EXHIBIT A

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

HARVEY N. LEVIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 07 C 4765
	)	
	)	The Honorable David H. Coar
LISA MADIGAN, individually, and	)	Judge Presiding
as ILLINOIS ATTORNEY GENERAL,	)	
OFFICE OF THE ILLINOIS	)	Jury Trial Demanded
ATTORNEY GENERAL,	)	
THE STATE OF ILLINOIS,	)	
ANN SPILLANE, individually,	)	
ALAN ROSEN, individually,	)	
ROGER P. FLAHAVEN, individually,	)	
and DEBORAH HAGEN, individually,	)	
	)	
Defendants.	)	

PLAINTIFF'S FIRST AMENDED COMPLAINT

Plaintiff, HARVEY N. LEVIN, by and through his attorney, EDWARD R. THEOBALD, for his complaint against Defendants, states as follows:

COUNT I
AGE DISCRIMINATION - ADEA

1. This action is brought pursuant to the Age Discrimination in Employment Act (hereinafter "ADEA"), 29 U.S.C. Sec. 621 *et seq.*, as amended. This Court has jurisdiction of this complaint under 29 U.S.C. Sec. 626(c), Title VII, Civil Rights Act of 1964, 42 U.S.C. Section 2000e-5 *et seq.* as amended, 28 U.S.C. Sections 1331 and 1343 and 745 ILCS 5/1.5. Venue for the acts alleged below is proper in this District.

2. Plaintiff, HARVEY N. LEVIN, is male, 62 years old and resides in Chicago, Cook County, Illinois.

3. Defendants, LISA MADIGAN, not individually, but officially as Illinois Attorney General, the OFFICE of the ILLINOIS ATTTORNEY GENERAL, and the STATE OF ILLINOIS, hereinafter referred to as "defendants" are located at the Thompson Center, 100 West Randolph, Chicago, Cook County, IL 60601.

4. Defendants employ in excess of 500 employees and are employers defined by Title VII, 42 U.S.C. Sec. 2000 (e) *et seq.*, and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. Sec. 621 *et seq.*

5. Since on or about September 5, 2000, plaintiff was employed by defendants as an Assistant Attorney General in the Consumer Fraud Bureau.

6. In 2002, plaintiff was promoted to Senior Assistant Attorney General, the second lowest attorney position, and was an employee as defined by Title VII, 42 U.S.C. Sec. 2000 (e) *et seq.*, and the ADEA, 29 U.S.C. Sec. 621 *et seq.*

7. Throughout his employment, plaintiff's job performance was more than satisfactory and he consistently met or exceeded his employer's legitimate job expectations.

8. Defendants' last performance rating of plaintiff prior to May 12, 2006 rated plaintiff as "Exceeds Expectations" - the highest rating on six out of twelve categories and "Meets Expectations" on the remaining performance criteria.

9. On or about May 12, 2006, defendants intentionally discriminated against plaintiff due to his age and sex and unlawfully terminated plaintiff's employment.

10. Defendants did not terminate the employment of similarly situated employees whose work performance was inferior to plaintiff's work performance, or defendants intentionally treated plaintiff differently than similarly situated female employees, or defendants intentionally treated plaintiff differently than similarly situated employees substantially younger than plaintiff.

11. Defendants replaced plaintiff with an individual who was less qualified than him, who is substantially younger than plaintiff, and female.

12. Defendants intentionally terminated two other male Assistant Attorneys General, over the age of 50, in the Consumer Fraud Bureau in Chicago.

13. The other two male Assistant Illinois Attorneys General, over the age of 50, who were terminated on May 12, 2006 and on May 16, 2006, had work performances that were satisfactory or better and were also replaced with individuals who were less qualified, younger than them and, or female.

14. Plaintiff's age or sex was a motivating factor in defendants' decision to terminate his employment on or about May 12, 2006, all in violation of Title VII, 42 U.S.C. Sec. 2000 (e) *et seq.* and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. Sec. 621 *et seq.*

15. Defendants maliciously and intentionally engaged in the above discriminatory conduct which caused severe emotional distress upon plaintiff.

16. As a result of defendants' intentional discriminatory conduct above, plaintiff lost his job, suffered lost wages, lost income, lost employment benefits of the State of Illinois, lost insurance benefits and his ability to pursue his career as a Senior Assistant Attorney General free from discrimination based upon his sex and, or age.

17. As a further result of defendants' intentional discriminatory conduct and harassment as described above, plaintiff has suffered and continues to suffer great emotional stress and strain, humiliation, loss of dignity, embarrassment, and loss of reputation.

18. All acts occurred in the Northern District of Illinois, Eastern Division.

19. Plaintiff demands trial by jury on all issues in this count.

20. On November 3, 2006, plaintiff filed a verified charge of age and sex discrimination against defendants with the Equal Employment Opportunity Commission (EEOC) in Chicago, Illinois.

21. Plaintiff's verified charge of age and sex discrimination was filed at the Illinois Department of Human Rights (IDHR) on November 3, 2006 and the IDHR deferred processing plaintiff's charge to the EEOC pursuant to the work sharing agreement between the EEOC and the IDHR.

22. On July 27, 2007, the EEOC issued a right to sue notice to plaintiff on the above charge of sex and age discrimination filed at the EEOC on November 3, 2006. On July 27, 2007, plaintiff received the EEOC's right to sue notice.

23. On August 23, 2007, plaintiff filed this action, within 90 days of receiving a notice of right to sue complying with all prerequisites for maintaining this action as required by Title VII, 42 U.S.C. Sec. 2000e-2 *et seq.*, and ADEA, 29 U.S.C. Sec. 621 *et seq.*

24. Plaintiff has exhausted all administrative remedies and complied with the statutory prerequisites for maintaining an action under Title VII, 42 U.S.C. Sections 2000e-2 *et seq.*, and the Age Discrimination in Employment Act, 29 U.S.C. Sec. 621 *et seq.*

25. Plaintiff was an employee as defined by Title VII, 42 U.S.C. Sec. 2000 (e) *et seq.*, and the ADEA, 29 U.S.C. Sec. 621 *et seq.*; to wit:

a. Plaintiff, HARVEY N. LEVIN, has not been elected to public office in any State or political subdivision of any State.

b. Plaintiff, HARVEY N. LEVIN, was not chosen by the Illinois Attorney General to be on the Illinois Attorney General's personal staff.

c. At all relevant times herein, the only persons on the Illinois Attorney General's Staff were:

Chief of Staff,
Chief Deputy Illinois Attorney General,
Deputy Chief of Staff,
Two Senior Counsels to the Attorney General,
Deputy Attorney General - Civil Litigation,
Deputy Attorney General - Criminal Justice, and
Deputy Attorney General - Child Support Enforcement.

d. Assistant Attorneys General and Senior Assistant Attorneys General do not have direct contact with the Attorney General during the performance of their duties, and they do not personally report to the Illinois Attorney General. Assistant Attorneys General and Senior Assistant Attorneys General have at least five (5) levels of supervision between them and the Attorney General.

e. Senior Assistant Attorneys General have no discretion and no authority whatsoever in deciding which cases or lawsuits are filed, prosecuted, defended, or settled.

f. Senior Assistant Attorneys General do not have any authority or discretion to decide what words, sentences, or phrases are placed in a lawsuit, or in the resolution of a lawsuit.

g. Senior Assistant Attorneys General do not have more authority than Assistant Attorneys General.

h. Plaintiff, HARVEY N. LEVIN, was not an immediate advisor to the Illinois Attorney General, with respect to the exercise of the constitutional or legal powers of the Illinois Attorney General.

i. Plaintiff was not a policy maker for the Illinois Attorney General, and had no working relationship with the Illinois Attorney General.

j. Assistant Attorneys General and Senior Assistant Attorneys General do not have input into the Attorney General's decision-making on issues.

k. The employment of an Assistant Attorney General or Senior Assistant Attorney General is a career position and does not coincide with the term or terms of office of the Illinois Attorney General.

l. Senior Assistant Attorneys General do not have the ability to implement the policies and goals of the Illinois Attorney General.

m. Senior Assistant Attorneys General do not independently make prosecutorial and other litigation decisions.

n. Assistant Attorneys General and Senior Assistant Attorneys General do not have authority to perform all the duties conferred by law upon the Illinois Attorney General.

26. The salaries, insurance and employment benefits of attorneys employed by the Illinois Attorney General are funded by the State of Illinois.

27. All of the Defendants' discriminatory acts above are in violation of the Age Discrimination in Employment Act, 29 U.S.C. Sec. 621 *et seq.*

WHEREFORE, Plaintiff, HARVEY N. LEVIN, prays this Honorable Court to:

A. Enter judgment in favor of Plaintiff and against Defendants, LISA MADIGAN, in her official capacity as ILLINOIS ATTORNEY GENERAL, the OFFICE of the ILLINOIS ATTORNEY GENERAL, and the STATE OF ILLINOIS, jointly and against each of them;

B. Award plaintiff actual damages in the form of lost wages, lost income, lost compensation and lost benefits and actual damages which plaintiff has suffered;

C. Enter an order against Defendants to cease their unlawful practices;

D. Enter an order requiring Defendants to reinstate or restore plaintiff in his former position of Senior Assistant Attorney General and to award plaintiff all salary and benefits that plaintiff would have received if not for the civil rights violations committed against him by defendants;

E. Award prejudgment interest on all lost wages, income and monies awarded to plaintiff;

F. Enter an order that plaintiff be awarded future damages and, or front damages for lost wages, front pay and all employee benefits he would have received during future years but for defendants' unlawful conduct;

G. Enter an order awarding plaintiff attorney's fees and costs incurred;

H. Enter an order that defendants be required to afford plaintiff equal employment opportunities and that he be made whole as to all wages, employee benefits and seniority or pension benefits plaintiff would have received but for the above civil rights violations committed against him by defendants;

I. Enter a declaratory judgment that defendants' actions constitute unlawful discrimination in violation of Title VII, 42 U.S.C. Sections 2000e-2 *et seq.*, and, or the Age Discrimination In Employment Act (ADEA), 29 U.S.C. Sec. 621 *et seq.*;

J. Enter an order awarding plaintiff an amount equal to twice the sum of the monetary damages awarded to plaintiff for defendants' intentional violations of the ADEA or for defendants' reckless disregard for plaintiff's rights under the ADEA pursuant to 29 U.S.C. Sec. 621, *et seq.*, including 29 U.S.C. Sec. 626(b);

K. Enter an order requiring defendants to remove all allegations that plaintiff had been terminated, from all defendants' records, including plaintiff's personnel file;

L. Enter an order for other relief which this Court deems equitable, proper and just or to make plaintiff whole in accord with Title VII and, or the ADEA;

M. Enter an order that plaintiff be awarded actual or compensatory damages in an amount greater than $300,000.00 for great stress, pain and suffering, emotional pain and distress, humiliation, loss of dignity, emotional distress, embarrassment, loss of reputation, and mental anguish.

N. Enter an order awarding plaintiff further relief to make him whole.

COUNT II

SEX DISCRIMINATION

1. This action is brought pursuant to Title VII, 42 U.S.C. Section 2000e-2 *et seq.* This Court has jurisdiction of this complaint under 42 U.S.C. Section 2000e-5 *et seq.* as amended, 28 U.S.C. Sections 1331 and 1343 and 745 ILCS 5/1.5. Venue for the acts alleged below is proper in this District.

2-26. Plaintiff realleges and incorporates paragraphs 2 through 26 of Count I as if fully set forth herein as paragraphs 2 through 26 of Count II.

27. All of the Defendants' discriminatory acts above are in violation of Title VII, 42 U.S.C. Sections 2000e-2 *et seq.*

WHEREFORE, Plaintiff, HARVEY N. LEVIN, prays this Honorable Court to:

A. Enter judgment in favor of Plaintiff and against Defendants, LISA MADIGAN, in her official capacity as the ILLINOIS ATTORNEY GENERAL, the OFFICE of the ATTORNEY GENERAL, and the STATE OF ILLINOIS, jointly and against each of them;

B. Award plaintiff actual damages in the form of lost wages, lost income, lost compensation and lost benefits and actual damages which plaintiff has suffered;

C. Enter an order against Defendants to desist in their unlawful practices;

D. Enter an order requiring Defendants to reinstate plaintiff in his former position of Senior Assistant Attorney General and to award plaintiff all salary and benefits that plaintiff would have received if not for defendants' civil rights violations;

E. Award plaintiff prejudgment interest on all lost wages, income and all other monies which are awarded to plaintiff;

F. Enter an order that plaintiff be awarded future damages and, or front damages for lost wages, front pay and all employee benefits he would have received during the future years but for defendants' unlawful conduct;

G. Enter an order awarding plaintiff attorney's fees and costs incurred herein;

H. Enter an order that defendants be required to afford plaintiff equal employment opportunities and that he be made whole as to all wages, employee benefits and seniority or pension benefits plaintiff would have received but for the above civil rights violations committed against him by defendants;

I. Enter a declaratory judgment that defendants' actions violate Title VII, 42 U.S.C. Sec. 2000e-2 *et seq.*, and, or the ADEA, 29 U.S.C. Sec. 621 *et seq.*;

J. Enter an order requiring defendants to destroy records reflecting plaintiff's termination;

K. Enter an order for other relief which this Court deems equitable, proper and just or to make plaintiff whole in accord with Title VII and, or the ADEA;

L. Enter an order that plaintiff be awarded actual or compensatory damages in an amount greater than $300,000.00 for great stress, pain and suffering, emotional pain and distress, humiliation, loss of dignity, emotional distress, embarrassment, loss of reputation, and mental anguish.

COUNT III

SEX DISCRIMINATION - EQUAL PROTECTION

1. This action is brought pursuant to the Equal Protection Clause of the 14th Amendment to the United States Constitution by and through 42 U.S.C. Section 1983 and jurisdiction arises under 28 U.S.C. Sections 1331 and 1343. Venue for the acts alleged below is proper in this District.

2. At all times herein, defendants, LISA MADIGAN, individually, ANN SPILLANE, individually, ALAN ROSEN, individually, ROGER FLAHAVEN, individually, and DEBORAH HAGEN, individually, acted under color of law, statutes, customs, or ordinances of the State of Illinois.

3. Plaintiff, HARVEY N. LEVIN, sues defendants, ANN SPILLANE, individually, LISA MADIGAN, individually, ALAN ROSEN, individually, ROGER FLAHAVEN, individually, and DEBORAH HAGEN, individually, in their individual capacities.

4. Plaintiff, HARVEY N. LEVIN, is male, 62 years old and resides in Chicago, Cook County, Illinois.

5. At all relevant times herein, defendant, LISA MADIGAN, was the Illinois Attorney General with an office located at the Thompson Center, 100 West Randolph, Chicago, Cook County, IL 60601.

6. At all relevant times herein, defendant, ANN SPILLANE, was the Chief of Staff for the Illinois Attorney General with an office located at the Thompson Center, 100 West Randolph, Chicago, Cook County, IL 60601.

7. At all relevant times herein, defendant, ALAN ROSEN, was the Chief Deputy Illinois Attorney General with an office located at the Thompson Center, 100 West Randolph, Chicago, Cook County, IL 60601.

8. At all relevant times herein, defendant, ROGER P. FLAHAVEN, was the Deputy Illinois Attorney General for Civil Litigation, with an office located at the Thompson Center, 100 West Randolph, Chicago, Cook County, IL 60601.

9. At all relevant times herein, defendant, DEBORAH HAGEN, was the Chief of the Illinois Attorney General's Consumer Protection Division, with offices located in Springfield, Illinois and the Thompson Center, 100 West Randolph, Chicago, Cook County, IL 60601.

10. Since on or about September 5, 2000, plaintiff was employed by the Illinois Attorney General, the OFFICE of the ILLINOIS ATTTORNEY GENERAL, and the STATE OF ILLINOIS, as an Assistant Attorney General in the Consumer Fraud Bureau.

11. In 2002, plaintiff was promoted to Senior Assistant Attorney General, the second lowest attorney position.

12. Throughout his employment, plaintiff's job performance was more than satisfactory and he consistently met or exceeded his employer's legitimate job expectations.

13. Defendants' last performance rating of plaintiff prior to May 12, 2006 rated plaintiff as "Exceeds Expectations" - the highest rating on six out of twelve categories and "Meets Expectations" on the remaining performance criteria.

14. Throughout her employment with the Illinois Attorney General, defendant, DEBORAH HAGEN, Chief of the Illinois Attorney General's Consumer Protection Division, preferred that all Assistant Attorneys General be young women.

15. At all relevant times herein, defendant, DEBORAH HAGEN, on many occasions refused to even read resumes or applications for employment for attorney positions that were submitted by male applicants.

16. On or about May 12, 2006, defendant, DEBORAH HAGEN, knowingly urged defendants, LISA MADIGAN, ANN SPILLANE, ALAN ROSEN, and ROGER FLAHAVEN, to intentionally terminate plaintiff's employment because of his sex and his age, which was then 61. Thereafter, each individual defendant knowingly agreed to terminate plaintiff's employment based upon his sex (male) and age (61 years old).

17. On or about May 12, 2006, defendants, DEBORAH HAGEN, knowingly urged defendants, LISA MADIGAN, ANN SPILLANE, ALAN ROSEN, and ROGER FLAHAVEN, to knowingly and intentionally terminate the employment of two other male attorneys assigned to the Illinois Attorney General's Consumer Fraud Bureau in Chicago because of their sex and age, both of whom were over 50 years old.

18. Prior to May 12, 2006, none of the defendants, or anyone employed by the Attorney General, provided plaintiff with any kind of notice or warning that his job performance was anything less than exceeding his employer's expectations.

19. On or about May 12, 2006 and on May 16, 2006, at the Attorney General's Office located at 100 West Randolph, Chicago, Cook County, IL, pursuant to defendants' agreements above, defendants, LISA MADIGAN, ANN SPILLANE, ALAN ROSEN, ROGER FLAHAVEN and DEBORAH HAGEN, knowingly and intentionally terminated plaintiff's employment and two other male attorneys assigned to the Illinois Attorney General's Consumer Protection Division because of their sex and age.

20. On or about May 12, 2006 and on May 16, 2006, pursuant to defendants' discriminatory agreements above, defendants LISA MADIGAN, and ANN SPILLANE knowingly and intentionally instructed defendants, ALAN ROSEN and ROGER FLAHAVEN, to meet with plaintiff at the Attorney General's Office located at 100 West Randolph, Chicago, Cook County, IL and intentionally terminate plaintiff's employment, along with two other male attorneys assigned to the Illinois Attorney General's Consumer Fraud Bureau in Chicago, both of whom were over 50 years old.

21. On May 12, 2006, defendant, ALAN ROSEN, Chief Deputy Attorney General, and defendant, ROGER FLAHAVEN, Deputy Illinois Attorney General for Civil Litigation, summoned plaintiff, HARVEY N. LEVIN, and without explanation, intentionally, knowingly and unlawfully terminated plaintiff because of his sex and age.

22. On May 12, 2006, defendant, ALAN ROSEN, Chief Deputy Attorney General, and defendant, ROGER FLAHAVEN, Deputy Illinois Attorney General for Civil Litigation, summoned one of the other male attorneys, over 50 years old, who was assigned to the Illinois Attorney General's Consumer Protection Division, and without explanation, intentionally and knowingly terminated him because of his sex and age.

23. Since the other male attorney was not in the office on May 12, 2006, a few days later on May 16, 2006, defendant, ALAN ROSEN, Chief Deputy Attorney General, and defendant, ROGER FLAHAVEN, Deputy Illinois Attorney General for Civil Litigation, summoned that male attorney, over 50 years old, assigned to the Illinois Attorney General's Consumer Protection Division, and without explanation, intentionally, knowingly and unlawfully terminated him because of his sex and age.

24. On or about May 12, 2006, defendants, MADIGAN, SPILLANE, ROSEN, FLAHAVEN, and HAGEN, knowingly did not terminate the employment of similarly situated employees whose work performance was inferior to plaintiff's work performance, or defendants, MADIGAN, SPILLANE, ROSEN, FLAHAVEN, and HAGEN, intentionally and knowingly treated plaintiff differently than similarly situated female employees, or these defendants intentionally and knowingly treated plaintiff differently than similarly situated employees substantially younger than plaintiff.

25. On or about May 12, 2006, defendants, MADIGAN, SPILLANE, ROSEN, FLAHAVEN, and HAGEN, knowingly and intentionally terminated plaintiff's employment based on the impermissible considerations of sex and, or age in violation of the Equal Protection Clause.

26. Defendants MADIGAN, SPILLANE, ROSEN, FLAHAVEN, and HAGEN, knowingly replaced plaintiff with an individual who was less qualified than him, who is substantially younger than plaintiff, and is female.

27. The two other male Assistant Illinois Attorneys General, over the age of 50, who were also terminated on or about May 12, 2006, had work performances that were satisfactory or better and were also replaced by defendants with individuals who were less qualified, and substantially younger than them, and, or female.

28. Defendants maliciously and intentionally engaged in the above discriminatory conduct which caused plaintiff severe emotional distress.

29. As a result of defendants' intentional discriminatory conduct above, plaintiff lost his job, suffered lost wages, lost income, lost employment benefits of the State of Illinois, lost insurance benefits and his ability to pursue his career as a Senior Assistant Attorney General free from discrimination based upon his sex and age.

30. As a further result of defendants' intentional discriminatory conduct, plaintiff has suffered and continues to suffer great emotional stress and strain, humiliation, loss of dignity, embarrassment, and loss of reputation.

31. Plaintiff demands trial by jury on all issues in this count.

32. Defendants, LISA MADIGAN, officially as Illinois Attorney General, the OFFICE of the ILLINOIS ATTTORNEY GENERAL, and the STATE OF ILLINOIS are necessary defendants in this count for the purpose of awarding prospective and injunctive relief on plaintiff's prayers for relief of reinstatement, front pay, future damages, attorney's fees and all other prospective relief, and are also necessary defendants to indemnify LISA MADIGAN, individually, ANN SPILLANE, individually, ALAN ROSEN, individually, ROGER FLAHAVEN, individually, and DEBORAH HAGEN, individually, for all monetary damage awards, except punitive damages.

33. Plaintiff's sex was a motivating factor in defendants' intentional decision to terminate his employment on or about May 12, 2006, in violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution by and through 42 U.S.C. Section 1983.

WHEREFORE, Plaintiff, HARVEY N. LEVIN, prays this Honorable Court to:

A. Enter judgment in favor of plaintiff, HARVEY N. LEVIN, and against Defendants, LISA MADIGAN, individually, ANN SPILLANE, individually, ALAN ROSEN, individually, ROGER FLAHAVEN, individually, and DEBORAH HAGEN, individually, jointly and against each defendant, and further enter judgment against defendants, LISA MADIGAN in her official capacity as Illinois Attorney General, the OFFICE of the ILLINOIS ATTTORNEY GENERAL, and the STATE OF ILLINOIS;

B. Award the plaintiff actual damages in the form of lost wages, lost income, lost compensation, lost insurance benefits, lost employee benefits, and actual damages which Plaintiff has suffered, against all defendants jointly and against each defendant;

C. Award the plaintiff actual damages in the form of future lost wages and, or front pay, against defendants jointly and against each defendant;

D. Enter an order and permanent injunction requiring defendants to reinstate plaintiff to his former position of Senior Assistant Attorney General;

E. Enter an order and permanent injunction requiring defendants to cease and desist in committing the above acts of intentional sex and, or age discrimination;

F. Enter an order that defendants be ordered to remove all allegations of plaintiff's termination from all records;

G. Award plaintiff prejudgment interest on all lost wages, income and all other monies which are awarded to plaintiff against defendants jointly and against each defendant;

H. Enter an order that defendants be required to afford plaintiff equal employment opportunities and that he be made whole as to all wages, employee benefits and pension benefits plaintiff would have received but for the above intentional civil rights violations committed against him by defendants;

I. Award Plaintiff all attorney's fees, expenses and costs incurred herein against all defendants jointly and against each defendant;

J. Award Plaintiff compensatory damages in an amount in excess of $500,000.00 for humiliation, embarrassment, loss of reputation, loss of dignity, substantial emotional pain and emotional distress, mental anguish, and for defendants' reckless disregard for plaintiff's right to pursue his career with the Illinois Attorney General free from sex, and or age discrimination;

K. Enter a declaratory judgment that the actions of defendants LISA MADIGAN, individually, ANN SPILLANE, individually, ALAN ROSEN, individually, ROGER FLAHAVEN, individually, and DEBORAH HAGEN, individually, constitute unlawful and intentional sex and, or age discrimination in violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution by and through 42 U.S.C. Section 1983;

L. Assess punitive damages against defendants LISA MADIGAN, individually, ANN SPILLANE, individually, ALAN ROSEN, individually, ROGER FLAHAVEN, individually, and DEBORAH HAGEN, individually, in the amount in excess of $500,000.00.

COUNT IV

AGE DISCRIMINATION - EQUAL PROTECTION

1-32. Plaintiff realleges and incorporates paragraphs 1 through 32 of Count III as if fully set forth herein as paragraphs 1 through 32 of Count IV.

33. Plaintiff's age was a motivating factor in defendants' intentional decision to terminate his employment on or about May 12, 2006, all in violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution by and through 42 U.S.C. Section 1983. Defendants had no rational basis for using age to terminate plaintiff's employment.

WHEREFORE, Plaintiff, HARVEY N. LEVIN, prays this Honorable Court to:

A. Enter judgment in favor of plaintiff, HARVEY N. LEVIN, and against Defendants, LISA MADIGAN, individually, ANN SPILLANE, individually, ALAN ROSEN, individually, ROGER FLAHAVEN, individually, and DEBORAH HAGEN, individually, jointly and against each defendant, and further enter judgment against defendants, LISA MADIGAN in her official capacity as Illinois Attorney General, the OFFICE of the ILLINOIS ATTTORNEY GENERAL, and the STATE OF ILLINOIS;

B. Award the plaintiff actual damages in the form of lost wages, lost income, lost compensation, lost insurance benefits, lost employee benefits, and actual damages which Plaintiff has suffered, against all defendants jointly and against each defendant;

C. Award the plaintiff actual damages in the form of future lost wages and, or front pay, against defendants jointly and against each defendant;

D. Enter an order and permanent injunction requiring defendants to reinstate plaintiff to his former position of Senior Assistant Attorney General;

E. Enter an order and permanent injunction requiring defendants to cease and desist in committing the above acts of intentional sex and, or age discrimination;

F. Enter an order that defendants be ordered to remove all allegations of plaintiff's termination from all records;

G. Award plaintiff prejudgment interest on all lost wages, income and all other monies which are awarded to plaintiff against defendants jointly and against each defendant;

H. Enter an order that defendants be required to afford plaintiff equal employment opportunities and that he be made whole as to all wages, employee benefits and pension benefits plaintiff would have received but for the above intentional civil rights violations committed against him by defendants;

I. Award Plaintiff all attorney's fees, expenses and costs incurred herein against all defendants jointly and against each defendant;

J. Award Plaintiff compensatory damages in an amount in excess of $500,000.00 for humiliation, embarrassment, loss of reputation, loss of dignity, substantial emotional pain and emotional distress, mental anguish, and for defendants' reckless disregard for plaintiff's right to pursue his career with the Illinois Attorney General free from sex, and or age discrimination;

K. Enter a declaratory judgment that the actions of defendants LISA MADIGAN, individually, ANN SPILLANE, individually, ALAN ROSEN, individually, ROGER FLAHAVEN, individually, and DEBORAH HAGEN, individually, constitute unlawful and intentional sex and, or age discrimination in violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution by and through 42 U.S.C. Section 1983;

L. Assess punitive damages against defendants LISA MADIGAN, individually, ANN SPILLANE, individually, ALAN ROSEN, individually, ROGER FLAHAVEN, individually, and DEBORAH HAGEN, individually, in the amount in excess of $500,000.00.

DATED: September 26, 2007

HARVEY N. LEVIN
Plaintiff

S/ Edward R. Theobald
EDWARD R. THEOBALD, Attorney for plaintiff

Edward R. Theobald (2814595)
Law Offices of Edward R. Theobald
Three First National Plaza,
70 West Madison Street, Suite 2030
Chicago, IL 60602
(312) 346-9246

EXHIBIT B

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

HARVEY N. LEVIN,

Plaintiff,

v.

LISA MADIGAN, ILLINOIS ATTORNEY GENERAL, OFFICE OF THE ILLINOIS ATTORNEY GENERAL, and THE STATE OF ILLINOIS,

Defendants.

07CV4765
JUDGE COAR
MAG. JUDGE SCHENKIER

Plaintiff Demands Jury Trial

COMPLAINT

Plaintiff, HARVEY N. LEVIN, by and through his attorney, EDWARD R. THEOBALD, for his complaint against Defendants, states as follows:

COUNT I

AGE DISCRIMINATION – ADEA

1. This action is brought pursuant to the Age Discrimination in Employment Act (hereinafter "ADEA"), 29 U.S.C. Sec. 621 *et seq.* as amended. This Court has jurisdiction of this complaint under 29 U.S.C. Sec. 626(c), Title VII, Civil Rights Act of 1964, 42 U.S.C. Section 2000e-5 *et seq.* as amended, 28 U.S.C. Sections 1331 and 1343 and 745 ILCS 5/1.5. Venue for the acts alleged below is proper in this District.

2. Plaintiff, HARVEY N. LEVIN, is 62 years old and resides in Chicago, Cook County, Illinois.

3. Defendants, Lisa Madigan, Illinois Attorney General, the Office of the Illinois Attorney General, and the State of Illinois, hereinafter referred to as "defendants" are located at the Thompson Center, 100 West Randolph, 12th Floor, Chicago, Cook County, IL 60601.

4. Defendants employ in excess of 500 employees and are employers defined by Title VII, 42 U.S.C. Sec. 2000 (e) *et seq.*, and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. Sec. 621 *et seq.*

5. Since on or about September 5, 2000, plaintiff was employed by Defendants as an Assistant Attorney General in the Consumer Fraud Bureau.

6. In 2002 he was promoted to the position of Senior Assistant Attorney General.

7. Throughout his employment, plaintiff's job performance was more than satisfactory and he consistently met his employer's legitimate job expectations.

8. Defendants' last performance rating of plaintiff prior to May 12, 2006 rated plaintiff as "Exceeds Expectations" – the highest rating on six out of twelve categories and "Meets Expectations" on the remaining performance criteria.

9. On or about May 12, 2006, defendants intentionally discriminated against plaintiff due to his age and sex and unlawfully terminated plaintiff's employment.

10. Defendants did not terminate the employment of similarly situated employees whose work performance was inferior to plaintiff's work performance.

11. Defendants replaced plaintiff with an individual who was less qualified than him, who is younger than plaintiff, or who is female.

12. On or about May 12, 2006, defendants intentionally terminated two other male Assistant Illinois Attorneys General, over the age of 50, in the Consumer Fraud Bureau.

13. The other two male Assistant Illinois Attorneys General, over the age of 50, who were also terminated on May 12, 2006, had work performances that were satisfactory or better and were also replaced with individuals who were less qualified, younger than them, or were female.

14. Plaintiff's age or sex was a motivating factor in defendants' decision to terminate his employment on or about May 12, 2006, all in violation of Title VII, 42 U.S.C. Sec. 2000 (e) *et seq.* and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. Sec. 621 *et seq.*

15. Defendants maliciously and intentionally engaged in the above conduct with the intent to inflict severe emotional distress upon plaintiff or defendants knew that there was a high probability that such conduct would cause plaintiff severe emotional distress.

16. As a result of defendants' intentional discriminatory conduct above, plaintiff lost his job, suffered lost wages, lost income, lost employment benefits of the State of Illinois, lost insurance benefits and his ability to pursue his career as a Senior Assistant Attorney General free from discrimination based upon his sex and, or age.

17. As a further result of defendants' intentional discriminatory conduct and harassment above, plaintiff has suffered and continues to suffer great emotional stress and strain, humiliation, loss of dignity, embarrassment, and loss of reputation.

18. All acts complained of occurred in the Northern District of Illinois, Eastern Division.

19. Plaintiff demands trial by jury.

20. On November 3, 2006, plaintiff filed a verified charge of age and sex discrimination against defendants with the Equal Employment Opportunity Commission (EEOC) in Chicago, Illinois.

21. Plaintiff's verified charge of age and sex discrimination was filed at the Illinois Department of Human Rights (IDHR) within 180 days of November 3, 2006 and the IDHR deferred processing of plaintiff's charge to the EEOC pursuant to the work sharing agreement between the EEOC and the IDHR.

22. On July 27, 2007, the EEOC issued a right to sue notice to plaintiff on the above charge of sex and age discrimination filed at the EEOC on November 3, 2006. On July 27, 2007, plaintiff received the EEOC's right to sue notice.

23. Plaintiff filed this action within 90 days of receiving the above notice of right to sue complying with all prerequisites for maintaining this action as required by Title VII, 42 U.S.C. Sections 2000e-2 *et seq.*, and the ADEA, 29 U.S.C. Sec. 621 *et seq.*

24. Plaintiff has exhausted all administrative remedies and complied with the statutory prerequisites for maintaining an action under Title VII, 42 U.S.C. Sections 2000e-2 *et seq.*, and the Age Discrimination in Employment Act, 29 U.S.C. Sec. 621 *et seq.*

25. All of the Defendants' discriminatory acts above are in violation of the Age Discrimination in Employment Act, 29 U.S.C. Sec. 621 *et seq.*

WHEREFORE, Plaintiff, HARVEY N. LEVIN, prays this Honorable Court to:

A. Enter judgment in favor of Plaintiff and against Defendants, Lisa Madigan, Illinois Attorney General, the Office of the Illinois Attorney General, and the State of Illinois, jointly and against each of them;

B. Award plaintiff actual damages in the form of lost wages, lost income, lost compensation and lost benefits and actual damages which plaintiff has suffered;

C. Enter an order against Defendants to cease their unlawful practices;

D. Enter an order that plaintiff be awarded punitive damages and assess punitive damages against Defendants for willful violations of Title VII of the United States Code, 42 U.S.C Section 2000 (e) *et seq.*, or the ADEA, 29 U.S.C. Sec. 621 *et seq.*, in an amount greater than $300,0000.00.

E. Enter an order requiring Defendants to reinstate or restore plaintiff in his former position of Senior Assistant Attorney General and to award plaintiff all salary and benefits that plaintiff would have received if not for the civil rights violations committed against him by defendants;

F. Award plaintiff prejudgment interest on all lost wages, income and all other monies which are awarded to plaintiff;

G. Enter an order that plaintiff be awarded future damages and, or front damages for lost wages, front pay and all employee benefits he would have received during the next seven years but for defendants' unlawful conduct;

H. Enter an order awarding plaintiff attorney's fees and costs incurred;

I. Enter an order that defendants be required to afford plaintiff equal employment opportunities as to all regular assignments and that he be made whole as to all wages, employee benefits and seniority benefits plaintiff would have received but for the above civil rights violations committed against him by defendants;

J. Enter a declaratory judgment that defendants' actions constitute unlawful discrimination in violation of Title VII, 42 U.S.C. Sections 2000e-2 *et seq.*, and, or the Age Discrimination In Employment Act (ADEA), 29 U.S.C. Sec. 621 *et seq.*;

K. Enter an order awarding plaintiff an amount equal to twice the sum of the monetary damages awarded to plaintiff for defendants' intentional violations of the ADEA or for defendants' reckless disregard for plaintiff's rights under the ADEA pursuant to 29 U.S.C. Sec. 621, *et seq.*, including 29 U.S.C. Sec. 626(b);

L. Enter an order requiring defendants to remove all allegations that plaintiff had been terminated, from all defendants' records, including from plaintiff's personnel file;

M. Enter an order for other relief which this Court deems equitable, proper and just or to make plaintiff whole in accord with Title VII and, or the ADEA;

N. Enter an order that plaintiff be awarded actual or compensatory damages in an amount greater than $300,000.00 for great stress, pain and suffering, emotional pain and distress, humiliation, loss of dignity, emotional distress, embarrassment, loss of reputation, mental anguish, or defendants' interference with plaintiff's right to pursue his career free from defendants' civil rights violations;

O. Enter an order awarding plaintiff further relief to make him whole.

COUNT II

SEX DISCRIMINATION

1. This action is brought pursuant to Title VII, 42 U.S.C. Section 2000e-2 *et seq.* This Court has jurisdiction of this complaint under 42 U.S.C. Section 2000e-5 *et seq.* as amended, 28 U.S.C. Sections 1331 and 1343 and 745 ILCS 5/1.5. Venue for the acts alleged below is proper in this District.

2-24. Plaintiff realleges and incorporates paragraphs 2 through 22 of Count I as if fully set forth herein as paragraphs 2 through 24 of Count II.

25. All of the Defendants' discriminatory acts above are in violation of Title VII, 42 U.S.C. Sections 2000e-2 *et seq.*

WHEREFORE, Plaintiff, HARVEY N. LEVIN, prays this Honorable Court to:

A. Enter judgment in favor of Plaintiff and against Defendants, Lisa Madigan, Illinois Attorney General, the Office of the Illinois Attorney General, and the State of Illinois, jointly and against each of them;

B. Award plaintiff actual damages in the form of lost wages, lost income, lost compensation and lost benefits and actual damages which plaintiff has suffered;

C. Enter an order against Defendants to desist in their unlawful practices;

D. Enter an order that plaintiff be awarded punitive damages and assess punitive damages against Defendants for willful violations of Title VII of the United States Code, 42 U.S.C Section 2000 (e) *et seq.*, or the ADEA, 29 U.S.C. Sec. 621 *et seq.*, in an amount greater than $300,0000.00;

E. Enter an order requiring Defendants to reinstate or restore plaintiff in his former position of Senior Assistant Attorney General and to award plaintiff all salary and benefits that plaintiff would have received if not for the civil rights violations committed against him by defendants;

F. Award plaintiff prejudgment interest on all lost wages, income and all other monies which are awarded to plaintiff;

G. Enter an order that plaintiff be awarded future damages and, or front damages for lost wages, front pay and all employee benefits he would have received during the next seven years but for defendants' unlawful conduct;

H. Enter an order awarding plaintiff attorney's fees and costs incurred herein;

I. Enter an order that defendants be required to afford plaintiff equal employment opportunities as to all regular assignments and that he be made whole as to all wages, employee benefits and seniority benefits plaintiff would have received but for the above civil rights violations committed against him by defendants;

J. Enter a declaratory judgment that defendants' actions constitute unlawful discrimination in violation of Title VII, 42 U.S.C. Sections 2000e-2 *et seq.*, and, or the Age Discrimination In Employment Act (ADEA), 29 U.S.C. Sec. 621 *et seq.*;

K. Enter an order requiring defendants to remove all allegations that plaintiff had been terminated, from all defendants' records;

L. Enter an order for other relief which this Court deems equitable, proper and just or to make plaintiff whole in accord with Title VII and, or the ADEA;

M. Enter an order that plaintiff be awarded actual or compensatory damages in an amount greater than $300,000.00 for great stress, pain and suffering, emotional pain and distress, humiliation, loss of dignity, emotional distress, embarrassment, loss of reputation, mental anguish, or defendants' interference with plaintiff's right to pursue his career free from defendants' civil rights violations;

N. Enter an order awarding plaintiff such other and further relief to make him whole.

DATED: August 21, 2007

HARVEY N. LEVIN
Plaintiff

By: _____
EDWARD R. THEOBALD
Plaintiff's Attorney

EDWARD R. THEOBALD
Three First National Plaza
70 West Madison Street
Suite 2030
Chicago, IL 60602
(312) 346-9246

EXHIBIT C

Stetson Law Review
Winter, 2000

LOCAL GOVERNMENT LAW SYMPOSIUM

ARTICLES

*573 ALONE IN ITS FIELD: JUDICIAL TREND TO HOLD THAT THE ADEA PREEMPTS § 1983 IN AGE DISCRIMINATION IN EMPLOYMENT CLAIMS

David C. Miller[FNaa1]

The Supreme Court has stated that "only twice have we found a remedial scheme sufficiently comprehensive to supplant § 1983." [FN1] Perhaps with this cautionary statement in mind, lower courts have held that statutes with remedial provisions as elaborate as those contained in the Civil Rights Act of 1964 [FN2] do not provide exclusive remedies, but leave plaintiffs free, in certain circumstances, to bring concurrent claims based on identical facts under § 1983. [FN3] Despite this seeming reluctance, a trend is developing in the circuit courts of appeals that the Age Discrimination in Employment Act (ADEA) [FN4] provides the exclusive remedy for claims of age discrimination against employers, and that § 1983 suits are thereby preempted. [FN5] Every circuit that has considered the question directly *574 has held that the ADEA preempts § 1983 claims for age discrimination in employment. District court decisions, however, fall on both sides of the question. [FN6] This Article argues that the ADEA clearly preempts age discrimination in employment claims brought under § 1983. Part A discusses the overwhelming weight of authority holding that the ADEA provides an exclusive remedy for age discrimination in employment claims and examines the leading decision on the issue. [FN7] Part B identifies and explains the proper analytical framework for determining preemption. [FN8] Part C applies that framework to the ADEA and shows how it compels the determination that the ADEA preempts § 1983 claims for age discrimination in employment. [FN9] Part C also demonstrates the fatal error in the reasoning employed by the leading case holding contrary to that position. [FN10] Finally, Part D discusses the inappropriateness of applying Title VII jurisprudence to the question of preemption by the ADEA. [FN11]

A. The Overwhelming Weight of Authority Holds That the ADEA Preempts Age Discrimination Claims in Employment Brought Under § 1983

Three circuit courts of appeals have considered and ruled on the issue of whether the ADEA provides an exclusive remedy for all claims of age discrimination in employment, and, thus, preempts claims under § 1983. All have held that it does. [FN12] The district *575 courts addressing the question are divided. [FN13] The most important of the circuit court decisions deserves careful examination.

In *Zombro v. Baltimore City Police Department*, [FN14] a police officer sued under § 1983 after he was transferred to what he considered a job of lesser status. [FN15] He claimed the transfer was based on his age, forty-

five, in violation of the Equal Protection Clause of the Fourteenth Amendment. [FN16] The plaintiff did not sue under the ADEA, evidently because he sat idle while the time limit for filing an administrative complaint expired. [FN17]

The court engaged in a lengthy and careful examination of the preemption issue. [FN18] First, it noted that the ADEA provides a comprehensive scheme to prohibit age discrimination in employment. [FN19] Included in that scheme is a detailed remedial framework that emphasizes administrative attempts at conciliation aimed at avoiding***576** excessive litigation. [FN20] The court pointed out that this elaborate and carefully drawn scheme would be subverted if a plaintiff could bypass it by suing directly through § 1983. [FN21] The question, then, was whether the ADEA preempted other claims for age discrimination in employment brought pursuant to § 1983. [FN22]

Section 1983, the court stated, "cannot withstand preemption" in the face of a comprehensive statutory scheme like the ADEA's unless there is manifest congressional intent to preserve it. [FN23] The court noted the Supreme Court's disinclination to preserve § 1983 claims in the face of other comprehensive statutory schemes, such as the habeas corpus statute and the Education of the Handicapped Act. [FN24] Significantly, the *Zombro* court identified a

> general policy of precluding § 1983 suits[] where Congress has enacted a comprehensive statute specifically designed to redress grievances alleged by the plaintiff .... We hold that this policy should be followed unless the legislative history of the comprehensive statutory scheme in question manifests a congressional intent [not to preempt § 1983.] [FN25]

Based on the *Zombro* court's reasoning, only if contrary intent is manifest - primarily in the statute, or secondarily, in its legislative history - should a mode of determination other than the *Sea Clammers* doctrine [FN26] be employed. [FN27]

In its analysis, the court first turned to the language of the statute itself to determine congressional intent. [FN28] The court found ***577** it "obvious," because the statute created such a comprehensive scheme, that the ADEA was intended to preempt § 1983 and further found it "implausible" that Congress could have intended to preserve § 1983 claims that would "debilitate" the ADEA. [FN29] Having found manifest intent in the language of the statute itself, the court properly looked no further, but allowed the statute itself to control. [FN30] The court did state that the legislative history revealed no intent to preserve a § 1983 claim. [FN31] In a postscript to this analysis, the court added that special factors inherent in the relationship between governments and their employees further counseled that a § 1983 claim should not be recognized. [FN32] The court concluded by declining to bypass the ADEA and "transfer wholesale public employment relations into the federal courts without any concrete and specific expression of federal constitutional priority." [FN33]

Zombro is the most comprehensive of the significant decisions bearing on whether the ADEA preempts § 1983 age discrimination in employment claims. [FN34] The most recent case in the *Zombro* line, ***578***Migneault v. Peck*, [FN35] rests on *Zombro*. *Migneault*, however, raises an additional issue in the course of addressing the individual defendant's affirmative defense of qualified immunity. [FN36] The *Migneault* court pointed out that a plaintiff must first show that his purported Equal Protection claim brought via § 1983 is cognizable under the Constitution, independent of the ADEA, before he can show the existence of a clearly established right for qualified immunity purposes. [FN37]

The Supreme Court examined the same idea in *Siegert v. Gilley*. [FN38] The Court explained that the question of whether a right exists necessarily precedes the question of whether it is clearly established. [FN39] The significance of the point to the preemption question is the same as that for qualified immunity. That is, if there can be no actionable claim [FN40] for age discrimination in employment that may be brought via § 1983 (typically, of course, on an equal protection or liberty interest theory), then the question of preemption by the ADEA simply does not arise - there is nothing to preempt. Indeed, in *Whitacre v. Davey*[FN41] one circuit court has questioned ***579** whether a claim for age discrimination in employment could arise under the Constitution. [FN42] The court stated

that, because "age discrimination does not implicate a suspect class or a fundamental right, [the plaintiff] may not possess 'a compensable injury to a constitutionally protected interest.'" [FN43] The *Whitacre* court pointed out that it may be impossible to designate a certain age, beyond which one is susceptible to bias based on being classified as "old." [FN44] The court stated, "[i]n the ADEA, Congress drew the line at 40, but it is hard to see such a constitutional boundary." [FN45] The court identifies the arbitrariness of any classification based on age and, thus, the impossibility of defining a protected class under the Equal Protection Clause. [FN46]

The great weight of authority, including all the circuit courts of appeals that have ruled on the question, holds that the ADEA provides the exclusive remedy for age discrimination in employment, preempting concurrent claims under § 1983. [FN47] Moreover, those district court opinions which hold otherwise do so on a mistaken basis. Clearly, then, the *Sea Clammers* analysis, employed by the *Zombro* court in the leading decision on this question, is proper for this question, and will now be examined in detail.

***580** B. The *Sea Clammers* Doctrine Is the Proper Means of Determining Whether the ADEA Preempts Claims for Age Discrimination in Employment Under § 1983

Put succinctly, the *Sea Clammers* doctrine states:

> When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983 .... "[W]hen a state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under § 1983." [FN48]

The Court elaborated on this rule in *Golden State Transit Corp. v. City of Los Angeles*. [FN49] There, the Supreme Court stated that the existence of a comprehensive scheme was "not *necessarily*" the sole criterion for determining preemption. [FN50] The scheme must show that permitting a § 1983 claim "'would be inconsistent"' with the statutory framework. [FN51] Inconsistency is derived from the comprehensiveness of the statutory scheme itself. [FN52]

As stated in the introduction to this Article, implicit statutory ***581** repeals are disfavored. [FN53] Some have argued that the *Sea Clammers* line of cases represents a conflict of authority within Supreme Court jurisprudence on the issue. [FN54] The better view is that the Supreme Court recognizes exceptions to the general rule that implicit repeals are disfavored, and that the ADEA falls squarely within an exception. The Supreme Court has stated that § 1983, specifically, may be implicitly repealed when, first, Congress fails to create enforceable rights in the statute being considered, or, second, when the statute evinces congressional intent to preempt § 1983 claims through a sufficiently comprehensive remedial scheme. [FN55] Surveying Supreme Court decisions on preemption, the Fourth Circuit stated that "the Supreme Court has increasingly focused on the comprehensiveness of a statute and its remedies .... Thus, in the absence of a specific congressional intent to the contrary, the comprehensive nature of [a statute is] strong evidence" of intent to preempt a § 1983 claim. [FN56]

The "irreconcilability" language of *Golden State* thus is not an additional requirement to finding preemption, but is nothing more than a generalization of the specific rule that a comprehensive remedial scheme is evidence of intent to preempt. [FN57] The Supreme Court stated that "availability of administrative mechanisms to protect the plaintiff's interests is not necessarily sufficient to demonstrate that Congress intended to foreclose a § 1983 remedy .... Rather, the statutory framework must be such that '[a]llowing a ***582** plaintiff' to bring a § 1983 action 'would be inconsistent with Congress' carefully tailored scheme." [FN58] The Court's language makes clear that "irreconcilability" is simply a way of stating the degree of comprehensiveness of the scheme. That is, an administrative scheme that is sufficiently comprehensive is "irreconcilable" with the statute sought to be preempted, and therefore, creates an exclusive remedy.

This is the case with the ADEA. [FN59] The ADEA is irreconcilable with allowing a claim for age discrimination in employment under § 1983 because the ADEA's remedial scheme is so comprehensive. Briefly put, the ADEA provides an elaborate structure of administrative charges, deadlines, hearings, and conciliation mechanisms, an exacting schedule of notices as conditions precedent for private actions, and incorporates many of the elaborate remedial provisions of the Fair Labor Standards Act (FLSA). [FN60] Thus, the *Sea Clammers* doctrine is the appropriate vehicle with which to analyze whether the ADEA preempts § 1983 claims. *Sea Clammers* was expressly relied upon, or implicitly relied upon by reference to *Zombro*, by the three circuit courts that have considered the question. [FN61] More significantly, the comprehensive remedial scheme carefully crafted into the ADEA presents precisely the circumstances for which the doctrine was created. [FN62] Thus, the structure and language of the statute itself, providing implicit evidence of congressional intent, forecloses use of some other analysis. [FN63] Finally, ***583** if resort is made to an interpretive analysis based on expressions in the legislative history, there is in the history of the ADEA no expression of congressional intent to retain remedies competing with and undermining the comprehensive scheme of the ADEA. [FN64]

C. Under the *Sea Clammers* Doctrine, the ADEA Clearly Provides the Exclusive Remedy for Claims of Age Discrimination

1. The ADEA's Comprehensive Remedial Scheme Evinces Congressional Intent to Preempt Claims of Age Discrimination in Employment Under § 1983

The *Sea Clammers* doctrine operates when Congress has enacted a remedial scheme so comprehensive that it evinces intent to foreclose competing remedies via § 1983. [FN65] The conclusion to be drawn from such an enactment is that allowing a plaintiff to circumvent the statutory framework would be inconsistent with that framework. [FN66] The courts look first to the language of the statute, ***584** particularly to the remedial portions thereof. [FN67] Then the court may look to legislative history. [FN68]

The ADEA provides just such a comprehensive remedial scheme for the field of age discrimination in employment. [FN69] It provides a complex and detailed framework of time limits, administrative intervention, conciliation, and enforcement, compliance with which are conditions precedent to bringing suit. [FN70] Suits by the United States Equal Employment Opportunity Commission (EEOC), which administers the ADEA, are given preemptive power over private suits; that is, if the EEOC brings suit based on an occurrence, the right to a private action based on the same occurrence terminates. [FN71] The ADEA's coverage affects public and private employers, employment agencies, and labor organizations, with special provisions for federal employers. [FN72]

5852. The ADEA's Remedial Scheme Incorporates Portions of the Comprehensive Remedial Scheme of the Fair Labor Standards Act (FLSA)*

In addition to its own enforcement provisions, the ADEA incorporates by reference several enforcement provisions of the FLSA, [FN73] specifically, § § 209, 211, 215, 216 (except for subsection (a)), and 217. [FN74] Section 209 of the FLSA deals with agency investigations. [FN75] It makes procedural rules for witnesses and evidence used by the Federal Trade Commission applicable to investigations under the FLSA, and, thus, to investigations under the ADEA. [FN76] Section 211 of the FLSA deals with the collection of data pursuant to investigations. [FN77] The enforcing agency is empowered to collect data, inspect workplaces, and question employees, using staff from the Department of Labor. [FN78] The section further provides for cooperation with state and local government, for record keeping by employers, and for regulating industrial homework so as to

prevent circumvention of the FLSA. [FN79]

Section 215 of the FLSA prohibits, among other things, selling goods produced in violation of the standards set forth in the FLSA and retaliation against employees who file complaints under the FLSA. [FN80] The ADEA makes any violation of its prohibitions in § 623 also a violation of § 215, further interrelating the two acts. [FN81] Section 216 of the FLSA provides for penalties for violations of the FLSA as well as the ADEA. [FN82] It provides liability for unpaid minimum wages or overtime and an additional, equal amount is available as liquidated damages for willful violations. [FN83] Application of the liquidated damages provision under the ADEA was meant to be punitive in nature. [FN84] In fact, the ADEA expressly provides that ***586** damages under the ADEA will "be deemed to be unpaid minimum wages or unpaid overtime" for purposes of §§ 216 and 217. [FN85] Section 216 also provides for other legal and equitable relief. [FN86] Section 217 of the FLSA empowers the courts to enjoin violations of the FLSA. [FN87] Thus, not only is the ADEA's remedial scheme itself comprehensive, but it gains added comprehensiveness through inclusion of elaborate and extensive procedures under the FLSA.

3. The Irreconcilability of Remedies Available Under the ADEA and Under § 1983 Demonstrate that the ADEA Was Intended to Preempt Concurrent Claims Under § 1983

The availability of compensatory and punitive damages under § 1983 is simply irreconcilable with the remedial scheme of the ADEA. Further, Congress never intended for such remedies to be available for claims of age discrimination in employment, by analogy to Title VII [FN88] or otherwise. The provisions of the Civil Rights Act of 1991 [FN89] (1991 Act) make this congressional intent quite clear.

The 1991 Act made substantial changes in Title VII's remedial scheme. [FN90] One of the most sweeping was the addition of the availability of compensatory damages for pain and suffering, previously unavailable under Title VII. [FN91] The 1991 Act also extended this remedy to claims arising under the Americans with Disabilities Act (ADA). [FN92] The ADA was intended to provide the same remedies as Title VII. [FN93] In fact, the ADA incorporates portions of Title VII's remedial scheme by reference. [FN94] Thus, because the remedial ***587** schemes of Title VII and the ADA are interwoven, a change to the first logically impels a change to the second. Nonetheless, Congress felt the need to make the availability of compensatory damages for mental pain and suffering under the ADA express. [FN95] With the 1991 Act, however, Congress did not make compensatory damages available under the ADEA. [FN96]

The fact that Congress did not provide compensatory damages under the ADEA must reflect Congress' realization that such damages were inconsistent with the ADEA's different remedial scheme. Further, it cannot be argued that this lack was mere oversight. The 1991 Act amends the ADEA's limitations structure (the only change made by the 1991 Act to the ADEA). [FN97] Further, the legislative history of the 1991 Act refers to the ADEA several times. [FN98] Congress obviously addressed the ADEA, portions of its enforcement scheme, and its similarities and differences from Title VII when it considered the changes made by the 1991 Act. Had it wished to provide compensatory damages under the ADEA - as it did under the ADA - it would have done so expressly. Further, had Congress wanted to clarify the availability of concurrent § 1983 claims, it likewise could have done so. That Congress did not do so when it had the perfect opportunity reflects a conscious choice that plaintiffs not be able to claim such damages for age discrimination in employment actions. Thus, allowing plaintiffs to be awarded compensatory damages for age discrimination in employment claims under § 1983 flies in the face of obvious congressional intent to the contrary.

Given the extreme comprehensiveness of the remedial scheme of the ADEA, it is clear that allowing other remedies to exist would conflict with it and be inconsistent. [FN99] This conclusion is confirmed by examination of the ADEA's statement of purpose. [FN100] Further, ***588** the comprehensiveness of the ADEA, or of any enactment, is not diminished by the fact that the scheme may not provide every imaginable remedy or create a basis for every imaginable claim. The *Zombro* court decisively addressed this argument. [FN101] The court stated:

> [W]here Congress has provided a comprehensive remedial framework, such as the ADEA, a plaintiff is not relieved of the obligation to follow that remedial procedure by claiming that state action violative of the statutory scheme also violates the Fourteenth Amendment (or some other constitutional right). A mere assertion that constitutional rights have been somehow infringed does not ipso facto defeat the coverage, application and exclusivity of a comprehensive statutory scheme specifically enacted by Congress to redress the alleged violation of rights. [FN102]

This obligation remains whether the supposed violations "rest in part or in whole on alleged violations of substantive rights under the ADEA" or are alleged to be independent. [FN103] The basic policy of these cases is that the existence of a sufficiently comprehensive remedial scheme demonstrates congressional intent to displace other remedies. [FN104]

Further, Congress' election not to provide every remedy does not detract from the comprehensiveness of a remedial scheme. [FN105] Implicit repeal of one statute by another almost necessarily involves including some remedies and leaving some out. [FN106] For example, in *Brown v. General Services Administration*, [FN107] the Supreme Court held that Title VII provides the exclusive remedy for race discrimination in federal employment. [FN108] This holding means that ***589** Congress intended that federal employees not have access to those remedies available under § 1983, like individual liability and punitive damages, which are excluded from Title VII against a government. [FN109]

Thus, the mere absence of a remedy in the ADEA does not support the conclusion that Congress must have intended to preserve § 1983 claims for age discrimination in employment. On the contrary, it argues for a choice by Congress to withhold the remedy and to enforce instead the use of its chosen remedies under the comprehensive scheme. The ADEA simply represents Congress' choice that all claims for age discrimination in employment should be brought pursuant to that Act.

Sea Clammers clearly is applicable to the ADEA. The existence of separate constitutional and statutory rights has not deterred the Supreme Court from holding that other statutes provide exclusive remedies. Indeed, the *Sea Clammers* doctrine provides a principled method for determining preemption in just such cases. The only counters to this demonstration of congressional intent are clear expressions to the contrary in the statute itself or in its legislative history. [FN110] As the following section establishes, neither exist in the ADEA.

4. There Is No Evidence in the ADEA's Legislative History That Congress Intended to Preserve Concurrent Claims for Age Discrimination in Employment Under § 1983

By any standard, the ADEA creates a comprehensive remedial scheme to redress age discrimination in employment. Thus, under *Sea Clammers*, the language of the statute itself - the primary interpretive source - demonstrates congressional intent to preempt § 1983 claims. Going further, however, to examine the legislative history, reveals a resounding silence as to the issue. [FN111] The *Mummelthie* court stated that it undertook an independent analysis and examination of the legislative history and determined that, indeed, Congress intended to retain § 1983 claims for age discrimination. [FN112] This determination rests on the discovery of a supposed ***590** linkage of ADEA and Title VII "principles" regarding § 1983 claims. [FN113] A careful reading of the history, however, shows that linkage - and, thus, the argument - is without substance.

The foundation of the *Mummelthie* court's contention is Congress' extension of Title VII coverage to public employees in the Equal Employment Opportunity Act of 1972. [FN114] In House Report Number 92-238, the House Education and Labor Committee stated that Title VII provides an alternative remedy to suits brought under § 1983. [FN115] This report - which never mentions the ADEA - is the key to the *Mummelthie* court's argument, which it must somehow tie to the ADEA or else fail utterly.

The *Mummelthie* court finds the "crucial link" in a single remark made by Senator Lloyd Bentsen in his 1972 failed attempt to extend ADEA coverage to public employees. [FN116] In his attempt, Senator Bentsen noted recent debate about extending Title VII coverage to public employees. He quoted an unspecified Senate committee report that stated the committee's belief that public employees should have the same benefits of equal employment as private employees. [FN117] Senator Bentsen then stated that he believed "the principles underlying these provisions in the EEOC bill are directly applicable to the [ADEA]." [FN118] The *Mummelthie* court evidently contends that this terse, utterly ambiguous statement incorporates wholesale into the ADEA everything ever said about Title VII's extension to public employees. On the contrary, it is absolutely indiscernible to what principles Senator Bentsen refers. First, he references Senate Bill Number 3318 [FN119] to extend ADEA coverage to public employees. [FN120] However, the Senate companion to the House bill that actually amended Title VII was Number 2515. [FN121] It is hard to say what bill and what report he is talking ***591** about. Therefore, it simply is not established that Senator Bentsen is referring to the "principles" regarding the extension of Title VII coverage to public employees that are stated in House Report Number 92-238, which are the heart of the *Mummelthie* court's argument. Even indulging the fiction that he does refer to those "principles," it is entirely unclear what "principles" he may mean. He speaks only of extending Title VII (or ADEA) coverage to public employees and compares their protections to those of private employees. [FN122] The only explicit reference, then, is to the extension of coverage to public employees, not to preemption.

To reach the *Mummelthie* court's conclusion, one must pile inference upon inference. First, one must conclude that Senator Bentsen was referring to the ideas expressed in House Report Number 92-238, even though he references different legislation, i.e., Senate Bill Number 3318. One must additionally infer that Senator Bentsen intended to incorporate not just those "principles" that supported giving public employees the same rights as private employees, which is what he said, but also those "principles" that asserted the preservation of claims under § 1983 in addition to claims under Title VII, which he did not say. [FN123] The tortured analysis *Mummelthie* urges shows nothing more than that Senator Bentsen's remarks are, at most, ambiguous and are, in fact, of indeterminable import.

Even weaker and more ambiguous is a possible argument based on information added to the *Congressional Record* in 1977. [FN124] This material is the text of a column from a newspaper that Senator Frank Church ordered attached to his comments after the fact in the *Congressional Record.* [FN125] Thus, this information was never heard on the floor. [FN126] The newspaper column refers to an unidentified federal court which held that the Fifth Amendment precludes singling out certain employees for early retirement. [FN127] Thus, this supposed evidence of congressional intent consists of the ***592** opinion of a newspaper writer, referencing an unidentifiable court decision and purporting to interpret it, which opinion evidently dealt with federal employment under the Fifth Amendment.

This "authority" was offered up by Senator Church during consideration of the 1978 amendments to the ADEA. [FN128] Those amendments, among other things, raised age limits under the ADEA. [FN129] Nothing in the committee report from the Senate or the conference committee report suggests that Congress had any thought concerning the preservation or elimination of § 1983 or other constitutional claims. [FN130]

A careful reading of the ADEA's legislative history shows no congressional intent to preserve claims for age discrimination in employment under § 1983. Further, it shows no linkage to Title VII legislative history on the issue. The vital link in that argument - Senator Bentsen's "principle" remark - is weak indeed. *Zombro*, the most authoritative judicial pronouncement on the issue, specifically found the ADEA's legislative history silent on the issue. [FN131] Finally, even accepting, arguendo, the *Mummelthie* court's conclusion, Senator Bentsen's comment is unpersuasive. [FN132] It is simply the opinion of a single legislator recorded two years before the salient action on the law.

It is easy to get lost in the trees when addressing the counterarguments that would hold compatible the ADEA and claims for age discrimination in employment under § 1983. Simply put, the ADEA provides a comprehensive remedial scheme that evinces congressional intent that it be an exclusive remedy. The internal evidence of the ADEA's remedial provisions - their complexity and extensiveness, their close connection to the FLSA and divorce

from Title VII, and their incompatibility with remedies provided under § 1983 - conclusively demonstrate that the ADEA ***593** was intended to stand alone. Further, nothing in the legislative history clearly contradicts this evidence or links the ADEA to Title VII legislative history addressing the question. Therefore, under *Sea Clammers*, the ADEA fills the field of age discrimination in employment and preempts claims brought under § 1983.

D. The ADEA and Title VII Should Not Be Construed *in Pari Materia* for the Issue of Preemption

As the foregoing discussion makes clear, the Court need not necessarily look further than the language of the ADEA itself to conclude that the *Sea Clammers* doctrine is appropriate and that it compels a finding of preemption. However, the *Mummelthie* court and its followers also argue that the ADEA should be interpreted in pari materia with Title VII on the preemption issue, the specifics of the legislative history explored above aside. [FN133] Therefore, some discussion of that issue is in order. [FN134] In short, it is inappropriate to construe the two statutes in pari materia on this issue. [FN135] Title VII and the ADEA do have many similarities; substantive provisions of the ADEA were imported from Title VII. [FN136] Reference to Title VII case law is appropriate in interpreting and applying those provisions. [FN137]

***594** However, as the Court in *Lorillard v. Pons*[FN138] emphasized, it is inappropriate to apply Title VII precedent in interpreting the remedial aspects of the ADEA because those provisions are closely modeled after those of the FLSA, and even incorporate some of that statute's enforcement provisions by reference. [FN139] The focus of inquiry for purposes of preemption is on the remedial and enforcement provisions of a statute. [FN140] During enactment of the ADEA, Congress actually had before it a proposal to adopt the enforcement scheme of Title VII but chose instead to adopt a scheme based on the FLSA. [FN141] The choice of the FLSA model obviously was not casual or uninformed. [FN142] It was, in fact, strongly indicative of congressional intent that the remedial portion of the ADEA differ from that of Title VII. [FN143] Thus, it is inappropriate to apply Title VII precedent to the ADEA when analyzing the preemption issue. Preemption analysis looks to the remedial portion of a statute, and it is in the remedial provisions where the ADEA and Title VII differ most. [FN144]

The appeal to interpret the ADEA identically with Title VII breaks down further when considered in the context of public employment. Title VII was extended to public employees in 1972. [FN145] Congress contemporaneously considered the same extension of the ADEA. [FN146] It was not until two years later, however, when the FLSA was amended, that the ADEA was extended to public employees. [FN147] As pointed out above, the ADEA's remedial provisions are patterned on and incorporate those of the FLSA. [FN148] The proposition***595** that the ADEA amendments were only fortuitously attached to those of the FLSA is questionable.

The Senate Committee on Labor and Public Welfare discussed the 1974 amendments to the FLSA in Senate Bill Number 2747, which included a proposed amendment to the ADEA extending coverage to state and local employees. [FN149] The brief discussion of the ADEA states, "[t]he amendment is a logical extension of the Committee's decision to extend FLSA coverage to Federal, State, and local government employees." [FN150] The report further states that the reason the ADEA did not cover local employees from its inception was because the original enforcement agency for the ADEA did not cover such employees. [FN151] There is no mention of Title VII and no mention of § 1983 or any constitutional cause of action. [FN152] The evidence of congressional intent, clearly, is the close link between enforcement of the ADEA and of the FLSA, not Title VII.

THERE IS SILENCE ON § 1983

House Report Number 93-913 also accompanied the Senate bill because the language of the companion House bill substituted that of the Senate bill, which was then passed. [FN153] That report presents an even shorter, but

substantially identical, discussion of the ADEA. [FN154] Again, there is no mention of Title VII, § 1983, or other constitutional claims. [FN155]

Moreover, courts using the Title VII analogy are oblivious to the logical jump they make. Certainly, Title VII case law is helpful in interpreting claims made under the similar substantive provisions of the ADEA. However, interpreting congressional intent with regard to the preemption issue is a wholly different matter. Analyzing claims is factually driven, case-specific, and geared toward resolving a single dispute set in discrete circumstances. [FN156] Analyzing congressional intent regarding preemption is abstract, generalized,***596** and geared toward setting policy for the resolution of many disputes. [FN157] Uncritically stating that Title VII case law applies to the ADEA for all purposes simply assumes the two statutes are functional equivalents for all purposes. Aside from the objection just pointed out, this view simply ignores the fact that the statutes serve different purposes and function differently. Title VII covers discrimination based on suspect or quasi-suspect classifications, that is, groups that have suffered from purposeful animus based on distinctive characteristics not shared by the majority of those with political and/or economic power, such as race. [FN158] The ADEA, by contrast, covers discrimination based on a classification that the Supreme Court has explicitly recognized is not suspect, and against a group that suffers not from status-based animus but from stereotypical attitudes about the quality of human abilities as we age. [FN159]

Thus, Title VII simply is unhelpful in interpreting the ADEA on the issue of preemption of age discrimination in employment claims brought under § 1983. And, without the bootstrapping help of Title VII, there is no support, however weak, for the argument that the ADEA and claims for age discrimination in employment under § 1983 can coexist.

CONCLUSION

While it may be true that the Supreme Court disfavors repeal by implication, it certainly does not disfavor it when the circumstances call for it. The ADEA obviously presents such circumstances,***597** and a growing number of courts of appeals have recognized this. Any principled analysis of the question leads inevitably to the *Sea Clammers* doctrine. Application of the doctrine, starting with the language of the statute and even proceeding through the legislative history, demonstrates conclusively the intent of Congress that the ADEA provide the exclusive remedy for age discrimination in employment. If the ADEA does not provide every conceivable remedy, if it does not offer a basis for every imaginable claim, then that is because Congress chose not to include them - in the ADEA or in an end run via § 1983. The connection that some have seen between Title VII and the ADEA regarding preemption is illusory and, even if accepted, is too fragile a reed upon which to base a holding against preemption in the face of the plain evidence of congressional intent in favor of preemption revealed by the *Sea Clammers* analysis. The ineluctable conclusion is that the ADEA preempts claims of age discrimination in employment brought under § 1983.

[FNaa1]. B.A., Newberry College, 1978; M.S., University of Tennessee, 1982; J.D., Stetson University College of Law, 1998; Articles & Symposia Editor, 1997-98, *Stetson Law Review*. David C. Miller, Esq. practices labor and employment law and is an associate in the Miami offices of Muller, Mintz, Kornreich, Caldwell, Casey, Crosland & Bramnick, P.A..

[FN1]. Blessing v. Freestone, 520 U.S. 329, 347 (1997). In *Blessing*, the Court considered whether Title IV-D of the Social Security Act precluded private actions brought pursuant to 42 U.S.C. § 1983 to enforce "substantial compliance" with provisions of Title IV.D. *See id.* at 346-48. As might be imagined from the quoted remark, the

Court found in the negative. *See id.* at 348. The two instances to which the Court referred were its decisions in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 21 (1981) (finding that the comprehensive remedial scheme of the Federal Water Pollution Control Act preempted private actions brought via § 1983; this case gives its name to the "*Sea Clammers* doctrine"), and *Smith v. Robinson*, 468 U.S. 992, 1013 (1984) (finding likewise as to the Education of the Handicapped Act). Section 1983, of course, does not create any substantive rights, but merely serves as a means of vindicating federal constitutional and statutory rights that have an independent basis. *See, e.g.*, Maher v. Gagne, 448 U.S. 122, 129 n.11 (1980). Section 1983 provides a private right of action against persons who, under color of state law, deprive others of federal constitutional or statutory rights. *See*42 U.S.C. § 1983.

[FN2]. Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. §§ 2000e-1-17 (1994)) [[hereinafter Title VII].

[FN3]. *See, e.g.*, Johnson v. City of Fort Lauderdale, 148 F.3d 1228, 1231 (11th Cir. 1998) (holding that Title VII does not preempt constitutional claims brought under Section 1983).

[FN4]. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-624 (1994)).

[FN5]. The Fourth Circuit was the first to so hold, in what remains the leading decision, *Zombro v. Baltimore City Police Department*, 868 F.2d 1364, 1369-70 (4th Cir. 1989). After a long pause, two more circuits have joined the Fourth since 1997. *See* Migneault v. Peck, 158 F.3d 1131, 1140 (10th Cir. 1998); *see also* LaFleur v. Texas Dep't of Health, 126 F.3d 758, 760 (5th Cir. 1997) (adopting what was stated in dicta by the Fifth Circuit earlier in *Britt v. Grocers Supply Co.*, 978 F.2d 1441, 1448 (5th Cir. 1992)).

[FN6]. *Compare, e.g.*, Ring v. Crisp County Hosp. Auth., 652 F. Supp. 477, 482 (M.D. Ga. 1987) (holding ADEA preempts § 1983 age discrimination in employment claims) *with* Mummelthie v. City of Mason City, 873 F. Supp. 1293, 1323 (N.D. Iowa 1995), *aff'd*, 78 F.3d 589 (8th Cir. 1996) (holding the opposite). While *Mummelthie* was affirmed by the Eighth Circuit, the court of appeals did so in an unpublished table decision (text available at 1996 WL 95-2349NI) of no precedential value. *See*78 F.3d 589. Further, the single paragraph of the opinion reveals that the lower court decision was upheld on grounds other than the preemption issue, which the court of appeals did not address. *See id.*

[FN7]. *See infra* Part A.

[FN8]. *See infra* Part B.

[FN9]. *See infra* Part C.

[FN10]. *See infra* Part C.

[FN11]. *See infra* Part D.

[FN12]. *See Migneault*, 158 F.3d at 1140;*Lafleur*, 126 F.3d at 760;*Zombro*, 868 F.2d at 1369. The Eighth Circuit, in *Mummelthie*, affirmed a district court decision that the ADEA did not preempt § 1983. *See*78 F.3d at 589. The decision, however, is of no precedential value. First, pursuant to Eighth Circuit Rule 28A(k), unpublished opinions are not precedent, even for that circuit. *See* 8TH CIR. R. 28A(k). Second, as explained below in Part C, decisions of other circuits are of no value in showing that the law is clearly established. *See infra* Part C. Third, an examination of the single-paragraph, per curiam opinion reveals that the lower court decision was upheld on grounds other than the preemption issue, which was not mentioned at all. *See Mummelthie*, 78 F.3d at 589.

[FN13]. *See* *Mummelthie*, 873 F. Supp. at 1302, 1315-17 (stating that the great weight of recent decisions finds the ADEA to provide the exclusive remedy for age discrimination in employment and listing cases). A non-comprehensive list of district court cases deciding the question, besides those already cited, includes the following, which hold the ADEA preempts age discrimination in employment claims under § 1983: *Gregor v. Derwinski*, 911 F. Supp. 643, 651 (W.D.N.Y. 1996); *Ford v. City of Oakwood*, 905 F. Supp. 1063, 1066 (N.D. Ga. 1995); *Reale v. Jenkins*, No. 92 Civ. 7234 (LJF), 1993 WL 17091, at *4 (S.D.N.Y. Feb. 9, 1993); *Frye v. Grandy*, 625 F. Supp. 1573, 1576 (D. Md. 1986); *Morgan v. Humboldt County School District*, 623 F. Supp. 440, 443 (D. Nev. 1986). The following cases hold the opposite: *Hornfeld v. City of North Miami Beach*, 29 F. Supp. 2d 1357, 1369, 1371 (S.D. Fla. 1998); *Jungels v. State University College of New York*, 922 F. Supp. 779, 785 (W.D.N.Y. 1996); *Howard v. Daiichiya-Love's Bakery, Inc.*, 714 F. Supp. 1108, 1113 (D. Haw. 1989); *Haag v. Board of Education*, 655 F. Supp. 1267, 1274 (N.D. Ill. 1987); *Price v. County of Erie*, 654 F. Supp. 1206, 1208 (W.D.N.Y. 1987); *Bleakley v. Jekyll Island-State Park Authority*, 536 F. Supp. 236, 241 (S.D. Ga. 1982).

[FN14]. 868 F.2d 1364 (4th Cir. 1989).

[FN15]. *See* *id.* at 1365.

[FN16]. *See* *id.* at 1365-66.

[FN17]. *See* Colleen Gale Treml, Note, Zombro v. Baltimore City Police Department: *Pushing Plaintiffs Down the ADEA Path in Age Discrimination Suits*, 68 N.C. L. REV. 995, 996 & nn.12-13 (1990).

[FN18]. *See* *Zombro*, 868 F.2d at 1366-71.

[FN19]. *See* *id.* at 1366.

[FN20]. *See* *id.*

[FN21]. *See* *id.* at 1367.

[FN22]. *See* *id.*

[FN23]. *Id.* (referring to *Sea Clammers*, 453 U.S. at 20 (quoting *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 673 n.2 (1979) (Stewart, J., dissenting))).

[FN24]. *See* *Zombro*, 868 F.2d at 1368 (citing *Preiser v. Rodriguez*, 411 U.S. 475 (1973), and *Smith v. Robinson*, 468 U.S. 992 (1984)).

[FN25]. *Id.* at 1368-69.

[FN26]. *See* *supra* note 1 and accompanying text.

[FN27]. *See* *Zombro*, 868 F.2d at 1369.

[FN28]. *See* *id.* This hierarchy in which to seek congressional intent is in consonance with the cardinal rule of statutory interpretation that courts shall look no further than the plain meaning of the words of statute, and only if the meaning cannot be determined from the statute itself shall further evidence of intent be sought. *See* *Sea Clammers*, 453 U.S. at 13 (stating, in considering preemption of § 1983, "We look first, of course, to the statutory language."); *see also* West Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 98-99 (1991) (stating that where a statute is unambiguous, the courts "do not permit" changes in meaning based on the statements of legislators or committees

during the enactment process).

[FN29]. *Zombro*, 868 F.2d at 1369.

[FN30]. *See id.*

[FN31]. *See id.*

[FN32]. *See id.* at 1369-70.

[FN33]. *Id.* at 1370.

[FN34]. The district court decision in *Mummelthie* qualifies as the leading case for the opposing view. Certainly, at 46 pages, it must be the longest. However intricate its reasoning and involved its arguments, though, *Mummelthie* rests in large part on a rejection of *Zombro* - on mistaken grounds. *See Mummelthie*, 873 F. Supp. at 1319, 1323. The linchpin argument in *Mummelthie*, and all following cases, is a supposed connection in the legislative history of the ADEA to that of Title VII. *Id.* at 1323-24. This argument is examined in detail and found to be incorrect. *See infra* Part C.4.

The *Mummelthie* court asserts that the Fourth Circuit in *Zombro* did not adequately explore the legislative history of the ADEA and particularly its relationship to Title VII legislative history, to determine whether Congress intended to preempt claims of age discrimination in employment. *See id.* at 1319, 1323. A careful reading of *Zombro*, however, shows not only that the ADEA's legislative history was before the court, but that the arguments against preemption based on the history - later taken up by the *Mummelthie* court - had a forceful advocate, dissenting Judge Murnaghan. *See Zombro*, 868 F.2d at 1374-77 (Murnaghan, J., dissenting). Judge Murnaghan relies heavily on *Keller v. Prince George's County*, 827 F.2d 952 (4th Cir. 1987) (holding Title VII does not preempt concurrent § 1983 claims). *See*868 F.2d at 1376.

The *Keller court*, in turn, made an exhaustive inquiry into Title VII legislative history. *See Keller*, 827 F.2d at 958-62. Judge Murnaghan used *Keller's* investigation of Title VII and made the same argument as the court in *Mummelthie*. *See Zombro*, 868 F.2d at 1374-77. To assert, as the *Mummelthie* court does, that the *Zombro* court did not look at the ADEA's legislative history is simply wrong. The dissent presented the history and made the arguments; the majority simply rejected them.

[FN35]. 158 F.3d 1131 (10th Cir. 1998).

[FN36]. *See*158 F.3d at 1140. Qualified immunity may be asserted by public officials who are sued in their individual capacities for conduct occurring pursuant to their discretionary authority. *See* Harlow v. Fitzgerald, 457 U.S. 800, 817-18 (1982). Government officials are shielded from liability for performing their discretionary duties so long "as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Further, the immunity is from suit, not merely from liability. *See* GJR Invs., Inc. v. County of Escambia, Fla., 132 F.3d 1359, 1366 (11th Cir. 1998); *see also* Siegert v. Gilley, 500 U.S. 226, 231-33 (1991). Thus, the public official asserting qualified immunity should not be subjected to the burdens of litigation, including discovery. *See Siegert*, 500 U.S. at 231-33;Lassiter v. Alabama A & M Univ., Bd. of Trustees, 28 F.3d 1146, 1149 (11th Cir. 1994) (en banc).

[FN37]. 158 F.3d at 1140.

[FN38]. 500 U.S. 226 (1991).

[FN39]. *See Siegert*, 500 U.S. at 229. In *Siegert*, the plaintiff alleged that the defendant had unconstitutionally deprived him of a liberty interest under the Fifth Amendment when the defendant made an unfavorable employment reference. *See id.* The defendant argued that a "right" to a favorable job reference did not exist under the Fifth

Amendment. *See id.* The Court agreed, stating that "[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff [was] 'clearly established' ... is the determination of whether the plaintiff has asserted the violation of a constitutional right at all." *Id.* at 232.

[FN40]. "Rights" that are unsecured by law are not actionable. *See* Davis v. Scherer, 468 U.S. 183, 194 & n.12 (1984). In *Wascura v. Carver*, 169 F.3d 683, 685 (11th Cir. 1999), the court stated that "[i]f a ... court lacks subject matter jurisdiction over a claim, that claim cannot provide a basis for imposing liability, and it necessarily follows that the claim states no violation of federal law."

[FN41]. 890 F.2d 1168 (D.C. Cir. 1989), *not followed as dicta*, Crawford-El v. Britton, 93 F.3d 813, 818 (D.C. Cir. 1996).

[FN42]. *See id.* at 1170 n.3.

[FN43]. *Id.* (quoting Butz v. Economou, 438 U.S. 478, 504 (1978)). This language implicitly recognizes that we are dealing with rights that can be the basis for an action, and not merely abstract, but unsecured, statements of principle. Notably, now-Supreme Court Justice Ruth Bader Ginsburg sat on the unanimous panel in *Whitacre*, although she did not author the opinion. *See id.* at 1168. Judge Cox of the Eleventh Circuit cites *Whitacre* and notes that it questions whether age discrimination can arise under the Constitution in an ADEA decision now pending before the Supreme Court. *See* Kimel v. Florida Bd. of Regents, 139 F.3d 1426, 1448 (11th Cir. 1998) (Cox, J., concurring in part and dissenting in part), *cert. granted*, 119 S. Ct. 901 (1999). The defendant in *Kimel* challenges the ADEA on Eleventh Amendment grounds. *See id.* at 1428-29.

[FN44]. *See* 890 F.2d at 1170 n.3.

[FN45]. *Id.*

[FN46]. It has long been established that there is no automatic right, much less a fundamental right, to public employment. *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 283-84 (1977); Elrod v. Burns, 427 U.S. 347, 360 (1976); Perry v. Sindermann, 408 U.S. 593, 597 (1972).

[FN47]. *See Migneault*, 158 F.3d at 1140; *Lafleur*, 126 F.3d at 760; *Zombro*, 868 F.2d at 1369-70.

[FN48]. 453 U.S. at 20 (quoting *Chapman*, 441 U.S. 600, 673 n.2 (citations omitted) (Stewart, J., dissenting)).

[FN49]. 493 U.S. 103, 106-07 (1989).

[FN50]. *Id.* at 106 (emphasis added).

[FN51]. *Id.* (quoting *Robinson*, 468 U.S. at 1012).

[FN52]. *See Robinson*, 468 U.S. at 1009 (examining the "carefully tailored" administrative procedures of the statute at issue); *Sea Clammers*, 453 U.S. at 13 (focusing on the "unusually elaborate enforcement provisions" of the act in question); *see also Blessing*, 520 U.S. at 346-48 (analyzing *Sea Clammers* and *Robinson* on this issue). Some district courts, including the district court in this matter, apparently have read a conjunctive into the *Sea Clammers* doctrine, requiring findings that Congress enacted a comprehensive remedial scheme and that the scheme is inconsistent with allowing a § 1983 claim. *See, e.g., Mummelthie*, 873 F. Supp. at 1314. The Supreme Court's statement in *Golden State* that the existence of a comprehensive scheme is "not necessarily" the only determinant of preemption presumes that, in some cases, it is the sole determinant. *See* 493 U.S. at 106. Nevertheless, an inquiry into "inconsistency" may be undertaken as further analysis of the issue. Thus, the Court is not mandating a two-step process in every case. A finding that a § 1983 remedy is inconsistent with a comprehensive remedial scheme is

merely a restatement of the finding that there exists a comprehensive scheme, and not a second prong of analysis. *See id.* Some courts find a lack of inconsistency by reasoning that the § 1983 claim and ADEA claim spring from the violation of different rights, e.g., those conferred by the ADEA itself and those secured by the Fourteenth Amendment. *See Hornfeld*, 29 F. Supp. 2d at 1366. However, this is not the appropriate analysis. Instead, the § 1983 claim is inconsistent because the ADEA itself provides a comprehensive remedial scheme.

[FN53]. *See Blessing*, 520 U.S. at 347.

[FN54]. *See* Treml, *supra* note 17, at 1000-01. Treml appears to posit the existence of a number of inconsistent Supreme Court decisions and rules on implicit repeal. *See id.* For example, she contrasts *Morton v. Mancari*, 417 U.S. 535 (1974) - "repeals by implication are disfavored" - with *Preiser v. Rodriguez*, 411 U.S. 475 (1973) - "precisely drawn, detailed statutes preempt more general remedies." Treml, *supra* note 17, at 1000 n.56. She then contends that the "key to determining exclusivity is uncovering congressional intent." *Id.* at 1001. This is no discovery, but merely a statement of the obvious, i.e., that all statutory interpretation is, at base, an inquiry into legislative intent. *See, e.g.*, Negonsott v. Samuels, 507 U.S. 99, 104 (1993) (stating that the Court's task in interpreting statutes "is to give effect to the will of Congress" (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982))); United States v. Grigsby, 111 F.3d 806, 816 (11th Cir. 1997) (stating that the court's objective in interpreting statutes "is to determine the drafters' intent" (quoting United States v. Castro, 829 F.2d 1038, 1049 (11th Cir. 1987), *modified on other grounds*, 837 F.2d 441 (11th Cir. 1988))).

[FN55]. *See Sea Clammers*, 453 U.S. at 19-20;Brown v. Housing Auth. McRae, Ga., 784 F.2d 1533, 1536 (11th Cir. 1986), *vacated on other grounds*, 820 F.2d 350 (11th Cir. 1987); *cf.* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 28 (1981).

[FN56]. *Keller*, 827 F.2d at 965.

[FN57]. *See*493 U.S. 103, 106-07;*see also supra* notes 47-50 and accompanying text.

[FN58]. *Golden State*, 493 U.S. at 106-07 (quoting *Robinson*, 468 U.S. at 1012, and citing Wright v. Roanoke Redevelopment & Housing Auth., 479 U.S. 418, 425-28 (1987)).

[FN59]. *See Zombro*, 868 F.2d at 1366.

[FN60]. Fair Labor Standards Act, ch. 676, § 1, 52 Stat. 1060 (1938) (codified at 29 U.S.C. §§ 201-219 (1994)); *see*29 U.S.C. § 626; *Zombro*, 868 F.2d at 1366. The application of the *Sea Clammers* doctrine to the ADEA, and, thus, the comprehensiveness of the ADEA's remedial scheme, is examined in detail *infra* Part C.

[FN61]. *See Migneault*, 158 F.3d at 1140;*Lafleur*, 126 F.3d at 760;*Zombro*, 868 F.2d at 1367.

[FN62]. *See Zombro*, 868 F.2d at 1366.

[FN63]. *See Sea Clammers*, 453 U.S. at 13;*Zombro*, 868 F.2d at 1369. The alternative approach improperly employed by some district courts examining this question looks beyond the statute to the legislative history. *See Mummelthie*, 873 F. Supp. at 1324-25. In the case of the ADEA, this led the *Mummelthie* court on an exhaustive search, eventually disclosing its needle in a haystack, not in the legislative history of the ADEA itself, but in that of Title VII. *See id.* at 1325 (citing 118 CONG. REC. 15,895 (1972)). The material cited in *Mummelthie* contains comments quoted by a single legislator that were made during hearings regarding the passage of amendments to Title VII. *See id.* Similar changes were not made to the ADEA until two years later. *See id.* at 1325-26. To rely on such a tenuous connection as the determinative factor in deciding the question of preemption is inappropriate. *See* Maher v. Strachan Shipping Co., 68 F.3d 951, 957 (5th Cir. 1995) (stating that "isolated statements in the legislative history, particularly those speaking to the motives of individual legislators, are not relevant to the issue of what

Congress actually did"); Coalition for Clean Air v. Southern Cal. Edison Co., 971 F.2d 219, 227 (9th Cir. 1992) (emphasizing that "statements of individual legislators are entitled to little, if any, weight"). This issue is explored in detail *infra* Part D.

[FN64]. *See* *Zombro*, 868 F.2d at 1369;*Ring*, 652 F. Supp. at 482 (stating "there is no legislative history which indicates that Congress did not intend the ADEA to be the exclusive remedy for age discrimination"). The *Ring* court's formulation underscores a fundamental difference of approach between the dominant line of cases, which hold the ADEA preempts § 1983, and those cases, like *Mummelthie*, which hold otherwise. As explained earlier, the *Zombro* line looks first to the language of the statute for evidence of congressional intent. *See*868 F.2d at 1369. Finding intent to preempt there, those cases may additionally look to the legislative history; when they do, they find silence, which merely confirms the prior conclusion. *See id.; Ring*, 652 F. Supp. at 482.*Mummelthie* declines to find intent from the language of the statute alone, but proceeds to examine the legislative history, strains to discover the barest indication of intent not to preempt, and then accords that expression determinative weight over the enacted language of the statute. *See*873 F. Supp. at 1319, 1324-27.*Mummelthie's* decision to infer from silence an affirmative congressional intent to preserve § 1983 claims in the face of the comprehensive scheme enacted in the ADEA leads that court down an improper analytical path resulting in a holding that is incorrect, no matter how meticulously reasoned.

[FN65]. *See* *Sea Clammers*, 453 U.S. at 20;*Zombro*, 868 F.2d at 1366-71.

[FN66]. *See* *Robinson*, 468 U.S. at 1012. This concern that the statutory remedial scheme not be bypassed by a § 1983 suit does not mean that if the scheme exempts some class of persons from liability, then a § 1983 claim against a defendant in that class would not be preempted on the theory that such a claim does not bypass the statute. For example, the ADEA imposes liability on "employers." *See*29 U.S.C. § 623(a). In the case of a government defendant, the employer is the public entity; public officials have been held not to be employers under the ADEA. *See* Smith v. Lomax, 45 F.3d 402, 403 n.4 (11th Cir. 1995) (stating that individuals "cannot be held liable under the ADEA"). However, courts construing both the ADEA and other statutes have not been concerned with this issue, but have held in favor of preemption. For example, the Tenth Circuit in *Migneault* had before it a public official sued as an individual defendant asserting the defense of qualified immunity to a § 1983 claim. *See*158 F.3d at 1135. In granting qualified immunity, the court stated, "[the individual defendant] claims [the plaintiff] failed to show the law is clearly established that a claim for age discrimination in employment is cognizable under the Equal Protection Clause, independent of the ADEA. We agree." *Id.* at 1140. Thus, the *Migneault* court made no distinction in the "type" of defendant.

Similarly, in *Brown v. General Services Administration*, 425 U.S. 820, 823-25 (1976), the Supreme Court considered whether Title VII preempted a constitutional claim of racial discrimination in federal employment brought under 42 U.S.C. § 1981. The Court had before it both governmental and individual defendants. *See* Brown v. General Servs. Admin., 507 F.2d 1300, 1303 (2d Cir. 1974) (in the decision appealed from, listing the defendants), *aff'd*, 425 U.S. 820 (1976). Nonetheless, the Court found Title VII to be the exclusive remedy for claims of racial discrimination in federal employment and dismissed the § 1981 claims against both the federal government and the individuals. *See* *Brown*, 425 U.S. at 835. This argument as to "uncovered" defendants is analogous to that of "uncovered" claims made *infra* Part D.

[FN67]. *See* *Sea Clammers*, 453 U.S. at 13.

[FN68]. *See* *Golden State*, 493 U.S. at 106-07;*Sea Clammers*, 453 U.S. at 13.

[FN69]. *See* *Zombro*, 868 F.2d at 1366.

[FN70]. *See*29 U.S.C. § 626 (1994); *Zombro*, 868 F.2d at 1366.

[FN71]. *See*29 U.S.C. § 626(c); *Zombro*, 868 F.2d at 1366.

[FN72]. *See* 29 U.S.C. §§ 623, 630, 633a (1994).

[FN73]. *See id.* § 626.

[FN74]. *See id.*

[FN75]. *See* 29 U.S.C. § 209 (1994).

[FN76]. *See id.*

[FN77]. *See* 29 U.S.C. § 211 (1994).

[FN78]. *See id.*

[FN79]. *See id.*

[FN80]. *See* 29 U.S.C. § 215 (1994).

[FN81]. *See* 29 U.S.C. § 626(b).

[FN82]. *See* 29 U.S.C. § 216 (1994).

[FN83]. *See id.* § 216(a)-(c); *see also* 29 U.S.C. § 626(b).

[FN84]. *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 125 (1985). Here, perhaps, is the clearest indication of why § 1983 claims are inconsistent with the ADEA. Section 1983 provides for compensatory damages; the ADEA does not. *See* Goldstein v. Manhattan Indus., Inc., 758 F.2d 1435, 1446 (11th Cir. 1985). Section 1983 provides for punitive damages against the individual; the ADEA allows for liquidated damages against the employer, which are meant to be punitive in nature. *See Trans World Airlines*, 469 U.S. at 125.

[FN85]. 29 U.S.C. § 626(b).

[FN86]. *See* 29 U.S.C. § 216.

[FN87]. *See* 29 U.S.C. § 217 (1994).

[FN88]. *See* 42 U.S.C. § 2000e.

[FN89]. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended at 42 U.S.C. § 1981 (1994)).

[FN90]. *See* 42 U.S.C. § 1981a.

[FN91]. *See* 42 U.S.C. § 1981a(b); *see also* H.R. REP. NO. 102-40(I), at 64-70 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 602-08.

[FN92]. *See* 42 U.S.C. § 1981a(a)(2) (citing the American with Disabilities Act of 1990, 42 U.S.C. §§ 12117(a), 12112 (1994)); *see* Civil Rights Act § 102(a)(2).

[FN93]. *See*H.R. REP. NO. 102-40(II), at 4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 697.

[FN94]. *See*42 U.S.C. § 12117; *see also*H.R. REP. NO. 102-40(II) at 4, *reprinted in* 1991 U.S.C.C.A.N. at 697.

[FN95]. *See*42 U.S.C. § 1981a(a)(2).

[FN96]. *See id.*

[FN97]. *See* Civil Rights Act § 115.

[FN98]. *See*H.R. REP. NO. 102-40(I) at 96, 104, *reprinted in* 1991 U.S.C.C.A.N. at 634, 642; H.R. REP. NO. 102-40(II) at 4, 40-41, *reprinted in* 1991 U.S.C.C.A.N. at 697, 734-35.

[FN99]. *See Zombro*, 868 F.2d at 1369.

[FN100]. *See*29 U.S.C. § 621. The statement reveals a commitment to a cooperative method of resolving problems engendered by the impact of age on employment, a clear reference to the extensive conciliation and mediation procedure contained in the act. *See id.* § 621(b). The subsection states, in full: "It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; *to help employers and workers find ways of meeting problems arising from the impact of age on employment." Id.* (emphasis added). This language contemplates a preference for cooperative, conciliatory methods, not litigation. Congress' commitment to the enforcement scheme it created is undeniable.

[FN101]. *See Zombro*, 868 F.2d at 1368.

[FN102]. *Id.*

[FN103]. *Id.*

[FN104]. *See id.* at 1368-69.

[FN105]. *See* Bush v. Lucas, 462 U.S. 367, 388-89 (1983) (stating that Congress is in the best position to determine whether to preserve or to withhold remedies and where it has provided an elaborate remedial system, the courts should not intervene to fill in perceived gaps); *cf. Smith*, 468 U.S. at 1019-20 (stating that availability of an additional remedy under the Rehabilitation Act did not preclude finding that Congress intended its comprehensive scheme under the Education of the Handicapped Act to be an exclusive remedy).

[FN106]. *See Smith*, 468 U.S. at 1019-20.

[FN107]. 425 U.S. 820 (1976).

[FN108]. *See id.* at 835.

[FN109]. *See* Bushy v. City of Orlando, 931 F.2d 764, 772 (11th Cir. 1991) (holding that individual liability for supervisors is not available under Title VII).

[FN110]. *See Zombro*, 868 F.2d at 1368.

[FN111]. *See id.* at 1369;*Ring*, 652 F. Supp. at 482.

[FN112]. *See* *Mummelthie*, 873 F. Supp. at 1323-27.

[FN113]. *See* *id.* at 1325-26.

[FN114]. *See*H.R. REP. NO. 92-238 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2154.

[FN115]. *See id.* at 2154.

[FN116]. *See* *Mummelthie*, 873 F. Supp. at 1325.

[FN117]. *See* 118 CONG. REC. 15,895 (1972). Private employees, of course, can have no employment claim whatsoever under the Fourteenth Amendment, which requires state action. *See*U.S. CONST. amend. XIV, § 1. Therefore, Bentsen's statement, if it can be so read, that he wanted public employees to have all the rights of private employees, could not possibly have included any right to sue for impairment of equal protection under § 1983.

[FN118]. 118 CONG. REC. at 15,895.

[FN119]. *See id.* at 15,894. Senate Bill Number 3318 says absolutely nothing about § 1983 or preemption. *See* 118 CONG. REC. at 7746.

[FN120]. *See* 118 CONG. REC. at 15,894; 118 CONG. REC. at 7745.

[FN121]. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, *reprinted in* 1972 U.S.C.C.A.N. 2137, 2154.

[FN122]. *See* 118 CONG. REC. at 15,895.

[FN123]. *See id.*

[FN124]. See 123 CONG. REC. 34,306-07 (1977).

[FN125]. *See id.* at 34,306.

[FN126]. *See id.*

[FN127]. *See id.* at 34,306-07. Further robbing the statement of support for this position, it has been held that the ADEA is the exclusive remedy for claims of age discrimination in federal employment, preempting claims under § 1983. *See* Ray v. Nimmo, 704 F.2d 1480, 1485 (11th Cir. 1983).

[FN128]. *See* 123 CONG. REC. 34,305.

[FN129]. *See* 123 CONG. REC. 34,293.

[FN130]. *See*H.R. CONF. REP. NO. 95-950 (1978), *reprinted in* 1978 U.S.C.C.A.N. 528; S. REP. NO. 95-493 (1977), *reprinted in* 1978 U.S.C.C.A.N. 504.

[FN131]. *See* *Zombro*, 868 F.2d at 1369;*see also* *Ring*, 652 F. Supp. at 482 (referring to Paterson v. Weinberger, 644 F.2d 521 (5th Cir. 1981)), which held the ADEA was the exclusive remedy for federal employees because legislative history did not indicate otherwise.

[FN132]. *See* *Maher*, 68 F.3d at 957 (stating that isolated comments in the legislative history are irrelevant to congressional actions); *Coalition for Clean Air*, 971 F.2d at 227 (stating that comments by individual legislators should be given little or no weight in determining legislative intent).

[FN133]. *See* *Mummelthie*, 873 F. Supp. at 1319-23.

[FN134]. For example, the *Hornfeld* court analogized the ADEA to Title VII, referring to Johnson, 148 F.3d at 1228.*See* *Hornfeld*, 29 F. Supp. 2d at 1364. In *Johnson*, the court considered whether the Civil Rights Act of 1991 rendered Title VII's remedial scheme sufficiently comprehensive that it should preempt § 1983 claims. *See*148 F.3d at 1230. The court pointed out that several circuits had already determined that Title VII did not preempt § 1983 prior to the 1991 Act. *See id.* (referring to Keller v. Prince George's County, 827 F.2d 952, 958 (4th Cir. 1981)). These determinations were based in part on legislative history that expressly indicated intent to retain the § 1983 remedies. *See id.* at 1230-31. Further, the court cited congressional findings accompanying the amendments expressly indicating its provisions were "additional," finding therein an implied intent to retain § 1983 remedies. *See id.* at 1231. Thus, in *Johnson*, the court had before it a widely held view of the law, express legislative history, express congressional findings, and decisions of other circuit courts, all in favor of retaining claims brought pursuant to § 1983. In considering the ADEA and § 1983, the court is in virtually the opposite situation. The great weight of authority holds that the ADEA preempts § 1983. *See* *Mummelthie*, 873 F. Supp. at 1302. Second, no legislative history nor anything else shows congressional intent to preserve claims brought pursuant to § 1983. *See Zombro*, • F.2d at 1369. Finally, all the circuits that have considered the question have held that § 1983 claims are preempted. *See* *Migneault*, 158 F.3d at 1140;*Lafleur*, 126 F.3d at 760,*Zombro*, 868 F.2d at 1369-70.

[FN135]. *See* *Ring*, 652 F. Supp. at 481;*cf.* Lorillard v. Pons, 434 U.S. 575, 584 (1978).

[FN136]. *See* *Ring*, 652 F. Supp. at 481.

[FN137]. *See* *Trans World Airlines*, 469 U.S. at 121 (interpreting liability under the ADEA in the light of Title VII precedent because substantive, though not remedial or procedural, provisions of the two statutes are similar).

[FN138]. 434 U.S. 575 (1978).

[FN139]. *See* *id.* at 577-80, 583-85.

[FN140]. *See* *Robinson*, 468 U.S. at 1012 (stating that allowing a plaintiff to circumvent a statute's comprehensive remedial scheme would not comport with congressional intent); *Sea Clammers*, 453 U.S. at 20 (stating the classic formulation of the doctrine as "[w]hen the remedial devices" in an act are comprehensive, they preempt § 1983 suits).

[FN141]. *See* *Lorillard*, 434 U.S. at 578.

[FN142]. *See* *id.* at 585.

[FN143]. *See* *id.* at 585 n.14 (stating that "the very different remedial and procedural provisions under the ADEA suggest that Congress had a very different intent in mind [from that of Title VIII]").

[FN144]. *See* *Ring*, 652 F. Supp. at 481.

[FN145]. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, *reprinted in* 1972 U.S.C.C.A.N. 2137.

[FN146]. *See* EEOC v. Elrod, 674 F.2d 601, 604 (7th Cir. 1982).

[FN147]. *See id.* at 605.

[FN148]. *See Lorillard*, 434 U.S. at 577-80.

[FN149]. *See* S. REP. NO. 93-690, at 55.

[FN150]. *Id.*

[FN151]. *See id.*

[FN152]. *See id.*

[FN153]. *See* Fair Labor Standards Amendment of 1974, Pub. L. No. 93-259, 88 Stat. 55, 1974 U.S.C.C.A.N. 2811.

[FN154]. *See*H.R. REP. NO. 93-913 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2849-50.

[FN155]. *See id.*

[FN156]. *See, e.g.*, Brown v. VanNostrand Reinhold Co., No. 89 Civ. 7309 (CSH), 1991 WL 197592, at *4 (S.D.N.Y. Sept. 24, 1991) (stating that common sense dictates case specific formulae in ADEA suits).

[FN157]. *See, e.g.*, Hawaiian Airlines, Inc. v. Finazzo, 512 U.S. 246, 251 (1994) (stating that federal preemption is a question of congressional intent).

[FN158]. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

[FN159]. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313-14 (1976); *see also* EEOC v. Wyoming, 460 U.S. 226, 231 (1983). Because age is not a suspect or quasi-suspect classification, age discrimination claims brought under the Fourteenth Amendment need merely meet the rational basis test. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 470 (1991) (applying rational basis test to state constitutional provision establishing mandatory retirement age); *Murgia*, 427 U.S. at 314 (applying rational basis test to state law establishing a mandatory retirement age). Under the rational basis test, a state-made classification will survive scrutiny if the distinction it makes rationally furthers a legitimate state interest. *See* Zobel v. Williams, 457 U.S. 55, 60 (1982); Plyler v. Doe, 457 U.S. 202, 208 (1982) (stating that a state law will survive if the distinction it makes bears a rational relationship to a legitimate state interest); *see also Migneault*, 158 F.3d at 1137-38 (analyzing the application of the Equal Protection Clause to age discrimination). On the other hand, suspect classifications, such as race, trigger strict scrutiny. *See, e.g.*, Abrams v. Johnson, 521 U.S. 74, 91 (1997) (providing that state action predominately motivated by race must be narrowly tailored to meet a compelling governmental interest).

END OF DOCUMENT

EXHIBIT D

United States District Court,
E.D. Pennsylvania.
Dr. Deborah BARLIEB, Dr. Marjorie L. Borden, Dr. Beth Miller Herbine, Dr. Margaret A. Herrick, Dr. Lynn K. Milet, and Dr. Cheryl Wilf, Plaintiffs,
v.
KUTZTOWN UNIVERSITY OF THE PENNSYLVANIA STATE SYSTEM OF HIGHER EDUCATION and Dr. Linda K. Goldberg, Individually, Defendants.
No. Civ.A. 03-4126.

Dec. 1, 2003.

Jana Barnett, Wyomissing, PA, for Plaintiffs.

James B. Brown, Nancy L. Heilman, W. Scott Hardy, Cohen & Grigsby PC, Pittsburgh, PA, Richard H. Martin, Montgomery Mccracken Walker & Rhoades, Philadelphia, PA, for Defendants.

MEMORANDUM AND ORDER

VANANTWERPEN, J.

*1 Plaintiffs, faculty members of Kutztown University ("Kutztown"), have filed a six-count complaint alleging that Defendants, Kutztown and Goldberg, denied them promotions to either Associate Professor or Full Professor, in violation of 42 U.S.C. § 1983, and failed to afford them due process of law. As to Counts I, III, IV, V, and VI, Defendants have filed a Partial Motion to Dismiss, pursuant to Fed.R.Civ.P. 12(b)(1), on grounds that this Court lacks subject matter jurisdiction, and pursuant to Fed.R.Civ.P. 12(b)(6), on grounds that Plaintiffs fail to state legally cognizable claims. For the reasons discussed below, we deny Defendants' Partial Motion to Dismiss on jurisdictional grounds (as to Count I), but grant the Partial Motion to Dismiss Counts III, IV, V, and VI, for failure to state a claim for which relief can be granted.

I. FACTUAL BACKGROUND

Plaintiffs are female citizens of the Commonwealth of Pennsylvania, over forty (40) years of age, who are employed by Kutztown University. Defendant Kutztown University is one of the fourteen (14) universities that comprise the Pennsylvania State System of Higher Education. Defendant Goldberg is the Provost and Vice President of Academic Affairs of Kutztown University.

In the fall of 2000, Plaintiffs were either Assistant Professors or Associate Professors. Plaintiffs each submitted an application for promotion to the appropriate department chairperson. (See Compl. ¶¶ 17--37). Pursuant to the University Faculty Promotion Guidelines, after reviewing Plaintiffs' applications, the chairpersons sent them to the appropriate departmental committees for evaluation. The departmental committees then recommended that Plaintiffs be promoted and sent their recommendations to the university-wide promotion committee. (Compl.¶¶ 19--39).

In the spring of 2001, the University Promotion Committee ("UPC") reviewed the applications for promotion received from the departments (including but not limited to those of the plaintiffs), and recommended that Plaintiffs not be promoted. (Compl.¶ 40). The UPC sent these recommendations to Defendant Goldberg (Compl.¶ 40), who evaluated them (Compl.¶ 42) and, in letters dated July 13, 2001, notified Plaintiffs that the UPC had recommended that they not be promoted and that she had accepted the UPC's recommendations. (Compl.¶ 41).

Of the completed applications for promotion, Plaintiffs allege that more males than females were promoted and that those chosen for promotion were younger than those denied. (Compl.¶¶ 43--50). Plaintiffs also allege that the UPC and Defendant Goldberg violated the procedures in the Promotion Guidelines. (Compl. ¶¶ 49--50).

On July 14, 2003, pursuant to 28 U.S.C. §§ 1331 and 1343(3), Plaintiffs filed a Complaint alleging that Defendants violated 42 U.S.C. § 1983 by denying them promotions due to their sex and/or age, and without affording them due process of law. In response, on September 10, 2003, Defendants filed the instant Partial Motion to Dismiss. We now deny Defendants' Partial Motion for lack of subject matter jurisdiction, but grant the Motion to Dismiss for

failure to state a claim.

II. DISCUSSION

A. *Rule 12(b)(1) Challenge for Lack of Subject Matter Jurisdiction*

***2** In Counts I, III, and V, Plaintiffs allege that Defendant Kutztown violated 42 U.S.C. § 1983 by denying them promotions due to their sex and/or age, and without affording them due process of law. Defendants have filed a Partial Motion to Dismiss, pursuant to Fed.R.Civ.P. 12(b)(1), challenging this Court's subject matter jurisdiction, on grounds that Kutztown is not a "person" under § 1983 and that Kutztown has Eleventh Amendment immunity from suit. Because Defendant fails to provide any information showing that Kutztown is a state agency, and thus neither a "person" under § 1983 nor an entity not protected from suit by the Eleventh Amendment, we deny Defendants' motion to dismiss Counts I, III, and V. However, we will allow Defendant to refile its Motion to Dismiss with the appropriate supporting documents.

Pursuant to Fed.R.Civ.P. 12(b)(1), when "considering a motion to dismiss for lack of subject matter jurisdiction, the person asserting jurisdiction bears the burden of showing that the case is properly before the court at all stages of the litigation." *Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1045 (3d Cir.1993). We may treat a Rule 12(b)(1) challenge as either a factual or facial attack to subject matter jurisdiction. *SeeMortensen v. First Federal Savings and Loan Ass'n*, 549 F.2d 884, 891 (3d Cir.1977). Because Defendant has offered no supplemental information relating to subject matter jurisdiction, we will treat this motion as a facial attack, which requires that we accept as true all allegations set forth in the Complaint. *SeeGould Electronics, Inc. v. United States*, 220 F.3d 169, 176 (3d Cir.2000) (discussing the distinction between facial and factual challenges to subject matter jurisdiction); *Mortensen*, 549 F.2d at 891 (same). We further will "draw all reasonable inferences in the plaintiff's favor...." *Lexington Ins. Co. v. Forrest*, 263 F.Supp.2d 986, 996 (E.D.Pa.2003).

The Supreme Court has held that the Eleventh Amendment bars any action brought by a citizen against one's own state in federal court when "the state is the real, substantial party at interest" and the relief sought will operate against the state. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984), *rev'g*673 F.2d 647 (3d Cir.1982) (en banc). Additionally, sovereign immunity protects state entities against § 1983 claims. *Quern v. Jordan*, 440 U.S. 332, 342, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979). Thus, we must determine whether Kutztown is a state entity.

Plaintiffs' Complaint, the averments within which we must accept as true, alleges that this Court has jurisdiction pursuant to 28 U.S .C. §§ 1331 and 1343(3) (Compl.¶ 2), and that Defendant Kutztown is a "person" for purposes of § 1983, capable of being held liable for its constitutional violations (Compl.¶ 10). Defendant offers no evidence showing otherwise. As such, we have no choice but to accept the allegation that Kutztown is a "person" capable of being sued under § 1983 and to deny Defendants' motion.

***3** Moreover, the cases that Defendants cite do not assist us in determining whether, as a matter of law, Kutztown is a state entity immune to suit or a "person" under § 1983. *Skehan v. State System of Higher Educ.*, 815 F.2d 244 (3d Cir.1987) involves the umbrella state entity of which Kutztown is a part but which is not being sued here, and *O'Hara v. Indiana Univ. of Penn.*, 171 F.Supp.2d 490 (W.D.Pa.2001) does not hold expressly that the individual universities within the State System of Higher Education are state agencies. In fact, *O'Hara* seems to recognize the absence of a clear finding as to whether individual schools are state entities. Thus, without more evidence, we are bound to reject Defendants' arguments. [FN1]

> FN1. Because we recognize the ambiguity in identifying which educational entities are state entities for purposes of immunity and § 1983, as stated *supra*, we will reconsider a Motion to Dismiss based on lack of subject matter jurisdiction if Defendant provides evidence allowing us to review the matter as a factual attack. A factual challenge will allow us to weigh evidence to determine whether we have the power to hear this matter. *Int'l Ass'n of Machinists & Aerospace Workers*, 673 F.2d 700, 711 (3d Cir.1982). We note that the Third Circuit has identified three factors to consider when determining whether an individual school is a state entity, which can be summed up as follows:
> 1. Whether the money that would pay the

judgment would come from the state;
2. The status of the agency under state law (this includes four factors-how state law treats the agency generally, whether the entity is separately incorporated, whether the agency can sue or be sued in its own right, and whether it is immune from state taxation); and,
3. The degree of autonomy that the agency has.
Fitchik v. New Jersey Transit Rail Operations, Inc., 873 F.2d 655, 659 (3d Cir.1989). Defendants offer no evidence regarding these issues.

According to the Third Circuit, "[a] claim may be dismissed under Rule 12(b)(1) only if it 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction' or is 'wholly insubstantial and frivolous.' " *Gould Electronics*, 220 F.3d at 178 (quoting *Kehr Packages, Inc. v. Fidelcor*, 926 F.2d 1406, 1409 (3d Cir.1991)) (internal quotations omitted). At this stage of the proceedings, we cannot find Plaintiffs' claim of jurisdiction to be immaterial or insubstantial and frivolous. Thus, we deny the Partial Motion to Dismiss under Rule 12(b)(1).

B. *Rule 12(b)(6) Challenge for Failure to State a Legally Cognizable Claim*

Defendants also argue that Counts III, IV, V, and VI should be dismissed pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim. We agree with Defendant's arguments and thus grant the motion as to these counts.

We must grant a Rule 12(b)(6) motion, "if it appears to a certainty that no relief could be granted under any set of facts which could be proved." *D.P. Enterprises, Inc. v. Bucks County Community College*, 725 F.2d 943, 944 (3d Cir.1984). When considering a motion to dismiss, "we are required to accept as true all of the allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the plaintiff." *Morse v. Lower Merion School District*, 132 F.3d 902, 906 (3d Cir.1997). However, "we are not required to accept legal conclusions either alleged or inferred from the pleaded facts." *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir.1993). In a § 1983 action, a motion to dismiss will be granted if the plaintiffs fail to sufficiently allege in their complaint the deprivation of a constitutional right. *SeeNami v. Fauver*, 82 F.3d 63, 65 (3d Cir.1996).

Counts III and IV: Age Discrimination

Counts III and IV of Plaintiffs' Complaint allege that the University and Defendant Goldberg violated the Fourteenth Amendment's Equal Protection Clause by failing to promote Plaintiffs because of their age. Plaintiffs claim that age was a substantial factor in Defendants' decision to deny their applications for promotion, such that their applications would have been granted had they been younger than forty years of age. (Compl.¶¶ 68, 69). Additionally, they allege that Defendants' purported acts of age discrimination were an official policy, practice or custom of the University, and that no reasonable public official could have assumed that she could treat applicants for promotion differently based on age. (Compl.¶¶ 71, 75).

***4** Contrarily, Defendants argue that Counts III and IV fall within the province of the Age Discrimination in Employment Act (ADEA) and thus cannot be enforced through § 1983 because the ADEA requires that Plaintiffs first exhaust all administrative remedies.

As Plaintiffs correctly contend, neither the Supreme Court nor the Third Circuit has addressed squarely whether an equal protection claim for age discrimination exists independent of an ADEA claim. However, within the context of federal employment, the Third Circuit has held that the ADEA preempts other jurisdictional remedies for age discrimination. *Purtill v. Harris*, 658 F.2d 134, 137 (3d Cir.1981).

This holding is consistent with those of other circuits that have found that substantive rights secured by the ADEA may not be used as the basis for an action under § 1983 brought, as is here, by non-federal employees. *Seee.g.,;Lafleur v. Texas Dep't of Health*, 126 F.3d 758, 760 (5thCir.1997) (holding that, absent facts supporting an independent § 1983 claim, the ADEA preempted a non-federal employee's age discrimination claim brought under § 1983); ***Zombro v. Baltimore City Police Dep't*, 868 F.2d 1364, 1369 (4th Cir.1989)** (holding that a police officer's action against a police department for allegedly transferring him because of his age came within the exclusive remedies of the ADEA); *seealsoMigneault v. Peck*,

158 F.3d 1131, 1140 (10th Cir.1998), *vacated on other grounds, Board of Regents of Univ. of New Mexico v. Migneault*, 528 U.S. 1110, 120 S.Ct. 928, 145 L.Ed.2d 806 (2000) (citing ***Zombro*** and adopting the Fifth Circuit's holding and rationale in *Lefleur* as Tenth Circuit law)).

As did the Tenth Circuit in *Migneault,supra,* we too find the rationales of the Fourth and Fifth Circuits to be persuasive. For example, in the Fourth Circuit case, the plaintiff filed an action pursuant to §§ 1983 and 1985, claiming that he was denied equal protection based on his age in connection with his transfer to a different departmental division. ***Zombro, 868 F.2d at 1365***. In affirming the district court's rejection of the plaintiff's claims, the Court of Appeals held that the specific and comprehensive remedies provided by the ADEA foreclosed claims of age discrimination under § 1983. *Id.* at 1366. The Fourth Circuit reasoned that permitting § 1983 age discrimination actions would allow alleged victims to circumvent the conciliatory and mitigating plan that Congress designed in the ADEA. In other words, to allow alleged victims to file age discrimination claims under § 1983 would undermine and render meaningless the "comprehensive statutory scheme to prohibit discrimination in employment on the basis of age" that ADEA provides. *Id.* Thus, the Fourth Circuit concluded that the ADEA is the exclusive remedy for claims based on age discrimination in employment. *Id.* at 1364, 1369.

Although not bound by the courts who have decided this particular issue, we find the reasoning therein persuasive and consistent with the Third Circuit's similar holding with respect to federal employees in *Purtill,supra.* Thus, we find that, at the very least, the ADEA preempts other judicial remedies for age discrimination in employment and, as such, Plaintiffs must first seek administrative remedies provided for by the ADEA and through the EEOC before filing a private action with this Court. Accordingly, we grant Defendants' motion to dismiss Counts III and IV of Plaintiffs' Complaint for failure to state a claim upon which relief can be granted.

Counts V and VI: Property Interest Deprivation

***5** Counts V and VI of Plaintiffs' Complaint allege that the University and Defendant Goldberg deprived Plaintiffs of a property interest without due process of law by refusing to promote them. To support this claim, Plaintiffs contend that the Union Contract and Promotion Guidelines created a constitutionally-protected property interest in being promoted. (Compl.¶¶ 78, 84--85). As legal conclusions, however, these contentions are not required to be viewed in a light most favorable to Plaintiffs. *Kost,* 1 F.3d at 183.

A § 1983 claim is predicated on two indispensable elements: "(1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Parratt v. Taylor,* 451 U.S. 527, 535, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). Counts V and VI lack the second component of a valid § 1983 action and must be dismissed. In other words, Plaintiffs have failed to plead that they have been deprived of a valid property or liberty interest. *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1977).

In *Roth,* a teacher employed by Wisconsin State University alleged that the school's failure to provide a hearing in connection with its decision not to rehire him denied him due process. *Id.* at 578. The Supreme Court held that the contract failed to create a property interest because it did not provide the teacher with a reasonable expectation that he would be rehired. *Id.*

The Court reasoned that to have a valid property interest, the plaintiff must "have a legitimate claim of entitlement to it." *Id.* A plaintiff's desire for, or unilateral expectation of, a property interest is not sufficient. *Id.* The Court further explained that "[p]roperty interests ... are not created by the Constitution. Rather they are created and ... defined by existing rules or understandings that stem from an independent source...." *Id.*

Here, the "independent source" that would create such a property interest would be the Kutztown University Promotion Guidelines ("Promotion Guidelines"). However, these guidelines do not present a teacher with a reasonable expectation that s/he would be promoted merely because s/he followed the correct application procedures. The Promotion Guidelines clearly indicate that the decision to promote is entirely discretionary. (Compl., Ex. 3). The discretionary nature of the promotion process eliminates any reasonable expectation that Plaintiffs would have been granted promotions pursuant to the Promotion Guidelines.

Accordingly, the Promotion Guidelines do not provide Plaintiffs with a constitutionally protected property interest.

Furthermore, Plaintiffs concede that most courts have found that there is no constitutionally protected property interest in a promotion. (See Pls.' Resp. at 4). As such, because Plaintiffs do not have a valid property interest, Defendants' Motion to Dismiss Counts V and VI for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6) is therefore granted.

IV. CONCLUSION

*6 Based on the preceding reasons, Defendants' Partial Motion to Dismiss Plaintiffs' Complaint is hereby denied on jurisdictional grounds with respect to Count I, but granted with respect to Counts III, IV, V, and VI for failure to state a claim upon which relief can be granted. Counts III, IV, V, and VI will be dismissed. An appropriate order follows.

ORDER

AND NOW, this 1st day of December, 2003, upon consideration of Defendants' Partial Motion to Dismiss Plaintiffs' Complaint, filed on September 10, 2003, and Plaintiffs' Response to Defendants' Partial Motion to Dismiss Plaintiffs' Complaint, filed on September 29, 2003, it is hereby ORDERED:

1. Defendants' Motion to Dismiss Plaintiffs' Complaint is:

i. DENIED as to Count I of Plaintiffs' gender discrimination claim.

ii. GRANTED as to Count III of Plaintiffs' age discrimination claim.

iii. GRANTED as to Count IV of Plaintiffs' age discrimination claim.

iv. GRANTED as to Count V of Plaintiffs' deprivation of property interest claim.

v. GRANTED as to Count VI of Plaintiffs' deprivation of property interest claim.

2. Counts III through VI are DISMISSED in their entirety WITH PREJUDICE.

3. As to Count I, Defendants are GRANTED leave to re-file their Motion to Dismiss, with the appropriate supporting documentation, under Rule 12(b)(1) for lack of subject matter jurisdiction.

Not Reported in F.Supp.2d, 2003 WL 22858575 (E.D.Pa.)

END OF DOCUMENT

HOnly the Westlaw citation is currently available.

United States District Court,
D. Nevada.
Glenn MARR, Plaintiff,
v.
Peter ANDERSON, Clair Mendenhall, Joseph Wulfkuhle, Robert Ashworth, Michael Dondero, Peter Cannizarro, Alan Biaggi, and Sim Com International Inc., a Florida corporation, Defendants.
No. 3:06-CV-00354-LRH-RAM.

Aug. 15, 2007.

Jeffrey A. Dickerson, Jeffrey A. Dickerson, Reno, NV, for Plaintiff.

Bryan L. Stockton, Nevada Attorney General's Office, Carson City, NV, Gregory W. Addington, U.S. Attorney's Office, Stephen S. Kent, Woodburn and Wedge, Reno, NV, for Defendants.

ORDER

LARRY R. HICKS, United States District Judge.

*1 Presently before the court is defendant Clair Mendenhall's ("Mendenhall") Motion to Dismiss (# 22 [FN1]). No opposition has been filed. Also before the court is Mendenhall's Motion to Strike (# 25). Defendants Peter Anderson, Robert Ashworth, Michael Dondero, Peter Cannizzaro, Allen Biaggi (collectively, "State Defendants"), Joseph Wulfkuhle ("Wulfkuhle"), and Sim Com International, Inc. have filed joinders (28, 32, 37) in the motion to Strike. Plaintiff, Glenn Marr ("Marr") has filed an opposition (# 26), and Mendenhall replied (# 29).

FN1. Refers to the court's docket number.

Next, Marr has filed a Motion for Order Granting Leave to Serve and File Second Amended Complaint (# 27). Mendenhall has filed an opposition (# 30). No reply was filed. Finally, before the court is Marr's motion to file a third amended complaint (# 41). Mendenhall, Wulfkuhle, and the State Defendants have filed oppositions (# 42, 43), and Marr replied (# 44).

I. Factual and Procedural Background

Marr filed this action seeking damages arising out of his termination from employment for allegedly exercising his First Amendment right to speech. During the period relevant to this action, Marr worked as a pilot for the Division of Forestry. In 2005, Marr allegedly learned that the number of pilots and the number of pilot hours were going to be reduced. According to the Amended Complaint, Marr spoke out against this action though his supervisor, Chief Pilot Pat Ross, and stated that the limitations on air operations to suppress fires was a danger to natural resources and to the lives, safety and property of citizens. On June 28, 2005, Peter Anderson, the State Forrester and Fire Warden for the State of Nevada, placed Marr on administrative leave pending an investigation regarding an allegedly false accusation that Marr asserted violence against Wulfkuhle, an employee of the United States Department of Interior, Bureau of land Management. On October 10, 2005, Marr was terminated. Marr subsequently filed this action asserting causes of action for First Amendment retaliation and defamation.

On November 20, 2006, Mendenhall filed the present motion to dismiss arguing that the amended complaint alleges no facts that would overcome Mendenhall's qualified immunity from suit. Rather than filing an opposition, Marr, on November 28, 2006, filed a Second Amended Complaint. The purpose of the Second Amended Complaint was to clarify the allegations against Mendenhall and Wulfkuhle. On December 4, 2006, Mendenhall filed a motion to strike the Second Amended Complaint arguing that Marr filed the Second Amended Complaint improperly by not first obtaining leave of this court. In response to this motion, Marr filed an opposition and a motion seeking leave to file the second amended complaint *nunc pro tunc*. On July 11, 2007, Marr filed a motion seeking leave to file a third amended complaint to add a 42 U.S.C. § 1983 claim alleging age discrimination under the Equal Protection clause.

II. Legal Standard

A. Motion to Amend

*2 Federal Rule of Civil Procedure 15(a) provides that a party may amend their complaint once "as a matter of course" before a responsive pleading is served. Fed.R.Civ.P. 15(a). After that, the "party may amend the party's pleading only be leave of court or by written consent of the adverse party." Fed.R.Civ.P. 15(a). Leave to amend shall be freely given when justice so requires. Fed.R.Civ.P. 15(a); *Jones v. Bates*, 127 F.3d 839, 847 n. 8 (9th Cir.1997); *DCD Program, Ltd. v. Leighton*, 833 F.2d 183, 185 (9th Cir.1987). "In exercising its discretion, 'a court must be guided by the underlying purpose of Rule 15--to facilitate a decision on the merits rather than on the pleadings or technicalities.' " *DCD Program*, 833 F.2d at 186 (*quoting United States v. Webb*, 655 F.2d 977, 979 (9th Cir.1981)). Rule 15's policy of favoring amendments to pleadings should be applied with "extreme liberality" insofar as the motion to amend is not sought in bad faith, does not cause the opposing party undue delay, does not cause the opposing party undue prejudice, and does not constitute an exercise in futility. *Id.* at 186.

B. Motion to Dismiss

In considering "a motion to dismiss, all well-pleaded allegations of material fact are taken as true and construed in a light most favorable to the non-moving party." *Wyler Summit P'Ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir.1998) (citation omitted). However, a court does not necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations in plaintiff's complaint. *See Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir.1994).

There is a strong presumption against dismissing an action for failure to state a claim. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir.1997) (citation omitted). "The issue is not whether a plaintiff will ultimately prevail but whether [he or she] is entitled to offer evidence in support of the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). Consequently, the court should not grant a motion to dismiss "for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also Hicks v. Small*, 69 F.3d 967, 969 (9th Cir.1995).

III. Discussion

A. The Third Amended Complaint

The court will first consider Marr's motion to file a third amended complaint. Marr's proposed third amended complaint seeks to add a cause of action for age discrimination under the Equal Protection Clause pursuant to 42 U.S.C. § 1983. The State Defendants oppose the motion arguing that amendment is futile because the majority of courts have concluded that claims of age discrimination may not be brought pursuant to 42 U.S.C. § 1983. Mendenhall and Wulfkuhle argue that the amendment should not be allowed because it does not state a claim against either defendant.

*3 42 U.S.C. § 1983 provides a statutory basis to receive a remedy for a deprivation of a right "secured by the Constitution and laws" of the United States by a person acting under color of state law. However, a Section 1983 action may be precluded when the remedial devices of a particular statute are sufficiently comprehensive so as to demonstrate congressional intent to preclude such a remedy. *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981). "In determining whether an act subsumes a section 1983 action, the court must determine whether Congress intended that act to supplant any remedy that would otherwise be available under section 1983. Such Congressional intent may be found directly in the statute creating the right or inferred when the statutory scheme is incompatible with individual enforcement under section 1983." *Alexander v. Underhill*, 416 F.Supp.2d 999, 1005 (D.Nev.2006) (citations omitted).

The Ninth Circuit has not considered whether Section 1983 is subsumed by the Age Discrimination in Employment Act ("ADEA"). However, the majority of courts to address the issue, including the Fourth, Fifth, and Tenth Circuits, have concluded that the ADEA is the exclusive federal remedy for age discrimination. *See, e.g.*, ***Zombro v. Baltimore City Police Dep't*, 868 F.2d 1364, 1369 (4th Cir.1989)**; *Migneault v. Peck*, 158 F.3d 1131, 1140 (10th Cir.1998), *abrogated on other grounds by Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Lafleur v. Texas Dept. of Health*, 126 F.3d 758, 760 (5th Cir.1997). Marr, on the other hand, cites *Mustafa v.*

State of Nebraska Dep't of Correctional Services, 196 F.Supp.2d 945 (D.Neb.2002) for the proposition that a Section 1983 action is available.

Upon careful consideration, the court agrees with the Fourth, Fifth, and Tenth Circuits that the provisions of the ADEA evidences congressional intent to foreclose actions for age discrimination under Section 1983. **"The ADEA provides a comprehensive statutory scheme to prohibit discrimination in employment on the basis of age."** ***Zombro*, 868 F.2d at 1366**. The ADEA is a "precisely drawn, detailed statute" that demonstrates a congressional intent to preclude a Section 1983 remedy. ***Id.* at 1369.** For these reasons, Marr's motion to file a third amended complaint will be denied as futile.

B. The Second Amended Complaint and Mendenhall's Motion to Dismiss

The Second Amended Complaint was filed in response to Mendenhall's Motion to Dismiss. The proposed Second Amended Complaint elaborates on the allegedly unconstitutional conduct of Mendenhall and Wulfkuhle. Mendenhall opposes the motion to file a second amended complaint arguing that the additional factual allegations fail to state a viable claim.

Mendenhall's pending Motion to Dismiss is based on the argument that the Amended complaint did not make any allegation regarding the unlawful conduct of Mendenhall. The proposed Second Amended Complaint adds specific factual allegations concerning Mendenhall. Paragraph five of the Second Amended Complaint states that Mendenhall falsely claimed that Marr had insufficient flight hours. (Second Am. Compl. (# 23) ¶ 5.) The proposed Second Amended Complaint continues by alleging that Mendenhall's statement led to Marr's termination. ***Id.***

*4 In light of the additional language of the Second Amended Complaint, Mendenhall has failed to show that Marr can prove no set of facts in support of his claim which would entitle him to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The parties have not filed points and authorities specifically addressing Marr's causes of action and whether the factual allegations of the Second Amended Complaint state a claim upon which relief can be granted. Therefore, Mendenhall's motion to dismiss will be denied, and this court will grant Marr's motion to file a Second Amended Compliant. Nevertheless, the court will give Mendenhall leave to file a motion to dismiss specifically addressing the new allegations contained in the Second Amended Complaint.

IT IS THEREFORE ORDERED that Mendenhall's Motion to Dismiss (# 22) is hereby DENIED.

IT IS FURTHER ORDERED that Mendenhall's Motion to Strike (# 25) is hereby DENIED.

IT IS FURTHER ORDERED that Marr's Motion for Order Granting Leave to Serve and File Second Amended Complaint (# 27) is hereby GRANTED.

IT IS FURTHER ORDERED that Marr's Motion to File a Third Amended Complaint (# 41) is hereby DENIED.

IT IS SO ORDERED.

Slip Copy, 2007 WL 2363116 (D.Nev.)

END OF DOCUMENT

EXHIBIT E

Jackson v. **Casey**
N.D.Ill.,2007.
Only the Westlaw citation is currently available.
United States District Court,N.D. Illinois,Eastern Division.
Darryl W. JACKSON, et al., Plaintiffs,
v.
Michael J. CASEY, et al., Defendants.
No. 07 C 5348.

Sept. 25, 2007.

Darryl W. Jackson, Bloomingdale, IL, pro se.

MEMORANDUM ORDER

MILTON I. SHADUR, Senior United States District Judge.

***1** Darryl Jackson ("Jackson") has just filed a thick Complaint and attached exhibits [FN1] targeting three defendants: Michael Casey of the Illinois Department of Children and Family Services, Dr. Eva Wyrwa of Glen Ellyn Clinic Pediatrics Group and Dr. Jayshree Vajaria of Central DuPage Hospital. As always, this Court's first obligation is to determine the existence or nonexistence of subject matter jurisdiction (see, e.g., *Cook v. Winfrey*, 141 F.3d 322, 325 (7th Cir.1998)), an obligation that compels this Court to act sua sponte if that inquiry produces a negative answer (see, e.g., *Wernsing v. Thompson*, 423 F.3d 732, 743 (7th Cir.2005)).

FN1. More precisely, the Complaint comprises 19 short paragraphs occupying just four pages, with the bulk of Jackson's submission consisting of extensive exhibits that set out the history of medical treatment of 15-month-old Juliet Nykai Jackson, whom Jackson lists as an additional plaintiff.

What Jackson complains about is the assertedly improper medical treatment of his infant daughter, a subject as to which this Court of course expresses no opinion (for purposes of evaluating Jackson's Complaint, his allegations must be accepted as true without this Court's making any actual findings in that respect). But the only basis on which Jackson seeks to enter the federal courthouse door is via several skeletal and purely conclusory characterizations: an unsupported reference to "Racial Targeting" and "Race Discrimination" in Complaint ¶ 2, a similarly unsupported reference to "Racial Bias" in Complaint ¶ 6 and two similarly unsupported uses of the terms "Maliciously & Racially" in Complaint ¶¶ 9 and 17.

Just this last Term the United States Supreme Court redefined the standard for testing federal complaints in *Bell Atlantic Corp. v. Twombly*, ---U.S. ----, ----, ---- n. 14, 127 S.Ct. 1955, 1965, 1973 n. 14, 167 L.Ed.2d 929 (2007) by imposing a requirement of "plausibility" on a plaintiff's allegations in place of the more generous standard announced a half century ago in *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). This Court's search of the thick Complaint exhibits reveals that Jackson's conclusory playing of the race card as described in the preceding paragraph is totally speculative, rather than plausible, so that he has clearly failed the *Bell Atlantic* test.

Too often nonlawyer litigants mistake the federal courts as a place where every wrong can be righted. Not so-instead, federal courts' subject matter jurisdiction is limited to the matters that Congress has specifically conferred upon them. It is possible that Jackson may have legitimate complaints about the treatment to which he and his daughter have been subjected (again matters on which this Court expresses no opinion), but if so he must advance those grievances in a state court of competent jurisdiction. Accordingly both the Complaint and this action are dismissed sua sponte, without prejudice to Jackson's possible pursuit of his claims elsewhere.

N.D.Ill.,2007.
Jackson v. Casey
Slip Copy, 2007 WL 2792150 (N.D.Ill.)

END OF DOCUMENT