“We Aren’t Getting Any Younger -- Age Discrimination:
School District Obligations and Teachers Rights”

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INTRODUCTION

Teachers are not getting any younger. Indeed, one study has shown that the median age of teachers across the United States has risen to and ranges from 40.5 years of age in Kentucky to 49 years of age in West Virginia.² Notably, those median ages are above the minimum age -- 40 years of age – that places teachers and other employees in a protected class under the Age Discrimination in Employment Act (ADEA). School district administrators are often confronted with decisions and issues that, in some form, involve an employee’s age and therefore fall within the purview of the ADEA. While the ADEA has many facets, and while attempting to understand comprehend its statutory requirements can appear to be a daunting endeavor at first glance, this Paper is one educator’s attempt to compile a non-exhaustive, but educator-relevant, summary of how the ADEA applies in the K-12 school setting.

It is critical that administrators and employees be able to identify issues under, and understand the basic legal requirements of, the ADEA. This Paper is intended to advance school district administrators’ and educators’ basic understanding concerning ADEA issues, and the requirements governing such issues, that may arise in K-12 schools. To this end, this Paper will discuss the requirements of the ADEA as they apply to school district obligations and educator employee rights in the context of K-12 schools.³ Part I of the Paper will summarize the purpose and scope of the ADEA. Part II will discuss how the ADEA is regulated and enforced, focusing primarily on enforcement by the Equal Employment Opportunity Commission (EEOC), regulation of age discrimination under state law, and principles of state sovereign immunity. Part III will focus on the ADEA’s requirements, discussing and analyzing how courts have applied the ADEA

³ As a shorthand reference, the Paper will often use the term “teacher” to speak generically about school district employees. In most instances, the term is intended to encompass all certificated school district employees, as well as educational support personnel.
in the K-12 educational setting concerning posting of job openings and hiring, numerous theories of liability and defenses, early retirement plans and employee waiver of ADEA rights.

DISCUSSION

I. Overview of the Age Discrimination in Employment Act

The ADEA protects employees and job applicants who are forty years of age or older from employment discrimination based on age. More specifically, the ADEA makes it unlawful to harass or discriminate based on age “with respect to any term, condition, or privilege of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training.” Along with certain private employers, employment agencies, and labor organizations, the ADEA applies to federal, state, and local government employers, including school districts. The purpose of the ADEA is to promote the employment of older persons and to prohibit arbitrary age discrimination in the work place. However, the ADEA does not prohibit an employer from favoring an older worker over a younger worker; this is true even if both workers are forty years of age or older.

II. Enforcement, Regulation, and Relation to State Law

The United States Equal Employment Opportunity Commission (EEOC) is charged with administering and enforcing the ADEA. The EEOC accepts individual complaints, initiates

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investigations, and resolves disputes by either attempting to conciliate between the employer and employee in an effort to recover monetary and/or non-monetary relief for the employee, or by bringing a civil lawsuit against the employer to protect the rights of the employee and the interests of the public as a whole.\(^\text{10}\)

States may enact anti-age discrimination laws as well, which may be, and usually are, more stringent and employee favoring than the ADEA. However, in accordance with preemption principles and the Supremacy Clause of Article VI of the United States Constitution, a state’s anti-age discrimination laws must not conflict with the provisions or hinder the purpose of the ADEA.\(^\text{11}\)

Further, upon the commencement of an action brought under the ADEA, the ADEA action supersedes any action brought under state law.\(^\text{12}\)

Especially pertinent to the ADEA’s applicability to state employees is the concept of state sovereign immunity. The Eleventh Amendment bars private suits against a non-consenting state in federal court.\(^\text{13}\) However, Congress can abrogate a state’s sovereign immunity by (1) unequivocally expressing its intent to abrogate the immunity, and (2) acting pursuant to a valid exercise of power.\(^\text{14}\) In *Kimel v. Florida Bd. of Regents*,\(^\text{15}\) the Supreme Court held that, although the ADEA contains a clear intent to abrogate a state’s immunity (thus meeting the first requirement for abrogation), the attempted abrogation exceeded Congress’s authority under the Fourteenth Amendment – and thus did not meet the second requirement for abrogation.\(^\text{16}\) Therefore, unless the state specifically abrogates its sovereign immunity, state employees cannot seek monetary

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\(^{11}\) See *EEOC v. Com. of Mass.*, 987 F.2d 64, 74 (1st Cir. 1993) (“[W]e hold that [state statute] . . . is preempted by[] the ADEA because it stands in direct conflict with § 4(a) of the ADEA.”).


\(^{13}\) U.S. CONST. amend. XI.


\(^{15}\) 528 U.S. 91 (2000).

\(^{16}\) *Id.* at 91.
damages from state employers in federal court for age discrimination under the ADEA; instead, state employees are limited to state law remedies for age discrimination.\textsuperscript{17} Despite the Supreme Court’s ruling in \textit{Kimel}, courts have generally found that the decision does not affect suits brought by private parties against school districts because school districts are generally found to not be arms of the state.\textsuperscript{18} Therefore, school districts generally fall outside the privy of the Eleventh Amendment’s sovereign immunity protection, and school district employees are able to bring private suits against the school district for ADEA violations.

\textbf{III. Prohibited Employer Conduct & Employee Waiver}

\textbf{A. Age Qualifications in Job Notices & Hiring}

Under the ADEA, it is generally unlawful for an employer to specify age preferences or age limitations in job notices or job advertisements.\textsuperscript{19} This prohibition extends beyond merely explicit age qualifications and includes terms or phrases that implicitly limit job candidates based on age.\textsuperscript{20} In determining whether a term or phrase limits candidates based on age, “the discriminatory effect of an advertisement is determined not by ‘trigger words’ but rather by its context.”\textsuperscript{21} For example, where an employment agency used the phrase “recent college grads, recent high school grads, and the like” in a job solicitation, the court found that the phrase violated the ADEA in some situations and not in others, based on the differing contexts in which the phrase was used.\textsuperscript{22} Specifically, the court found that the phrase was permitted when the purpose of the advertisement was to serve as a general invitation to the specific class of recent graduates to use

\begin{itemize}
\item \textsuperscript{17} Howard C. Eglit, \textit{State and Local Governments—Kimel and its Aftermath}, 1 AGE DISCRIMINATION § 3:77 (2D ED.) (May 2018 Update).
\item \textsuperscript{18} See, e.g., Woods v. Rondout Valley Cent. Sch. Dist. Bd of Educ., 466 F.3d 232, 251 (2d Cir. 2006), Narin v. Lower Merion Sch. Dist., 206 F.3d 323, 331 n.6 (3rd Cir. 2000), and Eason v. Clark County Sch. Dist., 303 F.3d 1137, 1144 (9th Cir. 2002).
\item \textsuperscript{19} 29 U.S.C.A. § 623(e) (1967).
\item \textsuperscript{20} See Hodgson v. Approved Personnel Serv., Inc., 529 F.2d 760, 765 (4th Cir. 1975).
\item \textsuperscript{21} Id.
\item \textsuperscript{22} Id. at 765–66.
\end{itemize}
the services the agency offers.\textsuperscript{23} However, where the phrase was used in the solicitation of a particular job, the court found such use “violates the Act since it is not merely informational to the job seeker but operates to discourage the older job hunter from seeking that particular job and denies them an actual job opportunity[,]” and since “there is an implication that persons older than the normal ‘recent graduate’ need not apply.”\textsuperscript{24}

**B. Age Discrimination Claims under the ADEA**

Employees may allege age discrimination claims against employers under the ADEA based on a number of theories. Those theories include claims for age discrimination based on disparate treatment, disparate impact, and pattern and practice discrimination. Employers may defend against these claims – either by rebutting or disproving the employee’s case or by alleging and proving affirmative defenses that any alleged age discrimination was based on a reasonable factor other than age (“RFOA”). Employees may also allege age discrimination claims based on hostile work environment and retaliation. This paper will discuss each claim and/or defense in turn.\textsuperscript{25}

1. **Disparate Treatment Claims**

It is a violation of the ADEA for an employer to intentionally terminate an employee, or otherwise intentionally discriminate against an employee or applicant, based on his or her age.\textsuperscript{26} To prove that an employer terminated an employee because of the employee’s age, the employee must show that he or she would not have been terminated “but for” his or her age.\textsuperscript{27} To make this

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\textsuperscript{23} *Id.* at 766.

\textsuperscript{24} *Id.*

\textsuperscript{25} A number of states prohibit age discrimination in employment as a matter of state statutory law. See, e.g., Idaho Human Rights Act, Idaho Code Section 67-5909 (“It shall be a prohibited act to discriminate against a person because of, or on the basis of, age …”). This Paper, however, will limit its discussion to age discrimination claims under federal statutory law, i.e. the ADEA.

\textsuperscript{26} 29 U.S.C.A. § 623(a)(1) (1967). Although certain sections of this paper will focus on the ADEA as it applies to current employees, the ADEA, by its terms, prohibits age discrimination against both employees and potential employees, i.e. job applicants.

\textsuperscript{27} Fisher v. Transco Servs.-Milwaukee, Inc., 979 F.2d 1239, 1243 (7th Cir. 1992).
showing, employees can either 1) “meet their burden head on by presenting evidence, direct or circumstantial, that age was the determining factor in their discharge[,]” or 2) “utilize the indirect, burden-shifting method of proof used in Title VII cases.” 28 Under the second method, the indirect burden-shifting method, employees must make a prima facie case by showing (1) they were in the protected class (persons 40 years of age and older), (2) they were doing their jobs well enough to meet their employer's legitimate expectations, (3) they were discharged or demoted or otherwise subject to a material adverse employment action, and (4) the employer sought a replacement for them.” 29 If the employee successfully makes this showing, “the burden of production shifts to [the] employer to articulate a legitimate, nondiscriminatory reason for the discharge.” And “[i]f such an articulation is forthcoming, . . . the burden of production shifts back to the plaintiff to show that the employer's proffered reason is a pretext for discrimination.” 30 Thus, where it appears that the employer had legitimate, nondiscriminatory reasons for the discharge, it may nevertheless be found that those reasons are merely pretextual for an underlying discriminatory purpose.

a. Prima Facie Case and Adverse Employment Action

Courts have held that proving a prima facie case of age discrimination under a disparate treatment theory is typically “easily made out,” 31 “not onerous” 32 and “is rarely the focus of the ultimate disagreement.” 33 Certainly, proof of termination, discharge or nonrenewal of contract constitute material adverse employment actions sufficient to satisfy that element of the employee’s

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28 Id. (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).
29 Id; see also Ellman v. Hentges, 165 F.3d 31 (Table), 1998 WL 560574, *3 (7th Cir. 1998).
30 Id.
33 Healy, 860 F.2d at 1214 n.1 (“Generally, the focus of age discrimination cases centers around the defendant's articulated legitimate business reasons and the plaintiff's evidence of pretext.”)
primafacie case as part of a disparate treatment claim under the ADEA. However, disputes frequently arise over whether adverse employment consequences short of firing are sufficient to make out a prima facie case of disparate treatment under that same statute.

In *Trachtenberg v. Dept. of Educ. of City of New York*, the district court provided several examples of what kinds of adverse employment consequences will be sufficiently materially adverse -- and which will not -- in terms of making out an employee’s prima facie case of disparate treatment under the ADEA. In *Trachtenberg*, the employee identified a number of consequences that she faced – excessive scrutiny in the workplace, relocation to a windowless, poorly-ventilated office, denial of professional training opportunities, constructive discharge, and poor performance evaluations -- that allegedly resulted due to her disparate treatment by the school district. The district court discussed each in turn, concluding that (1) excessive scrutiny does not constitute a material adverse employment action unless it is accompanied by a decrease in pay or placement on probation, (2) relocation to less than ideal office space meets the same fate, (3) denial of professional training opportunities will likewise be treated the same, unless it causes the employee to lose out on a promotion or other career advancement opportunity, (4) constructive discharge does constitute a material adverse employment action, but only when its requirements have been satisfied, and (5) poor performance evaluations will likewise be sufficiently adverse, if they lead to discharge proceedings or prevent the employee from transferring to another school or performing paid extracurricular/extra duty work.

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36 Id. at 467-469.
37 A constructive discharge will only be proven “when the employer ... deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation.” *Trachtenberg*, 937 F.Supp.2d at 468 (quoting Morris v. Schroder Capital Mgmt. Int'l, 481 F.3d 86, 88 (2d Cir.2007)).
38 *Trachtenberg*, 937 F.Supp. at 469.
In sum, material adverse employment action in an ADEA disparate treatment case need not involve the ultimate employment consequence of termination or firing, although consequences short of that may be treated differently by different courts.

b. Legitimate, Non-discriminatory Reasons for the Adverse Employment Action and Proof of Pretext

i. Legitimate, Nondiscriminatory Reasons

Once a teacher has satisfied his or her prima facie case, a school district is required to demonstrate a legitimate, nondiscriminatory reason for its decision imposing adverse employment consequences on an older worker. Legitimate, nondiscriminatory reasons for taking adverse employment action against an older teacher typically involve issues concerning deficient performance\(^{39}\) or misconduct\(^ {40}\) or school district finances or programmatic changes.\(^ {41}\)

ii. Pretext

Once a school district has offered a legitimate, nondiscriminatory reason for its decision to take adverse employment action against a teacher, the teacher may rebut that reason and prevail in his or her case by showing that the district’s proffered reason is pretextual.

*Schartz v.Unified School Dist. No. 512* \(^ {42}\) is illustrative. There, although the school district claimed a teacher’s discharge was based on five student complaints over a period of nine months, the teacher challenged the reason as merely pretext for an age-based discharge.\(^ {43}\) To prove pretext, the teacher produced affidavits of nine teachers who quit or retired over a ten-year period and who believed they were treated unfairly because of their age, argued that the principal subjected him to


\(^{43}\) *Id.* at 1216.
disciplinary procedures differing from those set out in his employment contract, and pointed to several comments made by the principal referencing other teachers’ ages.\textsuperscript{44} The court noted that the affidavits of the ten teachers was too small of a group to provide reliable statistical results evidencing any significant disparity in the district’s treatment of its employees based on age, that the principal’s comments appeared to be “isolated, stray, and ambiguous remarks,” and that the teacher’s employment contract argument seemed more appropriate for a breach of contract claim but was nonetheless unpersuasive because the contract set forth personal evaluation procedures, not disciplinary procedures.\textsuperscript{45} Thus, the court found that the teacher had “not presented sufficient disturbing procedural irregularities that could imply that age was a motivating factor in [the school district’s] actions.”\textsuperscript{46}

Conversely, in \textit{Stennett v. Tupelo Public School Dist.},\textsuperscript{47} an older teacher alleged that a school district’s failure to hire her to seven different positions for the stated reason that each younger teacher hired for each position was more qualified was pretextual.\textsuperscript{48} Specifically, to prove that the school district’s reasons were unworthy of belief, the teacher presented evidence showing that (a) she possessed comparatively exemplary qualifications for the jobs in question; (b) the school district failed to even interview her for five of the seven positions notwithstanding those exemplary qualifications; (c) the school district relied upon reasons that were peripheral to the job duties or subjective in nature for some of the positions in question; and (d) the school district failed to re-hire on a full-time basis the other three oldest employees at one of its schools.\textsuperscript{49} The Court of Appeals, after conducting an exhaustive analysis of the teacher’s evidence, concluded that, at the

\textsuperscript{44} \textit{Id.} at 1216-18.
\textsuperscript{45} \textit{Id.}
\textsuperscript{46} \textit{Id.} at 1218.
\textsuperscript{47} 619 Fed. Appx. 310 (5th Cir. 2010).
\textsuperscript{48} \textit{Id.} at 315.
\textsuperscript{49} \textit{Id.} at 318.
very least, she had raised a genuine issue of material fact that the school district’s proffered reasons for not hiring her were a pretext for age discrimination.\(^{50}\)

2. Pattern and Practice Discrimination Claims

A pattern-and-practice discrimination claim under the ADEA is based on “allegations of widespread acts of intentional discrimination against individuals” forty (40) years of age or older.\(^{51}\) To succeed, a plaintiff must “prove more than sporadic acts of discrimination; rather, [he] must establish that intentional discrimination was the defendant's ‘standard operating procedure.’”\(^{52}\)

The case law is sparse in the K-12 setting concerning pattern and practice discrimination claims asserted by teachers against school districts and/or their administrative officials. In Berg v. Bruce,\(^{53}\) a 49-year old teacher’s ADEA pattern and practice discrimination claim alleging that the school district favored younger teachers and forced a number of older teachers to take early retirement was not sufficient to withstand a summary judgment motion by the school district and its officials when the teacher failed to provide specific evidence of age-based animus by the school district concerning her and the other teachers’ claim.\(^{54}\) Conversely, in Bobkoski v. Board of Educ. of Cary Comm. Consolidated School District No. 26,\(^{55}\) the district court held that a 60-year old teacher’s claim that the school district engaged in a pattern and practice of discrimination under the ADEA by placing her and other older teachers on probation (with the eventual and inevitable

\(^{50}\) Id. at 317-321.
\(^{51}\) Robinson v. Metro–North Commuter R.R., 267 F.3d 147, 158 (2d Cir.2001).
\(^{52}\) Id. (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977)).
\(^{53}\) 112 F.3d 322 (8th Cir. 1997).
\(^{54}\) Id. at 327-328.
consequence of termination) was sufficient to withstand a motion to dismiss by the school district.\textsuperscript{56}

3. Disparate Impact Claims and the Reasonable Factor Other than Age Defense

In 2005, the Supreme Court resolved a split of opinion in the lower federal courts, holding that disparate impact, i.e. unintentional discrimination, claims may be brought under the ADEA.\textsuperscript{57} To prove a disparate impact claim under the ADEA, a teacher must show that a “disparate impact results from [a school district’s] facially neutral employment practices which fall more harshly on one particular group [i.e. individuals 40 years old or older,] and cannot be justified by business necessity.\textsuperscript{58} Specifically, to prove a prima facie case of disparate impact discrimination under the ADEA, a teacher “must identify a [school district’s] specific employment practice and offer sufficient statistical evidence which illustrates that the practice in question caused the exclusion of job applicants in the protected class.”\textsuperscript{59} To prove business necessity, an employer is allowed to raise the defense that its allegedly age discriminatory conduct was justified by a reasonable factor other than age (RFOA).\textsuperscript{60}

School districts’ implementation of salary schedule restrictions on the hiring of teachers has led to successful disparate impact claims by teachers against schools and school districts under the ADEA. Thus, in \textit{EEOC v. Francis W. Parker School},\textsuperscript{61} because a salary step system at a K-12

\textsuperscript{56} \textit{Id. at **2-3; see also} Williams v. Hartford Public Schools, 2007 WL 2080554, **4-5 (Conn. Super. Ct. 2007) (where teacher alleged that a school district engaged in a pattern and practice of forcing out older teachers and had raised genuine issue of material fact that he had been constructively discharged for this reason, court denied school district’s motion for summary judgment on the teacher’s ADEA claim).

\textsuperscript{57} Smith v. City of Jackson, Miss., 544 U.S. 228 (2005).

\textsuperscript{58} Wooden v. Board of Educ. of Jefferson County, Ky., 931 F.3d 376, 379 (6th Cir. 1991).

\textsuperscript{59} \textit{Id.} (citing Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656 (1989)).

\textsuperscript{60} 29 U.S.C.A. § 623(f)(1). Section 623(f)(1) also allows an employer to raise a bona fide occupational (BFOQ) defense, i.e. a defense that age discrimination is reasonably necessary to the operation of the employer’s business. This Author is not aware of the BFOQ defense having been raised in the employment context in the K-12 setting.

\textsuperscript{61} 1993 WL 106523 (N.D. Illi. 1993); Gellar v. Markham, 635 F.2d 1027, 1032-1034 (2nd Cir. 1980).
private school correlated years of experience with salary and the school set a maximum salary limit concerning hiring new teachers and did not allow more experienced applicants to work for less, the school did not hire an older teacher.\textsuperscript{52} Based on statistical evidence demonstrating that -- or, at the very least, raising a material factual issue concerning whether -- the salary step system caused the school to disproportionately hire younger applicants, the district court denied the school’s motion for summary judgment.\textsuperscript{63} Likewise, in \textit{Gellar v. Markham},\textsuperscript{64} the Court of Appeals affirmed an award of damages in favor of a 55-year old teacher, concluding that where, under the school board's cost–cutting policy of hiring only teachers below a certain experience level, statistical evidence showed a high correlation between experience and membership in an age group protected under the ADEA, the evidence was sufficient to establish a disparate impact claim.\textsuperscript{65}

In contrast, courts have rejected a number of disparate claims brought by teachers under the ADEA. Thus, in \textit{EEOC v. Mesa Unified School District},\textsuperscript{66} the court, disagreeing with \textit{Gellar}, held that a school district’s decision to not hire older teachers under a salary schedule that tended to provide higher salaries to older teachers based on their years of experience was a legitimate cost saving measure which constituted an RFOA and, as such, did not constitute age discrimination.\textsuperscript{67} Likewise, in \textit{Cefalu v. Tangipahoa Parish School Board},\textsuperscript{68} the district court granted summary judgment against an older teacher and in favor of the school board where the teacher was able to show a significant statistical disparity concerning the board’s hiring of younger, as opposed to older, teachers, but was unable to show that the disparity was due to a specific employment practice

\textsuperscript{52} \textit{Id.} at **3-4 and 9-11.  
\textsuperscript{53} \textit{Id.} at 11.  
\textsuperscript{64} 635 F.2d 1027 (2nd Cir. 1980).  
\textsuperscript{65} \textit{Id.} at 1032-1034.  
\textsuperscript{66} 893 F.Supp. 927 (C. D. Cal. 1995).  
\textsuperscript{67} \textit{Id.} at 931.  
\textsuperscript{68} 2013 WL 5329808 (E.D. La. 2013)
implemented by the board. And, in *Lowe v. Commack Union Free School District*, where an applicant for a teaching position did not present evidence that the procedures used for selecting teachers (candidate interviews and grading of applicant questionnaires) had a disparate impact on persons over 40 as a protected class, and where statistical analysis actually showed that older applicants were *favored* by the selection process, the court granted summary judgment in favor of the school board on the applicant’s disparate impact claim under the ADEA.71

4. Hostile Work Environment Claims

An employee may prove a hostile work environment claim under the ADEA by showing that the employer has caused or allowed the workplace to be “permeated with discriminatory intimidation, ridicule, and insult that is sufficiently pervasive to alter the conditions of the victim's employment”72 and further that the hostility occurred because of the employee’s membership in a protected class, i.e. that the employee was 40 years of age or older.73 Courts will look at all of the circumstances in evaluating an age-based hostile work environment claim.74 However, isolated or episodic acts of harassment (except when extremely severe), even when based on age, are typically not sufficient to alters the conditions of an employee’s employment and thereby give rise to a meritorious hostile work environment claim.75

Many cases brought by teachers 40-years and older have faltered due to the lack of severity of the school district’s conduct. Thus, in *Cepada v. Bd. of Educ. of Baltimore*, where an

69 Id. at **7-8.
70 886 F.2d 1364 (2nd Cir. 1989).
71 Id. at 1369-1372.
73 Id.
assistant principal told a teacher that he (the assistant principal) was younger than the teacher and constantly called him an “old man,” the district court dismissed the complaint, concluding that the administrator’s “comments did not create an objective change to employment conditions or an abusive atmosphere.” Likewise, in *Brenner v. City of New York Dept. of Educ.*, the Court of Appeals affirmed the district court’s grant of summary judgment in favor of the City Department of Education and a building principal on a teacher’s age-based hostile work environment claim, concluding that the principal’s “stray comments” about “older, white, Jewish teachers” were not sufficiently pervasive and the education department’s removal of the teacher from his teaching duties and placement in a “closet” after termination proceedings had commenced were not based on the teacher’s age and were, therefore, insufficient to prove the teacher’s claim.

However, in *Thomas v. New York City Dept. of Educ.*, a 64-year old high school teacher alleged in her Complaint that the Department of Education (“DOE”) Chancellor, in stating that the DOE needed “new blood” and to “‘clean house of the old ways' and teachers ‘wedded to old methods,’” signaled that he wanted “to purge the system of veteran tenured teachers at the top of the pay scale.” The teacher’s Complaint further alleged that, in accordance with the Chancellor’s wishes, her building principal encouraged a student teacher to harass the teacher and agreed to change the grades of students from failing to passing in order to obtain their assistance in fabricating disciplinary charges against the teacher and, as a result of the fabricated charges, the teacher was transferred to an undesirable assignment and location. Based on these allegations,

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77 Id. at 513-514; see also Trachtenberg, 937 F. Supp.2d at 472-473 (allegations that principal stared at teacher in attempt to intimidate her and that someone scolded teacher in front of students and co-workers insufficient to withstand motion to dismiss).
79 Id. at 54-55.
81 Id.
82 Id. The teacher was assigned to the Teacher Reassignment Center, notoriously referred to as one of New York City’s “rubber rooms” used to warehouse allegedly underperforming teachers. Id.
the district court believed that the teacher’s Complaint stated a hostile work environment claim under the ADEA.\(^\text{83}\)

### 5. Retaliation Claims

The ADEA prohibits employers from retaliating against an employee for exercising his or her rights under the ADEA.\(^\text{84}\) Specifically, the ADEA provides that it is unlawful for an employer to:

- discriminate against any of his employees . . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.\(^\text{85}\)

An employee can prove retaliation by direct or circumstantial evidence.\(^\text{86}\) To prove retaliation by circumstantial evidence, the employee must make a prima facie case by showing: 1) he or she engaged in activity protected by the ADEA, 2) an adverse employment action occurred, and 3) a causal link between the participation in the protected activity and the adverse employment decision exists.\(^\text{87}\) Similar to the burden shifting analysis in discharge claims, once the employee makes out the prima facie case, the burden shifts to the employer to show that it had a legitimate non-retaliatory reason for taking the adverse action against the him or her.\(^\text{88}\) And upon the

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\(^\text{83}\) Id.; see also Pumpido, 2003 WL 23312750 at *9 (where 71-year old middle school custodian made a factual showing that his building principal continually made negative remarks about his job performance and told him that he was too old to work and should retire and this treatment caused him to have a nervous breakdown, the district court held that, under all of the circumstance, the custodian had raised material factual issues that the principal’s conduct was sufficiently pervasive such that the custodian was allowed to prove his claim of hostile work environment under the ADEA before a jury).


\(^\text{85}\) Id.

\(^\text{86}\) Ray v. Iuka Special Mun. Separate Sch. Dist., 51 F.3d 1246, 1249 (5th Cir. 1995).

\(^\text{87}\) Id.

\(^\text{88}\) Id.
employer making that showing, the burden shifts back to the -employee to show that the
defendant’s proffered reason is actually pretext for retaliation.89

To this point, the case, Ray v. Iuka Special Mun. Separate School Dist., is illustrative. There, following the consolidation of two school districts, a principal with nineteen years of experience was not rehired to be principal of his school, and was instead passed over for a replacement nine years younger and with less experience.90 Following this decision, the principal filed an EEOC claim against the school district for age discrimination.91 Following the principal’s filing of the EEOC claim, the school district went on to fill its remaining principal positions throughout the district with an out-of-state individual who had twelve years of experience, and a person from outside the district with less than two years of experience.92 While the school district claimed it refused to hire the principal due to his inability to maintain student discipline, the principal alleged the school districts explanation was merely pretext for retaliation; and to prove such pretext, the principal offered a former superintendent’s testimony stating that a joint school board member had told him, “We might have been able to work out something like this if he had not sued us. I don't think you would hire somebody that had sued us.”93 The court concluded that the jury was reasonable in finding that the school district’s explanation for not hiring the principal was pretextual.94

D. Benefits and Retirement

Employers generally cannot deny or limit benefits to older employees because of their age.95 However, in its 1990 enactment of the Older Workers Benefit Protection Act (OWBPA),

89 Id.
90 Id. at 1248.
91 Id.
92 Id.
93 Ray, 51 F.3d at 1249.
94 Id. at 1251.
Congress recognized that providing benefits to older employees in certain circumstances may be more expensive than providing the same benefits to younger employees. And because increased benefits cost might deter employers from hiring older employees, an employer may reduce benefits based on an employee’s age as long as the cost of providing the reduced benefits to older employees is equal to the cost of providing benefits to younger employees.\(^96\) In other words, the amendment sought, among other things, “to ensure that age-based reductions in employee benefit plans are justified by significant cost considerations.”\(^97\)

Employers are also generally prohibited from denying or limiting an employee’s retirement plan because of the employee’s age.\(^98\) However, the ADEA does permit an employer to implement a bona fide plan “that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this Act.”\(^99\) Nonetheless, while the OWBPA did not expressly make early retirement plans unlawful per se, the legislative history of the OWBPA makes clear that the Congressional intent was to make a wide variety of early retirement plans unlawful.\(^100\) The Senate report states that “[e]arly retirement incentive plans that deny or reduce benefits to older workers while continuing to make them available to younger workers may encourage premature departure from employment by older workers[,]” which “conflicts with the purpose of eliminating age discrimination in employee benefits” and “frustrates the employment of older persons.”\(^101\)

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\(^97\) Polk, supra note 96.


The case, *Jankovitz v. Des Moines Indep. Cmty. Sch. Dist.*, is illustrative on this concept. There, the school district offered its employees early retirement benefits until the age of sixty-five and a one-time cash payment of thirty percent of the employee's annual salary. The employees had all worked for the school district for at least ten years, but were denied early retirement benefits because they were over the age of sixty-five. The court found that the plan was discriminatory on its face, because it denied benefits based solely on the employee’s age. As a result, the court held that the school district’s early retirement incentives plan violated the ADEA as a matter of law.

However, while early retirement plans that reduce or eliminate the early retirement incentive as the employee ages may violate the ADEA, the Senate report also identified examples of early retirement plans that comply with the ADEA, such as plans that provide for flat dollar amount bonuses, service-based benefits, or salary percentage incentives.

The ADEA also prohibits mandatory retirement programs. Generally, except for certain occupations such as law enforcement or firefighting, the ADEA prohibits employers from forcing employees to retire because of their age. However, although employers cannot force retirement based on one’s age, they can hold older employees to the same performance standards as all other employees. Thus, if that older employees’ performance drops below the standards set for all other employees, an employer’s usual disciplinary process may be followed.

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102 421 F.3d 649 (8th Cir. 2005).
103 *Id.* at 650.
104 *Id.* at 653.
105 *Id.* at 654.
106 *Id.* at 655.
107 Eglit, *supra* note 100.
110 *Id.*
E. Waiver of Rights

An employee, job applicant, or former employee, having received legally sufficient consideration, may waive the right to pursue present and/or future legal claims against an employer under the ADEA.\textsuperscript{111} Such a waiver is really nothing more than a contract between the employer and employee.\textsuperscript{112} An employer might pursue extracting such a waiver from an employee as part of the settlement of a pending or imminent legal action.\textsuperscript{113} The ADEA provides that “an individual may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary,” and “a waiver may not be considered knowing and voluntary unless at a minimum,” the waiver satisfies the statute’s listed requirements.\textsuperscript{114} It should be noted that the statutory requirements for an employee’s waiver are strict in the sense that failure to meet any of the requirements will render the waiver ineffective as a matter of law.\textsuperscript{115} The Tenth Circuit has summarized the ADEA’s waiver requirements as follows:

(1) the release must be written in a manner calculated to be understood by the employee signing the release, or by the average individual eligible to participate;

(2) the release must specifically refer to claims arising under the ADEA;

(3) the release must not purport to encompass claims that may arise after the date of execution;

(4) the employer must provide consideration for the waiver or release of ADEA claims above and beyond that to which the employee would otherwise already be entitled;

\textsuperscript{111} Howard C. Eglit, \textit{Releases from Liability – Generally}, \textit{1 Age Discrimination} § 5:28 (2d ed.) (May 2018 Update).
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{115} Eglit, \textit{supra} note 111.
(5) the employee must be advised in writing to consult with an attorney prior to executing the agreement;

(6) the employee must be given at least 45 days to consider signing if the incentive is offered to a group;

(7) the release must allow the employee to revoke the agreement up to 7 days after signing; and

(8) if the release is offered in connection with an exit incentive or group termination program, the employer must provide information relating to the job titles and ages of those eligible for the program, and the corresponding information relating to employees in the same job titles who were not eligible or not selected for the program.116

The case, *O'Grady v. Middle Country School Dist. No. 11*,117 helps illustrate the point that a court will ensure the ADEA’s waiver requirements are strictly followed. There, a teacher sued a school district alleging her retirement plan violated her rights under the ADEA.118 The school district argued, among other things, on a motion to dismiss the teacher’s claim that because the teacher had voluntarily opted into the retirement incentive plan, she effectively waived her claim that the incentive plan was discriminatory.119 The court found that a decision on the matter could not be made on a motion to dismiss, because discovery had to be conducted so as to enable the court to determine whether the ADEA’s “minimum requirements for a waiver to be knowing and voluntary,” which include a specific provision for waivers involved in conjunction with incentive plans such as the one at issue, were followed.120 As such, the court made it clear that a finding of

116 Kruchowski v. Weyerhaeuser Co., 446 F.3d 1090, 1093 (10th Cir. 2006).
118 Id. at 198.
119 Id. at 199.
120 Id. at 200-201.
strict adherence to the statutory waiver requirements was necessary prior to any decision affirming the waiver’s effectiveness.\textsuperscript{121}

CONCLUSION

This Paper has provided a summary of how the ADEA may apply in the K-12 setting. Although the ADEA’s breadth may be intimidating, it is nonetheless critical that school district administrators and educators have a basic understanding of employees’ rights and school districts’ obligations under the ADEA. When that end is achieved, schools, teachers, administrators, and the public will undoubtedly be better served.

\textsuperscript{121} Id.