IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. SIDLEY AUSTIN BROWN & WOOD, Defendant.	Civil No. 05 cv 0208 Judge Zagel Magistrate Ashman

PLAINTIFF EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON CLAIMS FOR INDIVIDUAL RELIEF

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Introduction

The United States Equal Employment Opportunity Commission ("EEOC") is the law enforcement agency of the federal government charged with the administration, interpretation and enforcement of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq*. In July of 2000, EEOC opened a directed investigation[1] into Defendant Sidley Austin Brown & Wood's ("Defendant") compliance with the ADEA in connection with Defendant's expulsion of 32 attorney "partners"[2] from the firm "partnership" in the fall of 1999 and its announcement of a change to its mandatory retirement age. EEOC opened its administrative investigation after (1) Defendant's managing partners were quoted repeatedly in the press saying both that the status of older partners had been changed to create opportunity for "younger lawyers" at the firm and that the firm was changing its retirement age, and (2) EEOC received a confidential complaint from one of the ousted partners.

In its motion for partial summary judgment, Defendant contends that *EEOC v. North Gibson Sch. Corp.*, 266 F.3d 607 (7th Cir. 2001) bars EEOC's claim for any individual relief in this action because no downgraded or mandatorily retired partner filed a Charge of Discrimination. *North Gibson,* a "timely charge" case that did not involve an EEOC directed

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[1] A directed investigation is an investigation opened by the EEOC absent an individual first filing a Charge of Discrimination. *See* 29 C.F.R. 1626.4. An EEOC investigation alternatively can be triggered by an individual Charge of Discrimination. *Id.*

[2] By its use of the term "partners" to refer to these individuals throughout the brief, EEOC does not intend to convey that they were in fact partners rather than employees for the purposes of the ADEA. To the contrary, EEOC's position is that attorney employees who have been designated partners but who are not on the firm's Executive or Management Committees are not true partners *for purposes of the ADEA.*

investigation, held that absent a Charge of Discrimination filed within 300 days of an event of discrimination, the EEOC could not seek relief for aggrieved individuals. The Court reasoned that because an individual could not bring suit on his own behalf absent a timely charge, the EEOC – which was deemed to be "standing in the shoes" of the victims -- could not seek relief on his behalf.

The law is clear that EEOC can seek victim-specific relief in this case and that Defendant's reliance on *North Gibson* is wholly misplaced. The "standing in the shoes of" doctrine of *North Gibson* has been rejected by the Supreme Court in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), which makes clear that the EEOC can seek victim-specific relief even when individuals would be barred from bringing an action on their own behalf. Further, the *North Gibson* analysis has been repudiated by the Seventh Circuit itself in *EEOC v. Board of Regents of the University of Wisconsin*, 288 F.3d 296 (7th Cir. 2002). Even if *North Gibson* were of some interest *after Waffle House*, it is inapplicable to EEOC enforcement actions *arising from EEOC directed ADEA investigations*; any application *North Gibson* might have is limited to actions *arising from individual Charges of Discrimination. See EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1536 (2d Cir. 1996)("[W]here no director has filed a charge with the EEOC, and, indeed, none supports the lawsuit . . . the EEOC may commence actions in the district court *to obtain both legal and equitable relief* . . . Section 16(c) of the FLSA . . . authorizes EEOC to bring actions on behalf of aggrieved employees and to seek relief *including back wages and liquidated damages*.")(emphasis added).

Background

A. Sidley Implements "The Plan" and the Local Press Reports On It

In the fall of 1999, Defendant told 32 partners that they had to accept a downgrade from "partner" to "counsel" or "senior counsel" or leave the firm. In either event, they were no longer partners. At the same time, Defendant also reduced its mandatory retirement age from 65 to a sliding scale from 60-65. Defendant has referred to these changes as "The Plan."

The media was quick to report on the events at Defendant, one of the most visible of all large law firms. In December of 1999, the *Chicago Lawyer* reported that "Sidley & Austin targets equity status and retirement age." Plaintiff's Statement of Undisputed Facts ("PSF"), at ¶ 1. According to the same article, Defendant's actions involved: (1) "requir[ing] attorneys to retire between the ages of 60 and 65, rather than at age 65;" and (2) stripping some of Defendant's partners of their equity status. PSF, at ¶ 2. The chairman of Defendant's executive committee, Thomas Cole, described the affected partners as "nearly 20 *older* attorneys and a smaller number of younger attorney partners." PSF, at ¶ 3 (emphasis added).

The *Chicago Lawyer* article confirmed prior reports of thinning in the partner ranks at Defendant. *Crain's Chicago Business* had reported that "Sidley & Austin has changed its *retirement age* from 65 to a policy under which retirement is expected between ages 60 and 65 . . . . As a result, *nearly 20 older partners are being offered senior counsel status* . . . ." PSF, at ¶ 4 (emphasis added).

The American Lawyer provided more details in December 1999, saying that the change in partner status was part of a strategic plan announced at the annual partners meeting on October 13, 1999, and reporting that "The affected partners, *who are mostly in their mid-fifties and early*

sixties, will lose their equity status as of January 1, according to managing partner Charles Douglas." PSF, at ¶¶ 5-6. Chairman Douglas also was reported as explaining "that his firm's strategy will *expand opportunities for younger partners and associates*, as senior partners transfer their work to them. To encourage this youth movement, the firm also *lowered its retirement age* from 65 to a flexible 60-65." PSF, at ¶ 7 (emphasis added).

In a letter to Defendant's clients published on the firm's own Internet website, Co-Chairmen Cole and Douglas themselves emphasized that "the theme of all of these changes was the creation of opportunity for our younger lawyers." Letter from Executive Committee Chairman Thomas A. Cole and Management Committee Chairman, Charles W. Douglas to Our Clients, Alumni, Colleagues and Friends (April 5, 2000), PSF, at ¶ 8.

B. A Confidential Complainant From Within Defendant Contacts the EEOC

During the same period, EEOC received a confidential complaint of age discrimination in connection with the Plan: One of the expelled partners contacted the EEOC – without informing the EEOC of his name – and requested that the EEOC investigate his downgrade from partner status at Defendant. PSF, at ¶¶ 11-12. The EEOC received the confidential complaint within 300 days of the complainant being stripped of his partnership status. PSF, at ¶ 11.

Along with a letter, the confidential complainant provided the EEOC with a copy of the firm's partnership agreement. PSF, at ¶ 13. Three months later, the same affected partner sent another letter addressing whether partners are properly regarded as employees for purposes of the ADEA. PSF, at ¶ 14. An additional letter listing all of Defendant's lawyers by practice group and age followed. PSF, at ¶ 15. According to the confidential complainant, "There were 15 practice groups firmwide in which a partner was demoted to senior counsel. In 12 of these

groups, the oldest partner, or the oldest group of partners, was demoted." PSF, at ¶¶ 15-16.

C. EEOC Conducts a Directed Investigation

Acting pursuant to its statutory authority, the Chicago District Office opened a directed investigation of Defendant's compliance with the ADEA, including but not limited to the 1999 partner demotions and reduction in the retirement age. *See* 29 C.F.R. 1626.4 (1991) ("The Commission may, on its own initiative, conduct investigations of employers . . . ."). On July 5, 2000, EEOC notified Defendant of the investigation in a letter that included a designated "Charge No."[3] and which was accompanied by a Request For Information ("RFI"). PSF, at ¶¶ 9-10.

Defendant provided only partial responses to this and a subsequent RFI. Accordingly, EEOC served a subpoena on Defendant, and, when Defendant refused to comply, filed and prevailed in a subpoena enforcement action before Judge Lefkow in the Northern District of Illinois. *EEOC v. Sidley & Austin*, N.D. Illinois No. 01 C 9635 (2/11/2002), 2002 WL 206485, 88 Fair Empl. Prac. Cas. (BNA) 64. Defendant appealed that decision to the Seventh Circuit, which, in an opinion by Circuit Judge Richard Posner, ordered Defendant to comply in significant part with the EEOC subpoena. *EEOC v. Sidley*, 315 F.3d 696 (7th Cir. 2002).

After reading about the EEOC's subpoena enforcement action, one of the 32 partners who was downgraded, David Alan Richards, came forward to the EEOC and gave testimony under oath. PSF, at ¶ 17. Richards testified that his downgrade came as a complete shock to him. Richard's Deposition Transcript, at p. 70, attached to PSF as Attachment 6 to Exhibit E. Prior to

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[3]Charge numbers are routinely assigned to EEOC investigations whether based upon an individual Charge of Discrimination, a Commissioner's Charge or the direction of the District Director.

the meeting in which he was told that he was being stripped of his partnership status, Richards "had no inkling of the topic" of the meeting, and in the course of that meeting, there was no criticism of Richard's performance at the firm. *Id.* at p. 62. Instead, during the meeting it was explained that his expulsion from the partnership "was part of refashioning the firm. It was part of . . . a trend that was happening among law firms and professional service firms generally, that the retirement age was going to be 60 except for a few very special people." *Id.* at p. 64. At the time of his expulsion, Richards was the oldest member of Defendant's real estate practice group in its New York office.

D. EEOC Issues LOD and Conciliation Fails

Upon the completion of its investigation, on July 14, 2004, EEOC issued its Letter of Determination ("LOD") finding reasonable cause to believe that Defendant violated the ADEA by downgrading and expelling partners on account of their age in or about October of 1999 and by maintaining a mandatory retirement age. PSF, at ¶ 18. Conciliation discussions between the parties did not result in an agreement, and on September 29, 2004, the EEOC issued to Defendant a Notice of Failure of Conciliation. PSF, at ¶ 19. On January 13, 2005, the EEOC filed this lawsuit seeking monetary and injunctive relief.

Argument

Defendant's argument that *North Gibson* bars EEOC from seeking individual relief in this action fails for two independent reasons: (1) the *North Gibson* "stand in the shoes of" analysis has been rejected by the United States Supreme Court and repudiated by the Seventh Circuit, and (2) even if the *North Gibson* approach were assumed *arguendo* to have some remaining vitality, it has no application here. The statutory language of the ADEA, the EEOC regulations

implementing the ADEA, and the only case to precisely address the issue (*Johnson & Higgins)* make clear that in a case predicated upon a directed investigation (which *North Gibson* was not), EEOC can pursue claims for individual victim-specific relief.[4]

I. *North Gibson* Is Fundamentally Inconsistent with the Supreme Court's Subsequent Decision in *Waffle House*

A. *Waffle House*

The Supreme Court's decision in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002) and the Seventh Circuit's decision in *EEOC v. Board of Regents of the University of Wisconsin*, 288 F.3d 296 (7th Cir. 2002) establish that in an EEOC enforcement action such as this, the EEOC can seek victim-specific relief even if the individual victims are barred from seeking relief on their own behalf. These holdings are fundamentally inconsistent with *North Gibson*. Further, *North Gibson* says nothing about EEOC authority in a case predicated upon an EEOC directed investigation and has never been extended to a case brought by the EEOC predicated upon a directed investigation.

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[4] In an apparent attempt to add a rhetorical *in terrorem* affect to its *North Gibson* argument, Defendant suggests throughout its brief that, were the Court to deny its instant motion, "EEOC would have extreme powers under the ADEA to bring otherwise barred claims going back to 1978." Defendant's Brief at 9. Defendant's saying it is so, however, does not make it so, and Defendant's contention is one about which *North Gibson* has virtually *nothing* to say. The issues in *North Gibson,* in *Wisconsin Board of Regents,* in *Johnson & Higgins,* and in *Waffle House* (discussed *infra)* all relate to the statutory authority of EEOC to obtain victim specific relief in situations in which the individuals upon whose behalf the agency seeks relief could not personally seek that relief in a private action. *That* is the *statutory authority* issue before the Court. There may well come a day in this litigation when it will be appropriate for the Court to address the issue of the temporal limits on the class of persons aggrieved by Defendant's age discrimination, but that cannot be done now without any discovery at all and on the basis of a bare-bones Complaint and Answer and a motion for partial summary judgment on a different issue. Therefore, EEOC will not in this brief burden the Court with an unnecessary discussion of Defendant's "back to 1978" rhetorical flourishes.

In *North Gibson* the court affirmed the dismissal of EEOC's claims for monetary relief under the ADEA on behalf of a group of employees where EEOC's enforcement action arose from an individual Charge of Discrimination which the court deemed untimely. Since private individuals *in litigation brought by themselves* are barred by the statute from seeking relief on their own behalf in the absence of a timely Charge, the Seventh Circuit concluded that the EEOC was also barred in a federal government action *predicated upon an individual Charge* from seeking relief on their behalf. 266 F.3d at 616.[5] According to this analysis, under the ADEA, the EEOC "steps into the shoes" of the individual for whom the agency is seeking relief and if the individual is barred from seeking relief, so too is the EEOC. 266 F.3d at 615. In reaching its decision, the *North Gibson* court relied, *inter alia*, on the Fourth Circuit's opinion in *EEOC v. Waffle House*, 193 F.3d 805, 812-13 (4th Cir. 1999) and the Second Circuit's opinion in *EEOC v. Kidder, Peabody & Co.* 298, 300-01 (2d Cir. 1998), which both held that the EEOC's claims for individual monetary relief were precluded by prior arbitration agreements between the employee and the employer. The Supreme Court's decision in *Waffle House* explicitly overrules both these decisions. *See* discussion *infra.*

Waffle House rejects *North Gibson's* analysis and holds that the EEOC does not stand in the shoes of individuals for whom it is seeking relief. In *Waffle House*, the Supreme Court recognized the EEOC's authority to go forward with a claim for monetary and injunctive relief on behalf of an employee who signed a mandatory arbitration agreement covering the discrimination at issue and who thus would be barred from bringing a court action in his own

[5]Under § 626(d) of the ADEA, the timely filing of a Charge of Discrimination is a prerequisite to a civil action by an individual.

name for such relief. Where the statute grants EEOC enforcement authority, according to the Supreme Court, "EEOC is in command of the process." 534 U.S. at 291. "It is the public agency's province – not that of the court – to determine whether public resources should be committed to the recovery of victim specific relief." *Id.* at 291-92. The Court emphasized that the EEOC seeks "to vindicate the public interest . . . even when it pursues entirely victim-specific relief." *Id.* at 296.

In its motion for partial summary judgment, Defendant contends that *Waffle House* is not applicable to the case at bar because it involved an ADA claim and not a claim under the ADEA. Yet, *Waffle House* itself made clear that it applies in the context of an ADEA case. *See Waffle House*, *Id.* at 285 (overruling *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298 (2d Cir. 1998) (holding that EEOC could not bring an ADEA claim for individual relief where the employee had a signed a mandatory arbitration agreement)). In addition, *Waffle House* has been applied in the Title VII context. *See In re Bemis Company, Inc.*, 279 F.3d 419, 422 (7th Cir. 2002)(Applying *Waffle House* to an EEOC Title VII action and holding that Rule 23 does not apply to EEOC as it does to private individuals: "[E]ven after the addition of compensatory and punitive damages to the EEOC's arsenal of remedies the EEOC does not sue as the representative of the discriminated-against employees who may benefit from the relief it obtains and hence is not barred from suing by the fact that the employees had agreed to submit their claims to binding arbitration. . . 'The EEOC does not stand in the employee's shoes.'").

Defendant also contends that Waffle House is limited to EEOC's authority to seek relief in the context of an arbitration agreement. The Seventh Circuit, however, in *Board of Regents, explicitly applied Waffle House's holding to an ADEA claim involving barriers to litigation by*

an individual other than a mandatory arbitration agreement. Thus, Defendant's argument that the holding in *Waffle House* does not extend to the ADEA or to circumstances other than arbitration has already been flatly rejected in this Circuit.

In *Board of Regents*, EEOC accused the University of Wisconsin Press of discriminating against certain individuals on the basis of their age in violation of the ADEA. For reasons of 11th Amendment immunity, the individuals affected by the discrimination could not sue. Defendant, citing *North Gibson* (the University's brief is attached as Exhibit 2, *see* page 5), argued "If the individuals cannot sue, the EEOC should not be able to either." 288 F.3d at 300. The University claimed, "the Commission is merely seeking redress of individual acts of discrimination; the Commission is simply standing in the shoes of the individuals and *is acting in privity with them as their representative*." *Id.* at 299-300 (emphasis added). The Seventh Circuit unequivocally rejected this argument: "Whatever wind might originally have been in the sails of this argument has been knocked out by *EEOC v. Waffle House*...." *Id.* at 300. Accordingly, the Seventh Circuit affirmed the jury's award of *victim-specific damages*, despite the fact that the victims were precluded from seeking relief on their own behalf. *Id.* at 304.

Together, *Waffle House* and *Board of Regents* make absolutely clear that even in ADEA cases involving barriers to individual litigation other than mandatory arbitration, the EEOC can seek victim-specific relief even when the victims themselves are precluded from doing so.[6]

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[6]The EEOC's independent litigation authority under the ADEA has long been recognized by the courts. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991)("the EEOC's role in combating age discrimination is not dependent of the filing of a charge"); *EEOC v. Tire Kingdom, Inc.*, 80 F.3d 449, 451 (11th Cir. 1996)(EEOC may investigate and bring suit under the ADEA whether or not an employee has filed a timely charge); *EEOC v. American & Efird Mills, Inc.*, 964 F.2d 300, 303-04(4th Cir. 1992)(same).

Accordingly, Defendant's attempt to limit EEOC's statutory enforcement authority on grounds that the individuals for whom the EEOC is seeking relief could not themselves pursue a suit for such relief should be rejected here.

B. The Res Judicata Cases Cited by Defendant Are Inapposite

In support of its position, Defendant cites a series of cases that have no bearing on this case and are readily distinguishable in any event. Not one involves a case in which EEOC was seeking relief for a group of affected individuals after *a directed investigation* and where there has been *no prior litigation* by the individuals. Instead, all of the cases cited by Defendant involve the doctrine of res judicata or claim preclusion.[7] Any discussion in these cases of privity between the EEOC and the individuals for whom the agency seeks relief relates solely to issues of claim relitigation and has no applicability to the case at bar.

EEOC v. U.S. Steel Corp., 921 F.2d 489, 495 (3d Cir. 1990), precluded EEOC from obtaining individual relief on behalf of employees who had filed earlier unsuccessful individual suits on the identical claims. The case addresses EEOC's litigation authority only in a situation where the individuals for whom the EEOC is seeking relief have already tried and failed to obtain such relief in a prior court action on the same claim. *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1291 (7th Cir. 1993) held the same thing – that the EEOC is barred from recovering back

[7] The only case Defendant cites that does not deal with claim preclusion is *EEOC v. Copello*, No. 02 C 3768, 2004 WL 765891 (N.D.Ill. April 7, 2004), which addresses the temporal scope of the class (i.e. whether the EEOC can seek relief for an individual employed only outside the 300-day charge filing period under Title VII). *Copello* is a case in which a timely charge was filed by an individual and the only issue before the court was the scope of the class entitled to relief based on that charge. *Copello* contains no discussion of whether in the absence of a Charge of Discrimination from an individual, the EEOC has the authority to seek victim specific relief.

pay, liquidated damages, or reinstatement on behalf of an individual who had *previously litigated the same claim*. Again, there is no discussion of EEOC's litigation authority where there has been no prior litigation of the same claim by an individual. *Vines v. University of Louisiana at Monroe*, 398 F.3d 700 (5th Cir. 2005), granted an injunction barring employees from relitigating state age discrimination claims where *EEOC had filed and lost age discrimination claim on their behalf.* The case has no holding regarding the EEOC's litigation authority, and recognizes that "[T]he EEOC is not always to be considered the representative of individuals on whose behalf it brings an ADEA action." *Id.*

In *Waffle House* the Supreme Court acknowledged that the nature and amount of the victim-specific relief the EEOC is able to obtain can be affected by the victim's own conduct, and referred to issues of prior settlement or *res judicata.* In so acknowledging, the Court stated that it "'goes without saying that the courts can and should preclude double recovery by an individual." 534 U.S. at 297, *quoting General Telephone*, 446 U.S. at 333. The Court was explicit, however, in saying that this is a separate issue from that of what relief the EEOC has authority to seek: "It simply does not follow from the cases holding that the employee's conduct may affect the EEOC's recovery that the EEOC's claim is merely derivative." *Id.* 534 U.S. at 297-298. "The fact that ordinary principles of res judicata, mootness or mitigation apply to EEOC claims does not . . . render the EEOC a proxy for the employee." *Id.* Thus, while these cases may have an impact upon the nature and amount of recovery for particular individuals, they do not -- and in the *post-Waffle* House era cannot -- control whether the EEOC can seek any individual relief in this case at all.

II. The EEOC Has Statutory Authority to Sue for Victim-Specific Relief in a Case Predicated on a Directed Investigation

Even if *North Gibson* is assumed *arguendo* to retain a modicum of vitality, it has no applicability to this case. Unlike *North Gibson* which arose out of an *untimely individual charge,* this case arises out of a *directed investigation opened by the EEOC within the 300-day limitation period.* In the sole published decision to address the EEOC's authority to obtain individual relief in an ADEA case predicated upon a directed investigation, the Second Circuit recognized EEOC's authority to sue for victim-specific relief in the absence of an individual Charge of Discrimination. *EEOC v. Johnson & Higgins*, 91 F.3d 1529 (2nd Cir. 1996). As the Second Circuit recognized in *Johnson & Higgins*, the ADEA, its implementing regulations, and the FLSA provisions explicitly incorporated into the ADEA make clear that victim-specific relief is available in such actions. Defendant neither discusses nor even cites *Johnson & Higgins*.

A. *Johnson & Higgins*

In *Johnson & Higgins*, EEOC conducted a directed investigation under the ADEA into Johnson & Higgins' mandatory retirement policy applicable to members of its board of directors. The court observed that although "no retired or current directors claimed to be aggrieved by the alleged discriminatory practices, the EEOC pursued the ADEA investigation on its own initiative." 91 F.3d at 1533. Following unsuccessful conciliation efforts, the EEOC filed suit "alleging that the Board's mandatory retirement policy for directors violated the ADEA and seeking, *inter alia*, a permanent injunction enjoining J&H from enforcing the alleged discriminatory practice, and reinstatement, back wages, and prejudgment interest for directors adversely affected by the policy." *Id.*

Johnson & Higgins argued that because none of the directors filed a Charge of

Discrimination with the EEOC and none supported EEOC's lawsuit against it, the EEOC had no authority to bring suit on behalf of the directors. In support of this contention, Johnson & Higgins argued that the directors signed waivers of any ADEA claims. The court assumed, without deciding, that the waivers were valid. *Id.* At 1536.

The court observed that even where no director has filed a charge or supports the suit that pursuant § 626(b) of the ADEA, the EEOC may commence an action to obtain both legal and equitable relief. *Id.* Section 626(b) of the ADEA, referred to by the court, specifically provides:

> *In any action*, brought to enforce this chapter, the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for *amounts deemed to be unpaid minimum wages or unpaid overtime compensation.*

Id. (emphasis added). Nowhere does the ADEA suggest that this monetary relief is available in cases predicated on an individual Charge of Discrimination and not in cases predicated on a directed investigation.

Furthermore, the *Johnson & Higgins* court observed that § 626(b) of the ADEA specifically incorporates the enforcement provisions of the FLSA which "authorize[ ] the EEOC to bring actions on behalf of aggrieved employees and to seek relief including back wages and liquidated damages" absent a Charge of Discrimination or the consent of aggrieved individuals. *Id.*, *citing* Section 16(c) of the FLSA, 29 U.S.C. § 216(c).

Finally, the court observed that under "EEOC's own regulations, the Commission has the power to bring an action even when the aggrieved party does not wish to proceed." *Id.*, *citing* 29 C.F.R. § 1626.13 (1995). Section 1626.13 of EEOC's regulations provides:

> Because the Commission has independent investigative authority, *see* § 1626.4, it may continue any investigation and may *secure relief for all affected persons*

notwithstanding a request by the charging party to withdraw a charge.

Emphasis added.

Based on § 626(b) of the ADEA, § 216(c) of the FLSA specifically incorporated into the ADEA, and EEOC's regulations, the court concluded that EEOC had authority to bring its action for injunctive and victim-specific monetary relief absent a Charge of Discrimination or consent of any aggrieved individual. In the end, Johnson & Higgins paid $28 million.[8]

Johnson & Higgins is on all fours with the present action and compels the conclusion that EEOC is empowered here to seek victim-specific relief for the ousted and mandatorily retired partners of Defendant.[9]

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[8]*Johnson & Higgins* was before the Second Circuit on defendant's appeal from the District Court's "grant[ing] the EEOC's motion for partial summary judgment on the issue of liability, reserving judgment on the question of damages." 159 F.3d at 1533; *see EEOC v. Johnson & Higgins*, 887 F.Supp. 682 (S.D.N.Y. 1995). After the Second Circuit's affirmance of summary judgment in favor of EEOC, defendant "brought [in the District Court] the instant motion for summary judgment as to damages" predicated upon releases it had procured from affected class members while the appeal had been pending. *EEOC v. Johnson & Higgins*, 5 F.Supp. 2d 181, 182 (S.D.N.Y. 1998). The District Court held "that the waivers . . . are invalid as a matter of law. The trial on the issue of damages will commence on October 5, 1998 as previously scheduled." *Id.* at 188. Settlement discussions followed, an on July 28, 1999, the District Court entered a Consent Judgment providing for the payment of $28 million by Defendant to the aggrieved claimants upon whose behalf EEOC had sued *but who had not filed Charges of Discrimination. See EEOC v. Johnson & Higgins,* S.D.N.Y. No. 93 C 481 Consent Judgment (7/29/1999, Leonard Sand, U.S.D.J.), attached as Exhibit 1.

[9]The District Court in *North Gibson* ignored *Johnson & Higgins* on the theory that the EEOC's action for individual relief was lacking a public interest component. *See EEOC v. North Gibson,* 2000 WL 33309722, n.2 (S.D.Ind. 2000). The Seventh Circuit opinion on appeal did not even cite – much less discuss – *Johnson & Higgins*. In *Waffle House*, the Supreme Court made clear that the EEOC acts in the public interest even when it seeks individual relief. 534 U.S. at 296.

B. The FLSA

As *Johnson & Higgins* recognizes, the FLSA, whose enforcement provisions are incorporated into the ADEA, permits the government to recover monetary damages even when none of the potential recipients has requested or even consents to the government's enforcement action.

Section 626(b) of the ADEA states that "The provisions of this chapter shall be enforced in accordance with the powers, remedies and procedures provided in sections 211(b), 216 (except for subsection (a) thereof) and 217 of this title ["Fair Labor Standards Act of 1938, as amended"]." 29 U.S.C. § 626(b).

Under § 216(c) of the FLSA, the government may act on its own initiative to recover back wages. Section 216(c) of the FLSA authorizes "The Secretary to bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages." 29 U.S.C. § 216(c). Prior to 1974, § 216 of the FLSA required the Secretary of Labor to obtain prior written consent from the parties aggrieved before suing for monetary relief. In 1974, Congress deleted from § 216 the requirement of employee consent. Pub. L. 93-259, § 26, 88 Stat. 55,73 (1974). As the law currently stands, therefore, the government may seek back wages and liquidated damages without any employee request or Charge. *See* H.R. Rep. No. 93-13, at 41 (1974) *reprinted in* 1974 U.S.C.C.A.N. 2811, 2825. [10]

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[10]The fact that the relevant FLSA amendments were adopted in 1974, seven years after enactment of the ADEA, is of no consequence. The ADEA expressly incorporates sections 216 and 217 of the FLSA "as amended." Publ. L. 90-202, § 7(b), 81 Stat. 602, 604 (1967). The "as amended" language indicates that Congress intended the powers, remedies, and procedures of the ADEA to evolve along with those of the FLSA. *See Herrmann v. Cencom Cable Assocs.*, 978

The government (i.e., the Department of Labor) may sue without consent even though the FLSA, like the ADEA, provides that a government enforcement action terminates an individual's right to file suit. *Compare* FLSA, 29 U.S.C. § 216(b), (c) *with* ADEA, 29 U.S.C. § 626(c)(1). The courts have uniformly recognized the government's right to seek monetary relief under the FLSA without a request or consent by an aggrieved individual. *See Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985)("That the associates themselves vehemently protest coverage under the Act makes this case unusual, but the purposes of the Act require that it be applied even to those would decline its protections."); *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 809 (D.D.Cir. 1983)("the Secretary may bring actions to enforce [the FLSA] even absent the consent of the underpaid employees). Accordingly, the Department of Labor's enforcement authority is not premised on a complaint from any individual.[11]

Because the ADEA incorporates the FLSA's enforcement procedures, the EEOC enjoys the same authority to seek monetary relief under the ADEA in the absence of a Charge and after a directed investigation that the Department of Labor enjoys under the FLSA.

F.2d 978, 983 (7th Cir. 1992)(most legislative cross-references incorporate subsequent amendments). It is of no moment that this "as amended" language appears only in the Public Law as it was enacted and not in the codified version of the statute. Where there is a conflict between the law as enacted and as codified, the law as enacted controls. *See United States v. Welden*, 377 U.S. 95, 98 n.4 (1964); *Nashville Milk Co. v. Carnation Co.*, 238 F.2d 86, 89 (7th Cir. 1956), *aff'd*, 355 U.S. 373 (1958).

[11]Like the ADEA, the Equal Pay Act ("EPA"), 29 U.S.C. § 206, *et seq.*, incorporates these same FLSA provisions. Here too, the courts have recognized the EEOC's authority to bring an action for individual relief in the absence of a request or consent from the affected employee. *See Donovan v. University of Texas*, 643 F.2d 201 (5th Cir. 1981); *EEOC v. Ferris State College*, 493 F. Supp. 707 (S.D.Mi. 1980).

C. ADEA and Regulatory Provisions

In addition to incorporating the FLSA at 29 U.S.C. § 626(b), and in addition to explicitly providing that monetary relief is available in any action brought by the EEOC at 29 U.S.C. § 626(b)(*see* discussion at p. 13, *supra*), the ADEA itself also makes clear that the EEOC may file an enforcement action absent an individual Charge of Discrimination. Although the ADEA does say that "no civil action may be commenced *by an individual* . . . until 60 days after a charge alleging unlawful employment discrimination has been filed with the [EEOC]," 29 U.S.C. § 626(d)(emphasis added), it contains no comparable language restricting the EEOC's ability to file suit. *See Tire Kingdom*, 80 F.3d at 451 ("by its plain reading, [§ 626(d)] does not apply to the EEOC.").

The ADEA imposes only one prerequisite on the EEOC before it may initiate litigation: the EEOC must first attempt to "effect voluntary compliance . . . through informal methods of conciliation, conference, and persuasion." 29 U.S. C. § 626((b); *see also* 29 C.F.R. § 1626.15(d). The sole purpose of the individual's Charge-filing requirement under § 626(d) is to allow the EEOC a chance to conciliate before the individual files suit. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978); H.R. Rep. No. 805; at 10 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2213, 2223. The EEOC already has such a chance, of course, if it initiates an investigation on its own. Initiation of a directed investigation also serves the purpose of providing defendant with notice that its practices are under investigation.[12]

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[12]To serve the purposes of providing notice and an opportunity to conciliate, the regulations implementing the ADEA provide that a Charge "shall be in writing and shall name the prospective respondent and shall generally allege the discriminatory act(s)." 29 C.F.R. § 1626.6. Here, Defendant received a formal letter, including an assigned "charge number." The letter named Defendant and informed the Defendant that its compliance with the ADEA was

EEOC's regulations implementing the ADEA confirm the EEOC's ability to sue under the ADEA for monetary relief absent a Charge of Discrimination. Under the applicable regulations, the EEOC may conduct ADEA investigations "on its own initiative," and it may receive information regarding violations from "*any source*," including from *confidential complainants* as in this case. 29 C.F.R. §§ 1626.3 and 1626.4 (2001). The regulations provide: "The Commission may, on its own initiative, conduct investigations of employers . . . . The Commission shall . . . receive information concerning alleged violations of the Act, including charges and complaints, from any source." 29 C.F. R. § 1626.4. In addition, as set forth in the discussion of *Johnson & Higgins, supra,* the regulations provide that the EEOC may secure relief "for all affected persons" even if an employee withdraws a charge. 29 C.F.R. § 1626.13.

In summary, *Johnson & Higgins*, the statutory language of the ADEA, EEOC's regulations, and the FLSA provisions incorporated into the FLSA all compel the conclusion that EEOC is entitled to seek victim-specific relief for the ousted and mandatorily retired partners.

D. Recovery of Individual Relief in Cases Arising Out of a Directed Investigation Serves the Public Interest

To do as Defendant suggests and preclude even the possibility of any award of individual relief, including monetary damages, in this case, which arises out of a directed investigation, would eviscerate the law enforcement value of EEOC's congressionally mandated authority to conduct directed investigations. If an employer had no risk of a monetary award arising out of a directed investigation, it would have little incentive to engage in meaningful conciliation

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under investigation. An accompanying Request for Information made clear that the retirement age for partners and the demotion of partners was at issue. Thus, any argument by Defendant that it did not receive the timely notice or opportunity to conciliate that it would have if a charge had been filed by an individual is without merit.

discussions or change its behavior prior to the filing of suit. As the Supreme Court has recognized, "It is the reasonably certain prospect of a back pay award that 'provide(s) the spur or catalyst which causes employers and unions to self-examine' and to strive to eliminate discrimination." *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 417-18 (1975) (citation omitted).[13]

There is no justification – in the language of the statute or as a practical matter – for eliminating the back pay remedy and other forms of individual relief in all cases filed by the EEOC after a directed investigation. Permitting Defendant to avoid liability for individualized relief would grant Defendant a windfall unjustified by fact or law.

[13] The U.S. Department of Labor also conducts administrative investigations and follow-up federal litigation to obtain victim-specific monetary relief under the same section of the FLSA incorporated by reference into the ADEA. Eliminating the availability of back pay in cases arising out of a directed investigation pursuant to § 216(c) of the FLSA, would not only cause grave harm to EEOC's enforcement efforts, but also to the Department of Labor's enforcement efforts under the FLSA as at least 30% of the cases brought by the Department of Labor are predicated on directed investigations without the request or consent of an aggrieved individual. *See* U.S. Department of Labor *1999-2000 Report on Initiatives: Employment Standards Administration Wage and Hour Division* (February 2001), p. 11, attached as Exhibit 3 ("Over the last decade, Wage and Hour has increased the proportion of its compliance efforts in 'directed' or 'targeted' investigations--as opposed to 'complaint-based' investigations--from 25 percent to 30 percent.") In view of their statutory foundation, it is virtually inescapable that acceptance of Defendant's argument with respect to EEOC's enforcement authority in non-Charge situations would also prejudice the Department of Labor's enforcement authority.

Conclusion

For the foregoing reasons, the EEOC respectfully requests that this Court deny Defendant's motion for summary judgment on EEOC's claims of individual relief.

Respectfully Submitted,

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Counsel for Plaintiff EEOC

May 10, 2005

EXHIBIT 1

ORIGINAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

JOHNSON & HIGGINS, INC.

Defendant.

93 Civ. 5481 (LBS) (AJP)

CONSENT JUDGMENT

99,1775

CONSENT JUDGMENT

This cause of action was initiated on August 5, 1993, by the Equal Employment Opportunity Commission (hereinafter "Plaintiff" or "EEOC"), an agency of the United States Government, alleging that Johnson & Higgins, Inc. (hereinafter "J&H" or "Defendant") violated the Age Discrimination in Employment Act of 1967, as amended, (the "ADEA") by requiring its employee-Directors to retire from employment with J&H at the earlier of age 60 with 15 years of experience on the Board of Directors or age 62.

This Court found by opinion dated June 12, 1995 that Defendant's mandatory retirement policy for employee-Directors violated the provisions of the ADEA. EEOC v. Johnson & Higgins, 887 F. Supp. 682 (S.D.N.Y. 1995). Defendant rescinded that mandatory retirement policy

and sent notification of said rescission to the Court, Plaintiff and all employee-Directors who retired pursuant to said policy since 1991.

By opinion dated August 8, 1996, the Second Circuit affirmed the District Court's decision. EEOC v. Johnson & Higgins, 91 F.3d 1529 (2nd Cir. 1996). Defendant's petition for Certiorari to the United States Supreme Court was denied, and the case was remanded to the District Court on October 6, 1996.

Defendant filed a summary judgment motion regarding damages on December 22, 995, alleging that the claimants on whose behalf EEOC brought suit, signed waivers releasing their damages to J&H in the fall of 1995. By order dated May 11, 1998, this Court denied Defendant's motion. EEOC v. Johnson & Higgins, 5 F. Supp.2d 181 (S.D.N.Y. 1998). Subsequent to the Court's May 11, 1998 opinion, the parties engaged in discovery regarding damages.

The EEOC and J&H have engaged in extensive negotiations regarding damages in this case. The parties have agreed to forego further litigation regarding this matter and to resolve this matter by agreement and the entry of this judgment.

Accordingly, it is, hereby, ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. At the Closing, as defined in paragraph 6 hereof, Defendant shall pay the sum of Twenty-Eight Million Dollars ($28,000,000), in satisfaction of the claims brought or which could have been brought in this matter by the EEOC. This sum shall be distributed by Defendant to each of the claimants identified in Exhibit A (the "Claimants"), through checks made payable to each such

Claimant in the amounts allocated to each in Exhibit A. Defendant shall be entitled to withhold or deduct applicable federal, state, local and other taxes from such amounts, in accordance with each Claimant's W-4 Form delivered in connection herewith. The Claimants shall be solely responsible for the payment of all individual taxes arising from such payments.

2. Subject to the next sentence in this paragraph, this judgment shall not constitute a waiver, release or resolution, by reason of res judicata, collateral estoppel or for any other reason, of any claim or defense brought in Aiona et al. v. Olsen et al., 97 Civ. 8713 (LAK) (SDNY), or Clemens v. Olsen et al., 98 Civ. 8762 (LAK) (SDNY), as those actions were constituted as of May 15, 1999. Notwithstanding the previous sentence, the parties agree that this judgment shall constitute such waiver, release and resolution with respect to any claims or entitlement to relief by the Claimants against any persons or entities arising out of or relating to age discrimination (whether asserted heretofore or hereafter in Aiona, Clemens, or any other litigation), which claims and relief the parties agree are precluded by this judgment and for which Defendant reserves all defenses. The foregoing sentence shall not apply to any claims by the Claimants against any persons or entities that are not, and never have been, affiliated with Defendant, Marsh & McLennan Companies, Inc. ("MMC"), and any of their parents, subsidiaries, affiliates, predecessors, successors or assigns.

3. Defendant's execution of this judgment and the payments made hereunder shall not be construed as an admission that EEOC or any of the Claimants is entitled to damages in connection with the claims asserted in this action and may not be used as evidence of liability or entitlement to damages for any purpose and in any action, proceeding or context.

4. This judgment shall constitute a full resolution of all claims which were raised by, or which could have been asserted in, complaint 93 Civ. 5481 (LBS), and all such claims are hereby released.

5. This judgment shall have no effect upon (i.e., not increasing or decreasing) Claimants' rights and entitlements to receive vested benefits, to the same extent as they existed immediately prior to the entry of this judgment, under any 401(k), pension, medical insurance or other benefit plan of Defendant.

6. EEOC having provided notice to the Claimants and the Court having considered the arguments presented, the Court finds the settlement fair and appropriate. Within fifteen (15) days following the expiration of time for any appeal from this judgment, Defendant shall make the payments described in paragraph 1 hereof (the "Closing"), unless a challenge has been made to, or an appeal has been filed from, this judgment. In such event, no payments as described in paragraph 1 hereof shall be made until the final disposition of such challenge or appeal, so long as such challenge or appeal does not result in this judgment being modified or vacated in any way without the consent or subsequent approval of the parties. In addition, unless both parties hereto agree otherwise, the Closing shall not occur in the event that any person obtains an injunction prohibiting the release to, or requiring the return by, MMC of any portion of the escrow fund (created in connection with MMC's acquisition of Defendant's stock in March 1997) sought by, or released to, MMC in connection with this action and judgment. In the event the

Closing does not occur as a result of such an injunction, either EEOC or Defendant may declare this judgment null and void, in which case the parties shall be restored to their respective positions in this action.

7. Defendant agrees to pay EEOC the amount of $100,000, as costs in this action. Such amount shall be offset by the amount of $54,806.89, representing expert fees ordered to be paid by EEOC in Judge Peck's January 20, 1999 Order, and $10,574.69, representing one-half of the fees of the mediator, Honorable Harold R. Tyler, Esq. At or before the Closing, Defendant shall pay EEOC the balance of $34,618.42, in connection with its costs. EEOC agrees that it shall not seek or be entitled to any other amounts from Defendant, including but not limited to costs and fees, in this action.

8. The Court shall maintain jurisdiction to resolve any disputes arising from the entry of this judgment.

Agreed to this 28 day of July, 1999.

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Honorable Leonard Sand, U.S.D.J.

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON 7/29/99

6

Exhibit A

Name	Amount
Sam W. Aiena	$2,062,189
George D. Benjamin	2,053,614
Peter A. Bergsten	3,278,771
Robert A. Cameron	1,291,690
Walter H. Clemens	1,485,074
Robert V. Hatcher, Jr.	1,866,579
Kenneth A. Hecken	3,570,573
Albert S. McGhee	2,599,013
Richard E. Meyer	3,101,650
George F.B. Owens, Jr.	1,407,001
Richard J. Rice	1,222,088
J. Kenneth Seward	2,454,697
George H. Shattuck, Jr.	1,607,061

Index No. 93 Civ. 5481 (LBS) (AJP)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

-against-

JOHNSON & HIGGINS, INC.,

Defendant.

CONSENT JUDGMENT

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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EXHIBIT 2

2002 WL 32156934
2002 WL 32156934 (7th Cir.)

For opinion see 288 F.3d 296
Briefs and Other Related Documents

United States Court of Appeals,
Seventh Circuit.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellee,
v.
BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, Defendant-Appellant.
No. 01-2998.
January 14, 2002.

Appeal from a Judgment in the United States District Court for the Western District of Wisconsin, The Honorable John C. Shabaz, Presiding, Case No. 00- C-564-S

Defendant's Reply Brief and Supplemental Appendix

James E. Doyle, Attorney General, State of Wisconsin.
Jennifer Sloan Lattis, Assistant Attorney General, State Bar No. 1000387.
John R. Sweeney, Assistant Attorney General, State Bar No. 1003066, Attorneys for Defendant-Appellant, Wisconsin Department of Justice, Post Office Box 7857, Madison, Wisconsin 53707-7857, (608) 267-3519, (608) 264-9457.

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TABLE OF AUTHORITIES

Cases

INTRODUCTION

The defendant-appellant Board of Regents of the University of Wisconsin System ("Board") submits this reply brief in support of its appeal and those arguments presented in its initial brief. The parties agree that the issues presented for review and the appropriate standard of review are those set forth in the Board's initial brief and in the brief submitted by the Equal Employment Opportunity Commission (EEOC). The Board incorporates herein those arguments and factual recitations presented in its initial brief.

RELEVANT STATEMENT OF FACTS

The EEOC's recitation of facts omits several crucial factual matters essential to the court's review of the record. In addition, the EEOC's statement of facts intertwines facts, some contested, some disputed, with argument. At the risk of repeating certain facts in the record, the Board once again brings the following facts to the court's attention.

It is undisputed that at no time was anyone ever hired to replace the four full-time academic staff charging parties, Rosalie Robertson, Mary Braun, Joan Strasbaugh or Chuck Evenson in the Acquisitions or Marketing Departments at the University of Wisconsin Press ("Press"). Other employees were hired after the layoff, May 1999 (Tr. 2-54), but none were similarly situated to the charging parties. Those who were hired after the layoff were students, limited term employees ("LTEs"), and classified staff. They were not hired for the positions which the charging parties had held and were not full-time academic staff.

Raphael Kadushin was the same age as Mary Braun, 46, two years younger than Joan Strasbaugh, and four years younger than Rosalie Robertson (App. 143-144; Tr. 2-108). Professor Bethea and Mr. Salemson were both older than the charging parties (App. 130; Tr. 2-81) and, because they had worked with the staff daily, they were familiar with the skills, qualifications and performance of each Press employee, including the charging parties (Tr. 1-284). When considering how to respond to the Press' financial crisis, they believed that if there was no increase in the number of books published, if they focused on the humanities with Raphael Kadushin in Acquisitions and reduced the social science and environmental and trade books, areas in which Robertson, Braun, and Strasbaugh concentrated, they could eliminate two and one-half positions in the Acquisitions Department (Tr. 2-34, 2-35, 2-36, 2-106, 2-107, 2-108, 2-113, 2- 114). With a reduction in the number of books produced, they believed

they could manage effectively with less marketing and publicity, and thus could eliminate Evenson's position in direct mail and Strasbaugh's half-time position in publicity. Id. Betty Steinberg, who had been at the Press for 38 years, concurred with Bethea's proposal (Tr. 2-158, 2-160, 2-161).

The EEOC misstates the record when it claims that "Bethea, as a general matter, assumed a positive correlation between youth and effective job performance." (EEOC brief at page 10, citing Tr. 129-30). For Bethea to do so would be ludicrous as he was as old or older than the four charging parties. There is no evidence that Professor Bethea and Mr. Salemson "doctored" the facts or misled UW officials in order to achieve cuts (EEOC brief at page 10).

Professor Bethea and Mr. Salemson believed that all consideration of age for any reason was inappropriate (Tr. 2-49, 2-128).

None of the charging parties made any efforts to apply for positions at the Press after they were laid off, although they knew positions were available (Tr. 3-34 to 3-37; 3-92, 3-93; 3-109 to 3-111; 3-145, 3-146).

ARGUMENT

I. THE EEOC'S CLAIMS ARE BARRED BY ELEVENTH AMENDMENT IMMUNITY.

A. The argument that immunity entirely bars the EEOC's claims is properly before the court as is a lesser included argument that, regardless, immunity bars monetary relief.

The EEOC concedes, as it must (e.g., Higgins v. State of Mississippi, 217 F.3d 951, 953-54 (7th Cir. 2000)), that the Board's immunity may be first asserted on appeal, such that the argument that immunity entirely bars the EEOC's claims was not waived. (EEOC brief, pp. 19-24.) Incongruously, however, the EEOC contends that a lesser included argument -- that immunity bars monetary relief regardless of immunity's effect on injunctive relief -- was waived because it was not raised below.

Why? Because the EEOC declares that an argument challenging only monetary relief cannot implicate immunity. (EEOC brief, p. 23, n.6.) Arguments that immunity bars monetary relief are hardly transformed into waivable non-immunity arguments either by injunctive relief being available or by defendants acknowledging that fact. Cf. MSA Realty Corp. v. State of Ill., 990 F.2d 288, 291 (7th Cir. 1993) ("state officials may be sued in their official capacities for injunctive relief, although they may not be sued for money damages"); Scott v. Lacy, 811 F.2d 1153, 1153 (7th Cir. 1987) ("public officials may appeal immediately the rejection of their defense of immunity from liability in damages, when a claim for an injunction is pending and will be tried no matter the outcome of the appeal"); Burgess v. Lowery, 201 F.3d 942, 944 (7th Cir. 2000), reh. & reh. en banc denied, cert. denied, Lowery v. Burgess, 531 U.S. 817 (2000) ("a plaintiff cannot block a defendant's right to take an immediate appeal from a ruling that *** the *** defendant lacks immunity from a damages judgment merely by asking for injunctive relief as well as damages"). No waiver occurred regarding either the argument that the Board's immunity entirely bars the EEOC's claims or the lesser included argument that, regardless, its immunity bars monetary relief. E.g., Higgins, 217 F.3d at 953-54. Each argument, asserting immunity, is properly before this court.

B. Immunity barred Evenson, Robertson, Strasbaugh and Braun from suing on the ADEA claims pursued in this case and the EEOC stands in their shoes.

The EEOC concedes, as it must (Kimel v. Florida Board of Regents, 528 U.S. 62, 91 (2000)), that the Board's immunity barred Evenson, Robertson, Strasbaugh and Braun from suing the Board on the ADEA claims pursued in this case. (EEOC brief, pp. 19-20.) The EEOC also seems to concede that, when it brings suit, as in this case, merely to enforce the rights of individuals, it stands in the shoes of those individuals. (EEOC brief, pp. 19-24.) E.g., **EEOC v. North Gibson School Corp., 266 F.3d 607, 614 (7th Cir. 2001).**

C. If federal agencies may sue nonconsenting States merely to redress private claims of individual citizens which are barred by the Eleventh Amendment, a critical constitutional distinction would evaporate.

The EEOC contends that it comports with the constitutional plan, and is inoffensive to the Eleventh Amendment, for a federal agency to "'stand in the shoes'" (EEOC brief, p. 23) of the Board's former employees and pursue their ADEA claims as their representative (e.g., **EEOC v. North Gibson School Corp., 266 F.3d at 614),** without any articulated direct interest of the United States. (EEOC brief, pp. 19-24.) If this contention is accepted, the Eleventh Amendment would be subjected to the mercy, and whim, of federal agencies, and a critical constitutional distinction established by the Founders between the Federal and State governments would evaporate.

When courts state that the Eleventh Amendment is inapplicable to actions brought by the United States, they assume that the United States is pursuing real and direct interests in the suit. E.g., Alden v. Maine, 527 U.S. 706, 713, 755-56 (1999) (exercise of "political responsibility" is required). Cf. West Virginia v. United States, 479 U.S. 305, 310-11 (1987) (immunity no bar to United States enforcing its own contractual rights against West Virginia); U.S. v. State of Minnesota, 270 U.S. 181, 194 (1926)(immunity unavailable because "the United States has a real and direct interest in the matter presented for examination and adjudication"); U.S. v. State of Michigan, 190 U.S. 379, 395 (1903) (no immunity when United States sued Michigan for surplus monies after Michigan built a canal using "funds procured from the sale or other disposition of the public lands of the United States"); U.S. v. Texas, 143 U.S. 621, 638-48 (1892) (immunity no bar to suit regarding Texas boundary with United States territory); U.S. v. State of North Carolina, 136 U.S. 211, 216-22 (1890) (suit seeking payment of interest owed to United States as bondholder). The United States can have real and direct interests in suits that seek to stop States from continuing to engage in patterns and practices of misconduct intentionally violative of the Fourteenth or Fifteenth Amendments. E.g., U. S. v. Mississippi, 380 U.S. 128, 138-41 (1965). It is critical to the vitality of the United States itself that such egregious disrespect for the constitutional structure be ended. E.g., id.

The question here, however, is whether the United States may, simply by standing in the shoes of a private citizen barred by a

State's immunity, thereby avoid that bar. Jurisdictional inquiries that rum on the participation of the United States are not satisfied by the United States merely being a party: instead the United States must be a real, rather than nominal, party. E.g., U.S. Fidelity & Guaranty Co. v. U.S., 204 U.S. 349, 356-59 (1907). See also U. S. for Use and Benefit of Romero v. Douglas Const. Co., Inc., 531 F.2d 478, 481 (10th Cir. 1976); Danning v. U. S., 259 F.2d 305, 307-08 (9th Cir. 1958), cert. denied, 359 U.S. 911 (1959). In suits against States, as in other cases, if "the United States [is] only a nominal party," then jurisdictional prerequisites calling for its participation remain unsatisfied. U.S. v. State of Minnesota, 270 U.S. at 193. Analyzing that decision, a commentator noted that direct interests are, instead, required:

The Court's response is illuminating: "It must be conceded that, if the Indians are the real parties in interest and the United States only a nominal party, the suit is not within this Court's original jurisdiction." Notably, the Court cited, among other authorities, New Hampshire v. Louisiana as support for this statement. Although the Court did conclude that the United States had a direct interest in the suit, the fact remains that such an interest must be present to support jurisdiction.

Riga, "State Immunity in Bankruptcy after Seminole Tribe v. Florida," 28 Seton Hall L. Rev. 29, 62, text and n.177 (1997), emphasis added.

The EEOC relies on Kansas v. Colorado, 121 S.Ct. 2023 (2001) in asserting that, without itself having direct interests in this suit, it may "stand in the shoes" of individual claimants, barred by immunity from suing nonconsenting States, and thereby avoid that bar. (EEOC brief, pp. 23-24.) [FN1] Kansas, and similar decisions, tested whether original jurisdiction was invoked over a controversy between States. Nonetheless, the Board concurs with the EEOC that, with the constitutional authority allowing suit against States being the same (U.S. Const., art. III, s 2), this line of cases is directly pertinent to whether the United States may, without articulating any direct interests of the United States, pursue claims, on behalf of individual claimants, otherwise barred by immunity.

> FN1. The EEOC also relies heavily on, and attaches to its brief, a copy of a Sixth Circuit decision that was, on its face, "UNPUBLISHED" (EEOC Appendix) without noting that status (EEOC brief, pp. 20-21). The Board, given the cautions conveyed through Circuit Rule 53, refrains from citing this decision while noting that (1) unlike here, it plainly involved a pattern and practice challenge to an entire retirement plan in which the EEOC sought extensive injunctive relief and class-wide monetary relief (EEOC Appendix) and (2) this court, in **EEOC v. North Gibson School Corp.**, recognized that the Sixth Circuit is at direct odds with this and other circuits regarding the status of the EEOC when it seeks to obtain monetary relief for individual employees (**266 F.3d at 614, n.7**). The Board submits that this unpublished decision is sufficiently unhelpful to merit further comment.

Kansas held that the Eleventh Amendment was no bar to Kansas suing Colorado precisely because Kansas had clearly articulated direct interests of its own. Kansas, 121 S.Ct. at 2029 ("the present proceeding is but one of several in which Kansas' own interest in preventing upstream diversions from the Arkansas River" is at stake and "a State properly invokes our jurisdiction ... by seek [ing] redress for a wrong perpetrated against it by a sister State" (emphasis added).) The Court emphasized that, absent such direct interests, suits by sister States were barred:

It is firmly established, and undisputed in this litigation, that the text of the Eleventh Amendment would bar a direct action against Colorado by citizens of Kansas. Moreover, we have several times held that a State may not invoke our original jurisdiction when it is merely acting as an agent or trustee for one or more of its citizens. For example, in New Hampshire v. Louisiana, 108 U.S. 76, 2 S.Ct. 176, 27 L.Ed. 656 (1883), we refused to assume jurisdiction over an action to recover payment on defaulted bonds that had been formally assigned to the state plaintiffs but remained beneficially owned by private individuals. And, in North Dakota v. Minnesota, 263 U.S. 365, 44 S.Ct. 138, 68 L.Ed. 342 (1923), we held that, while the plaintiff State could obtain an injunction against the improper operation of Minnesota's drainage ditches, the Eleventh Amendment precluded an award of damages based on injuries to individual farmers, where the damages claim was financed by contributions from the farmers and the State had committed to dividing any recovery among the farmers "in proportion to the amount of [their] loss." Id., at 375, 44 S.Ct. 138.

Those cases make it clear that a "State is not permitted to enter a controversy as a nominal party in order to forward the claims of individual citizens." Maryland v. Louisiana, 451 U.S. 725, 737; 101 S.Ct. 2114 [(1981)]; see also New Hampshire v. Louisiana, 108 U.S. at 89, 2 S.Ct. 176 (Eleventh Amendment applies and acts to bar jurisdiction where "the State and the attorney-general are only nominal actors in the proceeding"). The "governing principle" is that in order to invoke our original jurisdiction, "the State must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest." Oklahoma ex rel. Johnson v. Cook, 304 U.S. 387, 396, 58 S.Ct. 954, 82 L.Ed. 1416 (1938).

Kansas, 121 S.Ct. at 2029, emphasis added. Eleventh Amendment guarantees cannot be undone by one sovereign pursuing private citizen claims against another sovereign:

The evident purpose of the amendment, so promptly proposed and finally adopted, was to prohibit all suits against a state by or for citizens of other states, or aliens, without the consent of the state to be sued, and, in our opinion, one state cannot create a controversy with another state, within the meaning of that term as used in the judicial clauses of the constitution, by assuming the prosecution of debts owing by the other state to its citizens.

New Hampshire v. Louisiana, 108 U.S. 76, 91 (1883), emphasis added.

As of 1976, the Court, citing numerous decisions, declared that it was "settled doctrine that a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens. [Citations omitted.]" Pennsylvania v. New Jersey, 426 U.S. 660, 665 (1976). It explained, in language significant

here, that:

This rule is a salutary one. For if, by the simple expedient of bringing an action in the name of a State, this Court's original jurisdiction could be invoked to resolve what are, after all, suits to redress private grievances, our docket would be inundated. And, more important, the critical distinction, articulated in Art. III, s 2, of the Constitution, between suits brought by "Citizens" and those brought by "States" would evaporate.

Pennsylvania, 426 U.S. at 665-66, emphasis added.

Immunity "is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today ... except as altered by the plan of the Convention or certain constitutional Amendments" and the federal government may sue States only to the extent that was allowed through ratification of the United States Constitution or its amendments. Alden, 527 U.S. at 713 and 755-56, emphasis added. The Founders, and the States in ratifying the Constitution, did not intend Sister States -- or the federal government -- to evade the States' immunity "by the simple expedient of bringing an action in the name of a State" -- or the federal government -- "to redress private grievances." Pennsylvania, 426 U.S. at 665-66.

To be valid, "[s]uits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States." Alden, 527 U.S. at 756, emphasis added. Unless the federal government, exercising "political responsibility" (Alden, 527 U.S. at 756), restricts itself to suing States when it pursues its own real and direct interests, "the critical distinction, articulated in Art. III, s 2, of the Constitution, between suits brought by 'Citizens' and those brought by ['the United States'] would evaporate." Pennsylvania, 426 U.S. at 665-66, emphasis added.

The only recent reported decision that appears to directly address the issue presented here is U.S. v. Mississippi Dept. of Public Safety, 159 F. Supp. 2d 374 (S.D. Miss. 2001), recon. denied. [FN2] That court determined, in an ADA context, that the Eleventh Amendment bars suit where the United States merely stands in the shoes of employees rather than invoking any pattern and practice authority. 159 F. Supp. 2d at 376-77. Here, the EEOC asserted ADEA claims, otherwise barred by the Eleventh Amendment, to pursue private grievances by four former employees of the Board -- not to address any continuing alleged patterns and practices of State unconstitutional misconduct. (App. 174-177, 9/14/00 Complaint, pp. 1-4.) Substantively, the Complaint could, except for the named plaintiff, be easily mistaken for a routine ADEA complaint by employees pursuing their own grievances. (App. 174-177, 9/14/00 Complaint, pp. 1-4.) The only injunctive relief granted was, at best, incidental (NR. 107) -- with even a general "cease and desist" order being wholly inapplicable -- to the driving goal of recovering monetary relief for these four former employees who, not incidentally, were permitted to remain in the courtroom throughout the trial despite a sequestration order for witnesses (Tr. 1, pp. 32-33). The Eleventh Amendment may not be cast aside because a federal agency, failing to exercise "political responsibility" (Alden, 527 U.S. at 756), decides to "stand in the shoes" (EEOC brief, p. 23) of individual claimants. The Founders expected, and the States deserve, far more.

> FN2. As documents incorporated into the attached Supplemental Appendix reflect, the United States sought reconsideration in U.S. v. Mississippi Dept. of Public Safety and that request was denied in November 2001. (App. 166-173).

Immunity bars the EEOC's claims. Alternatively, immunity certainly bars the monetary relief awarded to the individual claimants.

II. THE PLAINTIFF FAILED TO PRODUCE SUBSTANTIAL EVIDENCE OF WILLFUL AGE DISCRIMINATION AND THE DISTRICT COURT SHOULD HAVE GRANTED THE DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW.

A. Plaintiff's prima facie case of age discrimination.

Again recognizing that at this stage of the proceedings the court goes directly to an analysis of all the evidence rather than concerns itself with an analysis of the prima facie case, it remains abundantly clear that the EEOC still has not produced sufficient evidence to establish a prima facie case of age discrimination or that these four charging parties were laid off because of their age. Specifically, the plaintiff presented absolutely no evidence that substantially younger, similarly situated employees were treated more favorably. Radue v. Kimberly-Clark Corp., 219 F.3d 612, 619 (7th Cir. 2000); Fisher v. Wayne Dalton Corp., 139 F.3d 1137, 1141 (7th Cir. 1998) ("substantially younger means at least ten years difference"). See also the Board's initial brief at pp. 22-25 and the legal authorities cited therein.

Professor Bethea and Mr. Salemson had eighteen full-time academic staff employees whom they considered for elimination and twelve of them were in the protected age group (App. 130). In the Acquisitions Department, there were three candidates for layoff: Rosalie Robertson, 50, Mary Braun, 46, and Raphael Kadushin, also 46, and one half-time Acquisitions person, Joan Strasbaugh, 48. There was no significant age difference between any of these employees. Thus, regardless of which employee was retained, no reasonable inference of age discrimination could be drawn. The fact that Kadushin, who was the same age as Braun, was retained does not permit an inference that the decision was motivated by age. Raphael Kadushin, 46, was retained for the reasons discussed by Professor Bethea and Mr. Salemson in the Justification Memo (App. 140-151), and Rosalie Robertson, 50, Mary Braun, 46, and Joan Strasbaugh, 48, were laid off and their positions were eliminated (App. 140-151).

Bethea and Salemson believed that Kadushin should be retained rather than Robertson, Braun or Strasbaugh because the Press intended to focus more on the humanities, Kadushin's area of expertise, and less on the social sciences, environmental and trade books, areas in which Robertson, Braun and Strasbaugh worked (Tr. 2-34, 2-35, 2-36).

Although similarly situated, the age of these four employees in Acquisitions does not permit the inference that age was a factor in

this decision because Mr. Kadushin was not substantially younger than the other three employees.

In the Marketing Department, Chuck Evenson's position was simply eliminated; the mailing function was discontinued (Tr. 2-109, 2-110). The Press had no legal obligation to bump another employee simply because Evenson was in the protected age category and his job was eliminated. The ADEA is neither a bumping statute nor is it a tenure statute. The ADEA does not require special treatment for older workers. Radue, 219 F.3d at 615. Nor did the Press have an obligation to find another employee to bump or create another position so that Evenson could have been retained.

Chuck Evenson was a staff of one in the mailing department. His position was eliminated. There was not another similarly situated employee in that department. Rebecca Gimenez was not similarly situated. According to David Bethea and Steve Salemson, she was more technologically skilled and more creative than Evenson, and she was highly skilled in electronic advertising. She was very efficient and a "bargain" because of her low salary (Tr. 2-110, 2- 111, 2-112). Evenson, on the other hand, had only minimal HTML work experience, whereas Gimenez had demonstrated her skill in this area. Id. There was no evidence that Professor Bethea and Mr. Salemson did not honestly believe that Ms. Gimenez was more talented and more versatile than Mr. Evenson.

The EEOC made no effort to present any evidence that the employees who were retained or those who were hired months later possessed the analogous attributes, experience, education or qualifications as those whose positions were eliminated and who were laid off. Nor did the district court make this inquiry. Not one of these employees was similarly situated to the charging parties.

B. The Plaintiff did not present substantial evidence that age was a motivating factor in the Press' decision about which employees to lay off, nor did the EEOC present substantial evidence that had the charging parties been younger than forty they would not have been laid off.

To demonstrate pretext, the EEOC must present substantial evidence that the defendant's explanation for its action, in this case, the Press' decision to lay off these four employees rather than four other employees, was a lie, a pretext for age discrimination; a mere scintilla of evidence is not enough. Mathur v. Board of Trustees of Southern Ill. Univ., 207 F.3d 938, 943 (7th Cir. 2000). The evidence must amply support the plaintiff's claim that the defendant's explanation is unworthy of credence.

There was absolutely no evidence from which a reasonable jury could have concluded that the layoff or the other cost reduction methods implemented in May 1999 were a subterfuge to get rid of the four charging parties. The EEOC presented no evidence that there was not in fact a financial crisis at the Press or that UW personnel and Press personnel did not believe that there was a real financial crisis. Regardless of the numbers, there was a financial crisis at the Press in the Spring of 1999, and everyone, including the charging parties, knew this. (Tr. 2-179).

The only questions for the reviewing court are was there sufficient, substantial evidence to demonstrate that Professor Bethea and Mr. Salemson's explanation why these four employees, rather than four other employees, were laid off was pretextual, a fabrication, a lie, a fraud upon the court, and could a reasonable jury honestly conclude based upon the evidence that the tree reason for the choice of these four employees, rather than four others, was age and if the charging parties had been younger, maybe younger than forty, and everything else had remained the same, they would not have been laid off. Lane v. Hardee Food Systems, Inc., 184 F.3d 705, 706-707 (7th Cir. 1999); Diettrich v. Northwest Airlines, Inc., 168 F.3d, 961, 965 (7th Cir. 1999); Helland v. South Bend Community School Corp., 93 F.3d 327, 330 (7th Cir. 1996) (the pretext inquiry focuses on the honesty not the accuracy of the employer's stated reasons). The plaintiff may make the requisite showing of pretext by providing evidence that the proffered reasons are factually baseless, that the stated reasons were not the actual reasons for choosing these employees for layoff, or that the Press' explanation was insufficient to motivate the layoff of these four employees rather than four other employees. Gordon v. United Airlines, Inc., 246 F.3d 878, 888 (7th Cir. 2001). The EEOC did none of these. Instead, the EEOC continued to argue the skills of the charging parties and that the process by which the decisions were reached *** were faulty and laden with mistakes and inaccuracies. This attack on the Press does not address pretext.

If Professor Bethea and Mr. Salemson honestly believed their reasons for choosing these four employees, these four positions, rather than four others, the EEOC cannot meet this burden. Id. Aungst v. Westinghouse Elec. Corp., 937 F.2d 1216, 1220 (7th Cir. 1991); Hartley v. Wisconsin Bell, Inc., 124 F.3d 887, 890 (7th Cir. 1997). The plaintiff must provide specific evidence of pretext for each of the Press' explanations, and the EEOC did not do this. Challenging the Press' evaluation of the charging parties' credentials and experience and skills does not address pretext. Mills v. First Fed. Sav. & Loan Ass 'n of Belvidere, 83 F.3d 833, 843 (7th Cir. 1996); Aungst, 937 F.2d at 1223 (evidence of the charging parties' qualifications and skills is a part of the prima facie case, not pretext). Professor Bethea and Mr. Salemson were free to make the decisions about which employees would best fulfill the Press' needs.

Professor Bethea and Mr. Salemson honestly believed that these four employees were the most expendable and that others possessed the skills and qualifications necessary to help the Press in the short and the long term (App. 136-151). Brill v. Lante Corp., 119 F.3d 1266, 1273 (7th Cir. 1997); Hartley, 124 F.3d at 897. The EEOC points to no evidence in the record that Professor Bethea and Mr. Salemson did not believe in their explanations, Hartley, 124 F.3d at 890. There is not a scintilla of such evidence much less substantial evidence which would permit a reasonable jury to disregard the defendant's explanation.

There was not a scintilla of direct evidence of age discrimination nor was there any evidence of ageism comments or ageism. Ransom v. CSC Consulting, Inc., 217 F.3d 467, 470 (7th Cir. 2000). The EEOC's "new vision argument," terms such as "hit the ground running," beginning in 1995 when Mr. Salemson was hired, and reference to the pre-electronic era, when mass mailings were the way of doing business, are not code words for age discrimination or ageism. Professor Bethea's reference to Rebecca Gimenez as a talented young woman, made seven months after the layoff, was not an ageist statement. Reeves v.

Sanderson Plumbing Products, Inc., 530 U.S. 133, 151 (2000); Fortier v. Ameritech Mobile Communications, Inc., 161 F.3d 1106, 1113 (7th Cir. 1998) (no liability for state such as "new blood," a lot of energy, or quick study). Courts and juries should not infer discriminatory animus into statements where none is apparent. See Markel v. Board of Regents of UW, 2002 WL 5692 *2 (7th Cir. Jan. 3, 2002). Salemson was older than the four charging parties and arguably part of what the EEOC called the "new vision."

The fact that younger employees, including students and LTEs, were not laid off or were hired after the layoff does not permit an inference of age discrimination because none of these employees mentioned by the EEOC or the district court, Susan Jevens (LTE, Tr. 1-174), Neinke Wijnia (LTE, Tr. 2-174), Will Morgan (Tr. 2-174), Jenny Siefert (Tr. 2-174), and Sheila McMahon (classified staff who replaced two LTEs in acquisitions) (Tr. 2-55), were similarly situated or comparable in any way to the charging parties. These employees were students, LTEs, or classified staff as opposed to the 18 academic staff, full-time employees, including the charging parties, at the Press (Defendant's Exhibit 686, Tr. 2-55; App. 130).

No one other than the charging parties believed that they should have been retained rather than Mr. Kadushin in Acquisitions. No witness said or demonstrated that the three charging parties were more qualified than Mr. Kadushin or that Bethea and Salemson did not think that Kadushin was the more versatile person to retain in the Acquisitions Department. Bethea, Salemson and Betty Steinberg believed that Kadushin was the appropriate person to retain. The EEOC did not dispute this evidence or demonstrate that it was not true. Thus, no pretext.

Chuck Evenson's position in the Marketing Department was eliminated; no one replaced him. There was not substantial evidence that Bethea and Salemson, or anyone remotely connected to the Press, did not honestly believe it was a sound business decision to eliminate the direct mail function and Mr. Evenson's position. Thus, no pretext. The Press had no obligation to bump anyone else, younger or not, to fred a place for Evenson, or to create a position simply because he had been at the Press for ten years. His job was eliminated; he was laid off.

No one testified that it was not a sound business decision to eliminate the direct mail function and Mr. Evenson's position. Even if they had, there was no showing that Bethea and Salemson and UW personnel did not believe that the direct mail function should be eliminated. Thus, no pretext.

Once the Press presented its explanation for why Professor Bethea and Mr. Salemson decided that these four employees were the least versatile, the EEOC was required to demonstrate for each of the charging parties that the explanation given was a pretext for discrimination. The EEOC did not do this for any of the charging parties.

The EEOC did not present substantial evidence of pretext or age discrimination, and the district court should have granted the Board's motion for judgment as a matter of law. Diettrich v. Northwest Airlines, Inc., 168 F.3d 961 (7th Cir. 1999), cert. denied, 120 S.Ct. 48 (1999); Shank *v. Kelly-Springfield Tire Co., 128 F.3d 474 (7th Cir. 1997) (because no evidence of pretext district court should have granted motion for judgment as a matter of law).*

C. In the alternative, the EEOC did not present sufficient evidence to enable the jury to find that the actions of Professor Bethea and Mr. Salemson were "willful" within the meaning of the ADEA.

The standard for willfulness under the ADEA is clear. It requires reckless disregard for whether the conduct was prohibited by the ADEA. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 128 (1985). The Board respectfully contends that the evidence did not support a willful violation of the ADEA. Both Professor Bethea and Mr. Salemson correctly believed that the ADEA prohibited all age discrimination in employment decisions, and that is precisely the law. The ADEA does not say that it is illegal to discriminate only against those who are over forty; however, the ADEA provides coverage only for those persons over forty who allege age discrimination. The issue is not over forty or under forty but age discrimination. Hartley, 124 F.3d at 892.

Professor Bethea and Mr. Salemson believed that the ADEA applied to all personnel actions, and they are correct.

There was not sufficient evidence for a reasonable jury to conclude that they willfully violated the ADEA. Their understanding of the law was correct, and the Board and the University were not negligent in training or educating them about their responsibilities under the ADEA.

III. IN THE ALTERNATIVE, THE DISTRICT COURT SHOULD HAVE GRANTED THE DEFENDANT'S MOTION FOR A NEW TRIAL.

The jury's verdicts of willful age discrimination and the damage awards are not supported by substantial evidence, and the court should have granted the Board's motion for a new trial to effectuate substantial justice.

As discussed in the Board's initial brief, none of the charging parties mitigated their damages as required by law because none of them applied for any of the vacant positions at the Press after the layoff. They claimed they could perform any of the jobs at the Press but they did not apply. They knew about the job openings at the Press but for various reasons none of them applied. Rosalie Robertson did not apply for the Rebecca Gimenez vacancy (Tr. 3-110), nor the positions formerly held by Steve Miller (Tr. 3-110) and Juliet Skuldt (Tr. 3-111), nor the manuscript editor position or the administrative program specialist position (Tr. 3-110-, 3-111).

Neither Joan Strasbaugh nor Mary Braun applied for any of these positions at the Press (Tr. 3-93; 3-110, 3-111).

The charging parties were obligated to exercise reasonable diligence to mitigate their damages. U.S. EEOC v. Gurnee Inn Corp., 914 F.2d 815, 817 (7th Cir. 1990). Because they did not pursue or apply for the vacant positions at the Press after their layoff, they did not, as a matter of law, properly mitigate their damages. In addition, Chuck Evenson refused to take a test for employment at the Press and instead voluntarily retired.

In finding willful age discrimination, the jury was guided by emotion and sympathy, and they ignored the facts. They were

prejudiced by the EEOC's inappropriate, blatantly unfair remark in closing argument: "We wouldn't be here unless the law had been violated." See the Board's discussion at p. 36 of its initial brief.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN AWARDING CERTAIN COSTS TO THE PLAINTIFF.

The district court was not authorized to award costs and expenses incurred by the charging parties and Dr. Tun, an EEOC employee, to the EEOC.

The charging parties were the true parties in interest, and the district court recognized them as such by permitting them to be present during the entire trial despite a sequestration order (Tr. 1-32 to 1-35). The holding and rationale in EEOC v. Wal-Mart Stores, Inc. 2000 U.S. Dist. LEXIS 11162029 (S.D. Ill. 2000) is appropriate in this case, and the court should reverse the $5,516.99 in costs awarded to the EEOC.

CONCLUSION

For the reasons discussed herein and in the initial brief, the Board of Regents of the University of Wisconsin respectfully asks this court to dismiss this action in its entirety, or in the alternative, to reverse the decisions of the district court and grant the motion for judgment as a matter or law or the motion for a new trial and/or to vacate the district court's decision awarding certain costs to the plaintiff.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellee, v. BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, Defendant-Appellant.

2002 WL 32156934

Briefs and Other Related Documents (Back to top)

. 2001 WL 34136113 (Appellate Brief) Brief of the Equal Employment Opportunity Commission as Plaintiff-Appellee (Dec. 21, 2001)

. 2001 WL 34136112 (Appellate Brief) Brief of Defendant-Appellant (Nov. 27, 2001)

. 01-2998 (Docket) (Jul. 31, 2001)

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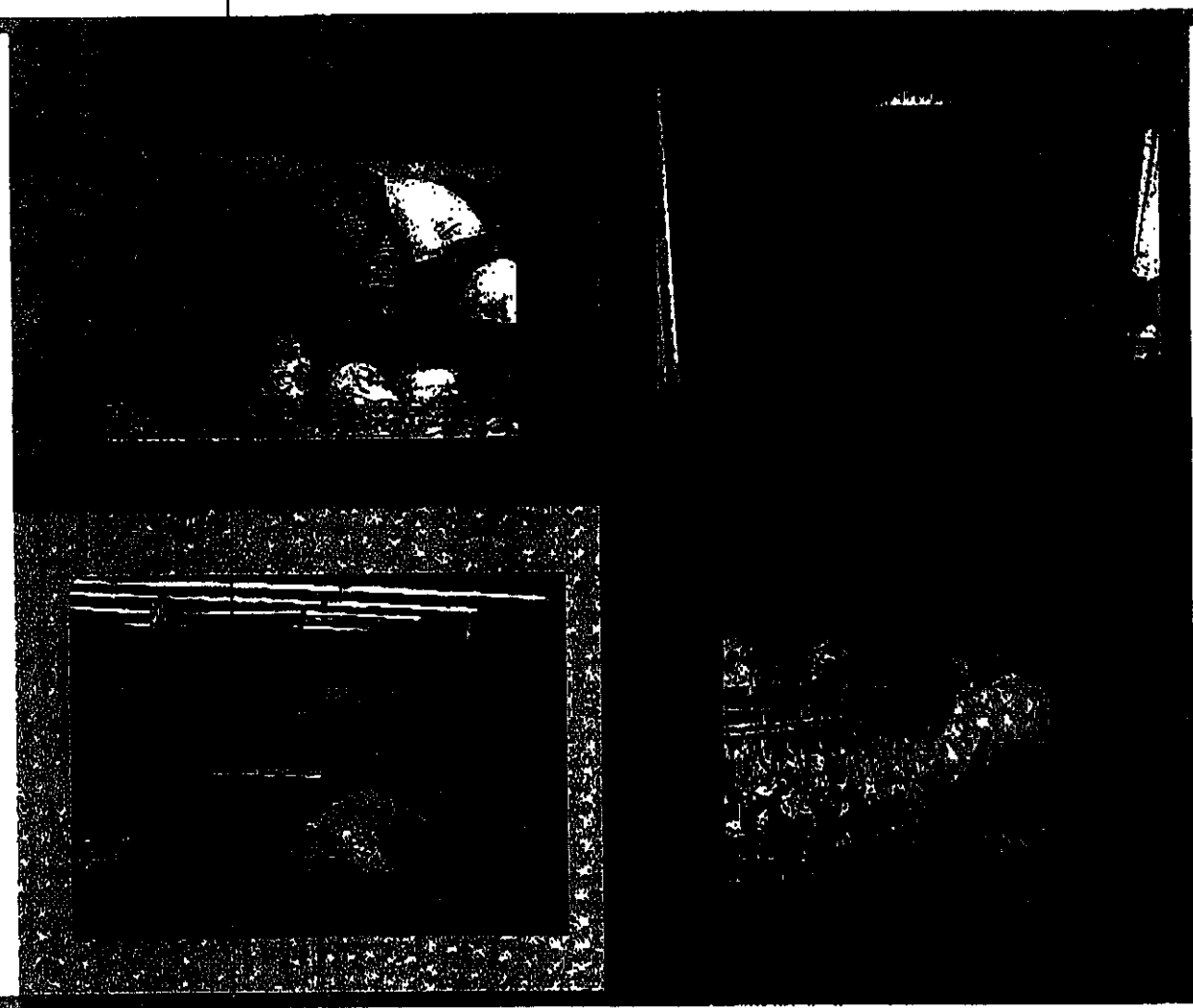
EXHIBIT 3

U.S. Department of Labor

1999 - 2000 REPORT ON INITIATIVES

Employment Standards Administration
Wage and Hour Division



FEBRUARY 2001

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division

99-00

Report on 1999 and 2000 Accomplishments
February 2001

Forward

This is the second report by the Wage and Hour Division on initiatives to achieve compliance with the Nation's most basic labor laws—especially in low-wage industries. The report covers Wage and Hour's activities in 1999 and 2000.

The first report, the *1998 Report on Low-Wage Initiatives,* was issued in February 1999.

Wage and Hour Division Mission

"To achieve and promote compliance with labor standards through enforcement, administrative, and educational programs to protect and enhance the welfare of the Nation's workforce."

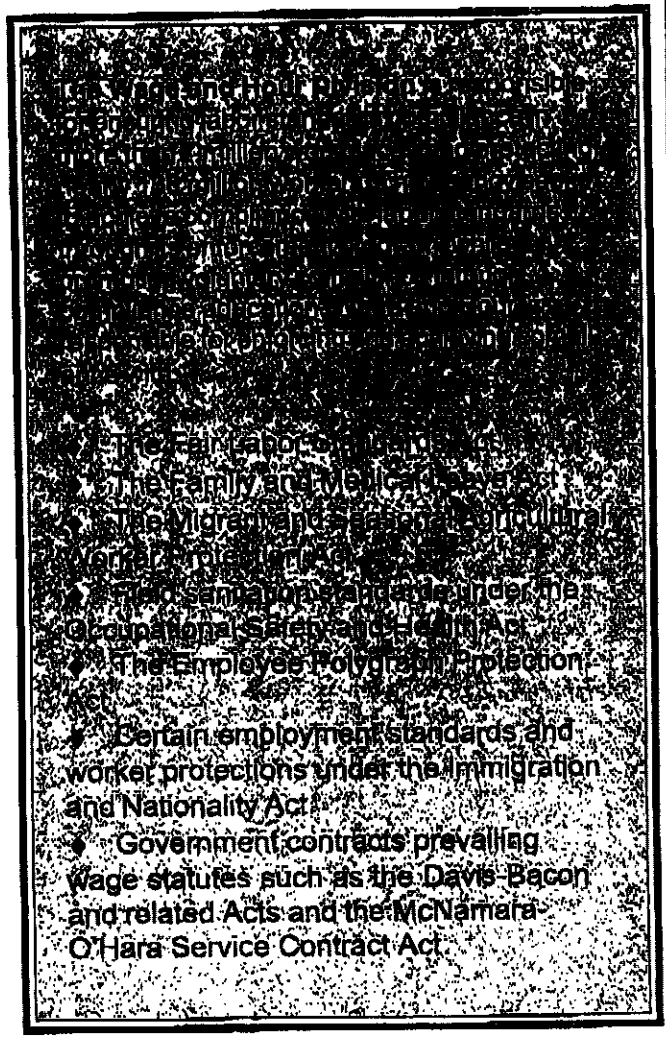
The U.S. Department of Labor's Wage and Hour Division is responsible for administering and enforcing a number of laws that establish minimally acceptable standards for wages and working conditions in this country. These labor standards statutes—including the Fair Labor Standards Act (FLSA), which sets the minimum wage, overtime standards and child labor restrictions—protect the most vulnerable in the workplace, *i.e.*, low-wage workers, the working poor and children.

Nationwide, Wage and Hour has approximately 1,500 employees. By the end of 2000, 949 of Wage and Hour staff were field investigators—a 21% increase since 1996. These new staff, many of whom are bilingual, have been deployed to those areas of the country where there are large numbers of low-wage workers and levels of compliance are low.

In both 1999 and 2000, the agency received additional funding from Congress. The agency's 2000 operating budget was $141.9 million—up 17% from the 1998 level, and included additional funds sought and obtained to:

➢ Hire 36 additional investigators in 1999 and 30 in 2000 to enhance compliance activities, including child labor, in garment manufacturing and agriculture;

➢ Implement a nationwide education initiative through non-traditional partnerships with intermediary organizations and institutions that provide services to workers and employers; and,



➢ Design and implement a nationwide toll-free number and "expert" system to allow the agency to respond more quickly and accurately to millions of information calls and thousands of employee complaints.

In addition, Wage and Hour continued to receive funding to pursue the process begun in 1999 for updating child labor hazardous orders to reflect current technologies, hazards, and other workplace factors.

determining compliance

...t agency within the ...Labor with over 4,000 ...ployees, pursuing ...ission, 'to enhance the welfare and protect the rights of American workers,' and is inspired by the vision, 'to achieve universally applied fair practices in the American Workplace."

Testimony of Bernard E. Anderson, Assistant Secretary for Employment Standards, before the House Education and the Workforce Subcommittee on Oversight and Investigations June 27, 2000

The Government Performance and Results Act (GPRA) calls on agencies to identify their core missions, establish meaningful challenging goals, and develop measures that will give Congress, the public and the agencies themselves a clear indication of the extent to which progress is being made towards the intended program results. GPRA requires agencies to develop strategic plans, structure their goals and measures, and focus their energies on achieving significant improvements in program results. GPRA—which is now an integral part of the budget process—provides the structure and the framework for Wage and Hour's strategic goals.

Consistent with GPRA's intent, Wage and Hour developed a new system of measuring its progress towards its goal of increasing compliance with the laws it enforces. Prior to this new measurement, there was no other source of accurate, comprehensive information for which to create reliable compliance data.

In order to determine a starting point—a compliance baseline—and whether progress is being made towards achieving its goal, Wage and Hour developed statistically valid investigation–based surveys as the means of measurement.

These measurement instruments serve four basic functions:

- They constitute a form of intervention to change compliance behavior because Wage and Hour conducts full investigations in carrying out the surveys;

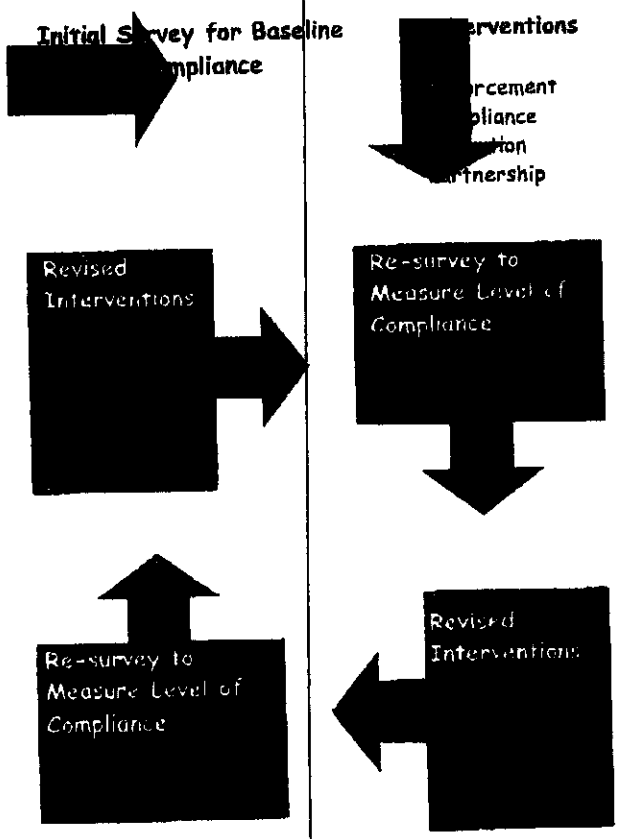
- They provide Wage and Hour, the public, and the Congress with accurate measures of compliance levels from which changes can be assessed over the long term;

- They inform the agency on industry-wide non-compliance patterns from which strategies for changing behavior can be designed; and,

- They measure how successful the agency was in changing the compliance behavior of prior violators (recidivists). These recidivism measurements help the agency identify and replicate effective forms of interventions, and carefully evaluate unsuccessful intervention techniques.

Initially, a randomly selected representative number of establishments within a targeted industry are scheduled for investigation. From these investigations, a baseline level of compliance is established. Thereafter, interventions—based on Wage and Hour's multi-prong compliance strategy of enforcement, compliance education and partnerships—are designed and implemented in the intervening time period between the surveys. Subsequent compliance surveys—usually on a two– to three–year cycle—determine changes in compliance patterns and may shed some light on how effective intervening strategies have been in changing behavior to achieve compliance in a targeted industry. Such surveys also provide insight for modifying strategies and implementing a course for subsequent years.

Measurement Model



COMPLIANCE

As early as the enactment of the Fair Labor Standards Act (FLSA) in 1939, this Country recognized that responsible public policy decreed a basic guarantee of minimum standards for workers. The FLSA—and those workplace laws that have since followed—benefit and protect millions of workers. And, for that reason, compliance with these laws remains as crucial today as when first enacted. If we could say that each employer provides all its workers with the compensation and workplace standards set forth in the laws enforced by the Wage and Hour Division, then, as an agency, we will have "achieved" compliance. But having focused our attention and resources on those industries with some of the most pervasive compliance problems in this Country, we understand the dimensions of the task that we have set for ourselves—violative employment practices are often long-standing and pervasive, the extrinsic factors affecting compliance are difficult to overcome and the tools and resources for accomplishing the task are limited. It may be unrealistic to believe that we will obtain full and complete compliance, so the goals we have established and the strategies that we have deployed are geared toward achieving "substantial" compliance as defined by the individual characteristics of the targeted industries.

targeting low-wage

While Wage and Hour recognizes that resolving worker complaints and restoring back wages are important core functions of the organization, we found—in establishing five-year strategic objectives—that complaint-based investigations are not effective in securing widespread substantial compliance within an industry as a whole. Only those individual employers investigated by Wage and Hour based on complaints alleging violations would be likely to change their violative behavior and, often they would only change behavior related to particular kinds of violations identified during the course of an investigation. In short, Wage and Hour complaint-based interventions changed some behaviors of an individual employer, but they were not changing the compliance behavior of an entire industry. And, they were not producing long-term sustainable patterns of compliance.

In the early 1990s, beginning with agriculture and garment manufacturing, Wage and Hour began shifting its strategies toward pursuing industry-wide compliance. Garment manufacturing became the first of three low-wage industries targeted nationally. Agriculture and health care comprise the other two. In addition, Wage and Hour has renewed its efforts to examine child labor compliance in industries where the data indicate that the risk of serious injury of young workers is greatest. To date, Wage and Hour has determined baseline levels of compliance in 12 industries or industry sectors, and has conducted subsequent surveys in five.

TARGETING FACTORS

Enforcement data and history that demonstrate high rates of violations or egregious violations, including data that emerges from other agencies like the Department's Occupational Safety and Health Administration, the Immigration and Naturalization Service, and State labor departments.

Workforce demographics that show a high concentration of low-wage workers. These workers are among the country's more vulnerable—many are immigrant workers (legal or illegal) who become easy targets for exploitation. Low-wage workers rarely complain or seek assistance because they are either unaware of or afraid to exercise their rights.

Changes in an industry—growth or decline—frequently impact compliance levels. Labor-intensive industries striving to compete in a changing, often global, marketplace may view labor as a negotiable commodity at the expense of the workers.

Levels of Compliance in Nationally Targeted Industries

Industry/Sector	Baseline Level of Compliance		Current Level of Compliance	
	Percent in Compliance	Year Determined	Percent in Compliance	Year Determined
Los Angeles	22%	1994	33%	2000
San Francisco	57%	1995	74%	1999
New York City	35%	1997	35%	1999
Nursing Homes	70%	1997	40%	2000
Residential Care	57%	1999		
"Salad Bowl" Commodities				
Tomatoes	75%	1996		
Onions	42%	1999		
Cucumbers	49%	1999		
Lettuce	65%	1999		
Garlic	38%	2000		
Poultry Processing	40%	1998	Zero	2000
Reforestation	30%	2000		
Full Service Restaurants	79%	2000		
Fast Food Restaurants	70%	2000		
Grocery Stores	83%	2000		

As importantly, every regional and local Wage and Hour office also targets local low-wage industries and carries out child labor initiatives within its jurisdiction. In 1999 and 2000, Wage and Hour offices conducted statistically valid surveys in a number of locally-targeted industries/industry sectors. All but two of these surveys established baselines. The two surveys—the Southeast Region's Hotel/Motel initiative, and the Seattle District Office's State of Washington Adult Family Homes initiative—were resurveys of a targeted industry. The level of compliance in the Southeast Region's Hotel/Motel initiative declined. The level of compliance for the State of Washington Adult Family Homes stayed the same.

Compliance Rates in Local Low Wage Industries

Location	Low-Wage Industry	Compliance Rate	Year
NE Region-wide	Temporary Help	79%	1999
Richmond, VA	Automobile Repair	64%	1999
Pittsburgh, PA	Restaurants	50%	1999
Pennsylvania	Day Care	47%	2000
Long Island, NY	Radiology Offices	83%	2000
Caribbean	Security Guards	24%	2000
Georgia	Day Care	26%	2000
South Carolina	Day Care	67%	2000
SE Region-wide	Hotel/Motel	56%	2000[1]
Tennessee	Day Care	46%	2000
Carolinas	Consumer Loan/Mortgage	57%	2000
Gulf Coast, AL	Day Care	33%	2000
South Carolina	Child Labor Recidivism in Myrtle Beach	88%	2000
Jacksonville, FL	Florists	81%	2000
Louisville, KY	County Jails	74%	2000
South Florida	Security Guards	60%	2000
Tampa, FL	Full Service Restaurants	53%	2000

1 The 1998 survey determined a baseline of 72%.

Compliance Rates in Local Low-Wage Industries

Location	Low-Wage Industry	Compliance Rate	Year
[redacted]			
Chicago, IL	Restaurants	42%	1999
Indianapolis, IN	Restaurants	47%	1999
Kansas City, MO	Day Care	24%	1999
Minneapolis, MN	Gas Stations	70%	1999
Columbus, OH	Restaurants	72%	2000
Des Moines, IA	Child Labor in Grocery Stores	48%	2000
Minneapolis, MN	Rainbow Foods Stores	5%	2000
Kansas City, MO	Day Care	55%	2000
St. Louis, MO	Nursing Homes	50%	2000
Springfield, IL	Day Care	68%	2000
[redacted]			
Houston, TX	Roofing	77%	1999
Salt Lake City, UT	Fast Food Restaurants	59%	1999
New Mexico & Texas	Red Chili Peppers	44%	2000
Bexar & Webb Counties, Texas	Restaurants	69%	2000
[redacted]			
Reno, NV	Hotels/Motels	62%	1999
Seattle, WA	Adult Family Homes	52%	1999
Los Angeles CA	Grocery Stores	57%	2000
Los Angeles, CA	Garlic	47%	2000
Phoenix, AZ	Restaurants	77%	2000
Phoenix, AZ	Produce Sheds	69%	2000
Portland, OR	Restaurants	81%	2000
Portland, OR	Pharmacies	98%	2000
Seattle, WA	Adult Family Homes	53%	2000[2]
West Covina, CA	Child Labor	94%	2000
West Covina, CA	Residential Care	35%	2000

2 The 1999 survey determined a baseline of 52%.

strategic approach

Several years ago, like many other agencies, Wage and Hour began experiencing the effects of downsizing, diminishing budgets and increasing responsibilities. As available resources steadily declined in the 1980s and early 1990s, we faced added responsibilities, like the implementation of the Family and Medical Leave Act in 1993. To meet these challenges, we began to think more strategically—to rethink compliance priorities by defining specific outcomes and strategic goals. These early efforts provided the basis for the development and articulation of Wage and Hour's "mission" statement, which defines for the public and the organization the fundamental reason for the agency's existence and our principal operational purpose.

In part, to fulfill its important mission, Wage and Hour established two broad interrelated and mutually-supporting strategic goals that guide our planning, program operation and the allocation of resources over the long term:

Achieve compliance **with laws and regulations administered and enforced by Wage and Hour; and,**

Improve customer satisfaction **with the services that Wage and Hour provides.**

These broad strategic goals provide consistency and constancy with the agency's mission at all levels of the organization.

And, in turn, these goals have guided the development of short-term objectives and activities. Wage and Hour established three objectives to achieve labor law compliance—the core of our worker protection program—and three customer satisfaction objectives. They are to:

Achieve Compliance in

Nationally identified low-wage garment manufacturing, agriculture, and health care industries; and, regionally/locally identified low-wage industries (such as restaurants, guard services, janitorial services, temporary help, hotels/motels) including in rural areas and small towns.

Improve employers' knowledge—especially new and small businesses—of Wage and Hour laws and processes in order to promote compliance.

Increase level of employers' compliance following a Wage and Hour intervention to reduce recidivism.

Improve Customer Satisfaction

. . . among workers seeking our services.

. . . among employers.

. . . among others seeking our services, including contracting agencies.

Wage and Hour uses a multi-prong approach of enforcement, compliance education, and partnerships to increase compliance with the labor standards for which it has responsibility.

The enforcement component of our comprehensive approach includes the use of traditional enforcement tools like investigations; the assessment of civil money penalties (fines) for repeat and willful violations; targeted strike forces in low-wage industries; and the FLSA "hot goods" provision. New tools, such as obtaining the "disgorgement" of ill-gotten gains from the sale of "hot-goods" and expanding referrals for criminal prosecution and civil litigation for injunctions are also being used.

strategies for inc

Over the last decade, Wage and Hour has increased the proportion of its compliance efforts in "directed" or "targeted" investigations—as opposed to "complaint-based" investigations—from 25 percent to 30 percent. Targeted investigations are used to deter and remedy violations in predominately low-wage industries where violations are more often egregious and complaints less common.

Compliance education includes such activities as seminars for employers and employer associations; town hall meetings for workers; and distribution of a variety of compliance assistance materials, including fact sheets, compliance manuals and palm cards.

Elaws is an interactive internet-based tool which provides easy-to-understand expert advice on basic FLSA requirements and the Family and Medical Leave Act. A separate module covers the Federal child labor requirements. The interactive format tailors answers based on the user's responses to a set of questions. Information can be accessed directly from the Department of Labor's home page at www.dol.gov/elaws.

WORKER EXPLOITATION TASK FORCE

The Worker Exploitation Task Force (WETF) was established in 1997 to help combat cases of egregious worker exploitation and modern day slavery in the United States. Co-chaired by the Solicitor of Labor and the Assistant Attorney General for Civil Rights and including representatives from the Federal Bureau of Investigation, the Immigration and Naturalization Service, the Equal Employment Opportunity Commission and other Federal agencies, the Task Force meets regularly to coordinate ongoing enforcement cases, deliver training and oversee the activities of the 15 Regional WETFs. The purpose of the WETF is to:

- Ensure better coordination between government agencies that look into worker exploitation;
- Create a centralized system to share information and exchange ideas on how to pursue these cases; and
- Craft an overall strategy to address worker exploitation by establishing a comprehensive enforcement plan.

Recent Wage and Hour related cases include:

- In early spring 1999, Abel Cuello, Jr., Basilio Cuello, and Herman Covarrubias of Immokolee, FL, were arrested and charged with involuntary servitude, extortion, harboring illegal aliens, and MSPA violations. Later that September, Abel Cuello was sentenced to 33 months in prison and ordered to pay $29,445 in restitution. Herman Covarrubias and Basilio Cuello each received prison sentences.

- In March 1999, Willie Warren, Sr., of Arcadia, FL—a farm labor contractor (FLC), with a long history of MSPA violations—pled guilty to engaging in farm labor contracting activities without a certificate of registration; failing to comply with safety and health standards for a migrant camp; and failing to obtain, post, and retain a copy of a certification that applicable safety and health standards had been met. Three months later, Warren was sentenced to five years probation, three months of home detention, and 200 hours of community service. During probation, Warren is prohibited from engaging in FLC activities.

Wage and Hour employs various partnerships to leverage its limited resources and broaden the impact of other strategies. The vast majority of Wage and Hour's partnership agreements result from enforcement actions involving specific employers and/or their commercial consumers. However, partnerships also evolve from our work with employer associations and other stakeholders.

Compliance agreements involving multi-establishment employers usually require corporations to take certain proactive steps to assure current and future compliance throughout all corporate (and sometimes franchise) establishments. Partnerships with commercial suppliers and consumers of a violating employer's goods/services also can be effective in promoting compliance on a broader scale. And, the development and maintenance of relationships with non-profit and community-based organizations, States, and other Federal agencies can help Wage and Hour reach low-wage employees, develop strategies for compliance and coordinate enforcement efforts.

PARTNERSHIPS WITH STATES

Creating and maintaining partnerships with State labor agencies is an important part of increasing the effectiveness of our enforcement, educational, and outreach efforts. Wage and Hour employs a number of strategies aimed at advancing the cooperative effort between the Federal government and the States, like conducting a number of joint presentations, meetings, compliance seminars in many States; entering into a number of Memoranda of Understanding and joint resolutions; and participating in cooperative educational outreach programs with leaders in low-wage industries.