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

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	No. 05c 0208
Plaintiff,	)	Honorable James B. Zagel
v.	)	Magistrate Martin C. Ashman
SIDLEY AUSTIN BROWN & WOOD LLP,	)	
Defendant.	)	

DEFENDANT'S REPLY IN SUPPORT OF
ITS MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

The EEOC's brief ("EEOC Br.") largely fails to address the three arguments set forth in Sidley's Opening Brief ("Op. Br."): (I) that *North Gibson* derives logically from an established line of cases based on the distinctive enforcement scheme of the ADEA; (II) that *Waffle House* did not overrule *North Gibson* and indeed reaffirmed the line of cases on which it rests; and (III) that *BOR* is consistent with *North Gibson*. Indeed, the EEOC's own brief in *BOR* concedes that *BOR* is consistent with *North Gibson* because, in the words of the EEOC, *North Gibson* "limits the Commission to a claim for injunctive relief in cases in which the charging party . . . has disqualified himself from recovering monetary damages." (*See* below, pp. 13-14.)

Instead, the EEOC in effect makes three arguments, related to each other but unrelated to *Waffle House* and *BOR*, attacking the wisdom of *North Gibson* and trying to confine its impact to a vanishing point. The three arguments are: (A) *North Gibson* requires a "charge" to be filed within 300 days. The EEOC now claims a single letter of inquiry, which the EEOC calls a "directed investigation," should be deemed a "charge." This argument has no basis in the ADEA or case law and is contradicted by the EEOC's regulations on what constitutes a "charge." (B) The EEOC claims that *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529 (2d Cir. 1996) ("*J&H*"), an opinion which the district court in *North Gibson* declined to follow and which the Seventh Circuit in affirming *North Gibson* ignored, somehow undermines *North Gibson*. This argument cannot in principle be correct and in any event is based on a misreading of both cases. (C) The EEOC seeks "the same right" to sue as the Department of Labor has under the FLSA. This argument, when fully analyzed, actually provides an added reason to grant the present motion and confirms the wisdom of *North Gibson*.

ARGUMENT

I. The EEOC Concedes That *North Gibson* Derives From An Established Line Of Cases, The Ongoing Validity Of Which Cannot Be Questioned, Which Are Based On The ADEA's "Distinctive Enforcement Scheme."

The EEOC concedes by complete silence that the ADEA has a "distinctive enforcement scheme"; that the rationale of *North Gibson* is based on that scheme (Op. Br. 5-9); that *U.S. Steel*, based on a similar rationale, was reaffirmed by *Waffle House* and thus is plainly still good law; and that the Seventh Circuit opinion in *Harris Chernin* so completely parallels *U.S. Steel* in analysis and result that, if one is good law, the other must also be (Op. Br. 9-11). The EEOC tries to minimize the significance of *U.S. Steel* and *Harris Chernin* by calling them "*res judicata*" cases (EEOC Br. 11-12), but such labeling does not undermine Sidley's substantive points.

The EEOC challenges only one step in Sidley's reasoning and does so by misreading *North Gibson*. Sidley argued that *North Gibson* inevitably follows from *Harris Chernin* and thus, given the line of cases on which it was based, *North Gibson* was unaffected by the *Waffle House* decision. (Op. Br. 10-12.) The entire EEOC challenge to this proposition is contained in a single paragraph (EEOC Br. 8, first paragraph). However, that paragraph's reasoning rests on two misconceptions stated in its first sentence – that *North Gibson* involved employees *who filed charges* and *who then sued*. The EEOC claims that, in the suit it believes occurred, "the court deemed [the charges] untimely." In fact, in *North Gibson*, five of the seven individuals filed no charge and none sued. Since there was no court decision (there having been no suit), *North Gibson* cannot be labeled a "*res judicata*" case.

The Sidley analysis of *North Gibson* which was ignored by the EEOC grew out of the very facts the EEOC gets wrong – that the individuals did not file charges and did not sue. (Op. Br. 10-12.) In effect, then, the only "dispute" is which side misread *North Gibson*. To

decide this "dispute," the Court need only read the relevant language from the decision (266 F.3d at 616-17):

> "*If any of the individuals* [for whom the EEOC sought individual relief] *had attempted to bring suit* in the district court based on [two] untimely *or* [five] *nonexistent charges*, the claim *would have been dismissed* by the district court . . . *At that point*, the seven [two untimely, five nonexistent charges] *would be in the same position* as the employee in *Harris Chernin*."[1]

This reading of *North Gibson* alone warrants granting Sidley's motion.

Sidley also argued (Op. Br. 12-15), alternatively but also cumulatively, that powerful reasons of public policy and legislative intent undergird the result in *North Gibson*. The EEOC relegates its response to two footnotes (EEOC Br. 7, n.4 and 11, n.7). Footnote 4 admits that the EEOC is not responding to Sidley's public policy and legislative intent arguments and gives as the reason that the EEOC does not want to "burden the Court" with an "unnecessary discussion" of Defendant's "back to 1978 rhetorical flourishes." The phrase "rhetorical flourish" attempts to minimize the warning that, absent *North Gibson*, the EEOC could attempt to revive stale claims dating back to 1978, exactly as it is doing in paragraph 6(A) of the instant Complaint: "In maintaining and implementing, ***since at least 1978***, an age-based retirement policy, Defendant Employer has discriminated against a class . . . [which] includes Defendant Employer's attorney employees age 40 and older who were adversely affected by the retirement policy."

Because the EEOC fails to disclaim that this is what it's doing here, or disclaim the authority or intent to do so in other cases, we are dealing with a fact not a flourish and a quite important fact at that: Unless restrained, the EEOC will continue in this and other cases (such as

[1] As in our Opening Brief, all emphasis and brackets are added unless stated otherwise.

Judge Leinenweber's *Copello* case) to try to litigate claims back to 1978, a constantly elongating period.

The "burden the Court" reason for not addressing public policy or Congressional intent is not persuasive given that the EEOC is asking this Court to ignore two unanimous Seventh Circuit precedents. If the EEOC had anything to say, surely it would have said it here (and in *Coppello*, where, to use Judge Leinenweber's phrase, it cited no "compelling authority" on those issues). Relegating its discussion to footnotes does not make public policy and Congressional intent unimportant when the EEOC is asking the Court to reject Seventh Circuit precedent expressly based on public policy and Congressional intent.

II. The Three Arguments The EEOC Advances To Criticize The Reasoning Of *North Gibson* And Confine Its Application Are Demonstrably Wrong.

The EEOC spends most of its brief advancing three arguments attacking *North Gibson* and trying to confine it to extremely narrow application: (A) the EEOC claims *North Gibson* should not apply when the EEOC had, within 300 days of the challenged conduct, initiated a "directed investigation" into such conduct by sending a letter of inquiry; (B) the EEOC claims the 1996 *J&H* decision allowed otherwise untimely individual relief because it held a "directed investigation" equivalent to a "charge"; and (C) the EEOC thinks the ADEA's incorporation of certain FLSA sections should be construed to grant the EEOC unlimited authority to pursue individual relief. These arguments are demonstrably wrong and in all events are asking the Court to overrule *North Gibson*.

A. Beginning A "Directed Investigation" With A Letter Inquiring Into Facts Does Not Meet *North Gibson's* Charge-Filing Requirement; Indeed, The Phrase "Directed Investigation" Has No Legal Significance.

North Gibson requires a "charge" to be filed within 300 days to preserve individual remedies. The EEOC suggests that it did the equivalent of "filing" a "charge" by a

single letter of inquiry which began what the EEOC calls a "directed investigation." (*See* EEOC Br. 18, n.12.) The EEOC does not define or explain "directed investigation," a term appearing nowhere in the text of the ADEA *or in the federal regulations promulgated by the EEOC*. Sidley computer-searched all employment cases decided over the past 40 years (easily thousands of cases) and found only two judges who used the phrase "directed investigation," both in passing, neither giving the phrase any significance. *Circuit City Stores, Inc. v. EEOC*, 75 F. Supp. 2d 491, 497 (E.D. Va. 1999); *EEOC v. Peat, Marwick, Mitchell & Co.*, 589 F. Supp. 534, 536 (E.D. Mo. 1984).

No case, regulation, or statute even remotely suggests that a "directed investigation" is equivalent to a "charge," which is a term of art, defined and explained in detail *by EEOC regulations*. 29 C.F.R. § 1626. Thus, *the EEOC regulations state* in Section 1626.5 that a charge "*shall* be in writing and . . . *shall* generally allege the discriminatory act(s)." *The EEOC regulations further state* in Section 1626.8 that a charge must contain: "A clear and concise statement *of the facts*, including *pertinent dates*, *constituting the alleged unlawful employment practices.*" *The EEOC regulations require* in Section 1626.11 that "the Commission *shall* promptly notify the respondent that a charge has been filed." A copy of the form promulgated by the EEOC for filing a charge is attached hereto as Exhibit C.

Since the alleged discriminatory actions in this case occurred no later than October 1999 and *North Gibson* requires a "charge" within 300 days, the EEOC in this case must establish the existence of a "charge" no later than August 2000. During that time (and indeed for many months thereafter), all that happened was that the EEOC sent Sidley a single letter on July 5, 2000. (Op. Br., Ex. A.) In this case, therefore, the EEOC has to persuade this Court to treat that letter as equivalent to a "charge."

The letter (signed by EEOC counsel) does not purport to include a "clear and concise statement" of facts claimed to "constitut[e] the alleged unlawful employment practices" or "allege" any "discriminatory act(s)." It does not "promptly notify" Sidley that a "charge had been filed" in those words or any equivalent words. On the contrary, the letter says that the EEOC was still gathering "evidence necessary to its investigation" and that the letter's purpose was "to inform you that the Commission *is investigating* your organization *in order to determine its compliance status* with the ADEA." The letter nowhere suggested that the Requests For Information accompanying the July 5, 2000 letter somehow constituted a "charge," a proposition first advanced by the EEOC in its brief to this Court. (EEOC Br. 18, n. 12.) On the contrary, those Requests reinforce the idea that the EEOC was trying to determine *whether* to charge Sidley with unlawful conduct.[2]

The letter uses the word "charge" only in a heading reference to an "EEOC Charge Number." That and (mostly) later references to a "charge" (the later ones occurring long after the 300 days had expired) led counsel for Sidley to ask the EEOC if a "charge of discrimination" had in fact been filed. (Op. Br., Ex. B.) EEOC counsel responded on December 27, 2001 (more than 15 months after the 300 days had expired): "*No partner or former partner* of Sidley & Austin *has yet filed a charge* of discrimination." (Op. Br., Ex. C at 1.) Certainly, if a "charge" had been filed, the EEOC would have disclosed it to both Sidley and the Court. The EEOC's reliance on its "directed investigation" confirms that the critical jurisdictional prerequisite for seeking individual relief is absent in this case.

There is an additional and more fundamental problem with the EEOC's argument. An agency which both writes regulations and enforces them can change those regulations after

[2] Fifteen months later, the EEOC sent a subpoena to Sidley because, as the EEOC put it, based on information they then had, "the EEOC is unable to analyze . . . whether there has been a statutory violation." (*See* October 23, 2001 letter from EEOC Investigator Akbar to Sidley, attached hereto as Exhibit D).

advance public notice and a comment period, using procedures Congress has specifically prescribed for this purpose. It violates those rules, due process, and fundamental fairness to allow an agency to surprise those it regulates with unpredictable and strained interpretations of the agency's own words. For these reasons, the EEOC should not be allowed to *ex post facto* redefine the term "charge" to include an initial letter of inquiry not meeting any of the preexisting regulatory requirements of a "charge."

B. The 1996 *Johnson & Higgins* ("*J&H*") Opinion, Which The Seventh Circuit For Good Reason Ignored In 2001 In Deciding *North Gibson*, Cannot And Does Not Provide Reason To Disregard *North Gibson*.

The main case the EEOC relies on is *J&H*. (EEOC Br. 13-15.) The EEOC does not accurately describe *J&H* which, when read correctly, is consistent with *North Gibson*. In all events. *J&H* inherently cannot be a reason for this Court to ignore *North Gibson*.

The EEOC seems to suggest that *North Gibson* arose in a different manner than *J&H*, but in fact both cases involved investigations commenced by the EEOC concerning individuals *who had not filed charges and did not bring suits* (thirteen in *J&H*; five in *North Gibson*). All claims of these individuals were thus, as the EEOC puts it, "predicated" on a "directed investigation" (assuming that means "an investigation undertaken by the EEOC solely on its own initiative"). *J&H* does not rely on the fact of a "directed investigation," a term it nowhere mentions, and *J&H* nowhere holds what the EEOC claims: that "a directed investigation opened . . . within the 300-day limitation period" is equivalent to a timely charge, thus authorizing individual relief. (EEOC Br. 13.)

J&H had no occasion to consider individual relief because it was an appeal from a judgment granting only *general injunctive relief*; individual relief was not at issue. The defendant in *J&H* argued that, because no charge had been filed, the EEOC was barred from pursing *any remedy whatsoever*. 91 F.3d. at 1535. *J&H* rejected the defendant's argument,

citing ADEA section 626 for the proposition that "the EEOC may commence actions in district court to obtain both legal and equitable relief" – a point no one can dispute (and Sidley surely does not). The *J&H* court also mentioned sections 216(c) and 217 of the FLSA (discussed at pp. 9-10, below). Those sections empower the EEOC to bring actions to recover monetary relief, to investigate possible violations, and to bring injunctive actions, *id.* at 1536, again general points no one can or does dispute. *J&H* reserved ruling on the appropriateness of any particular relief, *id.* at 1543 (remanding the case "for a determination of what additional relief, *if any*, is appropriate"), however, and thus does not deal with the issue in *North Gibson*: Should individual relief be barred by failure to file a timely charge?

J&H proceedings on remand also went off on points not at issue here. The defendant moved for summary judgment based on waivers executed while the case was on appeal. Summary judgment was denied because triable issues existed as to whether consideration given for the waivers was adequate and whether the waivers were knowing and voluntary. In addition, because the waivers purported to cover the suit filed by the EEOC, lack of EEOC participation was a problem. *EEOC v. Johnson & Higgins*, 5 F. Supp.2d 181, 186-88 (S.D. N.Y. 1998). None of these issues was involved in *North Gibson* or is involved here, where waiver was, and is, not asserted as a defense. After summary judgment was denied in *J&H*, the case settled, so there was no occasion to reach any of the issues in this case. This information, all in the public domain by 1998, was considered so irrelevant to the issues in *North Gibson* that the Seventh Circuit never mentions any of it.

Although *J&H* is thus not at odds with *North Gibson*, were the cases contradictory, *J&H* could not warrant this Court ignoring a Seventh Circuit precedent. Decided in 1996, *J&H* was specifically not followed by the district court in *EEOC v. North Gibson*

School Corp., 2000 WL 33309722, *8 (S.D. Ind. June 21, 2000) (attached hereto as Exhibit A) (declining to follow *J&H* in view of *Harris Chernin*). Affirming on appeal, the Seventh Circuit ignored *J&H* but left no doubt that, to the extent *J&H* (or any other case) could be viewed as inconsistent with *Harris Chernin*, the Seventh Circuit was following *Harris Chernin*. Thus, if – contrary to fact but as the EEOC appears to argue – *J&H* were contrary to *North Gibson*, this Court ought to ignore it as an earlier case which the Seventh Circuit deliberately declined to follow.

C. FLSA Cases, Far From Undermining *North Gibson*, Have Given Rise To A Parallel Analysis Which Reinforces *North Gibson* And Provides An Alternative Ground To Dismiss Prayer For Relief C.

The EEOC's final argument attacking the rationale in *North Gibson* for reasons unrelated to *Waffle House* is that, "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." (EEOC Br. 17.) That argument leads to a line of reasoning that further fortifies *North Gibson* and provides an alternative ground for granting Sidley's motion.

The EEOC relies on ADEA section 626(b): "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 the FLSA." One incorporated FLSA section, 216(c), adopts the FLSA limitations period (in FLSA section 255):

> ***In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title***, it shall be considered to be commenced in the case of any individual complainant on the date when the complaint is filed if he is specifically named as a party plaintiff, or . . . on the subsequent date on which his name is added as a party plaintiff . . .

The FLSA limitations period is usually 2 (sometimes 3) years and applies to Department of Labor attempts to recover *any* relief, individual or general. In other words, if the Department of Labor were suing under the FLSA in 2005 for an alleged 1999 violation, as the EEOC is doing here, the suit would be dismissed as untimely. To give the EEOC what it seeks, then, "the same authority . . . the Department of Labor enjoys," requires dismissal of prayer for relief C.

In fact, there is recent authority that supports this result. In *Rossiter v. Potter*, 357 F.3d 26 (1st Cir. 2004) ("*Rossiter*"), the court held that, absent an express ADEA limitations period, the court should "borrow" the FLSA statute of limitations to prevent ADEA claims without a limitations period. *Rossiter* involved an ADEA case brought by a federal employee. Federal employees need not file a charge with the EEOC before filing suit and thus are not subject to the 300-day filing rule. After the 1991 amendments to the ADEA (see Op. Br. 5-9), the old FLSA limitations period was eliminated for private ADEA actions and only the 300-day rule remained to limit claims of individuals (other than federal employees). *Rossiter* had to decide if the amendment meant that Congress intended to have no time limitation on a federal employee's right to pursue damages, or instead, if the courts should "borrow" a limitations period from an "analogous" statute, following *DelCostell v. International Brotherhood of Teamsters*, 462 U.S. 151, 158 (1983) (when Congress is silent as to statute of limitations, borrowing a limitations period from another federal source is appropriate when the borrowed statute was "actually designed to accommodate a balance of interests very similar to that at stake" and was "in fact, an analogy" to the statute containing no limitations provision).

Rossiter decided borrowing was warranted. *Rossiter* considered but declined to borrow the 300-day limitations period applicable to Title VII cases. The court reasoned that, because federal employees were not required to file a charge, Title VII was not the most

analogous statute. 357 F.3d at 29-32. *Rossiter* instead "borrowed" the FLSA's limitations periods as most analogous. For present purposes, this holding (choosing the limitations period to borrow) is not as important as the reasons *Rossiter* articulated to justify "borrowing" in the first place. The reasons *Rossiter* gave are reminiscent of the ones given by Judge Leinenweber in the similar situation he faced in *Coppello* (357 F.3d at 34-35):

> The FLSA's goals are congruent with the ADEA's: like the ADEA, the FLSA was designed to protect individual workers . . . The FLSA's enforcement mechanism also parallels the enforcement mechanism characteristic of ADEA bypass actions, that is, it creates private rights of action that do not depend upon a regime of administrative enforcement . . . Moreover, *the FLSA's limitations period is designed to accommodate a balance of interests similar to those at stake in ADEA bypass actions*. The importance of this fact is obvious.
>
> * * *
>
> *To cinch matters, sound policy also supports resort to the FLSA's limitations period. A two-year statute of limitations in no way undermines the salient interests served by timeliness rules in federal anti-discrimination laws, which are meant to "protect employers from the burden of defending claims arising from employment decisions that are long past."* (Citations omitted.)

In sum, *Rossiter* sensibly concluded that Congress did not intend to give federal employees unfettered rights to sue with absolutely no time limitation. If the statute imposed no limit, it made eminent sense to use a settled legal technique (*i.e.*, one Congress in 1991 knew existed) of "borrowing" the most appropriate rule of timeliness from the closest statutory source.

The same reasoning should apply to EEOC actions brought after 1991. The 1991 amendment focused on *private* ADEA litigants who thereafter needed only to comply with the Title VII limitations period (300/180 days to file a charge, 90 days to file suit following the investigation). (*See* Op. Br. 5-9.) The legislative history of the 1991 amendment shows that Congress' primary concern was the confusion the different filing requirements were causing *private* litigants. *See* H.R. REP. No. 102-40(I), p. 96 (1991) ("some of the differences between

the Title VII and ADEA charge-filing and litigation limitations provisions have led to substantial confusion among persons alleging discrimination . . . under the ADEA and Title VII together. . . . As a result of these differences, many age discrimination victims lost their rights to go to court, because they were unaware of the ADEA's time limitations for filing a lawsuit"). The EEOC obviously was not confused in this way, and there is no reason to think the 1991 amendments were intended to remove the limitations period for its benefit. Therefore, "borrowing" to limit the EEOC is even more appropriate in this case than in *Rossiter*.

Rossiter, *North Gibson* and *Coppello* all rest on the same common-sense idea: Congress surely did not intend to create an unprecedented endless right to sue on ADEA claims back to 1978 – a right which would grow more expansive with each passing year – especially by an amendment effectively *shortening* ADEA limitations periods to make them conform to other statutes, all of which limit EEOC suits. To cover what surely was Congressional intent, all three courts applied a limitations rule Congress itself had created in a closely analogous situation. *North Gibson* and *Coppello* did not use the "borrowing" wording that *Rossiter* used, but all three cases got to comparable results for comparable reasons.

III. ***North Gibson*** **Not Only Survives, But Is Ratified By, The Opinion In *Waffle House*.**

The EEOC largely abandoned its threatened *Waffle House* argument (which gave rise to the present motion) except to invent two straw men arguments and attribute those to Sidley: (i) that *Waffle House* can never apply to an ADEA case; and (ii) that *Waffle House's* reasoning should be limited to the arbitration context. (EEOC Br. 9.) Neither fairly describes any Sidley position or any issue that need be decided here.

What Sidley did argue in its Opening Brief is that *Waffle House* continued a decades-long tradition of choosing between two coexisting doctrines: the EEOC is sometimes a

"representative" of, but is not always "a proxy" for, individual employees. Sidley next argued that one needs to look beyond these simplified labels to decide in particular cases which doctrine should apply. (*See* Op. Br. at 15-18.) The EEOC does not dispute either that these two doctrines coexist (and have long coexisted) or that a lawyer cannot persuasively advocate a choice between them by parroting only one.

On the key question as to what criteria should be used to decide which doctrine should apply, the EEOC offers no answer. The EEOC does not, however, dispute Sidley's answer that a reasonable guideline comes from part V of the majority opinion in *Waffle House*, which distinguishes cases where the issue is a procedural one, such as whether the EEOC must arbitrate, from substantive rights cases (like *North Gibson*) involving the "validity of [a] claim" or the "relief that could be appropriately awarded." (*See* 534 U.S. at 296; Op. Br. 16-18.) For the former, *Waffle House* held the EEOC should not be bound by what individuals did; for the latter, *Waffle House* effectively said (*in dicta*) the EEOC should be. Indeed, as the Supreme Court stated, "[i]t is true . . . that [a claimant's] conduct may have the effect of limiting the relief the EEOC may obtain in court." 534 U.S. at 296. That is precisely the situation here.

IV. ***BOR* Provides No Reason To Ignore *North Gibson*.**

The EEOC won the *BOR* case with briefs that distinguished *North Gibson* (which defendant there cited) on grounds exactly parallel to the *Waffle House* distinction just discussed. Specifically, the EEOC brief to the Seventh Circuit in *BOR* stated that *North Gibson*:

> ***recognized, in certain contexts***, that ***the Commission is in privity*** with the individuals for whom it seeks relief in its ADEA actions . . . ***That principle***, however, does not support UW's claim of immunity. It merely ***limits the Commission to a claim for injunctive relief in cases in which the charging party, by his own actions, has disqualified himself from recovering monetary damages in a Commission action.***

(Exhibit B at 29-30.) The EEOC thereby so persuasively reconciled its position in *BOR* with *North Gibson* that the Seventh Circuit in *BOR* accepted the EEOC's position without mentioning *North Gibson*. It is therefore neither fair nor persuasive for the EEOC now to argue that the result in *BOR* is so inconsistent with *North Gibson* as to have overruled it *sub silento*.

The EEOC analysis quoted above is both reasonable on its face and an accurate restatement of the analysis of the Third Circuit in *U.S. Steel*, the Seventh Circuit in *Harris Chernin* and *North Gibson*, the Supreme Court in *Waffle House*, and the Fifth Circuit in the post-*Waffle House* decision in *Vines*. All agree that the EEOC's right to pursue individual relief is limited "in certain contexts," which include – to use the EEOC's phrasing (from its *BOR* brief) – where the individual, "by his own actions, has disqualified himself from recovering monetary damages." That was the situation both in *North Gibson* and here, where the individuals either missed the deadline for filing a "charge" or did not file a charge at all.

The EEOC's original position in *BOR* should be adopted, *North Gibson* should be applied, and the present motion should be granted.

CONCLUSION

For all of the reasons set forth above and in Sidley's Opening Brief, we ask the Court to rule that *North Gibson* remains the law in the Seventh Circuit and, accordingly, that prayer for relief C should be dismissed with prejudice.

Dated: May 24, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John E. Bucheit, an attorney, hereby certify that on May 24, 2005, I caused a true and correct copy of the foregoing **DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT** to be served via U.S. Mail and e-mail transmission upon the following:

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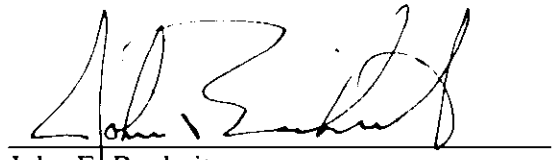

John E. Bucheit

EXHIBIT A

Westlaw.

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2000 WL 33309722 (S.D.Ind.)

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United States District Court, S.D. Indiana, Evansville Division.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
NORTH GIBSON SCHOOL CORPORATION, Defendant.
No. EV98-0168-C-Y/H.

June 21, 2000.

ORDER ON MOTION FOR SUMMARY JUDGMENT

McKINNEY.

*1 This matter comes before the Court on the motion of defendant, the North Gibson School Corporation ("NGSC"), seeking judgment in its favor as a matter of law on all of the claims presented in the complaint filed by the Equal Employment Opportunity Commission ("EEOC") on September 3, 1998. The EEOC brought this action under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.* It alleges that NGSC discriminated against seven of its teachers based on their age when it maintained an early retirement plan which paid lower benefits to employees age 56 to 64 than to employees age 55, and no benefits to employees age 65 and older. Compl. ¶¶ 7-8. The Court has fully considered the parties' arguments and, for the reasons discussed below, GRANTS the defendant's motion for summary judgment.

I. FACTUAL & PROCEDURAL BACKGROUND

In early January of 1997, the Northern District of Indiana determined that the early retirement program in the Crown Point Community School Corporation's collective bargaining agreement ("CBA") discriminated against teachers and administrators on the basis of their age. *See EEOC v. Crown Point Community Sch. Corp.*, 72 FEP Cases 1803 (N.D.Ind.1997). At the time the order was issued, the CBA between NGSC and the North Gibson Education Association ("Union") included an early retirement plan which was similar to the Crown Point plan. Under this plan, which was adopted in 1988 and amended in 1995, a teacher's early retirement benefit was calculated by multiplying the number of years of service (up to twenty) by a percentage which was obtained from a chart in the plan. Master Contract at 41-45. That figure was then multiplied by the starting salary in the year of retirement for a teacher with a master's degree. *Id.* Percentages were assigned according to the age of the teacher at the time of retirement and the year of retirement. *Id.* For example, NGSC calculated the benefits for a teacher in his or her first year of retirement who retired at age fifty-five using 2.5% as the percentage multiplier. *Id.* In contrast, the benefits for a teacher in his or her first year of retirement who retired at age fifty-nine were figured using 1.5% as the multiplier. *Id.*

When Cathy Heck ("Heck"), the Uniserv Director for the State Teachers Association and Chief Negotiator for the Union, learned of the Crown Point decision, she contacted Sandra Nixon ("Nixon"), Superintendent of NGSC, and suggested that there might be a problem with NGSC's early retirement plan. Heck Dep. at 26. In a letter to Nixon dated March 10, 1997, Heck informed Nixon that "the Association has become aware that the early retirement plan in Article XIII of the master contract may no longer be appropriate." Def.'s Dep. Ex. 22. According to Nixon, NGSC shortly thereafter advised the Union that pursuant to Article IV of the CBA, which provides that neither party is bound by any provision of the agreement which it may hereafter, in good faith, determine or find

contrary to law, NGSC believed that it was no longer bound by the early retirement plan. Nixon Aff. ¶ 6. By letter dated March 20, 1997, NGSC agreed to meet with the Union to negotiate a new early retirement plan. Def.'s Dep. Ex. 23.

***2** The first negotiation meeting was held on May 29, 1997. Heck Dep. at 29; Def.'s Dep. Ex. 24. Approximately twenty teachers attended the meeting because early retirement was a "very high interest topic." Heck Dep. at 30. At the meeting, NGSC told the Union's bargaining committee that no one else would be permitted to retire under the questionable early retirement provisions in the CBA and that anyone who wanted to retire early before the parties had reached a new agreement would have to negotiate their retirement provisions separately. *Id.* at 32-33. From May 29, 1997 to March 9, 1998, the Union and NGSC met on several occasions to discuss and negotiate a new early retirement plan. Nixon Aff. ¶ 7. A new plan was finally adopted on February 25, 1998 and ratified by the Union on March 9, 1998. *Id.*

Prior to the official adoption and ratification of the new early retirement plan, two teachers from NGSC filed charges of age discrimination with the EEOC under the previous retirement plan. Lewis Schleter ("Schleter") and Fred Anthis ("Anthis") filed their charges of discrimination on December 29, 1997, claiming that: "... The contract for Teachers and Administrators provides that older retirees receive a lesser percentage of their salaries for their retirement pay, and that they receive the retirement pay for a lesser number of years than the younger retirees do." Def.'s Dep. Exs. 3, 14. At present, both Schleter and Anthis are still employed with NGSC. Schleter Dep. at 6; Anthis Dep. at 19.

Schleter and Anthis first realized that they were "being discriminated against" under the NGSC early retirement plan in either 1994 or 1995. Schleter Dep. at 14; Anthis Dep. at 37. At one point, Schleter and Anthis specifically discussed the fact that they believed the retirement plan "was discriminative" because they were sixty years old, but they did not file charges of discrimination with the EEOC. Schleter Dep. at 18. In addition, Schleter and Anthis both claim that they would have retired in 1995, but for the discriminatory nature of the then current early retirement plan. *Id.* at 46; Def. Dep. Ex. 10; Anthis Dep. at 22. However, neither talked to NGSC about retirement or otherwise gave notice of his intent or desire to retire at that time. Schleter Dep. at 46; Anthis Dep. at 22. Several years later, Schleter and Anthis also became aware that the Union was negotiating a new early retirement plan in light of the Crown Point decision. Schleter Dep. at 21; Anthis Dep. at 11. Nevertheless, both teachers waited over six months to file a charge of discrimination with the EEOC.

Nixon received a "Notice of Charge of Discrimination" from the EEOC on or about January 2, 1998. After numerous attempts to conciliate the charges, the EEOC filed a complaint with this Court on September 3, 1998. In that complaint, the EEOC alleged that since at least 1992, NGSC had engaged in unlawful employment practices in violation of the ADEA by discriminating on the basis of age against individuals age fifty-six or older in the payment of early retirement benefits. Compl. ¶ 7. The complaint included a request for both injunctive and monetary relief. [FN1]

> FN1. The EEOC requested that the Court: (1) grant a permanent injunction enjoining NGSC from engaging in any employment practice which discriminates on the basis of age against individuals forty years and older, (2) order NGSC to institute and carry out policies, practices and programs which provide equal employment opportunities for those forty and older and which eradicate the effects of its past and present unlawful employment practices, (3) order NGSC to make whole those individuals whose early retirement benefits were or are being unlawfully withheld as a result of the acts complained of above, by restraining the continued withholding of amounts owing, with prejudgment interests, in amounts to be determined at trial, and (4) order NGSC to make whole all individuals adversely affected by the

> unlawful practices described above, by providing the affirmative relief necessary to eradicate the effects of its unlawful practices. Compl. ¶¶ A-D.

*3 On November 18, 1998, NGSC filed a motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). NGSC alleged that the EEOC's claims for injunctive relief should be dismissed as moot because the allegedly discriminatory plan was no longer in effect. Further, NGSC maintained that the EEOC's monetary claims for class-based discrimination were not actionable because no individual affected by the plan, including Schleter or Anthis, filed a timely charge of discrimination and, therefore, none of the potential members of the "class" could recover monetary damages if they wanted to bring their claims individually. In its order dated August 5, 1999, the Court granted NGSC's motion as it pertained to the EEOC's claims for injunctive relief. The Court reasoned that the request was moot because the discriminatory plan was no longer in effect and the EEOC had no reasonable expectation that the plan would be reinstated. August 5, 1999 Order at 10. With respect to claims for monetary relief, however, the Court denied NGSC's motion on the basis that it did not have enough information about the class to determine whether the EEOC could maintain an action for monetary damages. *Id.* at 20.

Shortly thereafter, the EEOC sent a letter to potential class members requesting that they contact the agency's legal counsel. Nixon Dep. at 97-100; Def.'s Dep. Ex. 32. When potential members called the agency in response to the letter, they were asked whether they wanted to participate as a class member in the EEOC's suit against NGSC. Nixon Dep. at 99. In February of 2000, the EEOC identified the class of individuals it purports to represent in this case as: Carolyn Browning, Iona Froman, William Krietemeyer, Francis Murphy, JoAnne Parke, Fred Anthis and Lewis Schleter. With the exception of Schleter and Anthis, none of these individuals ever filed a grievance or voiced a complaint to either NGSC or the Union about the early retirement language in the CBA. Nixon Dep. at 104-06, 120, 122, 115. Nor did anyone file a charge of discrimination with the EEOC. *Id.* at 104-06, 120, 122, 115.

At present, this case is before the Court on a motion for summary judgment filed by NGSC on March 15, 2000. NGSC contends that it is entitled to judgment as a matter of law because the EEOC cannot seek monetary relief when each of the teachers represented in this action failed to preserve his or her right to sue as a private individual. Having reviewed the factual and procedural background, the Court now turns to a brief overview of the standards governing its decision.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). An issue is genuine only if the evidence is such that a reasonable jury could return a verdict for the opposing party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A disputed fact is material only if it might affect the outcome of the suit in light of the substantive law. *Id.*

*4 The moving party has the initial burden to show the absence of genuine issues of material fact. *See Schroeder v. Barth*, 969 F.2d 421, 423 (7th Cir.1992). This burden does not entail producing evidence to negate claims on which the opposing party has the burden of proof. *See Green v. Whiteco Indus., Inc.*, 17 F.3d 199, 201 & n. 3 (7th Cir.1994). The party opposing a summary judgment motion bears an affirmative burden of presenting evidence that a disputed issue of material fact exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Scherer v. Rockwell Int'l Corp.*, 975 F.2d 356, 360 (7th Cir.1992). The opposing party must "go beyond the pleadings" and set forth specific facts to show that a genuine issue exists. *See Hong v. Children's Mem. Hosp.*, 993 F.2d 1257, 1261 (7th Cir.1993), *cert. denied*, 511 U.S. 1005 (1994). This burden cannot be met with

conclusory statements or speculation, *see Weihaupt v. American Med. Ass'n*, 874 F.2d 419, 428 (7th Cir.1989), but only with appropriate citations to relevant admissible evidence. *See* Local Rule 56.1; *Brasic v. Heinemann's Inc., Bakeries*, 121 F.3d 281, 286 (7th Cir.1997); *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 923-24 (7th Cir.1994). Evidence sufficient to support every essential element of the claims on which the opposing party bears the burden of proof must be cited. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In considering a summary judgment motion, a court must draw all reasonable inferences "in the light most favorable" to the opposing party. *Spraying Sys. Co. v. Delavan, Inc.*, 975 F.2d 387, 392 (7th Cir.1992). If a reasonable factfinder could find for the opposing party, then summary judgment is inappropriate. *Shields Enters., Inc. v. First Chicago Corp.*, 975 F.2d 1290, 1294 (7th Cir.1992). When the standard embraced in Rule 56(c) is met, summary judgment is mandatory. *Celotex Corp.*, 477 U.S. at 322-23; *Shields Enters.*, 975 F.2d at 1294.

III. DISCUSSION

NGSC contends that summary judgment is appropriate in this matter as the EEOC is barred from bringing an action for monetary damages because not one of teachers represented filed a timely charge with the EEOC. The EEOC counters that under the ADEA the agency can bring an action for damages, including backpay, on behalf of a class even where none of the plaintiffs have filed a discrimination charge. In the alternative, it asserts that Schleter's and Anthis' charges were timely.

The ADEA provides that it shall be unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age." 29 U.S.C. § 623. Subsections (b) and (c) of § 626 authorize the EEOC to bring a claim on behalf of an individual. In fact, an individual's right to bring a civil action under the ADEA "shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee" under the Act. 29 U.S.C. § 626(c). The limitation placed on the EEOC is that it must attempt to eliminate the discriminatory practice and effect voluntary compliance through informal conciliation, conference and persuasion before bringing suit. 29 U.S.C. § 626(b).

***5** As previously stated in the Court's order issued August 5, 1999, the EEOC has a right to sue which is independent of any private plaintiff's right to sue. *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1291 (7th Cir.1993) (citing *General Telephone Co. v. EEOC*, 446 U.S. 318, 326 (1980)). Put differently, the EEOC's role in combating age discrimination is not dependent on an individual filing a charge. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U .S. 20, 28 (1991). In practice, this means that the EEOC may receive information as to the alleged violations of the ADEA and subsequently conduct an investigation. *Id.* Once the EEOC begins an investigation, the EEOC may seek relief on behalf of individuals who are identified during the investigation, even if those individuals have not filed charges. *See* 29 U.S.C. § 626(d). When the EEOC seeks relief on behalf of an individual or a group of individuals who have previously litigated, settled, waived or arbitrated their discrimination claims, cases from various circuits have held that the EEOC cannot bring a suit for monetary damages. *See EEOC v. Kidder, Peabody & Co., Inc.*, 156 F.3d 298, 301 (2nd Cir.1998) (citations omitted). The agency may still pursue injunctive relief, but when the EEOC is seeking monetary damages on behalf of an individual courts have reasoned that there is less public interest at stake. *See id.* at 301-02; *Harris Chernin*, 10 F.3d at 1291.

Applying these principles, NGSC asserts that it is entitled to judgment as a matter of law on the EEOC's claims for monetary relief because the agency is precluded from resting its complaint on the timebarred claims of Schleter, Anthis or any of the remaining five teachers represented who failed to file a discrimination charge with the EEOC at any point. With respect to Schleter and Anthis, NGSC contends specifically that the applicable limitations period for filing a timely charge with the EEOC

began to run on July 1, 1997, or 180 days back from December 29, 1997, the day on which Schleter and Anthis both filed with the EEOC. Neither teacher's charge was timely because the early retirement plan was no longer in effect after May 29, 1997, when the Union began negotiating for a new plan. Thus, Schleter and Anthis effectively waived their claims for relief. Similarly, regarding the remaining five plaintiffs, NGSC maintains that all of the teachers waived their right to bring an action when they were employed in the North Gibson school system for at least ten years and, despite the allegedly discriminatory language in the CBA regarding early retirement, chose not to complain or file anything with the Union or the EEOC. Consequently, the EEOC is without a representative charge on which to base its claim for monetary relief.

In response, the EEOC counters that the agency's right to sue is wholly independent from that of a private individual. Therefore, it does not need a timely charge in order to obtain relief for those citizens participating in the action. Alternatively, the EEOC contends that while NGSC began negotiating for a new early retirement plan in May of 1997, a new plan was not adopted and ratified by the Union until March of 1998. Schleter's and Anthis' charges filed December 29, 1997, were, therefore, timely.

***6** The undisputed facts show that the EEOC is without a timely charge on which to base its complaint. First, with respect to members Browning, Froman, Krietemeyer, Murphy and Parke, both parties agree that none of these teachers ever filed a claim with the agency. Second, regarding Schleter and Anthis, the Court notes that Indiana is a non-deferral state for purposes of the ADEA which means that any action taken by an alleged victim of age discrimination is governed by the 180 day limitations period set forth in § 626(d)(1) of the statute. *Daugherity v. Traylor Brothers, Inc.*, 970 F.2d 348, 350 n. 2 (7th Cir.1992) . As a general rule, this time begins to run when the claimant receives notice that he is being discriminated against. *EEOC v. O'Grady*, 857 F.2d 383, 386 n. 7 (7th Cir.1988). However, as both parties appear to concede, in this case NGSC's conduct of maintaining an allegedly discriminatory policy amounts to a "continuing violation" of ADEA rights. Thus, the limitations period is determined by looking back 180 days from the date the charge was filed to consider whether the violation continued into that period. *See Stewart v. CPC Intern., Inc.*, 679 F.2d 117, 121 (7th Cir.1982).

Here, it is undisputed that NGSC publicly renounced its allegedly discriminatory plan for early retirement benefits on May 29, 1997. As evidence that NGSC continued to discriminate with regard to early retirement benefits beyond this date, the EEOC points to Dave Specht ("Specht") and Noel Loftin ("Loftin"), two teachers who allegedly retired under the discriminatory plan after NGSC claimed it was terminated. Specifically, the EEOC argues that Specht retired in August of 1997 and accepted retirement benefits under the old plan in October. With respect to Loftin, the EEOC concedes that he negotiated a separate retirement package with NGSC but claims that the benefits he received were, for all practical purposes, the same as what he would have gotten under the old plan. In the EEOC's view, these facts demonstrate that the discriminatory policy was still in effect after May of 1997.

Even when considered in the light most favorable to the EEOC, this evidence does not create a genuine issue of material fact as to whether NGSC was still using the allegedly discriminatory plan within 180 days of when Schleter and Anthis filed a charge with the EEOC. Specht had formally tendered his resignation in a letter to NGSC dated March 31, 1997, or nearly two months before the discriminatory plan was abandoned. The fact that he later received payments under the plan within 180 days of Schleter and Anthis' filings does not amount to evidence of a continuing violation. It is well-settled that the continuing violation doctrine does not apply when an employee is merely continuing to suffer in the present from the harmful effects of an employer's past act of discrimination. *See United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977); *Stewart*, 679 F.2d at 120.

***7** As for Loftin's case, although the payments he

EEOC's role in this matter would afford little, if any, protection for the public interest for several reasons.

> FN2. The EEOC strongly contends that *Harris Chernin* is inapplicable because here none of the teachers represented had previously litigated any of the claims presented so as to create an issue of res judicata. Instead, the EEOC argues that the outcome in this case should be controlled by the Seventh Circuit's decisions in *EEOC v. United Parcel Service,* 94 F.3d 314 (7th Cir.1996) and *Anderson v. Montgomery Ward & Co., Inc.,* 852 F.2d 1008 (7th Cir.1988). It further cites, among other cases, *EEOC v. Johnson & Higgins, Inc.,* 91 F.3d 1529 (2d Cir.1996) and *EEOC v. Frank's Nursery & Crafts, Inc.,* 177 F.3d 448 (6th Cir.1999) as persuasive authority for its position that the agency can maintain an action for monetary relief even where none of the individuals represented filed a charge of discrimination.
> The EEOC's position is untenable. In applying *Harris Chernin,* the Court readily acknowledges the factual distinction between it and the matter presented for disposition in this order. Nevertheless, the Court is guided by the Seventh Circuit's decision in that case because it sets forth the rationale for why the EEOC is permitted to maintain an action which is independent from a private litigant. As for the other cases cited by the EEOC, none are instructive to the extent that those decisions did not present situations in which not one representative plaintiff had filed a timely charge and the discriminatory policy or unlawful employment practice had been eradicated at the time the EEOC filed suit. As a result, those courts were not forced to scrutinize the strength of the public interest at stake.

First, any damages recovered by the EEOC would go directly to the seven teachers participating in the action. Like *Harris Chernin,* this is not a situation in which the EEOC is seeking damages in an amount equal to what the teachers represented would have received but for the discrimination with an intent to funnel the money back into the agency's budget to expand the resources available to fight employment discrimination in the future. Instead, the teachers would pocket the damages awarded for personal gain. Such a payout would, therefore, have little if any impact on the public's ability to fight discrimination in the workplace.

Second, it is undisputed that NGSC abandoned the allegedly discriminatory early retirement plan shortly after the Crown Point decision was issued. No evidence has been offered to suggest that NGSC intends to resurrect the old plan. Moreover, it is highly unlikely that the school would assume the risk associated with reimplementing such a plan because the EEOC has investigated similar early retirement provisions in at least two other school districts, including Middlebury Community Schools and Hanover Community School Corporation, for alleged discrimination. More importantly, similar provisions have been declared illegal in the Crown Point Community School Corporation and Gary School Corporation. *See Solon v. Gary Community Sch. Corp.,* 180 F.3d 844 (7th Cir.1999); *EEOC v. Crown Point Community Sch. Corp.,* 1997 WL 54747 (N.D.Ind.1997).

Third, NGSC prompted negotiations for a new plan nearly immediately after the Crown Point decision was issued which suggests that it was aware that failure to remedy any alleged discrimination in the previous plan could carry serious consequences. As a result of these negotiations, a new plan was adopted and ratified by the Union in March of 1998. The EEOC offers no evidence to suggest that its terms are unlawful.

Fourth, as previously stated, at least two courts in this circuit have already declared similar early retirement benefit provisions to be a violation of the ADEA. Thus, any message that a monetary award to the individual teachers represented in this action could send would merely duplicate the alarm that school corporations around the state have already heard. As such, it is difficult to see the impact that

enabling the EEOC to bring this action would have on deterring discrimination in the education workplace.

***9** Finally, any role that the EEOC may play in protecting the public interest by bringing this suit is outweighed by the impact that a monetary judgment would inevitably have on the local community. This is not a case in which the dollars paid would come from the bottomless depths of a corporate bank account in the private sector. Indeed, the reality presented by the parties in this matter is that the cost of any damages awarded against NGSC, as a public school corporation, would be borne by the local taxpayers, many of whom likely have children in the very school system at issue. NGSC suggests that a judgment on the amounts requested could total nearly twenty percent of its annual budget and would virtually bankrupt the corporation. Whether this figure is in fact an accurate assessment, the Court cannot ignore the reality that any award obtained could easily create an ironic result of placing severe financial hardship on an entity whose very purpose is to protect and develop the public interest in education.

In sum, the Court is unpersuaded that enabling the EEOC to litigate this case would do little more than enable seven individuals who would ordinarily be barred from recovery as private citizens to gain compensation for their alleged injuries. NGSC is entitled to judgment as a matter of law.

IV. CONCLUSION

The EEOC has failed to present sufficient evidence from which the Court could find a genuine issue of material fact for trial in this matter. Therefore, the motion for summary judgment filed by NGSC is GRANTED.

IT IS SO ORDERED this day of, 2000.

2000 WL 33309722 (S.D.Ind.)

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EXHIBIT B

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-2998

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM,

Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Wisconsin

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS PLAINTIFF-APPELLEE

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The Appellant's Jurisdictional Statement is incomplete. The district court entered judgment in this case on May 11, 2001, following a jury verdict. Appendix ("App.") 109.[1] Appellant filed a timely Motion for Judgment as A Matter Of Law or, in the Alternative, for a New Trial, on May 22, 2001. Docket Entry ("DE") 96. The district court denied that motion in a Memorandum and Order dated July 6, 2001. App. 101-07. Appellant filed a timely notice of appeal on July 26, 2001. DE 112; see F.R.A.P 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. Whether this lawsuit is barred by the Eleventh Amendment to the United States Constitution where the suit was brought against a State defendant by the Equal Employment Opportunity Commission ("Commission"), an agency of the United States government.

2. Whether the Commission presented sufficient evidence to sustain the jury verdicts of unlawful discrimination under the Age Discrimination in Employment Act of 1967, thus precluding judgment as a matter of law on that issue in favor of Appellant.

3. Whether the Commission presented sufficient evidence to support the jury verdicts of willful violations of the Age

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[1] An amended judgment was subsequently entered on June 28, 2001, providing for additional injunctive relief. App. 108.

Discrimination in Employment Act of 1967, thus precluding judgment as a matter of law on that issue in favor of Appellant.

4. Assuming there is adequate evidence to support the jury verdicts, thus precluding judgment as a matter of law in Appellant's favor, whether the district court abused its discretion in denying Appellant's motion for a new trial.

5. Whether the district court abused its discretion in awarding travel and deposition costs with respect to five of the Commission's witnesses, none of whom is a party to this case.

STATEMENT OF THE CASE

1. Nature of the Case

This is a public enforcement action brought by the Commission pursuant to Section 7 of the Age Discrimination in Employment of 1967 ("ADEA"), 29 U.S.C. 626. The Commission alleges that the defendant, Board of Regents of the University of Wisconsin System ("UW"), violated the ADEA when it terminated, because of age, the employment of the four charging parties: Rosalie Robertson, Mary Braun, Joan Strasbaugh, and Charles Evenson. A jury returned verdicts in the Commission's favor, and the district court denied UW's post-judgment motion to have the verdicts set aside.

2. Course of the Proceedings

The Commission initiated this action in September 2000. DE 2. On March 1, 2001, UW moved for summary judgment, arguing that the

evidence was insufficient, as a matter of law, to support a finding of unlawful discrimination. DE 13. By order dated April 9, 2001, the district court denied UW's motion. App. 116-22.

The case was tried to a jury over a three-day period in early May 2001. The case was bifurcated into a liability phase and a damages phase. At the close of the Commission's liability case, UW moved for judgment as a matter of law. Trial Tr. (May 8, 2001) at 14-16. UW argued that there was no evidence "in the record to date that if any of the four claimants had been younger, if they had been under 40 and all the other circumstances had remained the same, that their treatment would have been different." Id. at 16. The district court denied the motion, stating as follows:

> The Court in examining the testimony which has been provided to us to date does believe that there has been evidence sufficient for a reasonable jury to find that the younger employees were provided more appropriate treatment than were the claimants in this matter. The Court believes that there is evidence which would allow that determination to be made and accordingly the motion for judgment as a matter of law under Rule 50 is denied.

Id. at 18. UW renewed its motion for judgment as a matter of law at the close of its liability case. Id. at 191. Again, the court denied the motion. Id. at 192-93.

The liability issue was submitted to the jury with a special verdict form. App. 111-13. The verdict form asked the jury with respect to each of the four charging parties whether UW terminated

the individual because of age and, if so, whether the termination was willful. Id. The jury returned verdicts, answering yes to each question. Id. Thus, the jury found that each of the charging parties had been terminated because of age. Id. The jury also found that the termination in each case was willful. Id.

After the jury returned verdicts on liability, the case moved to the damages phase. The jury was again presented with a special verdict form. The jury was asked with respect to each charging party what amount of money, if any, would reasonably compensate the charging party for back pay and what amount of money, if any, would reasonably compensate the charging party for front pay. Id. at 114-15. The jury returned verdicts in the following amounts: Mary Braun ($29,085 in back pay, $10,990 in front pay); Charles Evenson ($52,382 in back pay, $39,297 in front pay); Rosalie Robertson ($61,874 in back pay, $19,979 in front pay[2]); Joan Strasbaugh ($38,548 in back pay, $14,468 in front pay). App. 114-15. The district court doubled the back pay damages for each charging party, based upon the jury's prior finding of willfulness, and entered judgment on the verdicts. Id. at 109-10.

Following the trial, UW filed a Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial. DE 96. UW

[2] By stipulation of the parties, Robertson's front pay was reduced to $1,894. Trial Tr. (May 9, 2001) at 214.

argued that it was entitled to judgment as a matter of law because there was insufficient evidence to support the jury verdicts on liability. Alternatively, UW argued that it was entitled to a new trial "because the jury's verdicts on the issues of liability, mitigation, willfulness and damages are against the weight of the evidence." DE 96 at 4. By order dated July 6, 2001, the district court denied the motion. App. 101-07. The court ruled that UW was not entitled to judgment as a matter of law because there was a "legally sufficient evidentiary basis for a reasonable jury to find for plaintiff on the issues of discrimination and willfulness." App. 104. The court ruled that UW was not entitled to a new trial because the jury verdicts were "not against the weight of the evidence" and the damages awarded were not "excessive." Id. at 106.

The Commission also filed a post-judgment motion, asking the court to provide additional injunctive relief for UW's multiple violations of the ADEA. DE 90. The court granted the Commission's motion in part, requiring UW to provide a training program for its managers on age discrimination. App. 108. The court denied the Commission's request for a permanent, "no discrimination" injunction. DE 107. The Commission elected not to appeal from the district court's denial of its request for a permanent injunction.

On July 12, 2001, the district court awarded $13,550.02 in

costs to the Commission. DE 111. The cost award included $5,516.99 in travel and deposition costs for the four charging parties and Dr. Sovan Tun, a Commission employee who testified as an expert at the damages phase of the trial. App. 123-27.

3. Statement of the Facts

This case stems from a decision by UW to terminate the employment of the four charging parties, all employees of the University of Wisconsin Press ("Press"). Rosalie Robertson, age 50, was the senior acquisitions editor. Trial Tr. (May 7, 2001) at 122, 133). Mary Braun, age 46, was an acquisitions editor. Id. at 232-33, 242. Joan Strasbaugh, age 47, was an assistant marketing manager who worked half-time in the acquisitions department. Id. at 196-97, 205. Charles Evenson, age 54, was a senior marketing specialist. Id. at 157, 167. The principal decision-makers for UW were David Bethea, the interim director of the Press, and Steve Salemson, the Associate Director of the Press. Id. at 276; Trial Tr. (May 8, 2001) at 86-88.

Bethea was appointed interim director of the Press in 1998. Trial Tr. (May 8, 2001) at 86-88. Bethea claims that he came to the conclusion, as early as February 1999, that the Press was financially troubled and that steps had to be taken to save costs. Id. at 95-99. Bethea decided that it was necessary to terminate several of the Press employees. Id. Working with Salemson, Bethea

prepared a list of employees to be considered for the terminations. Appellee's Supplemental Appendix ("Supp. App.") 6-7; Trial Tr. (May 8, 1999) at 66-68, 131-33. That list, prepared in early March 1999, included all of the charging parties, who, with the exception of the decision-makers themselves, were the oldest members of the Press' academic staff.[3] Trial Tr. (May 8, 1999) at 73-75, 131-33; App. 130. The list did not include several of the younger staff members. See Supp. App. 6-7. One of the younger employees kept off the list, Rebecca Gimenez, was a 23-year old employee working in the marketing department. Trial Tr. (May 7, 2001) at 167; App. 130. Bethea later remarked that he did not want to lose Gimenez because she was a "highly skilled young woman." Trial Tr. (May 8, 2001) at 138; Supp. App. 1.

By mid-to-late March 1999, Bethea and Salemson had finalized their plan to terminate the employment of the four charging parties. Trial Tr. (May 8, 2001) at 66-68; Supp. App. 8 (document dated 3/18/99, reflecting the projected terminations of the four charging parties). On April 23, 1999, Bethea met with the Press Committee, which had oversight responsibility for the Press. Trial

[3] This excludes individuals working in the Press' separate journals division, which was not subject to the proposed terminations. Trial Tr. (May 8, 2001) at 73-75, 117. It also excludes Elizabeth Steinberg (age 75), in the editorial department, who had already announced her retirement. Id. at 132, 156-57.

Tr. (May 8, 2001) at 122-23. The Committee approved the proposed cuts in staff. Id. at 123. The Committee, however, was not given the names or backgrounds of the four individuals selected for the terminations. Id. The proposal was also submitted, as early as April 5, 1999, to Ann Marie Lamboley, a senior administrative programs specialist at UW. Id. at 150-52. Lamboley, known as the "campus layoff expert," instructed the two decision-makers to provide a stronger, written justification for the selection of the four charging parties as the individuals to be terminated. Id. at 150-54.

Bethea and Salemson finalized a document entitled A Justification for the UW Press's Layoff Proposal ("Justification") on April 30, 1999. App. 136-51. Although the Justification purported to be, among other things, an assessment of the comparative skills and experience of the individuals working at the Press, id. at 142-51, neither Bethea nor Salemson ever spoke with the charging parties about their "skills, talents and contributions." Trial Tr. (May 8, 2001) at 48-49. Nor did the two decision-makers solicit the opinions of managers as to which individuals should be let go. Id. at 39-40, 105-06. Because the Press did not maintain a formal process of employee evaluations, the decision-makers "didn't have records in the form of formal reviews of these four people to compare against formal reviews of

[newer] hires." Id. at 65-66. Bethea concedes that, in assessing the comparative skills and experience of the charging parties, he relied to a significant degree on out-of-date resumes on file with the Press[4] and that he did not look at these resumes until late April 1999, when he and Salemson prepared the Justification. Id. at 105, 131-33. This was several weeks after he and Salemson had finalized the list of individuals to be terminated.

Bethea and Salemson met with each of the charging parties on May 5, 1999. Id. at 123-24. Each was told that his or her termination was "not in any way related to performance or personality issues." Id. at 60. Each was provided with a copy of the Justification.

There is evidence that the selection process was tainted by ageism. First, the Justification itself suggests that Bethea and

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[4] By way of example, Rosalie Robertson's resume "was from 1992" when she "had first applied for [her] position." Trial Tr. (May 7, 2001) at 135. The resume focused "on just the aspects or the type of job [she] was applying for at the time" and did not include "all the marketing and editing experience" that she had acquired over the years. Id. at 136. The resume is explicitly referenced in that portion of the Justification that discusses the supposed deficiencies in Robertson's skills and experience. App. 144. Likewise, Charles Evenson's resume was "ten years old." Trial Tr. (May 7, 2001) at 169. The resume was "targeted only at the position that [he] was applying for at the time and didn't have any of [his] stuff in the last ten years on it." Id. No one at the Press asked Evenson for an "update" of his resume. Id.

Salemson held the older workers to a higher standard than the more preferred younger workers. For example, the Justification claims that Charles Evenson would have to take a number of courses to get "up to speed" on "Webpage programming or the electronic transfer of data and images." App. 147-48. Yet, Bethea had no idea whether the much younger Rebecca Gimenez, who was retained in Evenson's marketing department, had herself taken the courses. Trial Tr. (May 8, 2001) at 141-42. In fact, Gimenez had not taken the courses. Trial Tr. (May 7, 2001) at 174-75. By the same token, the Justification credits Gimenez for achievements that were not hers. The Justification states that Gimenez was responsible for "creat[ing]" the "UW Press webpage." App. 146. Yet, the Press webpage had been created before Gimenez began working at the Press. Trial Tr. (May 7, 2001) at 170. Similarly, the Justification praises Gimenez for "upgrad[ing]" the webpage. App. 146. Gimenez did work on the upgrades but so did Evenson. Trial Tr. (May 7, 2001) at 170. The Justification omits any reference to Evenson's contribution. Id. at 171. Although discussing in detail the supposed deficiencies in training, experience, and skills of the four charging parties, who had vast experience working at the Press, the Justification does not have a single, critical thing to say about any Press employee under the age of 40. Trial Tr. (May 8, 2001) at 61.

More pointedly, the Justification uses code words, reflective of an age bias. The Justification refers to Charles Evenson as having skills more suited to the "pre-electronic" era. App. 146. The Justification assumes, without factual support, that the more senior Evenson would have to be brought "up to speed" on the "new trends of advertising via electronic means." Id. at 146-48; see also Trial Tr. (May 8, 2001) at 141 [testimony of David Bethea] (acknowledging that he simply assumed, in preparing the Justification, that Evenson had no experience with HTML programming). Bethea used similar terms when he pitched his proposal for job cuts to the Press Committee. Bethea urged that "the Press in the past had not had the vision to be agile enough" and that the terminations of the four charging parties would "improve that agility." Trial Tr. (May 8, 2001) at 136. Notably, Bethea assumed the position of interim director of the Press after he had authored a study that was highly critical of the prior director, a man in his 60's; Bethea believed that this man did not "fit the new vision for the Press." Id. at 127. There is evidence that Bethea, as a general matter, assumed a positive correlation between youth and effective job performance. Id. at 129-30.

There is also evidence that Bethea and Salemson doctored the facts and misled other UW officials in order to achieve the desired cuts in the Press staff. To begin with, the Justification, a post-

hoc document prepared to justify a decision already made, is riddled with factual inaccuracies and erroneous assumptions. For example, the Justification states with respect to Rosalie Robertson that she did not have as much experience in acquiring books in the Humanities area as a younger individual in the acquisitions department, Raphael Kadushin, who was not terminated. App. 143-44. Robertson, however, had "been publishing for 15 years in quite a few areas, including all those [e.g., Humanities] that . . . this younger editor was going to be handling." Trial Tr. (May 7, 2001) at 137-38. As it turns out, Kadushin had acquired only one published book in his brief, nine-month career in the acquisitions department. Id.; Trial Tr. (May 8, 2001) at 140-41. The Justification also states that Robertson could not be shifted into the Press' editorial department because she lacked experience "in copyediting manuscripts." App. 144. In fact, Robertson had extensive editing experience. Trial Tr. (May 7, 2001) 128-31, 136, 140.

Similar misstatements are made with respect to the other charging parties. The Justification states that Mary Braun could not assume the position of Carla Aspelmeier, a younger individual retained in the Press' production department, because Braun had "no background in graphic arts or printing." App. 145. In fact, Aspelmeier herself "did not have an education background in

designer graphic arts and her previous publish[ing] experience before coming to the Press was in marketing, not in production or graphic or anything to do with design." Trial Tr. (May 7, 2001) at 243. The Justification asserts that Braun had limited editorial experience when, in fact, her "skills as an editor" were "distinguished by the fact that she was the editor there and that people published with the Press because of her reputation as well." Id. at 141. With respect to Joan Strasbaugh, the Justification cites to a deficiency in the "requisite technical skills" in editing and production. App. 151. Yet, Strasbaugh had recently been chosen "to oversee the editing and production of The World of Mike Royko," a high profile book that the Press published for the "trade" book market. Trial Tr. (May 7, 2001) at 202, 217-26. The Justification omits any reference to Strasbaugh's "copyediting" experience and faults Strasbaugh for a supposed deficiency in "electronic skills" (App. 151) when, in fact, Strasbaugh had more experience in that area than the younger individual, Rebecca Gimenez, to whom she was unfavorably compared. Trial Tr. (May 7, 2001) at 202-04. The Justification contains similar falsities with respect to the comparative skills of Gimenez and Charles Evenson, as discussed above.

In addition to misstatements with respect to the charging parties, the Justification contains misleading information about

the Press' financial condition. The Justification states that the Press would save $238,000 by terminating the four charging parties. App. 142. The actual savings were considerably lower, a fact that was known to Bethea at the time. Trial Tr. (May 8, 2001) at 136-37, 149. In his April 1999 meeting with the Press Committee, Bethea claimed that the Press was suffering from a "$550,000 to $800,000 cash flow deficit." Supp. App. 3. The actual deficit was $30,000. Trial Tr. (May 8, 2001) at 176-77. Although the Justification asserts that "at this point the only alternative seems to be to retrench and reduce staff," App. 139, the Press' own budget projections revealed that "if the Press had continued to expand its sales of books at the rate it was on course to do and to expand the number of titles as it was planning to do, profitability would have begun to return, that is the deficit would have started to shrink at the latest within three years." Trial Tr. (May 8, 2001) at 175. Bethea and Samuelson were made aware of these projections in late February 1999. Id. at 174-75.

In a similar vein, the Justification creates the impression that it was the intention of Bethea and Salemson to eliminate positions in the Press as part of a cost-cutting reduction-in-force. Yet, in a hand-written document, prepared in March 1999, Bethea projected that the Press would hire "replacements" in the acquisitions and marketing departments once the individuals

selected for the terminations were removed from the workforce. Supp. App. 7; Trial Tr. (May 8, 2001) at 138-39. In a separate document, dated March 18, 1999, Bethea and Salemson projected the hiring of a new acquisitions editor for the 2000-01 academic year. Supp App. 8; Trial Tr. (May 8, 2001) at 66-68. In December 1999, only seven months after the terminations, Bethea recommended to the associate deans in the Graduate School that the Press hire a new marketing director and a new senior acquisitions editor. Supp. App. 1-2; Trial Tr. (May 8, 2001) at 137-38.

As it turns out, the terminations of the four charging parties resulted in a substantially younger workforce. The individuals retained in similar positions at the Press were all younger than the four charging parties. The individual retained in the acquisitions department, Raphael Kadushin, was 46. App. 130; Trial Tr. (May 7, 2001) at 123. The two permanent employees retained in the marketing department, Sheila Leary and Rebecca Gimenez, were 40 and 23, respectively. App. 130; Trial Tr. (May 7, 2001) at 176-77. Two individuals were retained in the editorial department, Scott Lenz, age 45, and Juliet Skuldt, age 27. App. 130; Trial Tr. (May 7, 2001) at 168. Two individuals were also retained in the production department, Terry Emmrich, age 39, and Carla Aspelmeier, age 36. App. 130; Trial Tr. (May 7, 2001) at 168, 187. Notably, Gimenez, Lenz, Skuldt, and Aspelmeier had been hired in the months

preceding the terminations. Trial Tr. (May 8, 2001) at 50-53. Salemson played a prominent role in those hires. Id.

The youth movement was also reflected in the individuals hired by the Press, at the direction of Bethea and Salemson, within the months immediately following the terminations. Id. at 50-60. Two weeks after the terminations of Robertson and Braun in the acquisitions department, the Press hired Sheila McMahon into that very same department. Id. at 54-55. McMahon was 24 or 25. Id. at 55. The Press renewed and extended the contract of Susan Jevens in the marketing department, who assumed the job duties of Joan Strasbaugh. Id. at 55-56; Trial Tr. (May 7, 2001) at 209. Jevens was in her twenties or thirties. Id. The Press hired three other individual into the marketing department, Nienke Wijnia, who was in her early thirties, Will Morgan, who was "[a]round 30," and Jenny Siefert, who was 25. Trial Tr. (May 8, 2001) at 56-58.

At trial, the Commission urged that UW had terminated the four charging parties as part of a "new vision" that Bethea and Salemson "were creating for the future of the Press," a vision that was designed "to get rid of the older" workers. Trial Tr. (May 7, 2001) at 90-95. The evidence supported the Commission's theory. For example, Salemson testified that he was brought in as Associate Director to "develop policies and direction (a vision) to prepare the Press for the 21st century." App. 128; Trial Tr. (May 8, 2001)

at 53-54. Salemson admitted that the younger individuals hired in the months preceding the terminations of the charging parties were part of that "vision." Id. at 54. Likewise, Salemson admitted that the younger individuals hired after the terminations of the charging parties were part of the "new vision." Id. at 58. Salemson was unable to explain how the charging parties would have fit into that new vision. Id. at 54.

Salemson's admissions were echoed by Bethea. Bethea admitted that, at the time he was proposing to terminate the four charging parties, he was already looking for "replacements." Id. at 138. Bethea testified that these replacements would fit the Press' "new vision." Id. at 138-39. As Bethea put it, "Okay, yeah. We were -- Yes, I was asking that if the, you know, legal hurdles could be, could be jumped that it would be good for us to hire new people in these positions." Id. at 139. Bethea conceded that "[t]hose legal hurdles included the Age Discrimination Act." Id.

There was also evidence that the decision-makers, and other UW officials, carried out the terminations with little or no regard for the prohibitions of the ADEA. Salemson testified that, at the time of the terminations, he was "unaware that [the] law protects people 40 and older." Id. at 49. "No one at the Graduate School" had ever "told [him] about that." Id. at 49-50. Nor had he been given any "formal training at any time from the UW, the Graduate

School, the Academic Personnel Office, anyone in regard to the Age Act." Id. at 50. Bethea testified that he had not "undergone any training in EEO laws" during his career at UW, that he had no idea who had "primary responsibility for EEO compliance" at the Press, that he had never been "evaluated on [his] knowledge or compliance with EEO law at any time," that the Press had never "examine[d] its policies regarding age discrimination during [his] time there," and that, at the time of the terminations, he "had no idea that the law started to protect them at age 40." Id. at 128-29. Ann Marie Lamboley, the self-styled "campus layoff expert," asserted that she carefully vetted the proposed terminations to ensure that they were "consistent with the University's practice and policies." Id. at 150-55. She admitted, however, that she did not "conduct an examination of [the proposed terminations] to see if age discrimination was involved." Id. at 155-56. Similarly, Mareda R. Weiss, the Associate Dean for Administration at UW's Graduate School, admitted that she "never investigated to see whether age discrimination was involved in this case" and "did not know at the time . . . that the age of protection under the Age Discrimination in Employment Act is 40." Id. at 180, 187. Weiss was responsible for "budget and personnel" matters at the Graduate School and was involved in reviewing the proposed terminations of the charging parties. Id. at 180, 182. Finally, Dean Virginia Hinshaw, who was

involved in reviewing the terminations in her capacity as Dean of the Graduate School, admitted that she did not check into the "qualifications" of the charging parties, did not "check on the ages of the people let go and the people staying in place," and did not know at the time "at what age people become protected under the ADEA." Trial Tr. (May 7, 2001) at 252, 269.

UW offered a number of defenses for the terminations. UW claimed, for example, that the terminations were necessary as a cost-cutting reduction-in-force. Trial Tr. (May 7, 2001) at 106-07. Yet, there was compelling evidence that it was the intention of Bethea and Salemson, all along, to replace the charging parties. Supp. App. 1-2, 7-8; Trial Tr. (May 8, 2001) at 66-68, 138-39. In a similar vein, UW argued, on the basis of the Justification prepared by Bethea and Salemson, that the charging parties were deficient in skills and experience, as compared to the younger individuals retained at the Press. App. 136-51. There was abundant evidence, however, that the Justification was factually inaccurate and that the two decision-makers merely assumed, without knowing, that younger employees working at the Press possessed the skills and experience supposedly found wanting in the charging parties. See supra pp. 10-13. UW also argued that some of the younger employees retained at the Press were not similarly situated to the charging parties -- insomuch as they worked in different

departments of the Press (editorial and production) -- and that the charging parties could not be shifted into those departments because "each of the departments within the Press is highly specialized, and movement of staff between departments is extremely rare." App. 142; Trial Tr. (May 8, 2001) 14-16. Yet, there was testimony, from UW's own decision-maker, Salemson, that "the whole Press is not that large, so we tend to work, you know, pretty much with everybody, you know, over the course of a week in some respect." Trial Tr. (May 7, 2001) at 284-85; see also id. at 244-45 [testimony of Mary Braun] (explaining that, contrary to the statement made in the Justification, there was a great deal of "movement between departments at the Press"). On the damages issue, UW urged that the charging parties failed to put forth "good faith" efforts to secure alternative employment. Trial Tr. (May 9, 2001) at 13-14. Yet, each of the charging parties did find new jobs and there was extensive evidence adduced at the damages phase with respect to their mitigation efforts. Id. at 15-24, 40-50, 75-89, 99-106. There was also evidence, from a Commission expert, supporting the amounts of back and front pay claimed by the Commission. Id. at 113-24.

None of UW's arguments carried the day in the district court. The district court, on three separate occasions, denied UW's motion for judgment as a matter of law. The jury returned verdicts in the

Commission's favor and awarded damages in accordance with the Commission's evidence.

SUMMARY OF ARGUMENT

The Commission's suit against UW is not barred by the Eleventh Amendment. The Supreme Court has made repeatedly clear that the Eleventh Amendment is a bar to private lawsuits against State defendants. It does not apply to suits brought by an agency of the United States government.

There is sufficient evidence to support the jury verdicts of unlawful discrimination in the terminations of the four charging parties. The evidence shows that the Justification for the terminations is a post-hoc document that is riddled with factual errors. The Justification makes unfounded assumptions concerning the superior skills of the younger individuals retained at the Press and uses age-tainted code words in referring to the charging parties. There is also evidence that the two decision-makers misled UW officials with respect to the facts purportedly supporting the terminations and that the decision-makers planned all along to hire replacements for the charging parties despite claiming at the time that the terminations were designed to cut costs by eliminating positions in the Press. The employees retained at the Press, in lieu of the charging parties, were all younger than the charging parties. A number of younger individuals

were hired, in the months immediately following the terminations, into the very same departments that had been previously occupied by the charging parties.

There is also sufficient evidence to support the jury's finding that UW acted willfully in unlawfully terminating the employment of the four charging parties. The principal decision-maker, Bethea, admitted that he wanted to bring in replacements for the charging parties who fit the Press' "new vision." He knew, however, that "legal hurdles," such as the ADEA, would have to be "jumped." Although he knew enough about the ADEA to see it as a hurdle that had to be "jumped," neither he nor Salemson had any EEO training and neither man had any idea when the protections of the ADEA kicked in. This is also true of the UW officials who reviewed the terminations, who were largely ignorant of the ADEA's protections and did not, in any event, make any attempt to investigate whether the terminations of the charging parties, the four oldest individuals working in their respective departments, were age-based.

The district court did not abuse its discretion in denying UW's motion for a new trial. Assuming that there is sufficient evidence to support the jury verdicts, thus precluding judgment as a matter of law in UW's favor, there is no basis for a new trial. The trial was eminently fair and the damage award was supported by

substantial evidence. Finally, the district court did not err in awarding the Commission, as prevailing party, the travel and deposition costs of the five non-party witnesses.

STANDARD OF REVIEW

UW argues that the Commission's suit is barred by the Eleventh Amendment. This is a legal issue subject to de novo consideration in this Court. See Cherry v. University of Wisconsin Sys. Bd. of Regents, 265 F.3d 541, 547 (7th Cir. 2001). UW also contends that the jury verdicts on liability and willfulness are not supported by the evidence and, thus, that the district court erred in denying UW's motion for judgment as a matter of law. This Court reviews a denial of motion for judgment as a matter of law de novo. See Sheehan v. Donlen Corp., 173 F.3d 1039, 1043 (7th Cir. 1999).

"To warrant judgment as a matter of law because of legal insufficiency of evidence, there must have been 'no legally sufficient evidentiary basis for a reasonable jury to find for the non-moving party.'" Id. (quoting Payne v. Milwaukee County, 146 F.3d 430, 432 (7th Cir. 1998)). This Court has made clear that "[a]ttacking a jury verdict is a hard row to hoe" and that a court "will not disturb the jury verdict unless [the Appellant] can show that 'no rational jury could have brought in a verdict against [it].'" 173 F.3d at 1043 (quoting EEOC v. G-K-G, Inc., 39 F.3d 740, 745 (7th Cir. 1994)). This Court's inquiry "'is limited to whether

the evidence presented, combined with all reasonable inferences permissibly drawn therefrom, is sufficient to support the verdict when viewed in the light most favorable to the party against whom the motion is directed.'" 173 F.3d at 1043 (quoting Emmel v. Coca-Cola Bottling Co. of Chicago, 95 F.3d 627, 629 (7th Cir. 1996)).

UW also contends that the district court erred in denying UW's motion for a new trial. This Court reviews the denial of a motion for a new trial for "'clear abuse of discretion.'" Hasham v. California State Bd. of Equalization, 200 F.3d 1035, 1052 (7th Cir. 2000) (quoting Emmel, 95 F.3d at 636). Finally, UW urges that the district court erred in awarding travel and deposition costs for five of the Commission's witnesses. This ruling is also subject to an abuse of discretion standard of review. See Martin v. City of Indianapolis, 192 F.3d 608, 614 (7th Cir. 1999).

ARGUMENT

THE DISTRICT COURT'S JUDGMENT SHOULD BE AFFIRMED IN ALL RESPECTS.

A. The Commission's Suit Is Not Barred By The Eleventh Amendment

UW begins its brief with an argument that it did not raise below. Specifically, it contends that the Commission's suit is barred by the principle of sovereign immunity embodied in the Eleventh Amendment to the United States Constitution. See UW Br. at 15-19. UW is correct that the immunity issue, although not

technically jurisdictional, can be taken up for the first time on appeal. See Edelman v. Jordan, 415 U.S. 651, 677-78 (1974); Kovacevich v. Kent State Univ., 224 F.3d 806, 816 (6th Cir. 2000); Higgins v. Mississippi, 217 F.3d 951, 953-54 (7th Cir. 2000). UW is also correct that "suits by private individuals" under the ADEA against a State defendant are barred by the Eleventh Amendment. Kimel v. Florida Bd. of Regents, 528 U.S. 62, 91 (2000). UW's argument, however, that this bar extends to lawsuits brought by the Commission, an agency of the United States government, is foreclosed by Supreme Court precedent.

In Seminole Tribe of Florida v. Florida, 517 U.S. 44, 47 (1996), the Supreme Court breathed new life into the Eleventh Amendment, holding that despite Congress' clear intent in the Indian Gaming Regulatory Act to abrogate States' sovereign immunity, States retained their immunity from private lawsuits under that Act. In reaching this conclusion, the Court made clear that, Eleventh Amendment immunity notwithstanding, "[t]he Federal Government can bring suit in federal court against a State" as a method "of ensuring the States' compliance with federal law." Id. at 71 n.14 (citing United States v. Texas, 143 U.S. 621, 644-45 (1892)). The Court repeated that principle in Alden v. Maine, 527 U.S. 706, 754 (1999), in holding that States "retain[ed] immunity from private suit" under the Fair Labor Standards Act. The Court

pointedly observed that, "[i]n ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government." Id. at 755 (emphasis added). The Court stressed that a "suit which is commenced and prosecuted against a State in the name of the United States . . . differs in kind from the suit of an individual." Id. In Kimel, the Court did not explicitly address the suit authority of the federal government. The Court stressed, nonetheless, that its decision did "not signal the end of the line for employees who find themselves subject to age discrimination at the hands of their state employers" because the Court's holding meant "only that, in the ADEA, Congress did not validly abrogate the States' sovereign immunity to suits by private individuals." 528 U.S. at 91 (emphasis added). Finally, in Board of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356 (2001), the Court, in holding that Title I of the Americans with Disabilities Act ("ADA") did not abrogate States' sovereign immunity, reiterated that the Eleventh Amendment immunity principle was not a bar to a lawsuit by the federal government. As the Court explained:

> Our holding here that Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under Ex parte Young, 209 U.S. 123 (1908).

Id. at 374 n.9.

Not surprisingly, the one circuit court to address the issue, in the wake of these Supreme Court pronouncements, has agreed that the Eleventh Amendment does not bar an ADEA suit by the Commission against a State defendant. In EEOC v. Kentucky Retirement Sys., 2001 WL 897433 (6th Cir. Aug. 2, 2001),[5] the State argued, on the basis of Kimel, that the Commission's ADEA suit was barred by the Eleventh Amendment. The Sixth Circuit disagreed, holding that Eleventh Amendment immunity applies only to private lawsuits against State defendants and does not in any way limit the suit rights of the Commission, as an agency of the United States. Id. at **3-5. The Court cited the longstanding principle that "'States retain no sovereign immunity as against the Federal Government.'" Id. at *4 (quoting West Virginia v. United States, 479 U.S. 305, 312 n.4 (1987)). The court stressed that the Commission has the authority to sue in its own name to "enforce the rights of employees who have been subjected to unlawful age discrimination." Id. at *4. In the court's view, although a suit brought by the charging parties themselves "would be barred by the Eleventh Amendment," the immunity principle did not bar a suit by the

[5] A copy of this decision is included in the Commission's Supplemental Appendix, which is attached as an addendum to this brief.

Commission, as the federal agency "charged by Congress to enforce the ADEA's prohibition against discriminatory employment practices based on age." Id.; see also EEOC v. Karuk Tribe Housing Auth., 260 F.3d 1071, 1075 (9th Cir. 2001) ("'just as a state may not assert sovereign immunity as against the federal government, neither may an Indian tribe;'" no distinction, for these purposes, between the Commission and "the United States itself," since the Commission "is an entity created by Congress and is specifically authorized by statute to enforce the ADEA").

UW concedes that there may be "circumstances" in which the United States may "sue the states for money damages." UW Br. at 18. UW argues, however, that the United States may do so "only where it is using a statute, such as the ADA or ADEA to seek to remedy a pattern of intentional discrimination on behalf of the United States or on behalf of the citizens of the state involved." Id. at 18 (citing United States of Am. v. Mississippi Dep't of Public Safety, 159 F. Supp. 2d 374 (S.D. Miss. 2001)). Thus, UW draws a distinction, for Eleventh Amendment purposes, between cases in which the Commission sues to redress a pattern of discrimination and cases in which the Commission sues to redress individual acts of discrimination.

The distinction drawn by UW finds no support in the Supreme Court's Eleventh Amendment jurisprudence. The immunity principle

is inapplicable to suits brought by the federal government because the States "consented" to such suits in "[r]atifying the Constitution." Alden, 527 U.S. at 755. That blanket consent, which is "inherent in the constitutional plan," Monaco v. Mississippi, 292 U.S. 313, 329 (1934), is not limited to cases in which the federal government seeks to redress a "pattern" of illegal conduct. UW Br. at 18. It was the "fear of private suits against nonconsenting States" that prompted "the Founders" to "preserve the States' sovereign immunity." Alden, 527 U.S. at 756. "Suits brought by the United States itself" are different because they "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." Id. Simply put, when an agency of the federal government, such as the Commission, chooses to bring suit against a State defendant in the "exercise of political responsibility," that exercise of suit authority falls beyond the reach of the Eleventh Amendment, irrespective of the scope of the unlawful conduct redressed by the suit.

In a similar vein, UW contends that the Eleventh Amendment applies in this case because the Commission "stands in the shoes of the four individuals and acts in privity with them as their representative." UW Br. at 17. This Court has recognized, in

certain contexts, that the Commission is in privity with the individuals for whom it seeks relief in its ADEA actions. See EEOC v. North Gibson Sch. Corp., 266 F.3d 607, 616 (7th Cir. 2001); EEOC v. Harris Chernin, Inc., 10 F.3d 1286, 1290-91 (7th Cir. 1993). That principle, however, does not support UW's claim of immunity. It merely limits the Commission to a claim for injunctive relief in cases in which the charging party, by his own actions, has disqualified himself from recovering monetary damages in a Commission action. See North Gibson, 266 F.3d at 617-21 (Commission limited to a claim for broad injunctive relief where the charging party filed an untimely charge of discrimination); Harris Chernin, 7 F.3d at 1290-91 (Commission limited to a claim for broad injunctive relief where the charging party filed an untimely lawsuit). UW is not arguing that the Commission is limited to a claim for injunctive relief.[6] It is arguing that the Commission's suit is barred outright by the Eleventh Amendment. The Eleventh Amendment is not concerned with the "relief sought by a plaintiff." Seminole Tribe, 517 U.S. at 58. It is concerned

[6] If this were in fact UW's argument, the argument would be waived, since it was never raised in the district court. See Arendt v. Vetta Sports, Inc., 99 F.3d 231, 237 (7th Cir. 1996). Although a party can raise an immunity argument for the first time on appeal, this is not an immunity argument; it is merely an argument that would impose some limitation on the remedial scope of the Commission's lawsuit.

with the "'indignity of subjecting a State to the coercive process of judicial tribunals at the insistence of private parties.'" Id. Because the Commission, not a private party, has brought this lawsuit in the proper exercise of its statutory authority, there is no basis for applying Eleventh Amendment immunity.

As it turns out, the Supreme Court, in an analogous context, has rejected the very proxy, or "stand in the shoes," theory now advanced by UW. In Kansas v. Colorado, 121 S. Ct. 2023 (2001), the State defendant argued that a suit brought by another State was barred by the Eleventh Amendment. The defendant acknowledged that "a State may recover monetary damages from another State in an original action, without running afoul of the Eleventh Amendment." Id. at 2027. The defendant urged, however, that the suit was barred by the Eleventh Amendment because the State plaintiff was merely seeking recovery for "losses sustained by individual water users in Kansas." Id. at 2028. The Supreme Court disagreed. The Court found that the State had not entered the controversy "'as a nominal party in order to forward the claims of individual citizens.'" Id. The State had filed the lawsuit in its own name and had "been in full control of [the] litigation since its inception." Id. The Court stressed that "[w]hen a State properly invokes our jurisdiction to seek redress for a wrong perpetrated against it by a sister State, neither the measure of damages that

we ultimately determine to be proper nor our method for calculating those damages can retrospectively negate our jurisdiction." Id. Nor would the court's jurisdiction be affected by the State's "postjudgment decisions concerning the use of the money recovered from the [defendant]," since it is the State's prerogative to use the proceeds of the suit "to 'benefit those who were hurt.'" Id. at 2028.

In this case, the Commission is no "nominal party." The Commission filed the lawsuit in its own name, as authorized by the ADEA. It has controlled the litigation from the inception, consistent with the fact that Congress gave the Commission the "whip hand in the enforcement of the age-discrimination law." G-K-G, Inc., 39 F.3d at 745. The Commission charged UW with multiple, willful violations of the ADEA and sought liquidated damages for those violations, damages that are, at least in part, "punitive in nature," thus serving a broader public purpose. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 125-26 (1985). That the charging parties will receive a monetary benefit from the Commission's suit does not bring the suit within the Eleventh Amendment bar.

The Supreme Court has made repeatedly clear that the Eleventh Amendment is not a bar to a suit brought by an agency of the federal government. UW's attempt to limit the Commission's ADEA

suit authority, by reference to the Eleventh Amendment, is without merit.

B. There Is Sufficient Evidence To Support The Jury Verdicts Of Unlawful Discrimination

UW next argues that the Commission "failed to produce substantial evidence to support the jury verdicts of willful age discrimination." UW Br. at 19. Although it is unclear from UW's brief, it appears that UW is challenging both the findings of liability (unlawful discrimination) embodied in the jury verdicts and the separate findings of willfulness. We respond first to the liability issue.

Contrary to UW's assertion (UW Br. at 21), this is not a case in which the Commission relied on nothing more than "its own opinion or the belief of the charging parties." To begin with, the principal document relied upon by UW, the Justification, is an entirely post-hoc document. The evidence shows that, as early as March 1999, Bethea and Salemson had decided to terminate the four charging parties. Bethea and Salemson were asked, by other UW officials, to provide a written justification for the terminations. They completed the Justification in late April 1999, basing their assessment of the comparative skills of the charging parties on materials (e.g., resumes) that were not before them at the time they finalized their list of individuals to be terminated. See

supra pp. 8-9. This is precisely the type of "after the fact" justification that supports a finding of pretext. Futrell v. J.I. Case, 38 F.3d 342, 349 (7th Cir. 1994).

But this is just the tip of the iceberg. The Justification is riddled with factual inaccuracies and misstatements. The Justification makes a number of errors in cataloguing the supposed deficiencies in the comparative skills and experience of the charging parties. The Justification contains misleading information about the Press' financial condition. The Justification creates the false impression that it was the intention of Bethea and Salemson to eliminate positions in the Press as part of a cost-cutting reduction-in-force. In fact, it was their intention, all along, to replace the charging parties with individuals who were a closer fit with the Press' "new vision." See supra pp. 14-17. These points support "the 'suspicion of mendacity' which can by itself sustain a finding of intentional discrimination." Wichmann v. Bd. of Trustees of Southern Illinois Univ., 180 F.3d 791, 803 (7th Cir. 1998) (evidence showed that employer lied about the claimant's position being eliminated as part of a reduction-in-force and manipulated the books to make the financial deficit, supposedly supporting the termination, larger than it was), vacated on other grounds, 528 U.S. 1111 (2000).

The Justification also betrays an age bias. The Justification assumes, without foundation, that the charging parties were deficient in the new, electronic technologies. The Justification assumes, without foundation, that the younger comparators were proficient in these technologies. See supra pp. 9-10. "It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age." Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993). The Justification, moreover, uses age code words, referring to Evenson's skills in particular, as more suited to the "pre-electronic" era. App. 146. Although Bethea later admitted that he was unsure about the extent of Evenson's experience with computer technologies, see supra p. 11, the Justification states, as fact, that Evenson would have to be brought "up to speed" on the "new trends of advertising via electronic means." App. 146-48. These terms, although not necessarily indicative of an age bias, can, together with other evidence, support a finding of age discrimination. Futrell, 38 F.3d at 347-48 (decision-maker's statement that individual was not a "forward enough thinker," or "was unwilling or unable to 'adapt' to new systems in the department," can support a finding that the decision-maker "harbored unfavorable views of older workers").

The Justification aside, there is additional evidence of age

bias. In the months immediately preceding the terminations of the charging parties, Salemson had hired a number of individuals into the Press. These individuals were younger than the charging parties. These individuals were retained in their positions when the charging parties, the oldest individuals (other than the decision-makers) working in the Press' book division, were fired. See supra pp. 15-16. One of these younger individuals was Rebecca Gimenez, age 23. Bethea admitted that he hated to lose Gimenez because she was a "highly skilled young woman." Trial Tr. (May 8, 2001) at 138. In the months immediately following the terminations, Bethea and Salemson hired a number of individuals into the acquisitions and marketing departments, the very departments previously occupied by the charging parties. The new hires were in their twenties and thirties.[7] See supra p. 16.

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[7] In addition to these younger hires, the Press hired two individuals who were in their "early to mid forties" and "mid fifties," respectively. Trial Tr. (May 8, 2001) at 76. Those individuals, however, were hired after charges of age discrimination had been filed with the Commission. Id. at 79-81. One was hired after the Commission filed suit and one shortly before the Commission filed suit. Id. See Greene v. Safeway Stores, Inc., 98 F.3d 554, 561 (10th Cir. 1996) (older replacement can be disregarded where "the circumstances would reasonably support an inference" that the replacement was hired as "a defense against [an] age discrimination claim"); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1376 n.36 (5th Cir. 1974) (acts taken "'in the face of litigation'" should be viewed with skepticism); Howard C. Eglit, Age Discrimination 7.18, at 7-102 to 7-103 (2d ed. 1995) (makes sense to disregard older

In reviewing the sufficiency of evidence "after a trial on the merits," the Court considers whether "the totality of the evidence supports a verdict of intentional discrimination." Sheehan, 173 F.3d at 1043. If there are conflicting versions of the events, each of which could have been accepted by the jury, the reviewing court does not substitute its judgment for the jury's. See Hybert v. Hearst Corp., 900 F.2d 1050, 1054 (7th Cir. 1990). Instead, the court asks, "[t]aking the facts as a whole," whether a reasonable jury could have inferred unlawful discrimination. Futrell, 38 F.3d at 350. "Taking the facts as a whole," the Commission's case easily clears the sufficiency threshold. See generally Wichmann, 180 F.3d at 800-03 (evidence sufficient to sustain a jury verdict of unlawful age discrimination); Futrell, 38 F.3d at 348-50 (same); Price v. Marshall Erdman & Assocs., 966 F.2d 320, 322-23 (7th Cir. 1992) (same); EEOC v. Century Broadcasting Corp., 957 F.2d 1446, 1455-57 (7th Cir. 1992) (same); Hybert, 900 F.2d at 1054 (same).

UW argues that the Commission's case fails because, to make out a "prima facie case" of discrimination, "there must be a difference of at least ten years between the employee laid off and the employee retained." UW Br. at 22-23. But it is too late in

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replacement in a situation where the replacement "is hired in an effort to make the defendant's employment practices look better to avert a threatened discrimination suit").

the day to be quibbling over the prima facie case. "Once the plaintiff prevails before the jury, the method of proof at trial is irrelevant." Wichmann, 180 F.3d at 800. On "post-trial review, whether Plaintiff's case is based on direct or indirect evidence, the McDonnell Douglas framework drops out of the analysis and we need only consider whether the record supports the resolution as to the ultimate question of intentional discrimination. Hasham, 200 F.3d at 1044. "[O]nce the case has been decided on the merits," the focus is no longer on the elements of the plaintiff's "prima facie case." Dadian v. Village of Wilmette, 269 F.3d 831, 837 (7th Cir. 2001). "After trial, the issue becomes whether the jury's verdict is against the weight of the evidence, with the focus being on whether there was sufficient evidence on the ultimate question of discrimination." Id. (citing United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714-15 (1983)).

Further, establishing a 10-year age differential between the claimant and an individual treated more favorably is not an immutable element of a plaintiff's ADEA case. The ADEA prohibits discrimination "because of" age. 29 U.S.C. 623(a)(1). In some cases, it may be necessary to show that the claimant was treated less favorably than a "substantially younger" individual, i.e., someone at least 10 years younger than the claimant, in order to raise an inference that the adverse action was "because of" age.

In other cases, such proof will not be required. The circumstances may support an inference of discrimination quite apart from the age of any comparator. See Hartley v. Wisconsin Bell, Inc., 124 F.3d 887, 893 (7th Cir. 1997) (age of replacement is not determinative where evidence otherwise "reveals the employer's decision to be motivated by the plaintiff's age").

A simple hypothetical illustrates the point. A manager decides that he must make cuts in a particular division. The manager wants to get rid of the oldest workers in the division. He decides to make four cuts and, thus, terminates the employment of the four oldest workers in the division. There is no doubt that the manager has terminated these four workers "because of" age; the workers were let go because they were the oldest workers. This is true regardless of the age of the workers retained in the division. Some of those retained may be close in age to the four workers cut. But so what? The manager drew the line at four cuts and took out the oldest workers.

As it turns out, this hypothetical is this case. Bethea and Salemson decided to terminate the employment of four individuals. They chose to cut the four oldest workers under circumstances that are suggestive of pretext and age bias. That one of the younger workers retained, Raphael Kadushin, was close in age to the workers terminated (UW Br. at 23) is beside the point. Kadushin was also

considered for termination. Trial Tr. (May 8, 2001) at 132. If Bethea and Salemson had made deeper cuts, Kadushin may have been the next one to go. Id. at 73-75, 132. The Commission's case is not defeated by the fact that UW chose to cut four, rather than five, employees.

Additionally, this is not a simple "replacement" case, with a single claimant and a single replacement hired from the outside. This is a case where several employees were terminated and their responsibilities "'absorbed by other employees'" or by replacements brought in from the outside. Wichmann, 180 F.3d at 802. In such a case, "some inference of discrimination may flow from the retention and promotion of younger employees," particularly where "'fungibility among jobs'" is demonstrated. Id. (quoting Gadsby v. Norwalk Furniture Corp., 71 F.3d 1324, 1331-32 (7th Cir. 1995)).

In this case, Robertson (age 50) and Braun (age 46) were terminated from the acquisitions department. Two weeks later, the Press hired Sheila McMahon, age 24 or 25, into the acquisitions department. See supra p. 16. Joan Strasbaugh, age 47, was terminated from her position as assistant marketing manager. Her job responsibilities were assumed by Susan Jevens, who was in her twenties or thirties, and whose contract was renewed and extended shortly after Strasbaugh's termination. See id. Charles Evenson, age 54, was terminated from his position as senior marketing

specialist. Among the individuals retained in the marketing department was Rebecca Gimenez, age 23, the "young" individual who had so impressed Bethea. See supra pp. 7, 15-16. Other individuals, in their twenties or thirties, were brought into the acquisitions and marketing departments and still other individuals, much younger than the charging parties, were retained in the editorial and production departments. See supra pp. 15-16.

UW contends that the Commission has not shown that the younger individuals hired or retained were "similarly situated" to the charging parties, as required to establish a prima facie case. UW Br. at 24-25. But, again, it is too late in the day to be arguing over the prima facie case. In any event, it is not true that the Commission "made absolutely no effort to present any evidence that the employees retained or those hired later possessed analogous attributes, experience, education or qualifications." Id. at 24. For one thing, UW itself plainly viewed the charging parties as similarly situated to several of the younger individuals retained by the Press. The Justification, at some length, draws comparisons between the charging parties and the other individuals working at the Press. Thus, the Justification discusses the relative skills of Evenson and Gimenez, both of whom worked in the marketing department. App. 145-47. The Justification discusses the relative skills of Robertson and Kadushin, both of whom worked in the

acquisitions department. Id. at 143-44. The Justification discusses the relative skills of Braun, in acquisitions, and Carla Aspelmeier, a younger individual retained in the Press' production department. Id. at 145. Of course, in each case, UW retained the younger individual. But it is clear, from the Justification itself, that UW viewed these individuals as being in the same qualifications pool.

More generally, there is evidence of a "fungibility" among the jobs in the Press' four departments (acquisitions, marketing, editorial, and production). Wichmann, 180 F.3d at 802. Salemson admitted that everybody at the Press tended to work "pretty much with everybody" else. Trial Tr. (May 7, 2001) at 284-85. There was also a good deal of "movement between departments." Id. at 244-45. Strasbaugh, for example, was splitting duties between acquisitions and marketing, while both Robertson and Braun, in acquisitions, had extensive editing experience. See supra pp. 12-13, 20. The Justification provides further support for this view, since its comparative skills assessment groups together employees from all four departments. App. 147.

Finally, the younger individuals hired in the aftermath of the terminations assumed positions in the very departments previously occupied by the charging parties. UW makes much of the fact that some of these individuals were hired into a different job

classification, as "limited term employees." UW Br. at 27. But "an employer cannot avoid liability for intentional discrimination by the 'simple expedient' of changing job titles." Wichmann, 180 F.3d at 803 (quoting Riordan v. Kempiners, 831 F.2d 690, 699 (7th Cir. 1987)). Salemson acknowledged that these younger individuals were hired as part of the "new vision" that he was charged with implementing, and Bethea conceded that it was his plan all along to hire "replacements" for the charging parties. See supra pp. 16-17.

These points aside, UW's brief is a series of ad hominem attacks on the Commission's case. UW, for example, states that "[t]here is absolutely no evidence that the two decision makers did not genuinely believe the reasons they presented" for the terminations. UW Br. at 26. There is evidence, however, that these men fudged the facts, doctored the numbers, plotted to replace the charging parties with younger individuals, and invented a justification for the terminations after-the-fact. UW accuses the Commission of "bet[ting] its case on the fact that the jury would buy the [Commission's] 'new vision' argument and ignore the facts." Id. at 27. The phrase "new vision," however, was not simply a "'slogan' injected by the [Commission's] Counsel at trial." Id. at 28. It was a concept that was fully embraced by Salemson and Bethea during their cross-examinations. Salemson conceded that the younger individuals brought into the Press were

part of the "new vision." Trial Tr. (May 8, 2001) at 54-58. Bethea conceded that it was his plan to hire "replacements" who would fit the Press' new vision, if he could only "jum[p]" the "legal hurdle[]" imposed by the ADEA. Id. at 138-39. Bethea conceded having said, at the time of the terminations, that the Press, in the past, had not "had the vision to be agile enough" and that the terminations of the charging parties would "improve that agility." Id. at 136. The jury did not "ignore the facts" in finding for the Commission; it simply listened carefully to UW's own witnesses.[8]

Plainly, UW is dissatisfied with the jury verdicts. But "a party appealing a jury verdict faces an uphill battle." Haschmann v. Time Warner Entertainment Co., 151 F.3d 591, 599 (7th Cir. 1998). The evidence is sufficient to support the jury verdicts.

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[8] UW suggests that it is unreasonable to think that Bethea and Salemson acted out of an age bias because both "are older than those employees who were laid off." UW Br. at 21-22. This Court has made clear, however, that "the relative ages of the terminating and terminated employee are relatively unimportant." Kadas v. MCI Systemhouse Corp., 255 F.3d 359, 361 (7th Cir. 2001) (explaining that "it is altogether common and natural for older people" to "exempt themselves from what they believe to be the characteristic decline of energy and ability with age," to "want to surround themselves with younger people," and "to be oblivious to the prejudices they hold, especially perhaps prejudices against the group to which they belong").

C. There Is Sufficient Evidence To Support The Jury Verdicts Of Willfulness

UW argues that the Commission "did not present sufficient evidence to enable the jury to find that [UW's] actions were 'willful' within the meaning of the ADEA." UW Br. at 31. This argument takes up no more than a single page of UW's brief, suggesting that UW does not take the argument seriously -- and for good reason.

Under the ADEA, "courts are required to assess liquidated damages in the same amount as the compensatory damages if the employer's violation of the statute was 'willful.'" Mathis v. Phillips Chevrolet, Inc., 269 F.3d 771, 777 (7th Cir. 2001). "A violation is considered 'willful' if 'the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.'" Id. (quoting Hazen Paper Co., 507 U.S. at 614). Once a plaintiff demonstrates that the employer's conduct was willful, "the plaintiff need not additionally show that the employee's conduct was outrageous, or provide direct evidence of the employer's motivation." 269 F.3d at 777. The term "willful," as used in the ADEA, is "'designed to shield the employer who violates the Act without knowing it,' and whose ignorance is not reckless." Wichmann, 180 F.3d at 804 (quoting Shager v. Upjohn Co., 913 F.2d 398, 406 (7th Cir. 1990)). This Court has described

such cases as "rare." 180 F.3d at 804.

In this case, there is ample evidence of intentional age discrimination. UW has "never raised any suggestion that, if it did have a discriminatory policy, the policy was justified because the age requirement was a bona fide occupational qualification or fell under a statutory exception to the ADEA." Mathis, 269 F.3d at 778. On this record, the jury was "free to infer willfulness from the circumstances of the case." Id. at 777.

Indeed, there is specific evidence that Bethea, in particular, knowingly sought to circumvent the proscriptions of the ADEA. Bethea admitted that he wanted to replace the charging parties with individuals who fit the new, more "agile" vision of the Press. Bethea understood that, to do so, "legal hurdles" would have to be "jumped." Trial Tr. (May 8, 2001) at 139. Bethea conceded that these "legal hurdles" included the ADEA. Id. Bethea was not simply "aware of the existence of the ADEA." UW Br. at 31. He was contriving to end run it.

Alternatively, there is evidence that UW acted with "'reckless disregard for the matter of whether its conduct was prohibited by the ADEA.'" Mathis, 269 F.3d at 777. Although Bethea knew enough about the ADEA to see it as a hurdle that had to be "jumped," neither he nor Salemson had any EEO training and neither man had any idea when the protection of the ADEA kicked in. See supra pp.

17-18. This is also true of the UW officials who reviewed the terminations. See supra pp. 18-19. The charging parties were the four oldest individuals working in their respective departments. Yet, Ann Marie Lamboley, the "campus layoff expert," admitted that, in vetting the proposed terminations, she did not "conduct an examination of [the proposed terminations] to see if age discrimination was involved." Trial Tr. (May 8, 2001) at 155-56. Likewise, Associate Dean Mareda R. Weiss admitted that she "never investigated to see whether age discrimination was involved in this case" and "did not know at the time . . . that the age of protection under the [ADEA] is 40." Id. at 187. Ditto for Dean Virginia Hinshaw, who was also involved in reviewing the proposed terminations. See supra p. 19. As this Circuit has held, "leaving managers with hiring authority in ignorance of the basic features of the discrimination laws is an 'extraordinary mistake' for an [employer] to make, and a jury can find that such an extraordinary mistake amounts to reckless indifference." Mathis, 269 F.3d at 778; see also Price, 966 F.2d at 324 (jury was entitled to find that employer's conduct was reckless where employer "had so far neglected its responsibilities for compliance with the age discrimination law as to allow a supervisory employee to whom it had delegated the power to hire and fire to remain ignorant of one of the most basic features of the law -- namely the age at which

workers are protected by it").

UW contends that its decision-makers "did not know specifically at what age the ADEA became effective but they believed that it was inappropriate to consider any age in making a personnel decision," meaning their understanding of the ADEA "was more expansive than the law itself." UW Br. at 31. This is UW's spin on the evidence, but the jury was entitled to reject it. Further, this argument misses the critical point. UW is no "mom and pop" shop. Price, 966 F.3d at 324. It is a major university that is routinely making personnel decisions. The terminations in this case took place in 1999, some 32 years into the history of the ADEA. Yet, UW had no procedures in place to ensure compliance with the ADEA and carried out the terminations with little, if any, regard for the ADEA's protections. At the very least, UW acted with reckless indifference, thus supporting a finding of willfulness.

D. The District Court Did Not Abuse Its Discretion In Denying UW's Motion For A New Trial

Alternatively, UW argues that "the district court erred in denying [UW's] motion for a new trial." UW Br. at 34. UW's argument, on this point, is largely a reprise of its challenge to the sufficiency of the evidence. UW contends that the jury's findings of age discrimination "are not supported by substantial

evidence, direct or circumstantial, and the jury could not conclude that Professor David Bethea and Steve Salemson and the other University personnel were guilty of willful age discrimination." Id. at 35. UW exhorts that the jury verdicts "were the product of speculation, impermissible guesswork and unfounded conjecture." Id. As discussed above, there is sufficient evidence to sustain the jury verdicts. Just as UW is not entitled to judgment as a matter of law on the Commission's claims, it is not entitled to a new trial on the basis of supposed deficiencies in the Commission's evidence.

UW also contends that a new trial is necessary "to effectuate substantial justice" because the "damage awards are clearly excessive." UW Br. at 34. Contrary to UW's argument, the damage awards do not "totally ignore undisputed and uncontradicted evidence that the charging parties' [sic] failed to mitigate their damages as a matter of law." Id. at 34-35. The charging parties testified at length about their efforts to obtain alternative employment. All eventually found jobs. See supra p. 20. Although UW faults the charging parties for not applying for openings at the Press itself, id. at 33-34, the charging parties had credible explanations for not having done so,[9] among them the fact that

[9] UW, for example, faults Robertson for not having applied for several vacant positions at the Press. UW Br. at 33.

having been unceremoniously dumped from their positions at the Press because of supposed deficiencies in their relative skills and experience, the charging parties had no reasonable expectation that the Press was chomping at the bit to hire them back. Trial Tr. (May 9, 2001) at 111-12 [testimony of Mary Braun] (testifying that she did not apply for openings at the Press because she had moved to Oregon to accept another job and, having been fired from her job at the Press, was not "overly sanguine about [her] prospects of being rehired at the Press"). As the district court pointed out in denying the motion for new trial, there is "no evidence that any of [the charging parties] were offered jobs [at UW] that they did not accept." App. 107. "Failure to mitigate is an affirmative defense," on which the employer "bears the burden of persuasion." Sheehan, 173 F.3d at 1048-49. UW cannot plausibly argue that the jury was required, as a matter of law, to find that UW had carried its burden on this issue.

Robertson testified, however, that those positions were not "as good" as the position from which she was terminated and were not "as good" as the position she eventually secured. Trial Tr. (May 9, 2001) at 38. Robertson also testified that no one from UW ever called her "to offer [her] any of those jobs." Id. Similarly, Evenson testified that he was not offered a job by UW during the period he was laid off and that he did in fact apply for the "[v]ery few" positions available at UW that were comparable in pay to his prior position. Id. at 72-75. Joan Strasbaugh also testified that she did in fact apply for jobs at UW that were in her salary range. Id. at 97-99.

Further, the issue here is not whether the jury, in the first instance, should have accepted UW's evidence on the failure to mitigate defense. The issue is whether the district court erred in denying UW's motion for a new trial on this issue, a ruling that is "'not subject to review by this court, except upon exceptional circumstances showing a clear abuse of discretion.'" Century Broadcasting, 957 F.2d at 1460. UW did not move for judgment as a matter of law on the damages issue.[10] It simply raised the point in its motion for a new trial. DE 98 at 61-62. UW advances no coherent argument why this is the type of "exceptional circumstance" that would justify this Court in second-guessing the district court's conclusion that a new trial was not required. See Hasham, 200 F.3d at 1052 n.21 (faulting a party for "poorly" formulating the issue by focusing on the validity of the jury verdict as such rather than the district court's denial of the motion for new trial, which is subject to abuse of discretion review).

Finally, UW argues that a new trial is required because "the

[10] UW, nonetheless, includes a portion of its mitigation argument under the heading, "the district court should have granted the defendant's motion for judgment as a matter of law." UW Br. at 33-34. This appears to be an organizational mistake in the brief, since UW simply argues in that portion of the brief that the supposedly excessive damage awards entitle UW to a new trial. Id. at 34.

jury was in fact inappropriately guided and influenced by [the Commission] counsel's remark in closing argument, '[W]e wouldn't be here unless the law had been violated.'" UW Br. at 36. A party "has a heavy burden when [it] seeks a new trial based on improper remarks during a closing argument." Doe v. Johnson, 52 F.3d 1448, 1465 (7th Cir. 1995). This Court has repeatedly explained that "'improper comments during closing argument rarely rise to the level of reversible error.'" Valbert v. Pass, 866 F.2d 237, 241 (7th Cir. 1989). "This observation is particularly pertinent when the comment is merely a brief and unrepeated part of a lengthy argument." Valbert, 866 F.2d at 241. Additionally, "an instruction to the jury stating that the arguments of counsel are not evidence can mitigate the harm potentially caused by improper statements made by counsel during closing argument." Id.

In this case, the remark cited by UW was promptly objected to. Trial Tr. (May 8, 2001) at 218. The district court sustained the objection, instructing the jury to "disregard that inappropriate argument." Id. The Commission's attorney apologized and moved on. This entire exchange covers six lines of the transcript. Id. As UW concedes, the district court instructed the jury at the close of evidence to disregard "matters which had been stricken and to put those remarks out of their mind." UW Br. at 36 n.6. The district court was in the best position to judge the prejudicial impact of

this remark. The court concluded that the trial was not "unfair" to UW. App. 106. That conclusion is entitled to deference.

E. The Award Of Travel And Deposition Costs Was Proper Because The Five Witnesses Identified By UW Are Non-Parties

Lastly, UW contends that "the travel and deposition costs related to the charging parties, as well as Dr. Tun, are not allowable and the court abused its discretion when it awarded these costs ($5,516.99) to the [Commission]." UW Br. at 37. UW is correct that the "general rule in the Seventh Circuit" is that a district court may not "tax witness fees for party witnesses." Id. (citing Haroco, Inc. v. American National Bank and Trust Co. of Chicago, 38 F.3d 1429 (7th Cir. 1994)). The problem with UW's argument is that the five witnesses identified by UW are not parties to this action. This is the Commission's lawsuit, filed in its own name. The four charging parties did not file their own lawsuits and did not intervene in the Commission's action. Dr. Tun, who testified briefly at the damages phase of the trial, is a Commission employee, but that does not make him a "party" to this case. See, e.g., Electronic Specialty Co v. Int'l Controls Corp., 47 F.R.D. 158, 162 (S.D.N.Y. 1969) (witness fees of "directors and officers" of a named party can be taxed so long as the directors and officers do not actually participate in the litigation "to the extent that they become identifiable as a party in interest").

Although the prohibition against taxing the fees of party witnesses "has sometimes been held to extend to real parties in interest," it is not enough that the witnesses "had a significant legal interest in the outcome of the litigation, and that they testified to matters directly affecting those interests." Barber v. Ruth, 7 F.3d 636, 646 (7th Cir. 1993). There must be evidence that the witnesses attended trial not "simply in order to testify" but "in order to manage the litigation." Id. This litigation was managed by the Commission's counsel, not the charging parties or Dr. Tun.

As this Court has recognized, "the question of whether a witness is a real party in interest, and therefore ineligible to receive witness fees, is one of degree." Id. There being no "bright line" rule, "broad discretion . . . must be afforded the trial [court] in making such determinations." Id. The district court did not abuse its discretion in awarding the travel and deposition costs of the four charging parties and Dr. Tun.

CONCLUSION

The judgment should be affirmed in all respects.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I, Robert J. Gregory, hereby certify that this brief complies with the type-volume limitations imposed under F.R.A.P. 32(a)(7)(B)(i). The brief contains _____ words.

_____
Robert J. Gregory

CERTIFICATE OF SERVICE

I, Robert J. Gregory, hereby certify that on this 21st day of December, 2001, two copies of the attached brief were sent by first-class mail, postage prepaid, to the following counsel of record:

John R. Sweeney
Assistant Attorney General
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857

_____
Robert J. Gregory

EXHIBIT C

I. CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; See Privacy Act Statement before Completing this form.

II.

III. AGENCY

FEPA

☐ EEOC

IV. CHARGE NUMBER

_____ and EEOC

State or Local Agency, if any

NAME *(Indicate Mr., Ms., Mrs.)*

HOME TELEPHONE *(Include Area Code)*

STREET ADDRESS CITY, STATE AND ZIP CODE

DATE OF BIRTH

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below.)

NAME

NUMBER OF EMPLOYEES, MEMBERS

TELEPHONE *(Indicate Area Code)*

STREET ADDRESS CITY, STATE AND ZIP CODE

COUNTY

NAME

TELEPHONE NUMBER *(Indicate Area Code)*

STREET ADDRESS CITY, STATE AND ZIP CODE

COUNTY

CAUSE OF DISCRIMINATION BASED ON *(Check appropriate box(es))*

☐ RACE ☐ COLOR ☐ SEX ☐ RELIGION ☐ NATIONAL ORIGIN

☐ RETALIATION ☐ AGE ☐ DISABILITY ☐ OTHER *(Specify)*

DATE DISCRIMNATION TOOK PLACE

EARLIEST LATEST

☐ CONTINUING ACTION

THE PARTICULARS ARE *(If additional paper is needed, attach extra sheet(s))*:

I want this charge filed with both the EEOC and the State or Local Agency, if any. I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

Date Charging Party *(Signature)*

NOTARY – (When necessary for State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(Day, month, and year)

EEOC FORM 5 (REV. 3/01)

EXHIBIT D

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Chicago District Office

500 West Madison St., Suite 2800
Chicago, IL 60661
PH: (312) 353-2713
TDD: (312) 353-2421
ENFORCEMENT FAX: (312) 886-1168
LEGAL FAX: (312) 353-8555

October 23, 2001

Paul Grossman
Paul, Hastings, Janofsky & Walker
555 S. Flower St., 23rd floor
Los Angeles, CA 90071

Re: Sidley & Austin Investigation, No. 210-A03557

Dear Mr. Grossman,

I have taken over responsibility for the EEOC's ongoing ADEA investigation of Sidley & Austin from Karen Sheley (who is no longer working at the Agency) and have now reviewed your September 6, 2001 supplemental response as well as the previously submitted information in the file.

Despite numerous efforts by the EEOC to obtain full and complete responses to our April 10, 2001 Request for Information, your answers remain incomplete. During an investigation the Agency is entitled to review materials relevant to the underlying statutory violation as well as materials relevant to jurisdiction. This is particularly true in this case because many of the materials that bear on the merits of an age discrimination termination claim are also relevant to the jurisdictional inquiry. The jurisdictional and merits issues are intertwined and cannot be considered in isolation.

In the absence of complete responses from you, the EEOC is unable to analyze fully either the Agency's jurisdiction or whether there has been a statutory violation. Based on the record as it now stands, however, the EEOC believes that its exercise of jurisdiction over this case is entirely consistent with the ADEA's statutory mandate and existing case law. Thus, a subpoena is attached listing the additional information that the EEOC requires in order to fulfill its congressionally mandated duty of investigating alleged violations of the ADEA.

I look forward to receiving responsive materials within the next 30 days. If you have any questions please call me at (312)353-7222.

Sincerely,

Timothy Akbar
Investigator

EEOC Form 136
(Test 10/94)

UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SUBPOENA

TO: Paul Grossman
Paul, Hastings, Janofsky & Walker
555 S. Flowers St., 23rd floor
Los Angeles, CA 90071

NO. CH-0217

IN THE MATTER OF: Sidley & Austin Investigation

Charge No. 210A03557

Having failed to comply with previous request(s) made by or on behalf of the undersigned Commission official, YOU ARE HEREBY REQUIRED AND DIRECTED TO:

[ ] Testify before: [ ] Produce and bring * or [X] Mail * the documents described below to:

[ ] Produce access to the evidence described below for the purpose of examination or copying to:

Timothy Akbar, Investigator of the Equal Employment Opportunity Commission

at 500 W. Madison, Suite 2800, Chicago, IL. 60661 on November 23, 2001 at 8:30 a.m. o'clock

The evidence required is

See attached list and definitions entitled "October 2001 Subpoena to Sidley & Austin."

This subpoena is issued pursuant to [ ] (Title VII) 42 U.S.C. 2000e-9 [X] (ADEA) 29 U.S.C. 626(a) [ ] (EPA) 29 U.S.C.209 [ ] (ADA) 42 U.S.C. 12117(a)

ISSUING OFFICIAL (Typed name, title and address)

John P. Rowe, District Director
Equal Employment Opportunity Commission
500 W. Madison St., Suite 2800
Chicago, IL 60661

ON BEHALF OF THE COMMISSION

10/23/01
Date

October 2001 Subpoena to Sidley & Austin

INSTRUCTIONS AND DEFINITIONS

Documents: **"Documents,"** as used in this Subpoena, includes tangible objects and materials of every kind and description including but not limited to all written, printed, typed, microfilmed and recorded memoranda, transcribed communications, correspondence, pamphlets, books, notes, digest, logs, diaries, calenders, computer printouts, time sheets, DayTimers, appointment books, photographs, tape and other recordings, disks, drives and other tangible things upon which information or data may be stored and/or any machine-readable data or electronic information or data from which any of the foregoing may be generated or produced and all non-identical copies of all of the foregoing.

Form of documents produced: Where some or all of the documents subpoenaed exist in electronic form, please specify the form. Where a document exists in electronic form, produce the document in one of the following forms in addition to hard copy:

- Fixed length or delimited text (*.TXT)
- Lotus 1-2-3 (*.WKS, *WK1)
- Excel 3.0, 4.0, or 5.0 (*.xls)
- Database tables (*.DB, *.DBF)
- Quattro Pro for Windows (*.WB1, *.WB2, *.WB3)
- Quattro Pro for DOS (*.WQ1)
- Quattro (*.WKQ)
- Excel 3.0, 4.0, or 5.0

Lists or Summaries: Lists or summaries of the data contained in documents covered by this Subpoena must be supported by copies of documents upon which the lists or summaries are based.

Compilations: Certain paragraphs of this Subpoena require Respondent to create documents which are compilations of information available to Respondent. *The production of all documents supporting, underlying, or related to such compilations are covered by and must be produced pursuant to this Subpoena.* However, Respondent may request of EEOC that Respondent be permitted by EEOC to defer actual production of such supporting, underlying, and related documents until requested by EEOC following production of the compilations. Whether to permit any such deferred production, and for how long, shall be within the sole discretion of EEOC.

No Documents: In the event that there are no documents responsive to any paragraph or subparagraph of this Subpoena within the possession, custody, or control of Respondent, provide a written representation, referring to the specific paragraphs or subparagraphs, certified by an authorized representative of Respondent, so stating.

Prior Production: In the event that you actually produced a particular document covered by this October 2001 Subpoena in response to a prior EEOC Request, you are not required to produce that document again. You are required to state the date upon which you previously produced any such document and to provide sufficient information (*e.g.*, Exhibit No., date, author, etc.) to permit its ready identification by EEOC. Documents previously produced which are not genuinely responsive to any request herein are not within this meaning of this instruction.

Identification of Documents: All documents produced in response to this Subpoena should be marked or produced in such a fashion that the paragraph or subparagraph in response to which they are produced is readily identifiable.

The Plan: For the purposes of this Request, the **"Plan"** refers to all demotions, terminations, changes in status, and changes in the retirement policy which were decided upon, announced, or implemented or occurred at Respondent between January 1, 1999 and December 31, 1999 (referred to in this Subpoena as the **"Period"**), including but not limited to the "series of measures" described at page 8 of Respondent's own April 5, 2000 letter "To Our Clients, Alumni, Colleagues and Friends" as follows:

> "In October, the Executive Committee adopted a series of measures designed to improve the Firm's competitive position. Press attention to those changes focus principally on the change in our retirement policy (formerly age 65 and now a range of 60 to 65) and the related change in status of approximately 20 partners to senior counsel. The press also noted that approximately 15 partners changed to counsel status."

The Partnership: As used in this Request, the **"Partnership"** refers to the so-called partnership constituting the Respondent Sidley & Austin law firm (hereinafter referred to in this Subpoena as **"Sidley"**).

Partners: As used in this Request, **"Partners"** refers to attorneys at Sidley deemed partners of the firm under the Partnership Agreement and by their colleagues at Sidley.

"Partnership Agreement(s)" as referred to in this Subpoena are the partnership agreements of Sidley as from time to time in effect. [1]

Committees: As used in this Subpoena the **"Management Committee"** and the **"Executive Committee"** are the committees bearing those names which have been involved in the governance and operation of Sidley and any respective predecessors or successors thereof.

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[1] The use of the terms "partner," "partnership," "partnership agreement," and similar terms in this Subpoena is exclusively for convenience, and such use should not be deemed to suggest or imply, directly or indirectly, that Sidley or any part of Sidley is or has been a partnership, or that Sidley is not an "employer" with respect to any person under the ADEA.

DOCUMENTS REQUESTED

The documents to be produced in response to this Subpoena are all documents which state, describe, constitute, discuss, memorialize, record, demonstrate, show, compile, summarize or refer or relate in any way to any of the following:

1. The process by which the Management Committee assigned, during the period 1990 to the present, the number of "units", "percents", and "guarantees" and the amount of capital contribution (or withdrawal of capital) of each Partner of Sidley and the process by which the Management Committee determines the annual compensation of each Partner of Sidley.

2. Who or what committee provides each practice group head with a schedule of proposed billing rates for each and every Sidley Partner and how such schedule is determined. (As described in Sidley's June 1, 2001 Response to EEOC's April 2001 Request for Information at p. 19.)

3. The Plan and all documents referring or relating to the Plan (including but not limited to drafts of the Plan).

4. A compilation created by Respondent setting forth for each person who has been a Partner of Sidley at any time during the period from January 1, 1999 to the present, the following:

    a. Name.
    b. Date of birth.
    c. Date of hire.
    d. Date of becoming a Partner.
    e. Area of practice and practice group(s) of which a member.
    f. Hourly billing rate and changes therein from January 1, 1997 to the present.
    g. Current title.
    h. Aggregate number of hours and dollars billed to clients of Sidley by year for the calendar years 1997, 1998, 1999, and 2000 through December 31, 2000.
    i. Aggregate dollars collected by Sidley to date for the billings described above in h, indicating the amount attributable to each year's billings.
    j. Practice group(s) within which the person served during the period from January 1, 1995 to the present.
    k. Date and reason for separation from Sidley (if applicable).

5. With respect to each person who has been a Partner of Sidley at any time during the

period from January 1, 1999 to the present, completed (*i.e.*, "filled-in") memoranda to that Partner with respect to each year 1997-2000 inclusive of the type provided to EEOC as Exhibit B to your counsel's letter to EEOC dated September 12, 2000 (which discussed "overall approach," annual "results," annual "participations generally," "your participation," and "minimum balances and expense ratio").

6. A compilation created by Respondent setting forth with respect to each Partner of Sidley whose status or compensation changed under the Plan or for any reason related to the Plan, the following:

   a. Name
   b. The reasons for the change in status.
   c. The date the Partner was informed of the change in status and how and by whom.
   d. If the Partner did not "consent," what happened to him or her.

7. The reasons that Sidley adopted the Plan, including all documentation reflecting why particular individuals were chosen for a change of status under the Plan, including notes from interviews by Management/Executive Committee members with each and every Sidley partner regarding the need to implement the Plan and the persons selected for inclusion.

8. All retirement ages or policies (whether formal or informal or what Sidley deems "expectations" of a retirement age) which have been in effect or advised at Sidley from January 1, 1970 to the present and the years each was in effect or advised and any exceptions thereto.

9. A compilation created by Respondent with respect to each Partner of Sidley who retired or was retired because of the retirement age, expectation or policy in effect at Sidley, or who retired coincident with the retirement age, expectation or policy in effect at Sidley, or who retired at age sixty (60) or later during the period from January 1, 1990 to the present, setting forth the following:

   a. The name and last known address of the Partner.
   b. The date of birth of the Partner.
   c. The date of retirement of the Partner.
   d. The gross aggregate amount of compensation received annually by the Partner from Sidley during the two full calendar years prior to retirement and the gross aggregate amount of compensation received by the Partner from Sidley during the last partial year prior to retirement, if any. (Excluding any payments in the nature of retirement benefits or any other payments not constituting compensation.)
   e. The gross aggregate amount of compensation, if any, received annually by the Partner from Sidley since retirement to the present.

(Excluding any payments in the nature of retirement benefits or any other payments not constituting compensation.)