

11.0 Introductory Comment

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, protects workers aged forty or older from employment discrimination on the basis of their age. The Act applies to private employers who have twenty or more employees for each working day. The Act also applies to States and political subdivisions of a State, regardless of the number of employees who work in that subdivision. 29 U.S.C. § 630(b); *Mount Lemmon Fire Dist. v. Guido*, 586 U.S. 1 (2018).

Because of the numerous similarities between the ADEA and Title VII, the instructions in this chapter generally mirror the Committee’s organization of Title VII instructions by theory of liability, as used in Chapter 10 (Civil Rights—Title VII—Employment Discrimination; Harassment; Retaliation). As with Title VII, the ADEA recognizes claims under both disparate treatment and disparate impact theories of liability. *See Smith v. City of Jackson*, 544 U.S. 228, 231-34 (2005); *see also Sheppard v. David Evans & Assoc.*, 694 F.3d 1045, 1049 & n.1 (9th Cir. 2012). The Committee recommends that the court first identify the theory under which the plaintiff has asserted an ADEA claim, and then refer to the relevant subchapter for applicable jury instructions.

In some cases of employment discrimination under Title VII (*i.e.*, when the employer is a public entity), the plaintiff has the option of suing under 42 U.S.C. § 1983. However, the ADEA is the exclusive remedy for a federal age discrimination claim. *See Ahlmeyer v. Nev. Sys. of Higher Educ.*, 555 F.3d 1051, 1056 (9th Cir. 2009).

“The ADEA and Title VII share common substantive features and also a common purpose: ‘the elimination of discrimination in the workplace.’” *McKennon v. Nashville Banner Publ’g Co.*, 513 U.S. 352, 358 (1995) (quoting *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979)). Further, certain “language in the ADEA . . . was ‘derived in *haec verba* from Title VII.’” *Smith*, 544 U.S. at 234. On issues when the ADEA and Title VII are in substantial accord, appropriately modified Title VII instructions should be given, as cross-referenced in this chapter. *See* Comments to Instruction 11.2 (Age Discrimination—Hostile Work Environment); Instruction 11.3 (Age Discrimination—Retaliation); Instruction 11.5 (Age Discrimination—Definition of Common Terms); Instruction 11.7 (Age Discrimination—Defenses—Bona Fide Occupational Qualification); Instruction 11.8 (Age Discrimination—Defenses—Bona Fide Seniority System); Instruction 11.9 (Age Discrimination—Defenses—After-Acquired Evidence).

The ADEA and Title VII are not identical. A brief summary of their differences is set forth below.

Mixed Motives: A Title VII plaintiff need only prove that a protected status was “a motivating factor” for an adverse employment action. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003). However, “textual differences between Title VII and the ADEA . . . prevent . .

. [application of] *Desert Palace* to federal age discrimination claims.” *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 & n.2 (2009). In *Gross*, the Court held that “a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the ‘but-for’ cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.” *Id.* at 180. Thus, it was reversible error to instruct the jury using Title VII’s “motivating factor” formulation. *Id.* at 170-71. Earlier Ninth Circuit cases applying the same standards to cases proceeding on disparate treatment or retaliation theories under the two statutes must now be read carefully in light of *Gross*. See generally *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1295 (9th Cir. 2000) (“The analysis under Title VII is the same as that under ADEA.”); *Mustafa v. Clark Cnty Sch. Dist.*, 157 F.3d 1169, 1180 n.11 (9th Cir. 1998) (“This Court applies the same standards to disparate treatment claims pursuant to Title VII [and] the Age Discrimination in Employment Act”); *Stillwell v. City of Williams*, 831 F.3d 1234, 1246-47 (9th Cir. 2016) (“Section 623(d) is the ADEA equivalent of the anti-retaliation provision of Title VII.”). See Instruction 11.2 (Age Discrimination—Hostile Work Environment); Instruction 11.3 (Age Discrimination—Retaliation).

Disparate Impact: After longstanding uncertainty on the issue, *Smith* held that an ADEA claim may be predicated on a disparate impact theory. 544 U.S. at 240. However, the Court held that because the Civil Rights Act of 1991 did not amend the ADEA, the pre-1991 heightened disparate impact standard applies. *Id.* (citing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)). Thus, to prove a disparate impact claim, plaintiffs must identify a “specific test, requirement, or practice . . . that has an adverse impact on older workers.” *Id.* at 241; see also *Meacham v. Knolls Atomic Power Lab’y.*, 554 U.S. 84, 100 (2008); Instruction 11.4 (Age Discrimination—Disparate Impact—Elements).

Defenses: Unlike race or gender, certain business costs correlate directly with age.

Thus, the ADEA permits an affirmative defense for certain actions related to the cost of noncompensation employment benefits. 29 U.S.C. § 623(f)(2)(B). See Instruction 11.10 (Age Discrimination—Defenses—Bona Fide Employee Benefit Plan).

The ADEA’s bona fide seniority system defense imposes the additional requirement, not found in the Title VII context, that the seniority system may not “require or permit . . . involuntary retirement[.]” 29 U.S.C. § 623(f)(2)(A). See Instruction 11.8 (Age Discrimination—Defenses—Bona Fide Seniority System).

Generally, in a disparate impact case, the ADEA provides a broad defense when the employer’s action is based on a reasonable factor other than age. 29 U.S.C. § 623(f)(1). This is substantially broader than the “business necessity” defense afforded by Title VII. See *Smith*, 544 U.S. at 243 (“Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected

class, the [reasonable factor other than age] inquiry includes no such requirement.”). See Instruction 11.11 (Age Discrimination—Defenses—Reasonable Factor Other than Age).

The First Amendment’s religion clauses give rise to an affirmative defense that “bar[s] the government from interfering with the decision of a religious group to fire one of its ministers.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 181, 195 n.4 (2012) (applying this defense to an ADA retaliation claim); see also *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 738, 756 (2020) (foreclosing discrimination claims by employees of religious organizations under the ADEA and the ADA).

Remedies: The remedies provision in the ADEA is borrowed from a wholly different body of law—the Fair Labor Standards Act (FLSA). See *Lorillard v. Pons*, 434 U.S. 575, 582 (1978) (“[Other than] those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA.”). This creates substantial differences in damages instructions. See Comment to Instruction 11.13 (Age Discrimination—Damages—Back Pay—Mitigation). Thus, the ADEA provides the FLSA’s remedies of back pay, liquidated damages and equitable relief. See 29 U.S.C. § 216. Additionally, front pay may be awarded in lieu of reinstatement if the court finds that reinstatement is not a feasible remedy. *Cassino v. Reichhold Chems., Inc.*, 817 F.2d 1338, 1347 (9th Cir. 1987) (ADEA case).

The ADEA does not provide for nonwage compensatory damages, such as damages for emotional distress, or for punitive damages. See *Ahlmeier*, 555 F.3d at 1059 (“Compensatory damages for pain and suffering and punitive damages are not available under the ADEA”); *Cancellier v. Federated Dep’t Stores*, 672 F.2d 1312, 1317 (9th Cir. 1982) (noting punitive damages are not available); *Naton v. Bank of Cal.*, 649 F.2d 691, 698 (9th Cir. 1981) (noting nonwage compensatory damages are not available); compare 42 U.S.C. § 1981a(a)(1) (permitting the recovery of compensatory and punitive damages under Title VII). See Instruction 11.13 (Age Discrimination—Damages—Back Pay—Mitigation); Instruction 11.14 (Age Discrimination—Damages—Willful Discrimination—Liquidated Damages).

Because the ADEA’s remedies’ analog is the FLSA, not Title VII, the ADEA provides for a jury trial on the issue of back pay. See *Lorillard*, 434 U.S. at 582-84; compare *Lutz v. Glendale Union High Sch.*, 403 F.3d 1061, 1067-68 (9th Cir. 2005) (holding plaintiff not entitled to jury determination of Title VII back pay award). The question of front pay is an issue for either the court or the jury. See *Traxler v. Multnomah County*, 596 F.3d 1007, 1009-14 (9th Cir. 2010); see also *Cassino*, 817 F.2d at 1346-48 (9th Cir. 1987).

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