

269. *Id.* at 17. See also Monroe Berkowitz, *Functioning Ability and Job Performance as Workers Age*, in *THE OLDER WORKER* 87, 108 (Michael E. Borus et. al. eds., 1988) (“the compensation cost per injury and per unit of exposure was considerably more for . . . older workers”).

Accordingly, it is likely that an employer which pays in whole or part for its employees' insurance (and does not, as discussed below, purchase coverage that keeps cost constant for each employee by varying the coverage provided, the result being that older workers have less coverage) is going to find that if its work force is skewed towards the upper end of the age spectrum, it will experience higher costs than it would were its workers younger—particularly if a significant majority of its employees are males.²⁷⁰ This relationship between insurance costs and the employment of older men and women understandably is a key concern of employers:

The increased cost of providing health benefits to older workers compared to the company worker of average age has many human resource professionals worried. The 140 gatekeepers who provided an estimate stated that, on average, it costs their company an additional 15 percent to insure an older worker compared to the health care benefit costs of insuring the average age company worker. Furthermore, when asked to evaluate the relative expenditures on health insurance for several "typical" employee types, this study found that one in three (33%) human resource decision-makers (compared with 30 percent in 1985) rated the health insurance costs of 65-year-old retired workers as "extremely" or "very costly." What is most significant about this finding is that in the four years since the last survey [in 1985], human resource decision-makers estimate that the costs of company-provided health insurance for retired workers has overtaken the costs of insuring a 30-year-old employee with two dependents

The perception that older employees are expensive to insure appears to be most acute in large companies. For instance, in companies with 1,000 or more employees, a "typical" 55-year-old male is now considered more costly to insure than a young employee with dependents.²⁷¹

270. *But see* William McNaught & Michael C. Barth, *Are Older Workers 'Good Buys'? A Case Study of Days Inns of America*, 33 SLOAN MGMT. REV. 53 (1992) (two factors—self-selection, whereby it is healthy older workers who remain in the work force, and the potential likelihood that older workers will have few or no dependents—may offset age-related differences in health care costs).

271. AMERICAN ASS'N OF RETIRED PERSONS, BUSINESS AND OLDER WORKERS 16-17 (1989).

Pension costs also may make older workers more costly employees in the case of defined benefit (in contrast to defined contribution) plans:²⁷²

[Under one method of computation, s]ince benefits in most defined benefit plans are based on average final pay, termination benefits and hence the implied cost of the benefit plan rise rapidly with age and tenure. The implied costs of pension compensation can vary from less than 1 percent of earnings at young ages to over 20 percent as a worker nears retirement Thus, holding earnings constant, the total cost of employing older workers would significantly exceed the cost of younger workers.²⁷³

It also generally is the case that age and seniority march in tandem, so that a long-term employee is likely to be older than a short-term employee. Thus, if benefits are keyed to seniority, there very likely will be a correlation with age, as well. For example, in one study assessing the costs of benefits for older workers versus younger workers, it was noted that "[d]ifferences in paid vacation . . . are tenure-based and not strictly age-based. However, correlation between tenure and age is so high for most [of the] companies [studied] that differentiating between the two is not useful."²⁷⁴ Likewise, since wages correlate with seniority, and seniority correlates with age, age and wages typically rise in tandem.²⁷⁵ (In macro-economic terms,

272. In the case of a defined benefit plan, the employer guarantees that the retired employee will receive a set benefit for a set period of time, usually until he or she dies. Under a defined contribution plan, the employer only promises to pay a set amount per month or year into the pension plan. What the actual benefit will be upon retirement will be a function of how successfully these payments were invested by the plan manager.

273. Clark, *supra* note 264, at 14.

274. VALUING OLDER WORKERS, *supra* note 244, at 9 n.7.

275. See Rachel Floersheim Boaz, *The 1983 Amendments to the Social Security Act: Will They Delay Retirement? A Summary of the Evidence*, 27 GERONTOLOGIST 151, 154 (1987); NATIONAL COMMISSION FOR EMPLOYMENT POLICY, OLDER WORKERS: PROSPECTS, PROBLEMS AND POLICIES 17 (1985). This is not always the case, of course. A 40-year-old supervisor who has worked for her employer for 15 years almost certainly will be receiving a higher wage than a new hire, even if that new hire is 55 years old. See *Ludovicy v. Dunkirk Radiator Corp.*, 922 F.2d 109, 111 (2d Cir. 1990). Moreover, the salary differentials between older and younger workers in any event may be diminishing:

[S]ome managers [in the 12 companies surveyed for the study in question] said that . . . salary differentials had decreased in recent years,

whereby older workers are addressed as a group, "[v]irtually all cross-sectional data on earnings show an upward progression through the prime of the working career (about at age 50 for men and slightly younger for women), and then a steady fall through the fifties, with more drastic reductions during the sixties")²⁷⁶

In sum, it is probably correct to conclude that, as a group, older workers, let us say those ages forty-five to sixty-five, are more expensive to employ than are younger workers—those, for example, between ages twenty-one and forty. (This is particularly so if the product made by the older workers is one that can be produced with no loss of efficiency or quality by younger, less well-paid employees, the result being that the per unit cost of production is higher in the case of the higher paid employee than it is for his or her younger counterpart.)²⁷⁷ But what very significantly should mitigate the legitimacy of employers' cost concerns insofar as benefits, at least, are concerned is the fact that the ADEA exempts those employers that are covered by the Act from liability even if they do not provide the same level of benefits for their older employees that they do for their younger employees. More specifically, after its enactment the ADEA was interpreted by its enforcement agencies—first the Department of Labor and then the EEOC—as allowing employers to take into account these benefit cost differentials without running afoul of the Act. Amendments made to the ADEA in 1990 transposed these administrative interpretations into statutory form: so long as an employer spends the same amount of health insurance and/or life insurance dollars on each of its employees, it will not violate the ADEA, even if it turns out

and would continue to narrow, as their company increasingly linked pay to performance and substituted bonuses and profit sharing for annual salary or wage adjustments. Managers also reported that many older workers had reached the maximum compensation possible for their position, and therefor had not received a pay raise for some time.

VALUING OLDER WORKERS, *supra* note 244, at 10.

276. VALUING OLDER WORKERS, *supra* note 244, at 7 n.3, citing, *inter alia*, Michael C. Barth et al., *The Costs and Benefits of Older Workers*, in HANDBOOK OF EMPLOYMENT OF THE ELDERLY (William Crown ed., 1995).

277. This analysis was addressed in *Metz v. Transit-Mix, Inc.*, 828 F.2d 1202, 1209 (7th Cir. 1987). See also James L. Medoff, *The Mid-Life Job Crisis—Growing Unemployment Due to Permanent Layoff Among Middle-Aged American Men*, NSC REPORT SERIES 4-6 (National Study Center), May 12, 1994.

that the actual coverage provided differs as between an older and a younger employee.²⁷⁸ In other words, under the "equal cost or equal benefit" principle incorporated into the statute, it is legally sufficient that an employer spends, let us say, \$1,000 each on its twenty-five-year-old employee and its fifty-five-year-old employee for health insurance, even though the \$1,000 purchases less coverage for the older employee.²⁷⁹

4. Summary

The past is prologue. The present is, as well. And what we know of the past and the present counsel us that there is reason to conclude that age bias in the workplace is likely to be a feature of the workplace in the foreseeable future. Concededly, one can argue about the depth and breadth of this particular "ism" over the past thirty years. One's perception of how significant age bias is, or has been, will color one's expectations as to what is going to be. The data leave room both for the doomsayers and the naysayers. Ultimately, there really is only one answer that comes even close to being a sure one for this debate: just wait and see.

D. *The Legal and Structural Issues of the Future*

Claims arising under the ADEA are not going to go away any time soon. My aim here is to identify, in abbreviated fashion, some of the key legal and structural issues likely to generate litigation, legislation or both over the coming years. In so doing, I clearly am not endeavoring to be comprehensive in identifying all the issues that are expectably going to be occupying the courts' time.

Some of those issues that I am not addressing are so obvious, yet so case-specific, that on the one hand they need no discussion, and on the other, they best can be discussed only in the context of specific cases. For example, one can confidently predict on the basis of already decided cases that the courts will continue to address questions involving the adequacy of prima

278. See 29 U.S.C. § 623(f)(2)(B) (1994).

279. See generally 1 EGLIT, *supra* note 2, at ch. 5.

facie cases. But any discussion beyond that bald assertion really would require specific factual paradigms, and to pose a variety of hypothetical factual scenarios—none of which would be of any particularly instructive coloration—would be pointless. Likewise, recent case law, as exemplified by the survey of 1996 rulings discussed *supra*, establishes that even more often in the future the courts are going to be addressing questions involving whether there are material issues of genuine fact that preclude, in specific scenarios, the granting of defendants' motions for summary judgment. Again, having made the point that summary judgment is a major vehicle for disposition of ADEA claims, any further discussion would have to focus on specific unknown, but no doubt unremarkable, factual scenarios.

Some issues are not being addressed here simply because, in the nature of things, they are of lesser import. For example, in recent years there have been a number of cases in which courts have addressed plaintiffs' efforts (which in the main have been unsuccessful) to hold individual supervisors liable for violations of the Act. Indeed, in Table 9, *supra*, I note that this issue was addressed in eighteen district court rulings entailing opinions that were published in 1996.²⁸⁰ Presumably, we are going to see several more rulings until this issue runs its course and is laid to rest by the Supreme Court or is resolved in the circuits by a set of uniform court of appeals dispositions.

280. This is an issue of relatively new popularity, so to speak. The probable explanation for this relatively new tack on the part of ADEA plaintiffs relates to the amending of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17, by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. The 1991 Act for the first time made the recovery of compensatory and punitive damages possible under Title VII. Thereby, it became economically worthwhile to pursue, in particular, sexual harassment claims, which up until that time had been economically unattractive as a pragmatic matter because the opportunity for financial redress for a women who had been harassed, but who had not lost her job nor suffered any loss in income, was non-existent. It seems that ADEA litigants, taking their cue from the post-1991 Act cases in which plaintiffs have sought compensatory and/or punitive damages from individual Title VII defendants, increasingly have undertaken to sue individuals in age discrimination cases, even though the compensatory and punitive damages prompting such suits in the Title VII context are not recoverable under the ADEA. See *supra* notes 25, 26.

1. The Fallout from *Hicks*

In *St. Mary's Honor Center v. Hicks*²⁸¹ the Supreme Court sent a confusing message as to the nature of the plaintiff's task in a discriminatory treatment case based on circumstantial evidence. At one point in its opinion the Court seemed to deem pretext-only analysis to be permissible.²⁸² Justice Scalia, writing for the majority, wrote the following:

The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.²⁸³

At another point, however, the Court insisted on pretext-plus analysis: "a reason cannot be proved to be 'a pretext for discrimination' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason."²⁸⁴

The lower courts still are trying to sort out the significance of *Hicks*. Some courts have reasoned that the Court rejected *both* pretext-only and pretext-plus analysis so that, on the one hand, the plaintiff's debunking of the defendant's explanation will not inescapably lead to a ruling for the plaintiff and, on the other hand, a plaintiff need not invariably actually prove the existence of animus in addition to debunking as pretextual the defendant's explanation.²⁸⁵ Thus, in *Rothmeier v. Investment Advisers, Inc.*,²⁸⁶ the court reasoned as follows:

281. 113 S. Ct. 2742 (1993).

282. As to pretext-only and pretext-plus analysis, see 2 EGLIT, *supra* note 2, §§ 7.29-7.34; Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the Pretext-Plus Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57 (1991).

283. *Hicks*, 113 S. Ct. at 2749 (emphasis in original).

284. *Id.* at 2752 (emphasis in original).

285. See, e.g., *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078 (6th Cir. 1994); *Anderson v. Baxter Healthcare*, 13 F.3d 1120, 1123-24 (7th Cir. 1994).

286. 85 F.3d 1328 (8th Cir. 1996).

The Court . . . struck a middle ground in *Hicks*, refusing to adopt either pretext-only or pretext-plus as the exclusive test for sufficiency of the evidence in employment-discrimination cases. Instead, the test fashioned by the Court . . . is more fact sensitive: whether the employee has provided evidence from which a reasonable factfinder could conclude that the employer intentionally discriminated against the employee for a prohibited reason [T]he Court recognized that in some cases the overall strength of the prima facie case in conjunction with evidence of pretext will be sufficient to permit a finding of intentional discrimination, while in other cases the prima facie case in tandem with evidence of pretext will not be sufficient to permit a finding of intentional discrimination Whether or not a case requires evidence beyond a showing of pretext to support a finding of intentional discrimination is necessarily a fact-intensive determination and must be decided on a case-by-case basis.²⁸⁷

Other courts have held that the *Hicks* Court unquestionably rejected the pretext-only approach. In other words, for these courts it is not sufficient to debunk the defendant's excuse; the plaintiff further must establish that the plaintiff's age was a motivating factor in the employer's decision.²⁸⁸

Further confusion comes to the fore when trying to determine what version of *Hicks* applies in the summary judgment context. Some courts have ruled that if the plaintiff proves his or her prima facie case and further raises a genuine issue of material fact as to whether the employer's excuse is true, summary judgment is not to be granted.²⁸⁹ Other courts require the plaintiff to establish both that the employer's reason is false and that there is a genuine issue of material fact as to whether the real reason for the defendant's decision was a discriminatory one.²⁹⁰

287. *Id.* at 1334-35.

288. *See, e.g.,* Rhodes v. Guiberson Oil Tools Div., 39 F.3d 537, 542-43 (5th Cir. 1994); Nelson v. Boatmen's Bancshares, Inc., 26 F.3d 796, 801 (8th Cir. 1994).

289. *See, e.g.,* Weisbrot v. Medical College of Wis., 79 F.3d 677, 682 (7th Cir. 1996); Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994).

290. *See, e.g.,* LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 843 (1st Cir. 1993), *cert. denied*, 511 U.S. 1098 (1994); Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957 (5th Cir. 1993).

One would expect the case law concerning these issues to continue to percolate.

2. The Use of Age Proxies

Certain factors relevant to the workplace are closely correlated with, albeit not the same as, age. Salary and seniority are the key examples. Since salary typically is a function of duration on the job, and since longer duration—as opposed to shorter—requires the passage of time, it follows that older employees are more likely both to have more seniority and to earn more, on average, in a given company than will younger workers.²⁹¹ Should a company choose to terminate all of its employees in the high salary range, chances are good that this policy will home in particularly (but not necessarily exclusively)²⁹² on the older members of the company's work force. An attack by a terminated employee based on disparate impact analysis is becoming increasingly problematic (and indeed is foreclosed, as discussed *infra*, in the Seventh and Tenth Circuits). As far as a claim based on discriminatory treatment analysis is concerned, *Hazen Paper Co. v. Biggins*²⁹³ makes the success of attacks on age proxies very problematic, as well.

Hazen Paper involved a sixty-two-year-old man who was discharged just weeks before his pension would have vested pursuant to the terms of the company plan, which provided for vesting once an employee had worked for the company for ten years. At the district court level the jury returned a verdict in his favor. The Court of Appeals sustained the verdict, reasoning as follows:

The jury could also have reasonably found that age was inextricably intertwined with the decision to fire Biggins. If

291. See Rachel Floersheim Boaz, *The 1983 Amendments to the Social Security Act: Will they Delay Retirement? A Summary of the Evidence*, 27 GERONTOLOGIST 151, 154 (1987); Howard Eglit, *Health Care Allocation for the Elderly: Age Discrimination by Another Name?*, 26 HOUS. L. REV. 813, 883-84 (1989). See also *Gustovich v. AT & T Communications, Inc.*, 972 F.2d 845, 851 (7th Cir. 1992). But see *EEOC v. Atlantic Community Sch. Dist.*, 879 F.2d 434 (8th Cir. 1989).

292. There may well be, after all, some recent hires who were brought into the company at high salaries.

293. 507 U.S. 604 (1993).

it were not for [his] age, sixty-two, his pension rights would not have been within a hairbreadth of vesting. [He] was fifty-two years old when he was hired; his pension rights vested in ten years.²⁹⁴

The Supreme Court first acknowledged that there was case law involving situations where an employer utilized a "factor, such as an employee's pension status or seniority, that is empirically correlated with age."²⁹⁵ It then went on to firmly reject the notion that the use of such age-correlated factors could constitute illegal discriminatory treatment in violation of the ADEA: "We now clarify that there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age."²⁹⁶ It went on to explain why a correlation between age and a factor other than age cannot suffice to establish that the employer in fact was motivated by the grievant's age:

Disparate treatment [analysis] . . . captures the essence of what Congress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age

When the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is On average, an older employee has had more years in the work force than a younger employee, and thus may well have accumulated more years of service [a factor which is typically correlated with pension eligibility] with a particular employer. Yet an employee's age is analytically distinct from his years of service. An employee who is younger than 40, and therefore outside the class of older workers as defined by the ADEA, . . . may have worked for a particular employer his entire career, while an older worker may have been newly hired. Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is in-

294. *Biggins v. Hazen Paper Co.*, 953 F.2d 1405, 1412 (1st Cir. 1992), *rev'd*, 507 U.S. 604 (1993).

295. *See Hazen Paper Co.*, 507 U.S. at 608.

296. *Id.* at 609.

correct to say that a decision based on years of service is necessarily "age-based."²⁹⁷

Applying these perceptions to the facts, the Court concluded that Biggins was not the victim of unlawful age discrimination, even if he had been fired in order to prevent the vesting of his pension. This was because "[t]he prohibited stereotype ('Older employees are likely to be ____') would not have figured in this decision, and the attendant stigma would not ensue. The decision would not be the result of an inaccurate and denigrating generalization about age. . . ."²⁹⁸

Just how seriously *Hazen Paper* undercuts any ability to establish a prima facie claim based upon an employer's use of an alleged proxy for age is unclear. Commentators range from expressing the view that nothing really is left of the age/proxy claim²⁹⁹ to offering more sanguine assessments of the significance of the decision for such claims.³⁰⁰ The Supreme Court itself left open some room for argument:³⁰¹ perhaps most telling (in terms of still leaving room for making age/proxy claims) was its following assertion:

We do not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination. Pension status may be a proxy for age, not in the sense that the ADEA makes the two factors equivalent, . . . but in the sense that the employer may suppose a correlation between the two factors and act accordingly Our holding is simply that an employer does not violate the ADEA just by interfering with

297. *Id.* at 610-11.

298. *Id.* at 612.

299. See generally Judith J. Johnson, *Semantic Cover for Age Discrimination: Twilight of the ADEA*, 42 WAYNE L. REV. 1 (1995); Toni J. Querry, Note, *A Rose by Any Other Name No Longer Smells as Sweet: Disparate Treatment Discrimination and the Age Proxy Doctrine After Hazen Paper Co. v. Biggins*, 81 CORNELL L. REV. 530 (1996).

300. See Robert J. Gregory, *There Is Life in That Old (I Mean, More "Senior") Dog Yet: The Age-Proxy Theory After Hazen Paper Co. v. Biggins*, 11 HOFSTRA LAB. L.J. 391 (1994).

301. The Court pointed out that it was not addressing "the special case where an employee is about to vest in pension benefits as a result of his age, rather than years of service . . . and the employer fires the employee in order to prevent vesting." 507 U.S. at 613 (emphasis in original).

an older employee's pension benefits that would have vested by virtue of the employee's years of service.³⁰²

Without passing judgment as to whether *Hazen Paper's* limiting (if not downright destruction) of the age/proxy approach to establishing age discrimination claims is a good or a bad development (although I tend to think it is a bad one), the question of the legitimacy of age proxies in particular contexts is likely to continue to generate some degree of attention by the courts (as it already in fact has³⁰³) in the near future, until the legal dust, so to speak, finally settles.

3. Disparate Impact Analysis

Even before the Supreme Court decided *Hazen Paper* in 1993 there was significant dispute, at least among academics, as to whether disparate impact analysis properly applied in the ADEA context.³⁰⁴ On the Court, then-Justice Rehnquist weighed in with the view that this analysis should not be used for ADEA claims when he dissented from a denial of certiorari

302. *Id.* at 612-13.

303. See, e.g., *Testerman v. EDS Technical Prods. Corp.*, 98 F.3d 297, 302 (7th Cir. 1996); *Doan v. Seagate Tech., Inc.*, 82 F.3d 974, 978 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 684 (1997); *Bialas v. Greyhound Lines, Inc.*, 59 F.3d 759, 763 (8th Cir. 1995); *Armendariz v. Pinkerton Tobacco Co.*, 58 F.3d 144, 152 (5th Cir. 1995); *Allen v. Diebold, Inc.*, 33 F.3d 674, 676 (6th Cir. 1994).

304. The seminal case, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), arose under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1994). Numerous ADEA courts have embraced such analysis. See, e.g., *Holt v. Gamewell Corp.*, 797 F.2d 36 (1st Cir. 1986); *Allison v. Western Union Tel. Co.*, 680 F.2d 1318 (11th Cir. 1982); *EEOC v. Air Line Pilots Ass'n Int'l*, 661 F.2d 90, 94 (8th Cir. 1981). Not surprisingly, numerous commentators have weighed in on the issue. See, e.g., Alfred W. Blumrosen, *Interpreting the ADEA: Intent or Impact*, in *AGE DISCRIMINATION IN EMPLOYMENT ACT—A COMPLIANCE AND LITIGATION MANUAL FOR LAWYERS AND PERSONNEL PRACTITIONERS* (Monte B. Lake ed., 1982); Howard Eglit, *The Age Discrimination in Employment Act's Forgotten Affirmative Defense: The Reasonable Factors Other Than Age Exception*, 66 B.U. L. REV. 155 (1986); Mack A. Player, *Proof of Disparate Treatment Under the Age Discrimination in Employment Act: Variations on a Title VII Theme*, 17 GA. L. REV. 570 (1983); Toni J. Querry, Note, *A Rose by Any Other Name No Longer Smells as Sweet: Disparate Treatment Discrimination and the Age Proxy Doctrine After Hazen Paper Co. v. Biggins*, 81 CORNELL L. REV. 530 (1996); Donald R. Stacy, *A Case Against Extending the Adverse Impact Doctrine to ADEA*, 10 EMPLOYEE REL. L.J. 437 (Winter 1984-85); Marla Ziegler, Note, *Disparate Impact Analysis and the Age Discrimination in Employment Act*, 68 MINN. L. REV. 1038 (1984).

in *Geller v. Markham*.³⁰⁵ In *Hazen Paper*—which actually was not a case in which the matter of disparate impact analysis was before the Court—Justices Kennedy and Thomas, joined by now-Chief Justice Rehnquist in a concurrence, hinted that they, too, shared this view.³⁰⁶ Taking their cue from the Supreme Court's 1993 ruling, two federal courts of appeals have now ruled that disparate impact analysis indeed is inapplicable in the ADEA setting,³⁰⁷ and several others have hinted that this theory of legal liability is in perilous shape.³⁰⁸ On the other hand, the Court of Appeals for the Eighth Circuit has expressly spurned following *Hazen Paper* to the logical end to which these other courts have seen it leading.³⁰⁹

This is an issue which is going to continue to generate judicial attention.

4. Waivers, or Releases, of Liability

Waivers, or releases, of liability have commonly been used in the American workplace as a means for employers to secure insulation from suits filed by departing, or former, employees.³¹⁰ Typically, the employer will offer the employee a finan-

305. 451 U.S. 945 (1981).

306. See *Hazen Paper Co.*, 507 U.S. at 617-18 (Kennedy, J., concurring).

307. See *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1006 (10th Cir. 1996), *cert. denied*, 116 S. Ct. 2500 (1996); *EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073, 1078 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 2577 (1995).

308. See *Rhodes v. Guiberson Oil Tools Div.*, 75 F.3d 989, 1004 (5th Cir. 1996) ("*Hazen Paper* indicates that disparate impact theory is not available under [the] ADEA."); *Lyon v. Ohio Educ. Ass'n & Prof. Staff Union*, 53 F.3d 135, 139 n.5 (6th Cir. 1995) ("There is considerable doubt as to whether a claim of age discrimination may exist under a disparate impact theory However, this circuit has stated that a disparate impact theory of discrimination may be possible."); *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732 (3d Cir.) (opinion of Greenberg, J.), *cert. denied*, 116 S. Ct. 306 (1995). ("[I]n the wake of *Hazen*, it is doubtful that traditional disparate impact theory is a viable theory of liability under the ADEA.").

309. *Smith v. City of Des Moines*, 99 F.3d 1466, 1470 (8th Cir. 1996).

310. About 80 percent of *Fortune* 100 companies sponsored an exit incentive program at least once during 1979 through 1988, according to company officials. About 30 percent of these companies required their employees to sign a waiver as a condition for receiving enhanced benefits. Overall, waiver usage increased during the years 1985-88 and was highest in 1987 and 1988, when 35 percent of companies with exit incentives used them.

UNITED STATES GEN. ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS,

cial incentive to retire early; that incentive is the quid quo pro for the release. Congress, concerned about possible abuses by employers seeking to extract waivers from their employees, in 1990 passed, and the President signed into law, the Older Workers Benefit Protection Act (OWBPA).³¹¹ This added, *inter alia*, a section 7(f) to the ADEA,³¹² setting forth a number of requirements that must be met for a release to be legally binding upon the party waiving his or her rights.³¹³ Not surprisingly, section 7(f) has generated a number of judicial rulings, which address such matters as the niceties of releases that are used in group termination contexts;³¹⁴ whether an employer's efforts to induce an employee to sign a release can itself violate the OWBPA's waiver protections;³¹⁵ whether an otherwise invalid release can be ratified by the releasor's acceptance of the benefits of the agreement;³¹⁶ whether the benefits received by the releasor must be tendered back as a predicate to the grievant being able to maintain suit against the releasee;³¹⁷ and other issues.³¹⁸

In 1995 the EEOC decided to engage in negotiated rulemaking, that is, rulemaking by the interested parties—employers, employees, and their representatives—to devise regulatory guidance for the implementation of section 7(f). Accordingly, it convened a panel of these non-EEOC parties to pursue this task. The proposed regulation ultimately was pub-

AGE DISCRIMINATION—USE OF WAIVERS BY LARGE COMPANIES OFFERING EXIT INCENTIVES TO EMPLOYEES 2 (1989).

311. Pub. L. No. 101-433, 104 Stat. 978, *as amended by* Pub. L. No. 101-521, 104 Stat. 2287 (codified at 29 U.S.C. § 626(f)).

312. 29 U.S.C. § 626(f) (1994).

313. *See generally* 1 EGLIT, *supra* note 2, §§ 5.63-5.73; John R. Runyan, *Hedging Betts: The Older Workers Benefit Protection Act*, 72 MICH. B.J. 168 (1993).

314. *See* Griffin v. Kraft Gen. Foods, Inc., 62 F.3d 368 (11th Cir. 1995).

315. *See* Lawrence v. National Westminster Bank, 98 F.3d 61 (3d Cir. 1996).

316. *See* Blistein v. St. John's College, 74 F.3d 1459 (4th Cir. 1996).

317. *See* Long v. Sears Roebuck & Co., 105 F.3d 1529 (3d Cir. 1997) (negative answer); Raczak v. Ameritech Corp., 103 F.3d 1257 (6th Cir. 1997) (same); Oberg v. Allied Van Lines, Inc., 11 F.3d 679 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 2104 (1994) (same); Forbus v. Sears Roebuck & Co., 958 F.2d 1036 (11th Cir. 1992), *cert. denied*, 506 U.S. 955 (1992) (same).

318. *See generally* William L. Kandel, *Preventive Maintenance Through ADEA Releases: Conflicts among the Circuits Threaten To Unravel OWBPA*, 21 EMPLOYEE REL. L.J. 129 (1996).

lished in the Federal Register on March 10, 1997.³¹⁹ No doubt, some version of this proposal will be promulgated in final, legally binding form. No doubt, also, it will not lay to rest occasions for further litigation regarding various facets of the waiver process, particularly in the two or three years immediately following promulgation of the regulation.

5. Arbitration of ADEA Claims

In *Gilmer v. Interstate/Johnson Lane Corp.*,³²⁰ the Supreme Court held that a claimant asserting a violation of the ADEA had to abide by a compulsory arbitration agreement he previously had signed, the result being that he was required to pursue his ADEA claim in the arbitral forum. Since, however, the agreement at issue was with a third party, rather than with the employer who was alleged to have discriminated against the grievant, the *Gilmer* ruling did not, on its face, address the legitimacy of an employer-employee arbitration agreement purporting to foreclose resort by the employee to the courts in the event that she considered herself to be the victim of a violation of the ADEA. Indeed, the Court specifically abjured deciding this issue:

What Gilmer himself did not argue, and what the Court did not address on the merits, was the contention that the FAA [Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*], which provides: "[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." While the Court ostensibly chose to not address the merits of the argument based on § 1 because they had not been raised by Gilmer, it also expressed a view revealing a substantive basis for its avoiding the import of § 1:

It would be inappropriate to address the scope of the § 1 exclusion because the arbitration clause being enforced here is not contained in a contract of employment³²¹

319. 62 Fed. Reg. 10,790-793 (Mar. 10, 1997).

320. 500 U.S. 20 (1991).

321. 2 EGLIT, *supra* note 16, § 7-405.

Notwithstanding that *Gilmer* did not address the significance of an arbitration agreement between an employer and an employee, its analysis left no doubt that it saw no problems with the arbitral forum as a suitable site for the resolution of statutory employment discrimination claims. Not surprisingly, post-*Gilmer* courts—most commonly courts addressing Title VII claims—have upheld such agreements, the result being to foreclose the grievant from pursuing his or her claim in federal court (save for the illusory opportunity to secure review of the arbitration ruling—a review which is going to be exceedingly deferential given the general doctrine of federal courts acquiescing to arbitration decisions.)³²²

There certainly are very important questions to be raised about arbitration's use as a dispute resolution mechanism for addressing employment discrimination claims, the *Gilmer* Court's confidence in the arbitral process notwithstanding. There are numerous factors that come into play here. Some work to the disadvantage of the grievant. For one, statutory employment discrimination law is complex; the technical and doctrinal issues require a large body of expertise and it is doubtful that many arbitrators are going to have that expertise. Second, there is a problem resulting from the potential advantage to be gained by large employers who are likely to be engaged in numerous arbitrations. They will be repeat players, and will develop both expertise as to the process and familiarity with particular arbitrators' predilections and inclinations—expertise and familiarity which will not similarly be possessed by the typical grievant, who is almost certainly going to be only a one-time participant in the arbitral forum.³²³

322. See, e.g., *Farrand v. Lutheran Brotherhood*, 933 F.2d 1523 (7th Cir. 1993); *Kaliden v. Shearson Lehman Hutton, Inc.*, 789 F. Supp. 179 (W.D. Pa. 1991). Cf. *Nghiem v. NEC Elec., Inc.*, 25 F.3d 1437 (9th Cir.), *cert. denied*, 513 U.S. 1044 (1994) (case arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (9th Cir. 1992) (same); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 n.9 (5th Cir. 1991) (same). See generally Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of Gilmer*, 40 ST. LOUIS U. L.J. 77 (1996); Michael L. Giovagnoli, *To Be or Not to Be?: Recent Resistance to Mandatory Arbitration Agreements in the Employment Arena*, 64 UMKC L. REV. 547 (1996).

323. See generally Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449 (1996).

Third, another very significant factor is the matter of recoveries: in terms of financial exposure, the arbitral process arguably is more beneficial to employers than it is to employees:

In examining the ranges of recovery, we see that it went from nominal to \$8 million in litigation, while in arbitration it only reached \$2,078,123. Likewise, the mean (\$417,178) and median (\$106,500) jury verdicts were at least three times greater than the comparable mean (\$114,905) and median (\$32,990) arbitration awards.³²⁴

On the other hand, there are considerations that cut in the other direction, i.e., in favor of the employee. Dollar amounts aside (although this factor certainly is a major one and cannot be discounted), grievants appear to do no worse in the arbitral forum than in the courts insofar as obtaining some recompense is concerned. William Howard, writing in the 1995 Dispute Resolution Journal, reported that plaintiffs received some compensation (typically through settlement) at about the same rate, i.e., 70% or so, whether they pursued their claims through litigation or arbitration (so long, at least, as the plaintiff was represented by counsel). Howard wrote as follows:

[I]t is appropriate to compare the occasions of employees prevailing (by settlement or verdict) in litigation (71%) with an award in cases arbitrated (68%). On that basis, it appears that the particular forum, whether litigation or arbitration, has very little effect on which party will prevail in any given case. Thus, it can be concluded that employees most likely will receive *some* recompense as frequently in arbitration as in litigation. In the latter case . . . this presupposes that the employee has been able to find a lawyer to pursue his or her case, which is clearly the exception rather than the rule.³²⁵

Apart from the matter of relief, there is also the pro-grievant fact that arbitrations generally are subject to virtually no judicial review, and so appellate court successes by losing employers which in the judicial forum have the resources and the will to appeal their cases, will not be replicated in the instance of

324. *Arbitrating Claims of Employment Discrimination*, *supra* note 47, at 45.

325. *Id.*

arbitral determinations.³²⁶ (On the other hand, losing plaintiffs sometimes succeed on appeal,³²⁷ and so the loss of an appellate forum can be a detriment for grievants, as well as a gain.) The simplicity and affordability of arbitration theoretically also offer employees the opportunity for serious and relatively prompt attention in a formal adjudicative forum that they would not otherwise be able to obtain, given that (1) litigation is expensive and slow and (2) the EEOC does little by way of providing a substantively significant agency alternative to litigation.³²⁸ What is more, there are additional factors that in theory also are favorable to grievants who pursue their claims in the arbitral forum:

The fact that the employer does not have many of the procedural weapons available to prevail short of an adjudication on the merits assures the employee of a full and presumably fair hearing. Equally as important is the finality of the arbitration award. The employer does not have the leverage to negotiate a reduction of an adverse verdict by the threat of a costly appeal that could result in a reversal of a successful result. Thus, many reluctant lawyers might be induced to handle an arbitrated case in which the arbitrator's decision would be final and from which there would be no appeal.³²⁹

One can safely predict that there is going to be much more litigation about the enforceability of individual arbitration agreements, into which employers increasingly are insisting their employees enter. In addition, no doubt there is going to be much needed discussion and study of the arbitral process to try to determine how well, and for whose benefit, it is working.

6. Contingent Workers

It has been estimated that 25 to 30% of the American work force is now made up of persons who are so-called "contingent workers."³³⁰ The contingent workforce is made up of one or

326. See *supra* Part III.K.3.

327. See *supra* Part III.K.3.

328. See *supra* note 50.

329. *Arbitrating Claims of Employment Discrimination*, *supra* note 47, at 46.

330. Susan L. Coskey, *Vizcaino v. Microsoft Corporation; A Labor and Employment*

more of seven types of workers: temporary employees, part-time employees, seasonal workers, independent contractors, leased employees, involuntarily self-employed workers, and casual employees.³³¹ "Contingent employment is growing between 40 to 75% faster than employment for the economy as a whole; between 40 to 55% of all jobs created between 1980 and 1993 were contingent."³³² The growth of this contingent work force has been described in a recent report of the National Academy of Aging:

In the higher-income sectors of the labor market there is . . . a newly-emergent model of employment which does not provide job security in the usual pattern of tenure with a single employer. It consists of transient or "temp" services not strongly tied to particular firms. It emphasizes flexibility, mobility, adaptability, and a generic capacity to deal with complex problems that may be poorly defined. Although the temporary employee model has been a familiar phenomenon in secretarial and administrative support positions, it is now developing for highly-skilled professionals who will not be tied to a traditional career ladder in one or a few large firms. Rather, individuals with high-level skills in generic areas of organizational operations will function independently, moving from firm to firm, or working simultaneously for several firms, on a transient, as needed basis. This model enables firms to flexibly retain and discharge employees as labor needs change. Job security is not tied closely to firm-specific skills, knowledge, institutional memory, seniority, loyalties, or career ladders.³³³

Lawyer's Perspective, 48 LAB. L.J. 91, 92 (1997).

331. Scott F. Cooper, *The Expanding Use of the Contingent Workforce in the American Economy: New Opportunities and Dangers for Employers*, 20 EMPLOYEE REL. L.J. 525, 526 (1995). Casual employees are individuals who are not on a regular seniority list in a unionized work setting and who are not serving probationary periods of employment, but who are used when regular or full time employees are out or when there is a business need for hiring additional workers for indefinite periods of time. See *id.* at 530. As to the mixing of various types of contingent workers in one job setting, see Timothy Aeppel, *Life at the Factory—Full Time, Part Time, Temp—All See the Job in a Different Light*, WALL ST. J., Mar. 18, 1997, at A1.

332. *Id.* See also Louis Uchitelle, *More Downsized Workers Are Returning as Rentals*, N.Y. TIMES, Dec. 8, 1996, at A1.

333. NATIONAL ACADEMY ON AGING, OLD AGE IN THE 21ST CENTURY: A REPORT TO THE ASSISTANT SECRETARY FOR AGING, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES 26-27 (1994).

The Academy report goes on to observe that "[t]hese characteristics [i.e., firm-specific skills, knowledge, etc.] . . . are the [very] assets particularly associated with older workers."³³⁴ Thus, the changing demands of employers, which demands are being met through growth of the contingent workforce, devalue those positive factors which older workers bring to the workplace.

Also either troubling or encouraging (depending upon one's perspective as a worker or an employer) is the fact that contingent workers generally are not going to be seen as being in employment relationships with the entities for which they provide services. And herein lies the sticking point insofar as invocation of the ADEA is concerned. But for the analogical lesson provided by a very few decisions³³⁵ mainly decided under Title VII, which is the ADEA's sister statute, the ADEA typically is understood as only applying to workplace discrimination perpetrated by employers vis-a-vis persons who fit within the statutory definition of "employee."³³⁶ Since people who are not employees are not protected by the ADEA, and since contingent workers typically are not understood to be the employees of the entities to which they provide services, it follows that contingent workers cannot invoke the protection afforded by the age discrimination statute, no matter how blatantly discriminatory the entities to which they provide services act towards them.

Of course, since the early days of the statute, there have been instances—under the ADEA and other statutes—when questions and disputes have arisen as to whether a given individual was or was not an employee.³³⁷ But now the issue has

334. *Id.* at 27.

335. *See, e.g.,* Sibley Mem'l Hosp. v. Wilson, 488 F.2d 1338 (D.C. Cir. 1973); Vakharia v. Swedish Covenant Hosp., 765 F. Supp. 461 (N.D. Ill. 1991). *See generally* 1 EGLIT, *supra* note 2, § 3.15.

336. The definitional provisions of the ADEA are circular and therefore provide no enlightenment as to what an employee is. "Employee" is defined in 29 U.S.C. § 630(f) (1994) as a person who works for an employer. "Employer" is defined in 29 U.S.C. § 630(b) (1994) as an entity having "20 or more employees for each working day of 20 or more calendar weeks in the current or preceding calendar years."

337. *See, e.g.,* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992) (case arising under Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 to 1461 (1994), which embraces common law "right of control" test, and which effectively establishes test to be used, as well, under ADEA); Garrett v. Phillips Mills, Inc., 721 F.3d 979, 980 (4th Cir. 1983) (embracing 'hybrid' test which is very close to *Darden*

the potential to become, in my view, a much larger one, calling into question the viability of the ADEA (and comparable statutes) insofar as they are premised on what is becoming a declining, albeit not outmoded, workplace relationship, i.e., the classic employer-employee configuration. If we, as a society, are serious about eradicating age discrimination in the work arena, it may be that the ADEA will have to be modified, or judicial doctrine will have to become more flexible,³³⁸ so as to recognize and protect these growing cadres of independent contractors and leased workers. Certainly, in any event, this growing contingent worker phenomenon should generate increasing academic and political attention.

V. CONCLUSIONS

The Age Discrimination in Employment Act is thirty years old. It is a mature statute which has generated significant case law over the years and which no doubt has had considerable significance in affecting the ways in which employers make their workplace decisions, as well as the very decisions themselves. Demographics and the inescapable process of aging that affects every individual, as well as well-entrenched views, assumptions and stereotypes that all of us (not just employers) entertain, ensure that this statute is going to continue to play a significant role in the workplace in the next thirty years and beyond.

test).

338. Cf. *Vizcaino v. Microsoft*, 97 F.3d 1187 (9th Cir. 1996), *rehearing en banc granted*, 105 F.3d 1334 (9th Cir. 1997) (persons who had been classified as independent contractors by Microsoft were nonetheless eligible for benefits under Microsoft's qualified § 401(k) plan and employee stock purchase plan).

APPENDIX I
1996 U.S. COURT OF APPEALS DECISIONS
(70 F.3D-101 F.3D 110)

1. Adam-Mellang v. Apartment Search, Inc., 96 F.3d 297 (8th Cir. 1996).
2. Adler v. Glickman, 87 F.3d 956 (7th Cir. 1996).
3. Americanos v. Carter, 74 F.3d 138 (7th Cir.), *cert. denied*, 116 S. Ct. 1853 (1996).
4. Armstrong v. Martin Marietta Corp., 93 F.3d 1505 (11th Cir. 1996).
5. Atkinson v. Denton Publ'g Co., 84 F.3d 144 (5th Cir. 1996).
6. Aucutt v. Six Flags Over Mid-America, Inc., 85 F.3d 1311 (8th Cir. 1996).
7. Blanciak v. Allegheny Ludlum Corp., 77 F.3d 690 (3d Cir. 1996).
8. Blistein v. St. John's College, 74 F.3d 1459 (4th Cir. 1996).
9. Bohac v. West, 85 F.3d 306 (7th Cir. 1996).
10. Brewer v. Quaker State Oil Ref. Corp., 72 F.3d 326 (3d Cir. 1995).
11. Brown v. CSC Logic, Inc., 82 F.3d 651 (5th Cir. 1996).
12. Burger v. New York Inst. of Tech., 94 F.3d 830 (2d Cir. 1996).
13. Burks v. Oklahoma Publ'g Co., 81 F.3d 975 (10th Cir.), *cert. denied*, 117 S. Ct. 302 (1996).
14. Burns v. AAF-McQuay, Inc., 96 F.3d 728 (4th Cir.), *cert. denied*, 117 S. Ct. 1247 (1996).
15. Cheney v. Anchor Glass Container Corp., 71 F.3d 848 (11th Cir. 1996).

16. *Corneveaux v. CUNA Mut. Ins. Group*, 76 F.3d 1498 (10th Cir. 1996).
17. *Crawford v. Medina Gen. Hosp.*, 96 F.3d 830 (6th Cir. 1996).
18. *Denisi v. Dominick's Finer Foods*, 99 F.3d 860 (7th Cir. 1996).
19. *Diez v. Minnesota Mining & Mfg.*, 88 F.3d 672 (8th Cir. 1996).
20. *Doan v. Seagate Tech., Inc.*, 82 F.3d 974 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 684 (1997).
21. *Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc).
22. *Dranchak v. Azko Nobel, Inc.*, 88 F.3d 457 (7th Cir. 1996).
23. *Duart v. FMC Wyoming Corp.*, 72 F.3d 117 (10th Cir. 1995).
24. *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (10th Cir.), *cert. denied*, 116 S. Ct. 2500 (1996).
25. *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529 (2d Cir. 1996).
26. *EEOC v. Kentucky State Police Dep't*, 80 F.3d 1086 (6th Cir.), *cert. denied*, 117 S. Ct. 385 (1996).
27. *EEOC v. Massachusetts*, 77 F.3d 572 (1st Cir. 1996).
28. *EEOC v. Texas Instruments, Inc.*, 100 F.3d 1173 (5th Cir. 1996).
29. *EEOC v. Tire Kingdom, Inc.*, 80 F.3d 449 (11th Cir. 1996).
30. *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954 (4th Cir. 1996).
31. *Fisher v. Vassar College*, 70 F.3d 1420 (2d Cir. 1995).
32. *Ford v. Bernard Fineson Dev. Ctr.*, 81 F.3d 304 (2d Cir. 1996).

33. *Fuka v. Thomson Consumer Elecs.*, 82 F.3d 1397 (7th Cir. 1996).

34. *Furr v. Seagate Tech., Inc.*, 82 F.3d 980 (10th Cir. 1996).

35. *Gadsby v. Norwalk Furniture Corp.*, 71 F.3d 1324 (7th Cir. 1995).

36. *Gallagher v. Croghan Colonial Bank*, 89 F.3d 275 (6th Cir. 1996).

37. *Garner v. Arvin Indus.*, 77 F.3d 255 (8th Cir. 1996).

38. *Gathright v. Teacher's Credit Union*, 97 F.3d 266 (8th Cir. 1996).

39. *Grayson v. K-Mart Corp.*, 79 F.3d 1086 (11th Cir.), *cert. denied*, 117 S. Ct. 447 (1996).

40. *Greene v. Safeway Stores, Inc.*, 98 F.3d 554 (10th Cir. 1996).

41. *Hall v. Gillman, Inc.*, 81 F.3d 35 (5th Cir. 1996).

42. *Hartsel v. Keys*, 87 F.3d 795 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 683 (1997).

43. *Haun v. Ideal Indus., Inc.*, 81 F.3d 541 (5th Cir. 1996).

44. *Holt v. JTM Indus., Inc.*, 89 F.3d 1224 (5th Cir. 1996).

45. *Hopper v. Hallmark Cards, Inc.*, 87 F.3d 983 (8th Cir. 1996).

46. *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436 (11th Cir. 1996).

47. *Jameson v. Arrow Co.*, 75 F.3d 1528 (11th Cir. 1996).

48. *Kalvinskas v. California Inst. of Tech.*, 96 F.3d 1305 (9th Cir. 1996).

49. *Kehoe v. Anheuser-Busch, Inc.*, 96 F.3d 1095 (8th Cir. 1996).

50. *Kelly v. Drexel Univ.*, 94 F.3d 102 (3d Cir. 1996).

51. *Koger v. Reno*, 98 F.3d 631 (D.C. Cir. 1996).

52. *Kuhn v. Ball State Univ.*, 78 F.3d 330 (7th Cir. 1996).

53. Kusak v. Ameritech Info. Sys., Inc., 80 F.3d 199 (7th Cir. 1996).
54. Lawrence v. National Westminster Bank, 98 F.3d 61 (3d Cir. 1996).
55. MacDonald v. Delta Air Lines, Inc., 94 F.3d 1437 (10th Cir. 1996).
56. Marfia v. T.C. Ziraat Bankasi, 100 F.3d 243 (2d Cir. 1996).
57. Marx v. Schnuck Mkts., Inc., 76 F.3d 324 (10th Cir.), *cert. denied*, 116 S. Ct. 2552 (1996).
58. Matthews v. Rollins Hudig Hall Co., 72 F.3d 50 (7th Cir. 1995).
59. Miller v. Butcher Distribs., 89 F.3d 265 (5th Cir. 1996).
60. Mills v. First Fed. Sav. & Loan Ass'n of Belvidere, 83 F.3d 833 (7th Cir. 1996).
61. Mulero-Rodriguez v. Ponte, Inc., 98 F.3d 670 (1st Cir. 1996).
62. Murff v. Professional Med. Ins. Co., 97 F.3d 289 (8th Cir. 1996).
63. Nelson v. J.C. Penney Co., Inc., 75 F.3d 343 (8th Cir.), *cert. denied*, 117 S. Ct. 61 (1996).
64. Nichols v. Loral Vaught Sys. Corp., 81 F.3d 38 (5th Cir. 1996).
65. Noreuil v. Peabody Coal Co., 96 F.3d 254 (7th Cir. 1996).
66. Nowd v. Rubin, 76 F.3d 25 (1st Cir. 1996).
67. O'Connor v. Consolidated Coin Caterers Corp., 84 F.3d 718 (4th Cir.), *cert. denied*, 117 S. Ct. 608 (1996).
68. O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756 (9th Cir. 1996).
69. Padilla v. Metro-North Commuter R.R., 92 F.3d 117 (2d Cir. 1996).
70. Pages-Cahue v. Iberia Lineas Aereas de Espana, 82 F.3d 533 (1st Cir. 1996).

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212. *Wanamaker v. Columbian Rope Co.*, 907 F. Supp. 522 (N.D.N.Y. 1995).
213. *Washington v. Illinois Dep't of Children & Family Servs.*, 919 F. Supp. 1182 (N.D. Ill. 1996).
214. *Wester v. K-Mart Corp.*, 69 Fair Empl. Prac. Cas. (BNA) 1077 (S.D. Fla. 1995), *aff'd without opinion sub nom. Sands v. K-Mart Corp.*, 103 F.3d 148 (11th Cir. 1996).
215. *Whitchurch v. Apache Prods. Co.*, 916 F. Supp. 809 (N.D. Ill. 1996).
216. *Wilde v. Florida Pneumatic Mfg. Corp.*, 941 F. Supp. 1203 (S.D. Fla. 1996).
217. *Wilvers v. DDB Needham Worldwide Inc.*, 70 Fair Empl. Prac. Cas. (BNA) 255 (S.D.N.Y. 1996).

218. Woythal v. Tex-Tenn Corp., 910 F. Supp. 368 (E.D. Tenn. 1995).

219. Wray v. Edward Blank Assocs., Inc., 924 F. Supp. 498 (S.D.N.Y. 1996).

220. Young v. Easter Enters., Inc., 915 F. Supp. 58 (S.D. Ind. 1995).

221. Young v. Lincoln Nat'l Corp., 937 F. Supp. 1326 (N.D. Ind. 1996).

222. Zellars v. Liberty Nat'l Life Ins. Co., 907 F. Supp. 355 (M.D. Ala. 1995).

APPENDIX II

1996 Court of Appeals Decisions*
(70 F.3d-101 F.3d 110)

Case	P's Age	D's Age	P's Gender	P's Job	D's Activity	Disposition Below	Form of Disposition Below	Disposition on Appeal	Basis for Disposition	Issue(s) on Appeal	Winner
Adam-Mellang	N/A	N/A	F	Mgmt.	Corporation	D won	Den. of Prelim. Inj.	Aff'd	Age-Substantive	Removal of D from Bd. of Dirs.; Placing of P on admin. leave	D
Adler	44	N/A	M	N/A	Gov't agency	D won	Summ. J.	Aff'd	Age-Substantive	Harassment; Retaliation	D
Americanos	52	N/A	M	Mid-level Atty.	Gov't agency	D won	Mot. to Dismiss	Aff'd	Non-Age Issue (P's status as EE)	Discharge	D
Armstrong	N/A	N/A	M, F	N/A	Corporation	D won	Summ. J.	Rev'd & Remanded	Non-Age Issue (statute of limitations for suit)	Discharge	P
Atkinson	58	N/A	M	Mgmt.	Corporation	D won	Summ. J.	Aff'd in part, vacated & remanded in part	Age-Substantive	Discharge	P
Aucutt	44	N/A	M	Blue collar	Corporation	D won	Summ. J.	Aff'd	Age-Substantive	Discharge	D
Blanciak	40+	N/A	M, F	Blue collar	Gov't empl. agency	D won	Mot. to Dismiss	Aff'd	Non-Age Issue (11th Amend.)	Discriminatory testing by state empl. agency	D

* The full names, as well as the citations, of the cases are set forth in Appendix I.

Case	P's Age	D's Age	P's Gender	P's Job	D's Activity	Disposition Below	Form of Disposition Below	Disposition on Appeal	Basis for Disposition	Issue(s) on Appeal	Winner
Blistein	61	N/A	M	Educator	University	D won	Summ. J.	Aff'd	Age-Substantive	Discharge (constructive)	D
Bohac	N/A	N/A	M	Blue collar	Gov't agency	D won	Summ. J.	Aff'd	Non-Age Issue (compliance with procedural requirements)	Denial of promotion	D
Brewer	53	N/A	M	Salesman	Corporation	D won	Summ. J.	Rev'd & Remanded	Age-Substantive	Discharge	P
Brown	58, 44	60	M(2)	Mgmt.	Corporation	D won	Summ. J.	Aff'd	Age-Substantive	Discharge	D
Burger	57	N/A	F	White collar	University	D won	P's Mot. for J. as matter of law (after bench trial ruling for D)	Rev'd & Remanded	Age-Substantive	Discharge	P
Burks	N/A	N/A	F	Mgmt.	Corporation	D won	P's Mot. for J. as matter of law (after jury verdict for D)	Aff'd in part, rev'd in part & remanded	Non-Age Issue (Erroneous exclusion of evidence)	Discharge (constructive)	P
Burns	65	46	F	Low-level white collar	Corporation	D won	Summ. J.	Aff'd in part, vacated in part, rev'd & remanded in part	Age-Substantive	Discharge (constructive); Demotion	P & D

Case	P's Age	D's Age	P's Gender	P's Job	D's Activity	Disposition Below	Form of Disposition Below	Disposition on Appeal	Basis for Disposition	Issue(s) on Appeal	Winner
Cheney	N/A	N/A	M	N/A	Corporation	D won	P's Mot. to set aside J. (entered pursuant to an arbitration award)	Rev'd & Remanded	Non-Age Issue (Failure to file timely demand for trial de novo)	Discharge; timeliness of demand for de novo trial	P
Corneveaux	N/A	N/A	F	White collar	Corporation	D won	D's Mot. for J. as matter of law (after P rested case)	Aff'd in part, vacated in part, rev'd & remanded in part	Age-Substantive	Retaliation; Refusal to hire	P & D
Crawford	55	N/A	F	Low-level white collar	Health care provider (hospital)	D won	Summ. J.	Aff'd	Age-Substantive	Hostile environment	D
Denisi	46	N/A	M	Mgmt.	Large corporation	D won	Summ. J.	Aff'd	Age-Substantive	Discharge	D
Diez	58	N/A	M	Mgmt.	Large corporation	D won	Summ. J.	Aff'd	Non-Age Issue	Discharge (constructive)	D
Doan	N/A	N/A	M	Low-level white collar	Corporation	P won	D's Mot. for J. as matter of law (after jury verdict for P)	Rev'd & Remanded	Age-Substantive	Discharge	D
Douglass	64	N/A	M	Low-level white collar	Trade Ass'n	D won	Summ. J.	Aff'd	Age-Substantive	Demotion	D
Dranchak	N/A	N/A	M	Mgmt.	Large corporation	D won	D's Mot. for J. as matter of law (after jury trial)	Aff'd	Age-Substantive	Retaliatory discharge; Discharge	D

Case	P's Age	D's Age	P's Gender	P's Job	D's Activity	Disposition Below	Form of Disposition Below	Disposition on Appeal	Basis for Disposition	Issue(s) on Appeal	Winner
Duart	58	N/A	M	Blue collar	Corporation	D won	Summ. J.	Aff'd	Age-Substantive	Discharge	D
Ellis	Early 40's	N/A	F, F	Flight Attendants	Large corporation	D won	Summ. J.	Aff'd	Age-Substantive	Refusal to hire	D
EEOC v. Massachusetts	65+	N/A	N/A	N/A	Gov't	P won	Summ. J.	Aff'd	Age-Substantive	Benefits	P
EEOC v. Johnson & Higgins	N/A	N/A	N/A	Mgmt.	Private corporation	P & D each won in part	Summ. J.	Aff'd	Age-Substantive	Mandatory retirement policy for Bd. of Dirs. (dirs. also EES)	P
EEOC v. Kentucky State Police Dep't	55	N/A	N/A	State Police	Gov't agency	P & D each won in part	Summ. J.	Aff'd in part (in favor of P); Rev'd in part (adversely to D)	Non-Age Issue (Statute of limitations; damages)	Mandatory retirement policy	P & D
EEOC v. Texas Instruments	51, 50, 51, 51, 54, 59, 56	N/A	M(6)	Low-level Mgmt.	Large corporation	D won	Summ. J.	Aff'd	Age-Substantive	Discharge	D
EEOC v. Tire Kingdom	N/A	N/A	N/A	Gov't Agency	Corporation	P won	Appeal from order directing compliance with subpoena	Aff'd	Non-Age Issue (subpoena)	EEOC's investigative authority	P

Case	P's Age	D's Age	P's Gender	P's Job	D's Activity	Disposition Below	Form of Disposition Below	Disposition on Appeal	Basis for Disposition	Issue(s) on Appeal	Winner
Evans	N/A	N/A	F	Blue collar	Corporation	D won	Summ. J.	Aff'd	Non-Age Issue (timeliness of EEOC charge)	Refusal to Promote	D
Fisher	53	N/A	F	Educator	University	P won	D's Mot. for J. as matter of law (after bench trial)	Rev'd	Age-Substantive	Denial of tenure	D
Ford	N/A	N/A	M	N/A	State agency	D won	Summ. J.	Rev'd	Non-Age Issue (timeliness of EEOC charge)	Discharge	P
Fuka	51	N/A	F	Low-level white collar	Corporation	D won	Summ. J.	Aff'd	Age-Substantive	Discharge	D
Furr	53, 58, 62	N/A	M(3)	White collar	Corporation	P's won	D's Mot. for J. as matter of law or new trial (after jury verdict for P's)	Rev'd & Remanded	Age-Substantive	Discharge	D
Gadsby	42	N/A	M	Sales Rep.	Corporation	D won	Summ. J.	Aff'd	Age-Substantive	Compensation (failure to pay commission); Discharge	D
Gallagher	60	N/A	F	Low-level white collar	Financial institution (bank)	D won	Summ. J.	Aff'd	Non-Age Issue (timeliness of EEOC charge)	Demotion	D

Case	P's Age	D's Age	P's Gender	P's Job	D's Activity	Disposition Below	Form of Disposition Below	Disposition on Appeal	Basis for Disposition	Issue(s) on Appeal	Winner
Garner	N/A	N/A	F	Low-level white collar	Corporation	D won	Summ. J.	Aff'd	Age-Substantive	Discharge	D
Gathright	N/A	N/A	F	White collar	Financial institution (credit union)	D won	P's Mot. for J. as matter of law (after jury verdict for D)	Aff'd	Age-Substantive	Discharge	D
Grayson	N/A	N/A	M(11)	Mgmt.	Large corporation	P won	P's Mot. to allow opt-in P's	Aff'd in part (in favor of P); Rev'd in part (in favor of P)	Non-Age Issue	Demotion; Discharge	P
Greene	52	42	M	Mgmt.	Corporation	D won	D's Mot. for J. as matter of law (at end of trial)	Rev'd & Remanded	Age-Substantive	Discharge	P
Hall	55	N/A	M	Mgmt.	Corporation	D won	Summ. J.	Rev'd & Remanded	Age-Substantive	Discharge	P
Hartsel	N/A	N/A	F	Mgmt.	City Gov't & mayor	D won	Summ. J.	Aff'd	Age-Substantive	Denial of promotion	D
Haun	51	N/A	M	Salesman	Corporation	P won	D's Mot. for J. as matter of law (after jury verdict for P)	Aff'd	Age-Substantive	Discharge; Refusal to hire	P
Holt	N/A	N/A	M, F	N/A	Corporation	P won	D's Mot. for J. as matter of law (after jury verdict for P)	Rev'd & dismissed with prejudice	Age-Substantive	Retaliation	D

Case	P's Age	D's Age	P's Gender	P's Job	D's Activity	Disposition Below	Form of Disposition Below	Disposition on Appeal	Basis for Disposition	Issue(s) on Appeal	Winner
Hopper	46	N/A	M	Mgmt.	Large corporation	D won	D's Mot. for J. as matter of law (after trial)	Aff'd	Age-Substantive	Discharge	D
Isenbergh	60	N/A	M	Mgmt.	Corporation	D won	D's Mot. for J. as matter of law (after jury verdict for P)	Aff'd	Age-Substantive	Refusal to hire	D
Jameson	51	N/A	F	White collar	Corporation	D won	Summ. J.	Rev'd	Age-Substantive	Refusal to rehire; Refusal to transfer	P
Kalvinskas	N/A	N/A	M	High-level white collar	University	D won	Summ. J.	Rev'd & Remanded	Age-Substantive	Benefits	P
Kehoe	61	N/A	M	Mgmt.	Large corporation	P won	D's Mot. for J. as matter of law (after jury verdict for P)	Aff'd	Age-Substantive & Non-Age Issue (relief)	Discharge; Refusal to transfer	P
Kelly	68	N/A	M	White collar	University	D won	Summ. J.	Aff'd	Age-Substantive	Discharge	D
Koger	N/A	N/A	M	Law Enforcement (U.S. marshal)	U.S. Gov't	D won	Summ. J., and P's Mot. for J. as matter of law (after bench trial ruling for D)	Aff'd	Age-Substantive	Denial of promotion	D
Kuhn	62	N/A	M	Educator	University	D won	Summ. J.	Aff'd	Age-Substantive	Denial of promotion	D

Case	P's Age	D's Age	P's Gender	P's Job	D's Activity	Disposition Below	Form of Disposition Below	Disposition on Appeal	Basis for Disposition	Issue(s) on Appeal	Winner
Kusak	63	N/A	M	Systems Engineer	Corporation	P won	D's Mot. for J. as matter of law (after trial)	Rev'd & Remanded	Age-Substantive	Privilege of empl. (failure to assist P in finding new job)	D
Lawrence	60	N/A	M	Mgmt.	Financial institution (bank)	D won	Summ. J.	Rev'd	Age-Substantive	Discharge	P
MacDonald	52	N/A	M	Blue collar	Corporation	D won	Summ. J.	Aff'd	Age-Substantive	Discharge	D
Marfia	N/A	N/A	M	Mgmt.	Financial institution (bank)	P won	Default J.	Remanded	Non-Age Issue (Default J.)	Discharge	D
Marx	N/A	N/A	M	Low-level Mgmt.	Corporation	D won	Summ. J.	Aff'd	Age-Substantive	Discharge; Demotion	D
Matthews	N/A	N/A	M	N/A	Corporation	P won	D's Mot. to compel arbitration. & to stay litigation	Rev'd & Remanded	Non-Age Issue (arbitration)	Discharge	D
Miller	57	N/A	F	White collar	Private enterprise	D won	D's Mot. for J. as matter of law (after jury verdict for P)	Aff'd	Age-Substantive	Discharge	D
Mills	56	N/A	F	White collar	Financial institutions (bank)	D won	Summ. J.	Aff'd	Age-Substantive	Discharge	D
Mulero-Rodriguez	47	N/A	M	Mgmt.	Corporation	D won	Summ. J.	Rev'd	Age-Substantive	Discharge	P

Case	P's Age	D's Age	P's Gender	P's Job	D's Activity	Disposition Below	Form of Disposition Below	Disposition on Appeal	Basis for Disposition	Issue(s) on Appeal	Winner
Murff	N/A	N/A	M	N/A	Insolvent corporation	D won	Mot. to dismiss	Rev'd & Remanded	Non-Age Issue (Relation of ADEA to state law regulating Ins.)	Demotion; Discharge	P
Nelson	55	N/A	M	Mgmt.	Large corporation	P won	D's Mot. for J. as matter of law (after jury verdict for P)	Rev'd	Age-Substantive	Discharge; Retaliation	D
Nichols	N/A	N/A	M	White collar	Corporation	D won	Summ. J.	Aff'd	Age-Substantive	Discharge	D
Noreuil	62	N/A	M	Blue collar	Corporation	D won	Summ. J.	Aff'd	Age-Substantive	Discharge	D
Nowd	N/A	N/A	N/A	Public safety	U.S. Gov't	D won	Mot. for fees	Rev'd & Remanded	Non-Age Issue (Atty's fees)	Not determinable	P
O'Connor	56	N/A	M	Mgmt.	Corporation	D won	Summ. J.	Aff'd	Age-Substantive	Discharge	D
O'Day	46	N/A	M	White collar	Corporation	D won	Summ. J.	Aff'd	Non-Age Issue (after acquired evidence)	Retaliatory discharge	D
Padilla	N/A	N/A	M	Mgmt.	Corporation	P won	D's Mot. for J. as matter of law (after jury trial)	Aff'd	Substantive & Non-Age Issue (damages)	Retaliatory demotion	P
Pages-Cahue	51, 45, 51	N/A	M, F(2)	White collar	Corporation	D won	Summ. J.	Aff'd	Age-Substantive	Discharge	D

Case	P's Age	D's Age	P's Gender	P's Job	D's Activity	Disposition Below	Form of Disposition Below	Disposition on Appeal	Basis for Disposition	Issue(s) on Appeal	Winner
Panaras	N/A	N/A	M	Mgmt.	Corporation	D won	Mot. to dismiss	Rev'd & Remanded	Non-Age Issue (failure to timely serve compl.)	Discharge	P
Parrish	66	N/A	F	Mgmt.	Corporation	P won	D's Mot. for J. as matter of law	Aff'd	Age-Substantive	Discharge (constructive)	P
Pulla	48	N/A	M	Mgmt.	Corporation	D won	P's Mot. to amend compl. to conform to evidence	Aff'd	Non-Age Issue (evidence)	Retaliation	D
Rabinovitz	65	N/A	M	White collar	U.S. Gov't	D won	Summ. J.	Aff'd	Age-Substantive	Discharge (constructive); Denial of promotion; Retaliation	D
Rhodes (82 F.3d)	56	N/A	M	Salesman	Corporation	P won	N/A	Aff'd in part, vacated in part, & remanded	Non-Age Issue (damages)	Discharge	P & D
Rhodes (75 F.3d)	56	N/A	M	Salesman	Corporation	P won	D's Mot. for J. as matter of law (after jury verdict for P)	Aff'd	Age-Substantive	Discharge	P
Rothmeier	46	N/A	M	Mgmt.	Corporation	D won	Summ. J.	Aff'd	Age-Substantive	Discharge	D
Roxas	54	N/A	M	Educator	University	D won	Summ. J.	Aff'd	Age-Substantive	Privilege of empl. (i.e., selection for sabbatical)	D

Case	P's Age	D's Age	P's Gender	P's Job	D's Activity	Disposition Below	Form of Disposition Below	Disposition on Appeal	Basis for Disposition	Issue(s) on Appeal	Winner
Schmidrig	62	N/A	M	Mgmt.	Corporation	D won	Summ. J.	Rev'd in part (in favor of P); Aff'd in part (in favor of D)	Age-Substantive	Discharge; Denial of promotion	P & D
Shaw	N/A	N/A	M	Mgmt.	Health care provider (hospital)	P won	D's Mot. for J. as matter of law (after jury verdict for P)	Aff'd	Age-Substantive	Discharge	P
Sherlock	48	N/A	F	White collar	Health care provider	D won	Mot. to dismiss	Aff'd in part (in favor of P & D); vacated in part & remanded in part (in favor of P)	Non-Age Issue (timeliness of suit; inability to use 42 U.S.C. § 1985 (3) as basis for ADEA suit)	Discharge	P & D
Simpson	47	N/A	M	White collar	Accounting firm	P won	Summ. J. & D's Mot. for J. as matter of law (after jury verdict for P)	Aff'd	Substantive & Non-Age Issues (relief; status of P as EE; damages)	Discharge	P
Slathar	57	N/A	M	Blue collar mgmt.	Corporation	D won	P's Mot. for J. as matter of law	Aff'd	Non-Age Issues (jury instruction; evidence)	Discharge	D
Smith v. City of Des Moines	N/A	N/A	M	Public safety (firefighter)	City Gov't	D won	Summ. J.	Aff'd	Age-Substantive	Discharge	D

Case	P's Age	D's Age	P's Gender	P's Job	D's Activity	Disposition Below	Form of Disposition Below	Disposition on Appeal	Basis for Disposition	Issue(s) on Appeal	Winner
Smith v. Cook County	48	N/A	M	White collar	Gov't hospital	D won	Summ. J.	Aff'd	Age-Substantive	Discharge	D
Sults	N/A	N/A	M(2)	Mgmt.	Corporation	D won	Summ. J.	Aff'd	Substantive & Non-Age Issue (liability of individual officer)	Discharge; Discharge (constructive)	D
Sutera	61	N/A	M	Salesman	Corporation	D won	Summ. J.	Vacated & Remanded	Age-Substantive	Discharge	P
Swaim	N/A	N/A	M	Mgmt.	Corporation	P won	D's Mot. for J. as matter of law (after entry of default J.), and to vacate default J.	Aff'd	Non-Age Issue (Default J.)	Discharge	P
Testerman	57	N/A	M	Low-level white collar	Corporation	D won	Summ. J.	Aff'd	Age-Substantive	Discharge	D
Weisbrot	65	N/A	F	White collar	Medical school	D won	Summ. J.	Aff'd	Age-Substantive	Discharge	D
Williams	47	N/A	M	Salesman	Corporation	D won	Summ. J.	Aff'd in part (in favor of D); Rev'd in part (in favor of P), & Remanded	Age-Substantive	Involuntary transfer; Demotion; Retaliatory discharge	P & D
Wohl	54	N/A	M	Mgmt.	Corporation	D won	Summ. J.	Rev'd & Remanded	Age-Substantive	Discharge	P

Case	P's Age	D's Age	P's Gender	P's Job	D's Activity	Disposition Below	Form of Disposition Below	Disposition on Appeal	Basis for Disposition	Issue(s) on Appeal	Winner
Wolf	53	N/A	M	Mgmt.	Corporation	D won	Summ. J.	Aff'd	Age-Substantive	Discharge	D
Woodhouse	53	N/A	F	Mgmt.	Health care provider (hospital)	P won	D's Mot. for J. as matter of law or new trial (after jury verdict for P)	Aff'd	Age-Substantive	Discharge; Reinstatement; Refusal to transfer	P

APPENDIX III

Federal District Court Decisions*
(903 F. Supp - 943 F. Supp 1344)
(69 Fair Empl. Prac. Cas. 801 - 72 Fair Empl. Prac. Cas. 992)

Case	P's Gender	P's Age	D's Age	Form of Disposition	Basis For Disposition		Issue	Winner
					Age Substantive	Non-Age Substantive		
Agugliaro	M	51		Mot. For Summ. J.	x		Discharge	D
Alcaraz	M	-		Mot. to compel arbitration		x	?	P
Allen	M	49	-	Mot. for Summ. J.	x		Discharge	D
Amos	F	-	-	Mot. to dismiss	x		Retaliation	D
Armbruster v. Erie Civic Ctr. Auth.	M	60		Mot. for Summ. J.	x		Discharge	D
Armbruster v. Unisys Corp.	-	-		D's Mot. in limine to exclude evid.		x	Discharge	D
Barvick	M	47	-	Mot. for Summ. J.	x		Denial of promotion	P
Bedwell	M, F	59	-	Mot. for Summ. J.	x		Demotion; Denial of promotion	D
Bern	M	67		Mot. for Summ. J.	x		Discharge	D
Biggins	M	62	-	D's Mot. for reduction of atty's fee		x	Discharge	D
Blackburn	M	58	-	Mot. for Summ. J.	x		Discharge	D

* The full names, as well as the citations, of the cases are set forth in Appendix I.

Case	P's Gender	P's Age	D's Age	Form of Disposition	Basis For Disposition		Issue	Winner
					Age Substantive	Non-Age Substantive		
Boyd	M	61	—	Mot. for Summ. J.	x		Refusal to hire	D
Bozner	M, F	—	—	Mot. for Summ. J.		x	Benefits	D
Brazel	M	49	—	Mot. for Summ. J.	x	x	Discharge; Terms & conditions of empl.	D
Brook	M	57	—	Bench trial	x		Denial of promotion; Retaliation	D
Brown v. IBM Corp.	M	42	—	D's Mot. to dismiss & P's Mot. to certify class	x	x	Discharge; Retaliation	D
Brown v. Intercity Fed. Bank	F	—	—	P's Mot. to remand to state court		x	Harassment	D
Brown v. McDonnell Douglas Corp.	M	53	—	Mot. for Summ. J.	x		Discharge	D
Bryson	—	—	—	Mot. for Summ. J.		x	Discharge	P
Bumstead	M, M	63, 66	—	Mot. for Summ. J.	x		Discharge	D
Burger	F	—	—	P's Mot. in limine for evidence		x	Discharge	P
Burress	M	—	—	P's Mot. in limine for evidence		x	Discharge	P
Cadelinia	F	45	—	Mot. to dismiss		x	Discharge	P & D
Caldwell	F	—	—	Mot. to dismiss		x	Refusal to hire; Retaliation	P
Camacho	F	47	—	Mot. for Summ. J.	x		Demotion; Constructive discharge	P

Case	P's Gender	P's Age	D's Age	Form of Disposition	Basis For Disposition		Issue	Winner
					Age Substantive	Non-Age Substantive		
Caraballo	F	—	—	Mot. to strike claim for punitive damages		x	?	P
Carlson v. WPLG/TV-10, 72 Fair Emp. Prac. Cas. (BNA) 646	M	44	—	Mot. for Summ. J.	x		Discharge	P
Carlson v. WPLG/TV-10, 70 Fair Emp. Prac. Cas. (BNA) 1596	M	44	—	Mot. for Summ. J.	x		Discharge	P
Carr	M	—	—	Mot. to quash subpoena		x	?	P
Causey	M	61	—	Mot. for Summ. J.	x		Discharge; Involuntary transfer; Retaliation; Denial of promotion	D
Caussade	F	61	—	Mot. for Summ. J.	x		Discriminatory reassignment	D
Cecilio	F	41	—	Mot. for Summ. J.	x		Discharge; Retaliation	D
Chastain	M	—	—	Mot. for Summ. J.	x		Discharge	P
Chenoweth	M	44	—	Mot. for Summ. J.	x		Discharge	D
Chiaromonte	M	59	—	Mot. for Summ. J.	x		Discharge	D
Collier	M	57	—	Mot. for Summ. J.	x		Discharge	D
Collins	F	—	—	Mot. to dismiss		x	Discharge	D
Cook	M	59	—	Mot. to remand to state court		x	Discharge	P

Case	P's Gender	P's Age	D's Age	Form of Disposition	Basis For Disposition		Issue	Winner
					Age Substantive	Non-Age Substantive		
Crossman	F(4)	—	—	Mot. for Summ. J.		x	Discharge	D
Dalal v. Alliant Techs., 927 F. Supp. 1383	M	—	—	Mot. for interest on award		x	Discharge	P
Dalal v. Alliant Techs., 927 F. Supp. 1374	M	—	—	P's request for front pay; D's request to reduce atty's fee		x	Discharge	P
D'Anna	M	—	—	P's Mot. to proceed with representative action		x	Discharge	D
Day	M	—	—	Mot. for Summ. J.	x		Compensation	D
DeJoy	M	56	—	Mot. to dismiss		x	Demotion; Retaliation; Constructive discharge	D
Denman	M	—	—	Mot. for Summ. J.	x		Discharge; Refusal to transfer	D
Denty	M	54	—	Mot. for Summ. J.		x	Denial of promotion; Retaliation	D
Derthick	M(2)	—	—	Mot. for Summ. J.		x	Discharge	D
Diehl	—	—	—	Mot. to dismiss & for bench trial	x		Discharge	D
DiRussa	M	—	—	Cross Mot. to vacate & D's Mot. to confirm arbitrator's award		x	Discharge	D
Dittman	M(4)	40-50	—	Mot. to dismiss	x		Benefits	D
Dittmann	M	—	—	Mot. for Summ. J.		x	Discharge	P

Case	P's Gender	P's Age	D's Age	Form of Disposition	Basis For Disposition		Issue	Winner
					Age Substantive	Non-Age Substantive		
Douglas	F	-	-	Mot. for Summ. J.	x		Denial of promotion	D
Dryden	F	Late 40's	-	Mot. for Summ. J.	x		Discharge	D
Duffy	F	59	-	Mot. for Summ. J.	x		Discharge; Retaliation	D
Dungee	F	50	-	Mot. for Summ. J.	x		Refusal to hire	D
Dunn	F	-	-	Mot. for Summ. J.	x	x	Hostile environment; Retaliation	P & D
Durkin	F	-	-	D's Mot. to compel arbitration		x	Hostile environment; Denial of promotion; Demotion	D
Elguindy	F	43	-	Mot. for Summ. J.	x		Retaliation; Promotion	P
Elias	F	56	-	Mot. to dismiss		x	Discharge	D
Ellis	M	52	-	Bench trial	x		Change of duties	D
EEOC v. Doremus & Co.	M	58	-	Mot. for Summ. J.	x		Discharge	P
EEOC v. Lockheed Martin Marietta Corp.	-	-	-	Mot. for reconsideration of order denying enforcement of subpoena		x	?	P
EEOC v. McDonnell Douglas Corp.	-	55+	-	Ps' Mot.s for separate trials & discovery for liability for damages		x	Discharge	P

Case	P's Gender	P's Age	D's Age	Form of Dispositon	Basis For Disposition		Issue	Winner
					Age Substantive	Non-Age Substantive		
EEOC v. Sara Lee Corp.	F(3), M	—	—	Mot. for Summ. J.		X	Validity of waivers of liability; Statute of limitations for filing suit; Conciliation requirement; Charge filing	P
Faix	M.	53	—	Mot. for Summ. J.	x		Discharge; Demotion	D
Falbaum	M(5)	—	—	Mot. to dismiss		x	Discharge	D
Farmer	M	61	—	Mot. for Summ. J.	x		Involuntary transfer	D
Fernandez	M	—	—	Mot. to dismiss		x	Discharge	D
Figuroa	M	60	—	Mot. for Summ. J.		x	Discharge	D
Finch	M	58	—	P's Mot. for new trial for damages; D's Mot. for J. as matter of law	x	x	Discharge	P & D
Fine	M	—	—	Jury trial		x	Discharge	P
Ford	M	—	—	Mot. to dismiss		x	Discharge	D
Forren	M	51	—	Mot. for Summ. J.	x		Discharge	D
Francescon	F	—	—	Mot. for Summ. J.	x		Denial of promotion; Discharge	P & D
Fries	F	55	—	Mot. for Summ. J.	x		Discharge; Refusal to hire; Retaliation	P
Fronduiti	M	—	—	Mot. for Summ. J.		x	Discharge	D

Case	P's Gender	P's Age	D's Age	Form of Dispositon	Basis For Disposition		Issue	Winner
					Age Substantive	Non-Age Substantive		
Gallo	F	—	—	Mot. to dismiss & Mot. for Summ. J.		x	?	P & D
Gerzog	M	68	—	Mot. to dismiss		x	Discharge	P & D
Giannapoulos	M	—	—	Mot. for Summ. J.	x		Discharge	D
Golder	M	61	—	Mot. for Summ. J.	x		Discharge	D
Golombiewski	M(2)	47, 45	—	D's Mot. for J. on pleadings		x	Denial of promotion	D
Gorman	F	46	—	Mot. to dismiss		x	Discharge	D
Gosnell	M	49	—	Mot. for Summ. J.	x		Denial of promotion	P
Goss	F	62	—	Mot. for Summ. J.	x		Discharge	D
Graboski	—	—	—	Mot. to dismiss		x	Benefits	D
Gregor	M	57	—	Mot. to dismiss		x	Discharge	D
Grinnell	—	—	—	Mot. for Summ. J.		x	?	D
Griswold v. Alabama Dep't Of Indus. Relations	F	—	—	Mot. to dismiss	x	x	Constructive discharge	P & D
Griswold v. New Madrid County Group Practice, Inc.	M	—	—	Mot. to dismiss		x	Discharge	D
Guadagno	F	—	—	Mot. to dismiss		x	Discharge	D
Hartley	F	51	—	Mot. for Summ. J.	x		Discharge	D

Case	P's Gender	P's Age	D's Age	Form of Disposition	Basis For Disposition		Issue	Winner
					Age Substantive	Non-Age Substantive		
Hawes	F	—	—	Mot. to substitute widow as P for deceased P		x	?	P & D
Heckelmann	M	63	—	P's Mot. to remand to state court		x	Discharge	P
Henderson, 933 F. Supp. 1326	F	—	—	Mot. for Summ. J.	x	x	Refusal to hire; Refusal to transfer; Discriminatory performance appraisal	P
Henderson, 918 F. Supp. 1059	F	—	—	D's Mot. to sever or for separate trials		x	?	P & D
Herrero	F	61	—	Mot. for Summ. J. ¹	x		Discharge	D
Hidalgo	M	65	—	Mot. for Summ. J.	x		Discharge	D
Hill	F	51	—	Mot. for Summ. J.	x		Discharge	D
Hodge	M.	67	—	Mot. to dismiss		x	Discharge	D
Huff	M	56	—	Mot. for Summ. J.	x		Demotion	D
Hurd	F	48	—	Mot. for Summ. J.	x		Denial of promotion; Retaliation	P
Johnson	M	—	—	Mot. to dismiss		x	Retaliation	P
Jungels	F	—	—	Mot. to dismiss		x	Discharge	P & D
Kelleher, 71 Fair Empl. Prac. Cas. (BNA) 544	M	54	—	Mot. for Summ. J.	x		Discharge	D

Case	P's Gender	P's Age	D's Age	Form of Disposition	Basis For Disposition		Issue	Winner
					Age Substantive	Non-Age Substantive		
Kelleher, 927 F. Supp. 361	M	54	—	Mot. to dismiss		x	Discharge	D
Kennedy	M	62	—	Mot. for Summ. J.	x		Discharge	D
Kerber	M	56	—	Mot. for Summ. J.	x		Discharge	D
Kern	M	57	—	Mot. for Summ. J.	x		Discharge	P
Kirsch	M	—	—	D's Mot. for J. as matter of law, new trial, remittitur; P's Mot. for relief	x		Constructive discharge	P & D
Knox v. Brundidge Shirt Corp.	F	53	—	Mot. for Summ. J.	x		Discharge	D
Knox v. First Nat'l Bank of Chicago	F	—	—	D's Mot. in limine to exclude evid.		x	Demotion; Denial of promotion	D
Koslow	M	—	—	Mot. to dismiss		x	Refusal to hire; Retaliation	D
Kotas	M	60	—	Mot. for Summ. J.	x		Constructive discharge	P
Kotlowski	F	47	—	Mot. for Summ. J.	x		Discharge	D
Kraemer, 941 F. Supp. 479	F	47	—	Court's post-jury trial determination for P as to whether reinstatement was feasible, and for awards of liquidated damages & prejudgment interest		x	Refusal to hire	P & D
Kraemer, 909 F. Supp. 268	F	47	—	D's Mot. in limine to exclude testimony		x	Refusal to hire	P

Case	P's Gender	P's Age	D's Age	Form of Disposition	Basis For Disposition		Issue	Winner
					Age Substantive	Non-Age Substantive		
Kramer	M	-	-	Mot. for Summ. J.	x		Constructive discharge	D
Kunzman	-	-	-	P's & D's Mot. in limine to exclude evid.		x	Discharge	P & D
Lamb	M	61	-	Mot. for Summ. J.	x		Denial of promotion	D
LeFevre	M	-	-	Mot. for prejudgment interest & application for costs	x		Discharge	D
Lewis	M	50	-	Mot. for Summ. J.	x		Discharge	D
Ligon	M(2)	-	-	Mot. for Summ. J. & D's Mot. to strike testimony	x		Discharge	P
Luis	F	41	-	Mot. for Summ. J.	x		Discharge	D
MacPherson	M(2)	49, 50	-	Mot. to dismiss		x	Promotion; Compensation	D
Maher	M	-	-	Mot. for J. on the pleadings	x		Discharge; Retaliation; Other acts	D
Majahad	M	40	-	Mot. for Summ. J.	x		Discharge	D
Mania	M	45	-	Mot. for Summ. J.	x		Discharge	D
Manos	F	49	-	Mot. for Summ. J.	x		Demotion; Constructive discharge	P
Matthews	M	-	-	Mot. for Summ. J.	x		Discharge	D
McDonald	M	43	-	Mot. for Summ. J.	x		Discharge	D

Case	P's Gender	P's Age	D's Age	Form of Disposition	Basis For Disposition		Issue	Winner
					Age Substantive	Non-Age Substantive		
McGreevy	M	—	—	P's request for protective order		x	?	D
McKenry	M	Mid 50's	—	Mot. for Summ. J.		x	Discharge	D
McNulty	F	59	—	Mot. to dismiss	x	x	Discharge; Refusal to hire	P
Mennella	M	52	—	D's Mot. for J. on the pleadings		x	Denial of promotion	D
Metsopoulos	M	—	—	Mot. to dismiss & Mot. for Summ. J.	x	x	Denial of promotion	P & D
Minetos	F	—	—	P's Mot. for new trial	x		Discharge	D
Mississippi Power & Light Co.	—	—	—	Mot. for Summ. J.		x	Involuntary transfer	D
Mitchell	F(2)	67	—	D's Mot. for J. as matter of law	x		Denial of promotion	P
Moebus	F	—	—	Mot. for Summ. J.		x	Discharge	D
Morrow	F	59	—	Mot. for Summ. J.	x	x	Constructive discharge	P & D
Moses, 922 F. Supp. 600	M	—	—	D's Mot. to stay execution of J.		x	Discharge	P
Moses, 905 F. Supp. 1054	M(2), F	—	—	D's Mot. for remittitur		x	Discharge	P & D
Mukhtar	M	—	—	Mot. to dismiss		x	Discharge	P
Mulqueen	M	—	—	D's Mot. for J. as matter of law or for new trial	x	x	Discharge	P

Case	P's Gender	P's Age	D's Age	Form of Disposition	Basis For Disposition		Issue	Winner
					Age Substantive	Non-Age Substantive		
Nakai	M	50	—	Mot. for Summ. J.	x		Discharge	D
Nembhard	F	41	—	D's Mot. for J. as matter of law; P's Mot. for fees & costs	x	x	Discharge	P & D
Newhouse	M	60	—	D's Mot. for J. as matter of law or new trial		x	Discharge; Refusal to hire	P & D
Newsome	F	52	—	Mot. for Summ. J.	x	x	Hostile environment; Denial of promotion	P & D
Nixon	F	—	—	Mot. to dismiss		x	Denial of promotion; Refusal to transfer	D
Odaiyappa	M	—	—	Mot. for Summ. J.		x	Retaliation	D
Odunmbaku	M	50	—	Mot. for Summ. J.	x		Discharge	P
O'Keefe	F	58	—	Mot. for Summ. J.	x		Discharge	P
Orisek	F	60	—	Mot. for Summ. J.	x		Discharge	D
Paquin	M	52	—	Mot. for Summ. J.	x		Discharge; Retaliation	D
Paradasani	M	54	—	Mot. to dismiss		x	Discharge	D
Patterson	M	—	—	Mot. for Summ. J.	x		Discharge	D
Payne	M	44	—	Mot. for Summ. J.	x		Discharge Retaliation	D
Pendas	F	—	—	Mot. for Summ. J.	x		Harassment; Constructive discharge; Denial of promotion	P

Case	P's Gender	P's Age	D's Age	Form of Disposition	Basis For Disposition		Issue	Winner
					Age Substantive	Non-Age Substantive		
Penchisen	F	-	-	Mot. for Summ. J.	x		Discharge	D
Philippeaux	M	-	-	Mot. for Summ. J.		x	Refusal to hire	P & D
Phuong	F	57	-	D's Mot. for J. as matter of law or new trial	x	x	Discharge	P & D
Pina	F	-	-	Mot. for Summ. J.	x		Denial of promotion	D
Pollard	M(3)	51, 55, 62	-	Mot. for Summ. J.	x		Discharge	D
Pollis	F	70	-	D's request for atty's fees		x	Involuntary retirement	P
Posey	M	42	-	Mot. for Summ. J.	x		Discharge	P
Pouncy	F	-	-	Mot. for Summ. J.		x	Discharge	D
Reado	M	47	-	P's Mot. to proceed in forma pauperis & for appointment of counsel		x	?	P & D
Reynolds	F	53	-	Judicial determination of damages after jury verdict for P		x	Discharge	D
Rivers	M	-	-	Mot. for Summ. J.		x	Discharge	D
Robins	M	-	-	Mot. to dismiss		x	Discharge; Denial of promotion	D
Roemer	M	46	-	Mot. for Summ. J.	x		Discharge	P
Rogic	M	63	-	Mot. for Summ. J.	x		Discharge	D

Case	P's Gender	P's Age	D's Age	Form of Disposition	Basis For Disposition		Issue	Winner
					Age Substantive	Non-Age Substantive		
Saell	M	47	—	Mot. for Summ. J.	x		Discharge	D
Sastri	F	47	—	Mot. for Summ. J.	x		Constructive discharge; Retaliation	P & D
Secrist	F	62	—	Mot. to dismiss		x	Discharge; Compensation	D
Shapiro	M	73	—	Mot. for Summ. J.	x		Discharge	P
Sharkey	M	59	—	Mot. for Summ. J.		x	Discharge	P
Shaver	M	57	—	Mot. for Summ. J.		x	Failure to rehire; Refusal to transfer; Discharge	D
Shea	M	63	—	D's Mot. for new trial or remittitur; P's Mot. for reinstatement		x	Demotion	P
Shenker	M	48	—	Mot. for Summ. J.	x		Discharge	D
Shivers	F	66	—	Mot. for Summ. J.	x		Discharge	D
Simon	M	—	—	Mot. for Summ. J.		x	Discharge; Refusal to hire	D
Smith v. Chrysler Corp.	—	—	—	Mot. for Summ. J.	x		Loss of seniority	D
Smith v. CIBA-Geigy Corp.	M	45	—	Mot. for Summ. J.	x		Discharge	D
Smith v. Lehman Bros.	M	—	—	D's Mot. to compel arbitration		x	Discharge	D
Smith v. Midland Brake, Inc.	M	63	—	Mot. for Summ. J.	x		Discharge	D
Sorenson	M	54	—	Mot. for Summ. J.	x		Discharge	D

Case	P's Gender	P's Age	D's Age	Form of Disposition	Basis For Disposition		Issue	Winner
					Age Substantive	Non-Age Substantive		
Sperling, 924 F. Supp. 1396	-	-	-	D's Mot. in limine to exclude evid.	x		Discharge	P
Sperling, 924 F. Supp. 1346	-	-	-	Mot. for Summ. J.	x		Discharge	D
Stafford	F	50	-	Mot. to dismiss		x	Discharge	P & D
Stahlke	M	-	-	Mot. for Summ. J.	x		Discharge	D
Storr	F	55	-	Mot. to dismiss		x	Discharge	D
Stratton	F	61	40	D's Mot. for J. as matter of law or new trial; P's Mot. for front pay & benefits	x	x	Discharge	P & D
Swartzbaugh	F	-	-	Mot. to dismiss		x	Demotion	P & D
Taylor v. Brown	M	57	-	Mot. for Summ. J.	x		Denial of promotion	D
Taylor v. Washington Metro. Transit Auth.	M	57	-	Mot. for Summ. J.	x		Demotion; Retaliation; Denial of promotion	P & D
Teichgraeber	F	-	-	D's Mot. to compel discovery		x	Discharge	D
Thomas	M	78	-	Mot. to dismiss		x	Refusal to certify P (an atty.) as eligible to handle appointed criminal cases	D
Tipsword	F	61	-	Mot. for Summ. J.	x		Discharge	D
Tobin	F	-	-	Mot. for Summ. J.		x	Refusal to hire	D

Case	P's Gender	P's Age	D's Age	Form of Disposition	Basis For Disposition		Issue	Winner
					Age Substantive	Non-Age Substantive		
Tomasello	M	—	—	Mot. to dismiss		x	Retaliation	P & D
Topf	M	—	—	D's Mot. to compel arbitration; P's Mot. for jury trial		x	Discharge	D
Tsai	F	—	—	Mot. to dismiss		x	Harassment; Involuntary transfer; Denial of promotion	D
Tucker	M	54	—	Mot. for Summ. J.	x		Discharge	D
Tyson	M	53	—	P's Mot. for appointment of counsel		x	Refusal to hire	D
Vakharia Centers	F	49	—	Mot. to dismiss	x	x	Terms & conditions of empl.	D
Vitello	M	46	—	Mot. to dismiss		x	Demotion; Retaliation	P & D
Walszek	M	43	—	Mot. to dismiss		x	Discharge	P & D
Waldemar	F	59	60+	Mot. for Summ. J.	x		Discharge; Failure to hire	D
Walker	M	52	52, 44, 44	Mot. for Summ. J.	x		Discharge	D
Walsh	M	62	—	Mot. to dismiss	x	x	Discharge	P & D
Wanamaker	M	—	—	Mot. for Summ. J. & P's Mot. for recons.	x		Discharge; Retaliation	D
Washington	F	—	—	Mot. for Summ. J.	x		Involuntary transfer	D
Wester	M	—	—	Mot. for Summ. J.	x		Demotion; Retaliation	D

Case	P's Gender	P's Age	D's Age	Form of Dispositon	Basis For Disposition		Issue	Winner
					Age Substantive	Non-Age Substantive		
Whitchurch	M	63	—	Mot. for Summ. J.	x	x	Discharge	P & D
Wilde	M	57	—	Mot. for Summ. J.	x		Discharge	D
Wilvers	F	60+	—	Mot. for Summ. J.	x		Discharge	P
Woythal	M	67	—	Mot. for Summ. J.	x		Discharge	D
Wray	F	55	—	Mot. for J. on the pleadings; Mot. to dismiss		x	Discharge	P & D
Young v. Easter Enters., Inc.	—	—	—	Mot. for Summ. J.		x	Discharge; Refusal to hire; Retaliation	D
Young v. Lincoln Nat'l Corp.	M	62	—	Mot. for Summ. J.	x		Denial of promotion	D
Zellers	M	—	—	Mot. to dismiss		x	Discharge	D