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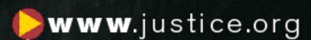
Workers' rights

Ensuring fairness and safety on the job



WORKERS' RIGHTS

Representing the age discrimination plaintiff

Charges of age bias in the workplace are increasing as baby boomers reach their 60s. While these cases have broad jury appeal, they can challenge even seasoned trial lawyers.

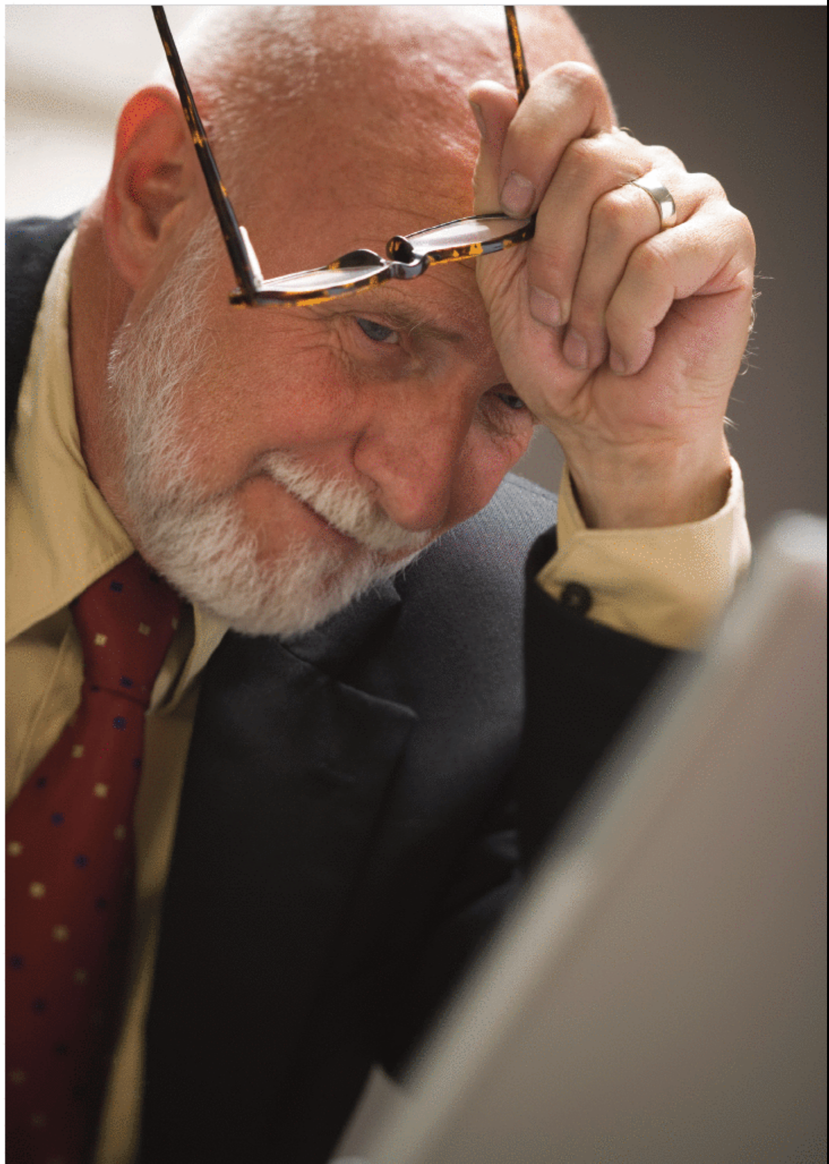
WILLIAM R. AMLONG AND KAREN COOLMAN AMLONG

"He said the dean's office wanted someone younger," Adolfo Zamora testified in his 2006 age discrimination case against Florida Atlantic University.[1]

Lots of employers, it appears, want "someone younger." Forty years after Congress enacted the Age Discrimination in Employment Act (ADEA)[2]—long enough ago that an infant born on its effective date would today enjoy the protections it gives to workers 40 and older—the illegal actions it sought to address are alive and well. As baby boomers edge into their 60s, charges of discrimination filed with the U.S. Equal Employment Opportunity Commission (EEOC) have increased from 15,785 in fiscal year 1997 to 19,103 in fiscal year 2007.[3]

Why are employers today so eager to say goodbye to Mr. Chips?[4] In today's bottom-line-driven economy, it's not uncommon to hear about 30- and 40-something executives who look askance at older workers' higher salaries, resent having to permit boomers to take time off to care for even-older parents, and hungrily eye workers' retirement funds as reservoirs of cash that they can invest as they will, including at times ill-advisedly in the shares of their own mismanaged companies.[5]

A number of state laws likewise prohibit age discrimination.[6] Some provide compensatory and punitive damages not available under the ADEA, which provides only back wages, liquidated damages (double back wages) for "will-



ful" violations, and either reinstatement or "front pay."

Common sense dictates—and many employment lawyers' trial experience shows—that age discrimination cases have broader jury appeal than any other kind of discrimination suit. A juror's ability to relate to a gender discrimination case may well be tied to his or her own gender, and racial minorities are, by definition, minorities. Most people, thankfully, do not suffer from disabilities or even have a close family member who does. Everybody, however, grows older—and has had parents, brothers, sisters, aunts, uncles, childhood neighbors, and favorite schoolteachers who have aged.

Additionally, age discrimination—or, at the very least, the perception of it—is so prevalent that hands fly up during voir dire when potential jurors are asked if they or anyone they know has been the victim of age discrimination. As one employment lawyer noted,

> The fear of growing old, with the prospect of suffering through the aging process and eventual physical decline, is common to us all. Whether young, middle-aged, or old, jurors entering the jury box are influenced, at least to some degree, by such foreboding expectations. Jurors are prone to sympathize and identify with the older worker who is without a job and can expect to find few or no opportunities for other employment.[7]

Rule of three

Direct evidence is one of three ways of proving age discrimination. It is evidence that, if believed, compels the conclusion that unlawful discrimination was at play in the employer's decision-making.[8]

In some cases, employers provide direct evidence by making blatant statements of age bias. This was what happened in Zamora's case. He was a 54-year-old computer systems application coordinator for the university when he was passed up for promotion. When he asked his boss why the promotion had gone to a substantially younger person hired from the outside, he got the candid answer quoted at the start of this article.

Based on that statement, the trial court agreed to give the jury a mixed-motive, burden-shifting jury instruction.[9] This required the defendant, assuming that the jury believed Zamora, to prove by a preponderance of the evidence that it chose the younger job applicant for some reason other than age.[10]

Zamora's boss did not bring to the witness stand the same frankness he had displayed during the one-on-one conversation in an office that he obviously considered an ivy-tower cloister. Nevertheless, the jury believed Zamora, rejecting the university's contrary evidence.

Common sense dictates—and many employment lawyers' trial experience shows—that age discrimination cases have broader jury appeal than any other kind of discrimination suit.

While candor like this is rare, management decision-makers who would never sink to the crassness of racist or sexist slurs can be blithe about leaving paper trails of ageist comments. In *Morgan v. New York Life Insurance Co.*, the court, in upholding a state law age discrimination verdict, quoted a senior vice president's memo about a managing partner who had been forced into retirement:

> His last three years have by far been the best of his career and at the age of 64, he is still exuberant about the life insurance industry. As I have told you many times, Jim is a manager from the past. I have remained a big supporter of his but also recognize that he is not a manager for the future. Change has been so rapid in our industry that time has passed Jim by.[11]

Other statements by supervisors that have provided direct evidence of discriminatory intent include the following: It was a "good time 'to get rid of some of the older mediocre managers,'" the employee's "'accounts could use some younger blood,'" and the employee was "'an old fuddy-duddy.'"[12]

The primary method of proving age discrimination (or any other kind), however, is using the *McDonnell Douglas/Burdine* circumstantial evidence model.[13] Distilled to its essence, this model involves setting out a series of events that makes the judge and jurors ask, "What's wrong with this picture?" The plaintiff, who must first prove that he or she is part of the protected class (age 40 or older), is "Exhibit One."

In a case in which a younger employee was favored over the plaintiff, that younger employee can also be over 40 but must be "substantially younger" than the plaintiff.[14] "Substantially," however, can be as little as three years.[15] Under the ADEA, there is no such thing as "reverse age discrimination"; there is no prohibition against favoring older workers over younger ones.[16]

Next, the plaintiff must prove that he or she is qualified for the job, which at this stage means "minimally qualified," and this can be inferred if the plaintiff is in a job that he or she has held for a long while.[17]

The plaintiff also must prove that the employer took some adverse employment action. While adverse job actions are generally concrete—failure to hire, termination or layoff, demotion, or denial of promotion—they also include "a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation."[18] Constructive discharge—making an older worker's life so miserable that no reasonable person would put up with it—provides as valid a claim as an actual firing.[19]

Finally, the plaintiff must show some reason for believing that his or her age

William R. Amlong *and* Karen Coolman Amlong *are the shareholders in the Amlong Firm in Fort Lauderdale, Florida.*

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"made a difference"—for example, replacement by a substantially younger employee,[20] lighter discipline given to substantially younger employees for the same offense, or a statistical pattern of treating substantially younger employees more favorably.[21]

Sometimes, the "age made a difference" link can be established through the words of either sympathetic or unwitting managers. Such a statement, in the words of Federal Rule of Evidence 801(d)(2)(D), is one made "by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship."

Management decision-makers who would never sink to the crassness of making racist or sexist slurs can be blithe about leaving paper trails of ageist comments in memoranda and e-mails.

In one case, for example, the court admitted the plaintiff's testimony that his manager said that "there is a feeling in New York that, with the arrival of a new publisher, the people we have in their 60s will probably be replaced."[22] In another, the court allowed the plaintiff to testify about what his supervisor told him during a personnel evaluation: "[T]he company frowned on older people" and, therefore, "my raises wouldn't be as high as he would like them to be."[23]

There need be nothing "rigid, mechanized, or ritualistic" about how one makes a prima facie case through circumstantial evidence.[24] The burden of making out a prima facie case is not meant to be "onerous."[25] And, once it is done, "establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee."[26]

To rebut that presumption, the employer must articulate, through admissible evidence, a legitimate, nondiscriminatory reason for its action.[27] Although the employer is not required to prove the reason, generalities or off-point reasons will not suffice.[28]

While subjective reasons may be acceptable, they must be the kind on which the plaintiff's lawyer could cross-examine a witness. For example, while a blanket "I didn't like his appearance" is insufficient, management could prevail—or at least get by a directed verdict—based on statements like "I did not like his appearance because his hair was uncombed and he had dandruff all over his shoulders," or "because he had his nose pierced," or "because his fingernails were dirty," or "because he came to the interview wearing short pants and a T-shirt."[29]

Assuming that such a reason is presented, it then becomes the plaintiff's burden to show that the reason is nothing other than a pretext for discrimination. One way to do this is to explain that the reason given is simply not true by showing that the older worker is being measured by a different yardstick than younger workers.

If an over-40 pharmaceutical representative, for example, was fired for not meeting her quota, you might show the jury how the 20- and 30-somethings who had lower quotas did not meet even those—and yet did not get fired. Scour corporate e-mails and Web pages for such foot-in-mouth statements as the announcement in *Morgan* of "A New Generation of Agency Field Management Leaders."[30]

Present side-by-side charts of the plaintiff's qualifications and experience compared to those of the younger worker who got the job. Use Federal Rule of Evidence 404(b), or its state equivalent, to show how the company shoved other older workers out the door with similar flimsy excuses. Ask each person involved in the employment decision how, why, and when it was made—and then present all the different answers.

A third, less common, approach for proving age discrimination uses statistical analyses of the workforce to reveal a pattern of treating older workers worse than younger ones. This method is generally coupled with one of the two evidentiary approaches discussed above.[31]

"[S]tatistics often demonstrate more than the testimony of many witnesses" and can be used to establish a prima facie case of intentional discrimination.[32] And when it comes to showing that an employer's explanation is pretextual, as the Supreme Court noted in *McDonnell Douglas*, "statistics as to [an employer's] employment policy and practice may be helpful to a determination of whether [a defendant employer's particular act] conformed to a general pattern of discrimination . . . ."[33]

Statistics are particularly helpful in establishing whether a facially neutral policy has a disproportionate impact on older workers to the point of being discriminatory, which is actionable under the ADEA for post-hiring employment actions.[34] These so-called "disparate impact" cases—which put aside the issue of whether an employer intended to discriminate against workers because of their age—look not at the motivation of the employer, but rather at the impact on the older worker.[35]

While "identifying a specific practice is not a trivial burden,"[36] once an employee does so, it becomes—under a case decided June 19 by the U.S. Supreme Court concerning a reduction-in-force at a nuclear-submarine shipyard—the burden of the employer not only to produce evidence that the challenged action was taken for a "reasonable factor other than age (RFOA)," but also to prove it.[37]

In addition to clarifying that an RFOA is an affirmative defense that is an employer's burden to plead and prove, the Court last term handed plaintiffs a potentially powerful weapon for proving a corporate culture of age bias by requiring that trial judges make a case-by-case evaluation, under Federal Rules of Evidence 401 and 403, of testimony concerning how other supervisors within a

company treat other, unrelated, older workers.[38]

Rather than being a fourth approach to proving discrimination, the use of corporate-culture evidence is simply an expansive use of Rule 404(b) to show how the corporation organically treats any particular class of employees—in this case, older ones. This evidence would be used to put the icing on the direct-, circumstantial-, or statistical-evidence case. Similarly, social psychology experts can testify about stereotyping of older workers,[39] just as they have been testifying for years about how women may be stereotyped in the workplace.[40]

The Rule 801(d)(2)(D) statements by managers, even if they do not rise to the level of direct evidence, are sufficient to raise a jury question about whether management witnesses are testifying truthfully concerning their asserted reasons for failing to hire or promote, demoting, or terminating an older worker. Be on the lookout for politically correct, but nonetheless ageist, managers sugarcoating their bias with such code words as "overqualified."[41]

If a jury believes that management is lying about the "legitimate, nondiscriminatory reason" for its action, it is free to infer that the real reason was age discrimination.[42]

A bonus for showing that management witnesses lied about their reason for treating an age discrimination plaintiff badly is simple: Lying also could support an inference of a willful violation—and this leads to the issue of damages.

Damages

In states that do not have separate statutes outlawing employment discrimination and providing for compensatory damages, plaintiffs are limited to back wages and benefits and reinstatement (the preferred remedy)[43] or front pay (the defense bar is generally effective in arguing that it should not be a "windfall" to a plaintiff for whom reinstatement is not feasible).[44] While back pay always has been a jury question under the ADEA, which incorporates the remedies of the Fair

Prepare your employment discrimination case with documents from the AAJ Exchange

The AAJ Exchange has many resources to help members assess and prepare cases involving the representation of older workers, including court documents on age discrimination, an employment discrimination litigation packet, and education speaker papers. For more information, visit www.justice. org/exchange or call the Exchange at (800) 344-3023.

Court documents

Griffin v. Kraft General Foods, Inc. The plaintiffs' appellate brief in a case holding a waiver of ADEA rights signed in exchange for severance benefits is not knowing and voluntary where an employer closing a plant fails to provide age-protected employees with the ages of similar employees at ongoing plants. (No. LR2597)

Hyman v. First Union Corp. The court's memorandum opinion and plaintiff's complaint, motion for leave to file the complaint, and memorandum of points and authorities in a case alleging age and race discrimination. (No. LR3200)

Mody v. General Electric Co. The defendant's memoranda supporting its motions for summary judgment and judgment as a matter of law, and the court's orders on those motions, in this case alleging an older Indian American engineer was fired in retaliation for complaining of discrimination. (No. LR4425)

Reeves v. Sanderson Plumbing Products. AAJ's amicus curiae brief in a case holding that a jury may infer unlawful discrimination from an employee's prima facie case, combined with sufficient evidence that an employer's proffered reasons for an adverse employment action are false. (No. LR3592)

Sutera v. Schering Corp. The parties' appellate briefs in a case holding that a court must allow a plaintiff to discover information relevant to showing that the defendant's proffered reason for the employment action was pretextual before granting the defendant's summary judgment motion. (No. LR2681)

Vinson v. Equity Resources Management. The plaintiff's complaint, proposed voir dire, and brief opposing summary judgment, and the court's order denying summary judgment, in a case alleging that an apartment building owner fired its manager in violation of the ADEA. (No. LR3066)

Wells v. Columbia Gas of Kentucky, Inc. The plaintiff's amended complaint, memorandum in support of a motion for attorney fees and litigation expenses, and memoranda opposing the defendants' motions for summary judgment, new trial, and judgment n.o.v. in a case alleging race discrimination where an older worker was fired after a customer accused him of sexual harassment. (No. LR3781)

Litigation packet

Employment Discrimination Law. This packet offers AAJ plaintiff lawyers key documents to defeat the often-critical summary judgment motion. It contains complaints and discovery requests from various employment discrimination cases, including age, disability, and sex-based discrimination; summary judgment motions and briefs in opposition; statutory and U.S. Supreme Court case summaries outlining the changing role of a Rule 56 summary judgment motion and its application in employment rights cases; Equal Employment Opportunity Commission materials outlining various charges of discrimination and information detailing how to file a complaint; and other court documents on wrongful termination and denial of COBRA benefits. ■

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Labor Standards Act,[45] the court generally decides front pay as a matter of equitable relief.[46]

Regardless of whether the judge or jury decides to award front pay, a plaintiff will need to quantify both back and front pay, as well as explain why he or she has not obtained a replacement job (if that is the case) or likely will not get one anytime soon. Experts, such as forensic accountants, vocational counselors, and labor economists, need to make this determination. Your experts' credentials and methodology must comply with the *Daubert/Kumho Tire*[47] strictures in federal court and with either *Daubert/Kumho Tire* or *Frye*[48] in state court, depending on the jurisdiction.

Future earnings also play an important role in age discrimination cases. You should become familiar with whether your jurisdiction will permit the present value of any future earnings to be calculated using the "total offset" method, which accounts for inflation by not reducing the future income stream, or the below-market discount approach, which results in lower awards.[49]

Adding state law claims to age cases is an important strategic consideration. If a case is to be filed in a state that allows compensatory damages, adding a supplemental-jurisdiction state law claim to an action brought in federal court under the ADEA would allow you to add a claim for emotional distress, if appropriate. It would also make relevant testimony about the mental anguish that the plaintiff endured after being rejected by his or her employer.

Another plus to state law claims is that their addition can destroy diversity if the plaintiff decides to go only with state law discrimination claims and allow trial in state court.[50] This is especially true if the state law claims include those under which the plaintiff can add individual supervisors—for example, defamation for a false personnel evaluation or tortious interference by a manager whose animus against older workers, rather than a desire to legitimately serve the company's needs, guided him or her to take the employment action.[51]

If a state employment discrimination statute has been interpreted as only permitting the naming of the actual corporate employer as a defendant,[52] then the only way to inject a nondiverse party into the action is to name an individual supervisor who has defamed the plaintiff, has tortiously interfered with his or her employment, or, in a sexual harassment case, has committed a battery against the plaintiff. This provides a nondiverse individual defendant and keeps a case in state court.[53]

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If you can prove that the defendant willfully violated the ADEA, this may entitle the plaintiff to a doubling of the back pay damages.[54] Likewise, if pendent state law claims permit punitive damages, a jury's disbelief of the defendant's explanation could translate into a belief that the defense witnesses' lies merited punitive damages.[55]

Finally, the charge conference in an age case is critical, especially in state courts, where the judge may not be as experienced in instructing juries on federal causes of action and where he or she may be swayed by arguments that commercially produced, defense-oriented jury instructions correctly state the law. Use the pattern jury instructions from the federal appellate circuit in which the case is being tried.

The federal pattern instructions—unlike the instructions defendants typically submit, cobbled together from case law favorable to the defense—are balanced. They stress that a plaintiff, even in the absence of direct evidence, is not required to show that age was the employer's sole or exclusive reason for the employment decision, but only that it was "a determining consideration that made a difference in the defendant's decision."[56]

The no-excuses starting point for this entire process—unless you practice in a state such as New Jersey that does not have an administrative exhaustion requirement to bring a civil action under its discrimination law[57]—is the filing of a Charge of Discrimination (COD). The charge is filed with the EEOC within 180 days in a state that has no fair employment practices agency (FEPA), or with either the EEOC or the FEPA within 300 days in a state that does have such an agency.[58] Some states may have longer limitations periods.[59]

The COD must identify the defendant and generally set forth the discriminatory incident about which the employee is complaining. While the COD need not list every detail of the discrimination, it must contain enough details on which the EEOC or FEPA could be expected to base an investigation of the overall situation.[60]

A charge alleging pay discrimination would not necessarily cover a subsequent termination, but generally within employment law, a retaliatory firing that grows out of an earlier COD would not require a second COD, since the very nature of the retaliatory firing would clearly make the second charge futile as a vehicle for conciliation.[61]

Age discrimination is as wrong as any other kind of discrimination, and as irrational. It judges workers not for what they can do but for something they cannot do: roll back time.

As the number of baby boomers continues to surge, there are likely to be more managers who, like Zamora's college dean, want somebody younger. When that happens, there needs to be a price tag. The employee advocate's job is to ensure that the price is high enough to fully compensate the older worker or to discourage discrimination in the future—or, in the best case scenario, to do both. ■

Notes

1. *Zamora v. Fla. A. U. Bd. of Trustees*, No. 502004CA004311XXMBAO (Fla., Palm Beach Co. Cir. 2006).
2. 29 U.S.C. §§621-634 (2000).
3. EEOC, *Age Discrimination in Employment Act (ADEA) Charges, FY 1997-FY 2007*, www.eeoc.gov/stats/adea.html.
4. *Goodbye, Mr. Chips* (MGM 1939) (motion picture).
5. *See e.g. Tittle v. Enron Corp. (In re Enron Corp. Secs. Derivative & ERISA Litig.)*, 284 F. Supp. 2d 511, 669 (S.D. Tex. 2003).
6. *See e.g.* Alaska Stat. §8.80.200 (Lexis 2008); Mass. Gen. Laws ch. 151B, §4(1B) (2008); Ohio Rev. Code Ann. §4112.01-.02 (West 2008); Penn. Stat. Ann. tit. 43, §§951-955 (West 2008).
7. Raymond F. Gregory, *Age Discrimination in the American Workplace: Old at a Young Age* 220-21 (Rutgers U. Press 2001).
8. *See e.g. Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926 (6th Cir. 1999).
9. *See e.g. Costa v. Desert Palace, Inc.*, 299 F.3d 838, 858 (9th Cir. 2002) (*en banc*), *aff'd*, 539 U.S. 90 (2003).
10. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-45 (1989).
11. *Morgan v. N.Y. Life Ins. Co.*, 507 F. Supp. 2d 808, 820 (N.D. Ohio 2007).
12. *Id.* (quoting *Morgan v. Ark. Gazette*, 897 F.2d 945, 951 (8th Cir. 1990)).
13. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Tex. Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).
14. *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 313 (1996).
15. *See e.g. Carter v. DecisionOne Corp. ex rel. C.T. Corp. Sys.*, 122 F.3d 997, 1003 (11th Cir. 1997) (per curiam).
16. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004).
17. *See e.g. Damon v. Fleming Supermkts., Inc.*, 196 F.3d 1354, 1360 (11th Cir. 1999).
18. *Crady v. Liberty Natl. Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993).
19. *See e.g. Sheridan v. E.I. Dupont de Nemours & Co.*, 100 F.3d 1061, 1075 (3d Cir. 1996) (en banc) (listing various employment actions that jury could view as constructive discharge of employee).
20. *See e.g. Carter*, 122 F.3d at 1003-04.
21. *Pace v. S. Ry. Sys.*, 701 F.2d 1383, 1388 (11th Cir. 1983).
22. *Hybert v. Hearst Corp.*, 900 F.2d 1050, 1053 (7th Cir. 1990).
23. *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1216 (3d Cir. 1995).
24. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).
25. *Burdine*, 450 U.S. at 253.
26. *Id.* at 254.
27. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993).
28. *See e.g. Baggett v. Program Resources, Inc.*, 806 F.2d 178, 180-81 (8th Cir. 1986).
29. *Chapman v. AI Transp.*, 229 F.3d 1012, 1034 (11th Cir. 2000).
30. 507 F. Supp. 2d at 820.
31. *See. e.g. Intl. Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 337-38 (1977).
32. *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245, 247 (10th Cir. 1970).
33. *McDonnell Douglas*, 411 U.S. at 804-05.
34. *See e.g. Smith v. City of Jackson*, 544 U.S. 228, 236 n. 6 (2005).
35. *Id.*
36. *Meacham v. Knolls Atomic Power Lab.*, 2008 WL 2445207 at *31 (June 19, 2008).
37. *Id.* at *5.
38. *Sprint/United Mgmt. Co. v. Mendelsohn*, 128 S. Ct. 1140 (2008).
39. *See* Todd D. Nelson, *The Young Science of Prejudice against Older Adults: Established Answers and Open Questions about Ageism*, in *Beyond Common Sense: Psychological Science in the Courtroom* 45 (Eugene Borgida & Susan T. Fiske eds., Blackwell Publg. 2008).
40. *See e.g. Price Waterhouse*, 490 U.S. 228.
41. *See Binder v. Long Is. Lighting Co.*, 933 F.2d 187, 192-93 (2d Cir. 1991).
42. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147-48 (2000).
43. *See e.g. Palasota v. Haggar Clothing Co.*, 499 F.3d 474, 489 (5th Cir. 2007).
44. *See e.g. id.* at 488.
45. 29 U.S.C. §216 (2000).
46. *See e.g. Curtis v. Elecs. & Space Corp.*, 113 F.3d 1498, 1503-04 (8th Cir. 1997).
47. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).
48. *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923).
49. *See Beaulieu v. Elliott*, 434 P.2d 665, 671-72 (Alaska 1967).
50. *See e.g. Rudnick v. Sears, Roebuck & Co.*, 358 F. Supp. 2d 1201 (S.D. Fla. 2005).
51. *See generally* Jane M. Draper, Annotation, *Defamation: Publication by Intracorporate Communication of Employee's Evaluation*, 47 A.L.R.4th 674 (1986).
52. *See e.g. Patterson v. Consumer Debt Mgmt. & Educ., Inc.*, 975 So. 2d 1290, 1292 (Fla. App. 2008) (holding that the Florida Civil Rights Act "does not impose liability on individual employees/supervisors").
53. *See e.g. Rudnick*, 358 F. Supp. 2d 1201.
54. *See Tevelson v. Life & Health Ins. Co.*, 643 F. Supp. 779, 784 (E.D. Pa. 1986), *aff'd*, 817 F.2d 753 (3d Cir. 1987).
55. *See e.g. Hardin v. Caterpillar, Inc.*, 227 F.3d 268, 271-72 (5th Cir. 2000).
56. 11th Cir. Pattern Jury Instr. 1.4.1 (2005) (Age Discrimination in Empl. Act, 29 U.S.C. §§621-634).
57. *See* N.J. Stat. Ann. §10:5-13 (West 2008).
58. 29 U.S.C. §626(d) (2000).
59. Fla. Stat. §760.11(1) (2007).
60. *See e.g. Sanchez v. Stan. Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970); *Marshall v. Fed. Express Corp.*, 130 F.3d 1095, 1098 (D.C. Cir. 1997).
61. *See e.g. Gupta v. E. Tex. St. U.*, 654 F.2d 411, 413-14 (5th Cir. 1981).

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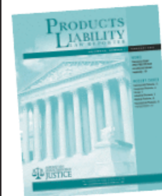

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