

4 PJI 10 | AGE DISCRIMINATION IN EMPLOYMENT ACT - 29 USC §621-634

In this case, [Plaintiff] makes a claim under the federal law that prohibits employers from discriminating against an employee in the terms and conditions of employment because of the employee's age. The federal law applies to employees who are at least 40 years old.

Specifically, [Plaintiff] claims that [Defendant] [describe adverse employment action] because of [his/her] age.

[Defendant] denies [Plaintiff]'s claim and asserts that [describe the defendant's defense].

To succeed on [his/her] claim against [Defendant], [Plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Plaintiff] was [Defendant]'s employee;

Second: [Plaintiff] was at least 40 years old at the time of [describe adverse employment action];

Third: [Defendant] [describe adverse employment action]; and

Fourth: [Defendant] took that action because of [Plaintiff]'s age.

[In the verdict form that I will explain in a moment, you will be asked to answer questions about these factual issues.]

If you find that [Plaintiff] [was [Defendant]'s employee,] was at least 40 years old, and that [Defendant] [describe adverse employment action], you must decide whether [Defendant] took that action because of [Plaintiff]'s age.

To determine that [Defendant] [describe adverse employment action] because of [Plaintiff]'s age, you must decide that [Defendant] would not have [describe adverse employment action] if [Plaintiff] had been younger but everything else had been the same.

[Defendant] denies that [he/she/it] [describe adverse employment action] because of [Plaintiff]'s age and claims that it made the decision for [other reasons/another reason].

An employer may not discriminate against an employee because of age, but an employer may [describe adverse employment action] an employee for any other reason, good or bad, fair or unfair. If you believe [Defendant]'s reason[s] for [his/her/its] decision to [describe adverse employment action], and you find that



[Defendant]'s decision was not because of [Plaintiff]'s age, you must not second guess that decision, and you must not substitute your own judgment for [Defendant]'s judgment - even if you do not agree with it.

[Pretext (optional, see annotations): As I have explained, [Plaintiff] has the burden to prove that [Defendant]'s decision to [describe adverse employment action] was because of [Plaintiff]'s age. I have explained to you that evidence can be direct or circumstantial. To decide whether [Defendant]'s decision [describe adverse employment action] was because of [Plaintiff]'s age, you may consider the circumstances of [Defendant]'s decision. For example, you may consider whether you believe the reason[s] [Defendant] gave for the decision. If you do not believe the reason[s] [he/she/it] gave for the decision, you may consider whether the reason[s] [was/were] so unbelievable that [it was/they were] a cover-up to hide the true discriminatory reasons for the decision.]

[Including BFOQ affirmative defense: If you find by a preponderance of the evidence that [Defendant] [describe adverse employment action] because of [Plaintiff]'s age, you must decide whether [Defendant] has established [his/her/its] affirmative defense.

To establish its affirmative defense, [Defendant] must prove by a preponderance of the evidence that [he/she/it] [describe adverse employment action] because age is a "bona-fide occupational qualification." It is not unlawful for an employer to [describe adverse employment action] an employee based on a bona-fide occupational qualification.

To establish that age is a "bona-fide occupational qualification," [Defendant] must prove both of the following elements by a preponderance of the evidence:

First: The age qualification is reasonably necessary for [Plaintiff] to successfully perform [his/her] job; and

Second: [Defendant] had reasonable cause to believe that all, or substantially all, persons over the age qualification would be unable to perform the job safely and efficiently.

If you find that [Defendant] has proved that age is a bona-fide occupational qualification, you must decide whether [Defendant] has proved by a preponderance of the evidence that [he/she/it] [describe adverse employment action] because of the bona-fide occupational qualification.



If you find that [Defendant] [describe adverse employment action] because of the bona-fide occupational qualification, you have found that [he/she/it] established [his/her/its] affirmative defense, and you will not decide the issue of [Plaintiff]'s damages. But if you find that [Defendant] has not established [his/her/its] affirmative defense, you must decide the damages issue.]

[Including seniority system affirmative defense: If you find by a preponderance of the evidence that [Defendant] [describe adverse employment action] because of [Plaintiff]'s age, you must decide whether [Defendant] has established [his/her/its] affirmative defense. An affirmative defense allows a party to limit [his/her/its] liability.

To establish [his/her/its] affirmative defense, [Defendant] must prove by a preponderance of the evidence that [he/she/it] [describe adverse employment action] because [he/she/it] was applying the terms of a bona-fide seniority system. It is not unlawful for an employer to [describe adverse employment action] based on a bona-fide seniority system.

To establish that [he/she/it] was applying the terms of a bona-fide seniority system, [Defendant] must prove both of the following elements by a preponderance of the evidence:

First: [Defendant]'s seniority system used the employees' length of service - not the employees' age - as the primary basis for giving available job opportunities to [his/her/its] employees; and

Second: [Defendant]'s decision to [describe adverse employment action] was consistent with its seniority system.

If you find that [Defendant] established both these elements by a preponderance of the evidence, you have found that [he/she/it] established [his/her/its] affirmative defense, and you will not decide the issue of [Plaintiff] compensatory damages. But if you find that [Defendant] has not established [his/her/its] affirmative defense, you must decide the damages issue.]

[Without Affirmative Defense: If you find in [Plaintiff]'s favor for each fact [he/she] must prove, you must consider [Plaintiff]'s compensatory damages.]

When considering the issue of [Plaintiff]'s compensatory damages, you should determine what amount, if any, has been proven by



[Plaintiff] by a preponderance of the evidence as full, just and reasonable compensation for all of [Plaintiff]'s damages as a result of [describe adverse employment action], no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize [Defendant]. Also, compensatory damages must not be based on speculation or guesswork.

You should consider the following element of damage, to the extent you find that [Plaintiff] has proved it by a preponderance of the evidence, and no others: net lost wages and benefits from the date of [describe adverse employment action] to the date of your verdict.

[Mitigation of Damages: You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages. For purposes of this case, the duty to mitigate damages requires [Plaintiff] to be reasonably diligent in seeking substantially equivalent employment to the position [he] [she] held with [Defendant]. To prove that [Plaintiff] failed to mitigate damages, [Defendant] must prove by a preponderance of the evidence that: (1) work comparable to the position [Plaintiff] held with [Defendant] was available, and (2) [Plaintiff] did not make reasonably diligent efforts to obtain it. If, however, [Defendant] shows that [Plaintiff] did not make reasonable efforts to obtain any work, then [Defendant] does not have to prove that comparable work was available.

If you find that [Defendant] proved by a preponderance of the evidence that [Plaintiff] failed to mitigate damages, then you should reduce the amount of [Plaintiff]'s damages by the amount that could have been reasonably realized if [Plaintiff] had taken advantage of an opportunity for substantially equivalent employment.]

[Willful Violation: [Plaintiff] also claims that [Defendant] willfully violated the law. You will only consider this issue if you find for [Plaintiff] and award [him/her] compensatory damages.

If [Defendant] knew that [his/her/its] [describe adverse employment action] violated the law, or acted in reckless disregard of that fact, then [his/her/its] conduct was willful. If [Defendant] did not know, or knew only that the law was potentially applicable, and did not act in reckless disregard about whether the law prohibited its conduct, [his/her/its] conduct was not willful.]



SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

[1. That [Plaintiff] was [Defendant]'s employee?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.]

2. That [Plaintiff] was at least 40 years old at the time of the [describe adverse employment action]?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

3. That [Defendant] [describe adverse employment action]?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

4. That [Defendant] took that action because of [Plaintiff]'s age?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

[5. That [age is a bona-fide occupational qualification] [Defendant]'s seniority system used employees' length of



service and not the age of employees as the primary basis for giving available job opportunities to the employees]?

Answer Yes or No _____

If your answer is "No," go to Question No. 7. If your answer is "Yes," go to the next question.

6. That [[Defendant] took the action you found it took because of the bona-fide occupational age qualification/[Defendant]'s decision to take the action you found it took was consistent with [Defendant]'s seniority system]?

Answer Yes or No _____

If your answer is "Yes," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "No," go to the next question.

7. That [Plaintiff] should be awarded damages?

Answer Yes or No _____

If your answer is "Yes," in what amount?
\$ _____

[8. That [Defendant] willfully violated the law?

Answer Yes or No _____]

SO SAY WE ALL.

DATE: _____

Foreperson's Signature

((Rev. 03/2022) | *Judicial Council of the United States Eleventh Judicial Circuit*)

Annotations and Comments



I. Cause of Action

The Age Discrimination in Employment Act, 29 U.S.C. §621 et seq. (“ADEA”), prohibits employment discrimination on the basis of age. Pattern Instruction 4.10 is meant to be used for ADEA disparate treatment claims based on any adverse employment action, including but not limited to failure to hire, failure to promote, discharge, reduction in force, and elimination of position.

Pattern Instruction 4.10 is not intended to be used for ADEA retaliation claims. Pattern Instruction 4.22, *infra*, may be adapted to address such claims. An instruction on ADEA retaliation should incorporate the damages instructions of Pattern Instruction 4.10.

The Eleventh Circuit has assumed without deciding that the ADEA provides a cause of action for hostile work environment. See *E.E.O.C. v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1249 & n.7 (11th Cir. 1997). Pattern Instruction 4.10 is not intended to be used for hostile work environment claims that do not involve a tangible employment action; Pattern Instructions 4.6 and 4.7, *supra*, may be adapted to address claims for an age-based hostile work environment.

II. Elements and Defenses

A. “Employee”

To prevail on an ADEA claim (other than a failure-to-hire claim), the plaintiff must prove that he was an employee of the defendant. In a failure-to-hire case, the pattern charge and interrogatories should be modified so that the jury does not have to find that the plaintiff was an employee of the defendant. If there is a dispute about whether the plaintiff was an employee of the defendant, this issue should be determined as a threshold matter and should be inserted as the first fact to be considered by the jury. For example, the ADEA does not provide a cause of action for discrimination against an independent contractor. *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1495 n.13 (11th Cir. 1993). If there is a genuine fact dispute regarding the plaintiff’s status as an employee or independent contractor, that issue should be determined by the jury. See *Garcia v. Copenhagen, Bell & Assocs., M.D.’s*, 104 F.3d 1256, 1266-67 (11th Cir. 1997). Please refer to Pattern Instruction 4.24, *infra*, for a pattern instruction regarding the independent contractor-employee distinction. Pattern Instruction 4.25, *infra*, addresses the “joint employer” issue, and Pattern Instructions 4.26 and 4.27, *infra*, address situations where one company may be considered the alter ego of an individual or corporation.

B. Causation

The ADEA prohibits discrimination “because of [an] individual’s age,” 29 U.S.C. §623(a)(1), and the prohibition is “limited to individuals who are at least 40 years of age,” *id.* §631(a).¹¹



In Gross v. FBL Financial Services, Inc., 557 U.S. 167 (2009), the Supreme Court held that a plaintiff asserting an ADEA disparate treatment claim must prove that his or her age was the but-for cause, not simply a motivating factor, of the adverse employment action and that the burden of persuasion does not shift to the employer to show that it would have taken the same action regardless of the plaintiff's age. Id. at 174-78. As a result, the "same decision" defense (also known as the "mixed motive" defense) is no longer viable in ADEA cases. See Mora v. Jackson Mem'l Found., Inc., 597 F.3d 1201, 1203-04 (11th Cir. 2010) (per curiam). Pattern Instruction 4.10 incorporates this causation standard and does not contain a mixed motive instruction.

Pattern Instruction 4.10 includes in brackets an optional charge discussing the inference of pretext. The basis for this charge is explained in further detail in the annotations following Pattern Instruction 4.5, supra. See also Mitchell v. City of Lafayette, 504 Fed. App'x 867, 869-70 (11th Cir. 2013) (per curiam) (explaining that, even after *Gross*, ADEA claims are analyzed under the McDonnell Douglas framework); Sims v. MVM, Inc., 704 F.3d 1327, 1333-34 (11th Cir. 2013) (evaluating pretext in ADEA context).

Pattern Instruction 4.10 does not contain an optional cat's paw charge based on Staub v. Proctor Hospital, 131 S. Ct. 1186 (2011). The Supreme Court in Staub applied the cat's paw theory to a claim under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. §4301, et seq., which requires proof that protected military status "is a motivating factor in the employer's action." Staub, 131 S. Ct. at 1190-91 (quoting 38 U.S.C. §4311(a)). A cat's paw charge may be given in an appropriate case, and the cat's paw instruction in Pattern Instruction 4.5, supra, may be used as a starting point, though the court should modify it because of the differences in causation standards between Title VII/USERRA ("motivating factor") and the ADEA ("but for"). A stricter causation standard applies to cat's paw claims under a "but for" statute like the ADEA. Sims v. MVM, Inc., 704 F.3d 1327, 1335-37 (11th Cir. 2013) (evaluating cat's paw argument in ADEA context and finding that a different standard applies to claims under the ADEA).

III. Remedies

Pattern Instruction 4.10 contains an instruction on willful violations, which is to be used in cases where the plaintiff alleges a willful violation of the ADEA. The willful damages instruction is adapted from Formby v. Farmers and Merchants Bank, 904 F.2d 627, 632 (11th Cir. 1990) (per curiam). If the jury finds that the defendant acted willfully, then the court should award as damages the amount calculated by the jury plus an equal amount as liquidated damages. 29 U.S.C. §626(b); accord Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322, 1340 (11th Cir. 1999).



Front pay should not be included in liquidated damages awards because “while liquidated damages are intended to be punitive in nature, the express terms of the ADEA limit the calculation of liquidated damages to double the amount of lost pecuniary wages. Front pay, however, is equitable rather than compensatory relief.” Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322, 1340 (11th Cir. 1999) (internal citations omitted). Therefore, liquidated damages are limited to double the amount of full back pay and lost fringe benefits. *Id.*

A court may award both prejudgment interest and liquidated damages in an ADEA case because the legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature. See Lindsey v. Am. Cast Iron Pipe Co., 810 F.2d 1094, 1102 (11th Cir. 1987) (citing Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 125 (1985)). “ADEA liquidated damages awards punish and deter violators, while FLSA liquidated damages merely compensate for damages that would be difficult to calculate.” *Id.*

“[N]either punitive damages nor compensatory damages for pain and suffering are recoverable under the ADEA.” Goldstein v. Manhattan Indus., Inc., 758 F.2d 1435, 1446 (11th Cir. 1985).

IV. Disparate Impact Claims

The ADEA provides a right to jury trial for all claims covered by the Act, including disparate impact claims. 29 U.S.C. §626(c)(2). In Smith v. City of Jackson, Miss., 544 U.S. 228, 240 (2005), the Supreme Court held that the ADEA authorizes recovery on disparate impact claims in accordance with Griggs v. Duke Power Co., 401 U.S. 424 (1971), which announced a disparate impact theory of recovery in Title VII cases. Pattern Instruction 4.10 does not include a disparate impact charge.

Should the court need to craft a disparate impact instruction, the following points may be useful. The disparate impact ground of recovery is narrower in the ADEA context than in the Title VII context. First, the ADEA permits a disparate impact claim “where the differentiation is based on reasonable factors other than age.” 29 U.S.C. §623(f)(1). Second, the 1991 amendment to Title VII modified the Supreme Court’s holding in Ward’s Cove Packing v. Atonio, 490 U.S. 642 (1989), in which the Court narrowly construed the employer’s exposure to disparate-impact liability under Title VII. Because the 1991 amendment to Title VII did not affect the ADEA, it follows that the standards of Ward’s Cove remain applicable to disparate impact actions under the ADEA. Smith, 544 U.S. at 240. Under Ward’s Cove, “it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.” Smith, 544 U.S. at 241 (emphasis omitted) (internal quotation marks omitted).

In an ADEA disparate-impact case, the employer may assert the affirmative defense that its employment decision was made on the basis of reasonable factors other than age, and

the employer bears the burdens of production and persuasion on this defense. Meacham v. Knolls Atomic Power Lab., 554 U.S. 84, 93-95 (2008).

V. Miscellaneous Issues

Trial by jury is available in ADEA disparate treatment cases. Lorillard v. Pons, 434 U.S. 575, 585 (1978).

The ADEA does not abrogate the states' sovereign immunity. Kimel v. Fla. Bd. Of Regents, 528 U.S. 62, 92 (2000).

A court may award attorney's fees to a prevailing ADEA defendant only upon finding that the plaintiff litigated in bad faith. Turlington v. Atlanta Gas Light Co., 135 F.3d 1428, 1437 (11th Cir. 1998).

