Civil Rights Actions

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CIVIL RIGHTS ACTIONS

VOLUME 5

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MATTHEW BENDER

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¶ 22.01 Legislative History and Purpose.

29 U.S.C. § 621

Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) 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.

The prohibitions contained in the Age Discrimination in Employment Act of 1967 are analogous to those contained in Title VII of the Civil Rights Act of 1964,[1] addressed more generally to discrimination in employment. Scholars have contended that the problems related to discrimination on the basis of age are not analogous to those addressed by other anti-discrimination legislation.[2] In *EEOC v. Wyoming*,[3] the Supreme Court confirmed that the ADEA was a valid exercise of Congress' power under the Commerce Clause.

The Act, however, suffered a significant blow in *Kimel v. Florida Board of Regents*[4]

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[1] 42 U.S.C. §§ 2000e *et seq.* (1994).

[2] *See* Issacharoff & Harris, *Is Age Discrimination Really Age Discrimination? The ADEA Unnatural Solution*, 72 N.Y.U. L. Rev. 780 (1997); Reaves, *One of These Things Is Not Like the Other: Analogizing Ageism to Racism in Employment Discrimination Cases*, 38 U. Rich. L. Rev. 839 (2004).

[3] 460 U.S. 226, 103 S. Ct. 1054, 75 L. Ed. 2d 18 (1983).

[4] 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000).

in which the Court held that the ADEA did not validly abrogate the sovereign immunity afforded to the states by the Eleventh Amendment, and, therefore, its protection did not extend to state employees. Justice O'Connor, joined by four Justices, observed that the Court had never treated age as a suspect classification, and, therefore, legislative classifications based on age need only be rationally related to a legitimate state interest to survive attack under the Equal Protection Clause. Hence, she reasoned, "[o]ur Constitution permits States to draw lines on the basis of age when they have a rational basis for doing so at a class-based level, even if it 'is probably not true' that those reasons are valid in the majority of cases."[5] It followed that the ADEA was not "appropriate legislation" under section five of the Fourteenth Amendment because its requirements were "disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act."[6] She concluded that the "extension of the Act to the States was an unwarranted response to a perhaps inconsequential problem"[7] because "Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age."[8] Finally, Justice O'Connor noted that state employees would continue to be protected by state age discrimination statutes "in almost every State of the Union."[9]

Being remedial in nature, the Act is to be liberally construed.[10] By like reasoning, exceptions to the Act are narrowly construed.[11] Standards applicable in Title VII cases[12] may also be pertinent to claims under this Act.[13] But a definition of retirement

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[5] 120 S. Ct. at 647.

[6] *Id.* at 645. "The Act, through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection rational basis standard." *Id.* at 647.

[7] 120 S. Ct. at 648-49.

[8] *Id.* at 649.

[9] *Id.* at 650.

[10] Moses v. Falstaff Brewing Corp., 525 F.2d 92 (8th Cir. 1975); Dartt v. Shell Oil Co., 539 F.2d 1256 (10th Cir. 1976), *aff'd*, 434 U.S. 99 (1977); Vazquez v. Eastern Air Lines, Inc., 579 F.2d 107, 109 (1st Cir. 1978) ("The insidious effects of being barred at the door of the employment market were recognized as undermining one's self-esteem in a work-oriented society. . . . In line with the broad humanitarian goals of the statute, liberal construction should be favored."); Holliday v. Ketchum, MacLeod & Grove, Inc., 584 F.2d 1221 (3d Cir. 1978); Sartin v. City of Columbus Util. Comm'n, 421 F. Supp. 393 (N.D. Miss. 1976), *aff'd*, 573 F.2d 84 (5th Cir. 1978); Hall v. United States, 436 F. Supp. 505 (D. Minn. 1977); Jackson v. Alcan Sheet & Plate, 462 F. Supp. 82 (N.D.N.Y. 1978); Horne v. New England Patriots Football Club, Inc., 489 F. Supp. 465 (D. Mass. 1980); Gazder v. Air India, 574 F. Supp. 134 (S.D.N.Y. 1983); Bassett v. Sterling Drug, Inc., 578 F. Supp. 1244 (S.D. Ohio 1984), *appeal dismissed*, 770 F.2d 165 (6th Cir. 1985); Crutchfield v. Pulaski County Special Sch. Dist., 647 F. Supp. 884 (E.D. Ark. 1986).

[11] Sexton v. Beatrice Foods Co., 630 F.2d 478 (7th Cir. 1980); Orzel v. City of Wauwatosa Fire Dep't, 697 F.2d 743 (7th Cir.), *cert. denied*, 464 U.S. 992 (1983); Marshall v. Eastern Airlines, 474 F. Supp. 364 (S.D. Fla. 1979), *aff'd sub nom.* EEOC v. Eastern Airlines, 645 F.2d 69 (5th Cir. 1981), *cert. denied*, 454 U.S. 818 (1981); EEOC v. Pennsylvania Liquor Control Bd., 565 F. Supp. 520 (E.D. Pa. 1983).

[12] *See supra* Chapter 21.

[13] Douglas v. Anderson, 656 F.2d 528 (9th Cir. 1981); Kauffman v. Sidereal Corp., 695 F.2d 343 (9th Cir. 1982); Murphy v. American Motors Sales Corp., 410 F. Supp. 1403 (N.D. Ga. 1976), *modified*, 570

plans for purposes of the Internal Revenue Code is not persuasive in the interpretation of this Act given the disparate purposes of the statutes.[14] The ADEA is not preemptive insofar as states retain the power to enact broader protection.[15] A 1984 amendment to the Act[16] provides that an employee of a foreign corporation controlled by a United States employer is protected.

¶ 22.02 Employer Defined.

Consistent with the remedial purposes of the ADEA, disputes concerning the inclusion of an entity within the concept of "employer" have usually been resolved in favor of the employee.[1] The requirement of 29 U.S.C. § 630 that the employer be "engaged in an industry affecting commerce" was taken from Title VII, wherein "industry affecting commerce" is defined as

> any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [citation omitted], and further includes any governmental industry, business, or activity.[2]

As used in labor laws, the term has been interpreted to vest in the National Labor Relations Board "the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause."[3] In *Martin v. United Way of Erie County*,[4] the Court of Appeals for the Third Circuit rejected the contention that the connections with interstate commerce of United Way were so minimal as to exclude it from the reach of the Act. In addition to the fact that one percent of its revenues went to its parent organization in another state, the court noted "evidence of receipts from the federal government and corporations engaged in interstate commerce and disbursements to

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F.2d 1226 (5th Cir. 1978); Quinn v. Bowmar Publ'g Co., 445 F. Supp. 780 (D. Md. 1978).

[14] Brennan v. Taft Broad. Co., 500 F.2d 212 (5th Cir. 1974).

[15] Simpson v. Alaska State Comm'n for Human Rights, 608 F.2d 1171 (9th Cir. 1979).

But cf. Nance v. Maxwell Fed. Credit Union, 186 F.3d 1338, 1342 (11th Cir. 1999) ("[T]he enforcement of rights secured through the ADEA must be pursued in the manner specified in the ADEA, not through alternative state-law mechanisms" such as conspiracy claims.).

[16] 29 U.S.C.A. § 623(h) (1994).

See also Comment, *Protecting Older Americans Working for Foreign Employers from Age Discrimination in Employment*, 65 Ford. L. Rev. 2535 (1997); Note, Mahoney v. RFE/RL, Inc.: *The "Foreign Laws" Exception to the ADEA—When a Collective Bargaining Agreement Equals a Law*, 19 W. New Eng. L. Rev. 455 (1997).

[1] Marshall v. West Essex General Hosp., 575 F.2d 1079 (3d Cir. 1978) (hospital); Goodman v. Board of Trustees of Community College Dist. 524, 498 F. Supp. 1329 (N.D. Ill. 1980) (college president); Gazer v. Air India, 574 F. Supp. 134 (S.D.N.Y. 1983) (instrumentality of foreign government); Lettich v. Kenway, 590 F. Supp. 1225 (D. Mass. 1984) (general partners of law firm).

[2] 42 U.S.C. § 2000e(h).

[3] NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224, 226, 83 S. Ct. 312, 9 L. Ed. 2d 279 (1963).

[4] 829 F.2d 445 (3d Cir. 1987).

agencies that are affiliates of organizations engaging in activities outside" of the state.[5]

As between a parent company and its subsidiary, there is a presumption that the subsidiary is the employer.[6] Courts are disinclined to focus upon sub-units of an employer in determining whether the minimum number of employees is satisfied.[7] But the minimum number of employees must be employed simultaneously.[8] The twenty employee minimum requirement as been interpreted to apply to public as well as private employers.[9] A majority of courts have held that there is no individual liability under the ADEA.[10]

Individuals properly classified as business partners are not employees,[11] nor are directors of a corporation.[12] A trade association with fewer than the required minimum number of employees cannot be brought within the ambit of the Act by conglomerating the employees of each of its members.[13] Unpaid trustees and volunteer workers of a performing arts center are no employees for purposes of the Act.[14]

A worker appropriately characterized as an "independent contractor" will not be protected by the ADEA. The distinction between an employee and an independent contractor was addressed by the Court of Appeals for the Third Circuit in *EEOC v.*

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[5] *Id.* at 450.

[6] Johnson v. Flowers Indus., Inc., 814 F.2d 978, 981 (4th Cir. 1987) ("In an employment context, the parent company can be the employer of a subsidiary's workers if it exercises excessive control in one of two ways. First, the parent could control the employment practices and decisions of the subsidiary . . . . Second, the parent might so dominate the subsidiary's operations that the parent and the subsidiary are one entity and thus one employer.").

Cf. New York v. Holiday Inns, 656 F. Supp. 675 (W.D.N.Y. 1984).

[7] Brennan v. Ace Hardware Corp., 362 F. Supp. 1156 (D. Neb. 1973), *aff'd*, 495 F.2d 368 (8th Cir. 1974); Woodford v. Kinney Shoe Corp., 369 F. Supp. 911 (N.D. Ga. 1971) (denial of summary judgment); Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715 (E.D.N.Y. 1978), *aff'd in part, rev'd in part*, 608 F.2d 1369 (2d Cir. 1979); Cohen v. S.U.P.A. Inc., 814 F. Supp. 251 (N.D.N.Y. 1993).

[8] Zimmerman v. North Am. Signal Co., 704 F.2d 347, 354 (7th Cir. 1983) ("[T]he district court was correct in declining to count hourly paid workers as employees for days when they were neither working nor on paid leave."); McGraw v. Warren County Oil Co., 707 F.2d 990 (8th Cir. 1983).

[9] Kelly v. Wauconda Park Dist., 801 F.2d 269 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1592 (1987).

[10] *See generally*, Comment, *Individual Supervisor Liability under Title VII and the ADEA*, 45 Drake L. Rev. 999 (1997) (collecting cases).

[11] Hyland v. New Haven Radiology Assocs., 794 F.2d 793 (2d Cir. 1986); Wheeler v. Main Hurdman, 825 F.2d 257 (10th Cir.), *cert. denied*, 484 U.S. 986 (1987) (*discussed in* 25 Hous. L. Rev. 1179 (1988)).

And see Comment, *Gray Power in the Gray Area between Employer and Employee: The Applicability of the ADEA to Members of Limited Liability Companies*, 51 Vand. L. Rev. 429 (1998).

[12] Zimmerman v. North Am. Signal Co., 704 F.2d 347 (7th Cir. 1983); McGraw v. Warren County Oil Co., 707 F.2d 990 (8th Cir. 1983).

[13] York v. Tennessee Crushed Stone Ass'n, 684 F2d 360 (6th Cir. 1982) (unless the members are engaged in an "integrated enterprise).

[14] Schoenbaum v. Orange County Center for Performing Arts, Inc., 677 F. Supp.1036 (C.D. Cal. 1990).

Zippo Manufacturing Co.[15] The plaintiff had been terminated as a district manager by the defendant upon reaching age sixty-five. The defendant had divided the country into twenty-four sales districts and engaged managers in each to sell its products to wholesalers and retailers. The agreements could be terminated by either party on thirty days' notice. District managers were compensated solely by commissions on sales and bonuses based on sales.[16] The defendant did not withhold income tax from commission payments, nor did it pay any social security tax for district managers.[17] Finally, the defendant exercised virtually no control over or support for the district managers.[18] The court concluded that the appropriate test to apply was that used by courts in Title VII cases, which examined "the economic realities of the relationship viewed in light of the common law principles of agency and the right of the employer to control the employee."[19] Under such a standard, the plaintiff was not an employee for purposes of protection under the Act.[20]

In *Coleman v. New Orleans and Baton Rouge Steamship Pilots Association*,[21] the Court of Appeals for the Fifth Circuit ruled that an association and its board of commissioners, which served "as sort of a clearinghouse and dispatching service for the river pilots,"[22] did not qualify as an employer for purposes of the ADEA. The court found the question controlled by the Supreme Court decision in *Clackamas Gastroenterology Associates, P.C. v. Wells*,[23] a case concerning the application of the Americans with Disabilities Act. While acknowledging that it was "not controllin-g–even though it may constitute a 'body of experience and informed judgment' to

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[15] 713 F.2d 32 (3d Cir. 1983) (*discussed in* 64 B.U. L. Rev. 1145 (1984)).

[16] "Zippo neither provides a retirement plan, health insurance, life insurance, profit sharing, nor other benefits such as sick leave or paid vactions." *Id.* at 33.

[17] *See also* Dake v. Mutual of Omaha Ins. Co., 600 F. Supp. 63 (N.D. Ohio 1984).

[18] "Retaining only experienced salespersons, Zippo has no need to train or to direct DMs about how to sell its products. DMs set their own working hours and days as well as vacation time without consultation with or accountability to Zippo. Moreover, DMs may freely operate under the business form of their choice whether it be a sole proprietorship, as most DMs are, a partnership or a corporation. They may hire employees without regard to Zippo. DMs provide and finance their own work facilities, such as office space, pffoce furniture, secretarial assistance, telephone and automobile." 713 F.2d at 33,

[19] Cobb v. Sun Papers, Inc., 673 F.2d 337, 341 (11th Cir.), *reh'g denied*, 679 F.2d 253 (11th Cir.), *cert. denied*, 459 U.S. 874 (1982).

[20] *See also* Garrett v. Phillips Mills, Inc., 721 F.2d 979 (4th Cir. 1983); Frankel v. Bally, Inc., 987 F.2d 86 (2d Cir. 1993); Cox v. Master Lock Co., 815 F. Supp. 844 (E.D. Pa.), *aff'd*, 14 F.3d 46 (3d Cir. 1993); Strange v. Nationwide Mut. Ins. Co., 867 F. Supp. 1209 (E.D. Pa. 1994)

In *Hickey v. Arkla Industries, Inc.*, 699 F.2d 748 (5th Cir. 1983), the court applied a more liberal "economic realities" test which relied on the extent of the employee's dependence for his livelihood upon the employer to determine employee status. The court declined to determine whether this test or the test used in Title VII cases should be used to determine employee status in ADEA cases. However, even under the more liberal standard applied by the court, the plaintiff was not an employee protected under the ADEA.

[21] 437 F.2d 471 (5th Cir.), *cert. denied*, 548 U.S. 905 (2006).

[22] *Id.* at 473.

[23] 538 U.S. 440, 123 S. Ct. 1673, 155 L. Ed. 2d 615 (2003).

which we may resort for guidance,"[24] the Court cited the EEOC Compliance Manual identifying six factors relevant to the inquiry whether a share holder-director is an employee:

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work
- Whether and, if so, to what extent the organization supervises the individual's work
- Whether the individual reports to someone higher in the organization
- Whether, and if so, to what extent the individual is able to influence the organization
- Whether the parties intended that the individual be an employee, as express in written agreements or contracts
- Whether the individual shares in the profits, losses, and liabilities of the organization.[25]

Applying this test, the *Coleman* court concluded that the defendants were not the employer of the plaintiff. First, although the defendants had the power to admit pilots into their membership, it was the Governor who granted permissions to work in the profession, and the association could not decommission a pilot. Moreover, the employment relationship was between the pilots and the vessel that engaged them, the latter having the power to refuse the services of a particular pilot. As to the second and third *Clackamas* factors, the associations did not supervise the work of the pilots. Fourth, the pilots constituted the entire body of shareholders of their respective associations and exercised equal potential influence on the management of the group, which again counseled against labeling them as employees. So, too, the fifth factor weighed against the plaintiff, because the association charters unequivocally provided that no employment relationship was intended. Finally, the pilots shared in the profits and losses of the association by receiving a share of the fees collected.[26] The court appeared less than satisfied with this outcome[27] but was resigned to the result so long as the Supreme Court offered nothing other than *Clackamas* as the standard.

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[24] *Id.* at 449 n.9.

[25] EEOC Compliance Manual § 605:0009.

[26] Coleman, *supra*, 437 F.3d at 481.

[27] "It is certainly true that the associations, along with the NOBRA and Crescent Boards and the governor, play an almost monopolistic gate-keeper role in determining who will ultimately work as a river pilot' it is also true that the associations (through their members) set rules and regulations directly affecting the daily work of each pilot." *Id.* at 482.

¶ 22.03 Parties Protected.

29 U.S.C. § 631

Age Limits

(a) Individuals at least 40 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

(b) Employees or applicants for employment in Federal Government.

In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

(c) Bona fide executives or high policymakers

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Equal Employment Opportunity Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

The Age Discrimination in Employment Act affords no protection to individuals under forty years of age.[1] An individual who will reach the age of forty during the pendency of the action is protected.[2]

Prior to the decision of the Supreme Court in *General Dynamics Land Systems, Inc.*

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[1] *See* Kodish v. United Airlines, Inc., 463 F. Supp. 1245 (D. Colo. 1979), *aff'd*, 628 F.2d 1301 (10th Cir. 1980).

[2] Hahn v. Buffalo, 596 F. Supp. 939 (W.D.N.Y. 1984), *aff'd*, 770 F.2d 12 (2d Cir. 1985).

v. Cline,[3] lower courts had been split on the question of whether the Act protected younger workers against discrimination by favoritism of older workers. In *Cline*, General Dynamics and the United Auto Workers had eliminated the employer's obligation to provide health benefits to subsequently retired employees except employees who were at least fifty years old at the time of the agreement. Cline represented a class of workers who were over forty, and hence protected by the Act, but under fifty, and thus not entitled to health benefits under the collective bargaining agreement. They contended that the agreement violated the ADEA by discriminating against them with respect to terms of employment because of their age. The EEOC agreed with the workers, but when an informal settlement could not be reached, this action was brought, which the district court characterized as one for "reverse age discrimination"[4] for which relief had never been granted, and dismissed the action relying on the position of the Court of Appeals for the Seventh Circuit that "the ADEA 'does not protect . . . the younger *against* the older.' "[5] The Court of Appeals for the Sixth Circuit, however, reversed the decision of the district court, holding that the language of the Act was "so clear on its face that if Congress had meant to limit its coverage to protect only the older workers against the younger, it would have said so."[6] The Supreme Court granted certiorari and reversed.

Justice Souter speaking for the Court concluded that "Congress's interpretive clues speak almost unanimously to an understanding of discrimination as directed against workers who are older than the ones getting treated better."[7]

As originally enacted, the ADEA protected workers between the ages of forty and sixty-five. In 1978, the protection was broadened to protect workers up to the age of seventy.[8] In 1986, the upper age limit was removed altogether.[9] Hence, today the Act covers all workers over the age of forty.

In *Kimmel v. Florida Board of Regents*[10] the Supreme Court held that the Eleventh Amendment prohibited Congress from extending the benefits of the ADEA to state employees. While conceding that Congress would have the power to abrogate Eleventh Amendment immunity by laws enacted pursuant to its power under the Fourteenth Amendment, the Court held that that amendment did not support federal

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[3] 540 U.S. 581, 124 S. Ct. 1236, 157 L. Ed. 2d 1094 (2004).

[4] Cline v. General Dynamics Land Systems, Inc., 98 F. Supp. 2d 846, 848 (N.D. Ohio 2000).

[5] Hamilton v. Caterpillar Inc., 966 F.2d 1226, 1227 (7th Cir. 1992) (quoting *Karlen v. City Colleges of Chicago*, 837 F.2d 314, 318 (7th Cir.), *cert. denied sub nom. Teachers v. City Colleges of Chicago*, 486 U.S. 1044 (1988)).

[6] Cline v. General Dynamics Land Systems, Inc., 296 F.3d 466, 472 (6th Cir. 2002).

[7] 540 U.S. at 586.

[8] 1978 Amendment, Pub. L. No. 95-256.

[9] 1986 Amendments, Pub. L. No. 99-592.

See Craver, *The Application of the Age Discrimination in Employment Act to Persons Over Seventy*, 58 Geo. Wash. L. Rev. 52 (1989).

[10] Kimel v. Florida Bd. of Regents, 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000).

legislation directed at discrimination on the basis of age. Hence the Act could be sustained only by Congressional power under the Commerce Clause, and this power was subject to the limitations imposed by the Eleventh Amendment.

Few cases have considered the exemption for an employee in "a bona fide executive or a high policymaking position."[11] High-ranking corporate officers are excludable as executives.[12] The title held by an employee is not dispositive.[13] The Court of Appeals for the Second Circuit held in *Whittlesey v. Union Carbide Corp.*[14] that the chief labor counsel for the defendant was not such an individual. The court agreed with the finding of the district court that the plaintiff "was primarily an attorney doing legal work, giving legal advice, giving attention to the effect of statutes, regulations and administrative action upon company practices, and attending to litigation."[15] But in *EEOC v. Reno*,[16] the Court of Appeals for the Eleventh Circuit held that an assistant state attorney, "with practically all of the duties, responsibilities and discretions of the state attorney,"[17] came within the exception.[18] A college president falls within the policy maker exception.[19]

Lower courts have found the ADEA inapplicable to Indian tribes.[20] There is, however, no exemption for religious institutions.[21]

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[11] *But see* 29 C.F.R. § 1625.12 (1999).

[12] Passer v. American Chem. Soc'y, 935 F.2d 322 (D.C. Cir. 1991); Colby v. Graniteville Co., 635 F. Supp. 381 (S.D.N.Y. 1986) (senior vice-president of finance and administration); Morrissey v. Boston Five Cents Sav. Bank FSB, 866 F. Supp. 643 (D. Mass. 1994), *aff'd*, 54 F.3d 27 (1st Cir. 1995) (bank executive vice president).

[13] Simpson v. Ernst & Young, 100 F.3d 436 (6th Cir. 1996), *cert. denied*, 520 U.S. 1248 (1997) (accountant was covered employee, notwithstanding being called a partner).

[14] 742 F.2d 724 (2d Cir. 1984).

[15] Whittlesey v. Union Carbide Corp., 567 F. Supp. 1320, 1323 (S.D.N.Y. 1983), *aff'd*, 742 F.2d 724 (2d Cir. 1984).

See also Tranello v. Frey, 758 F. Supp. 841 (W.D.N.Y. 1991), *aff'd in part, appeal dismissed in part*, 962 F.2d 244 (2d Cir.), *cert denied*, 506 U.S. 1034 (1992).

[16] 758 F.2d 581 (11th Cir. 1985).

[17] *Id.* at 584.

[18] "[T]he position . . . is clearly one of policy-making level, involving one who necessarily advises, and acts upon, the exercise of constitutional and legal powers of the office of the state attorney." *Id.*

See also Colby v. Graniteville Co., 635 F. Supp. 381 (S.D.N.Y. 1986) (corporate senior vice-president was a bona fide executive).

[19] EEOC v. Board of Trustees, 723 F.2d 509 (6th Cir. 1983).

[20] EEOC v. Fond du Lac Heavy Equip. & Constr. Co., 986 F.2d 246 (8th Cir. 1993).

[21] DeMarco v. Holy Cross High Sch., 4 F.3d 166 (2d Cir. 1993); Geary v. Visitation of the Blessed Virgin Mary, 7 F.3d 324 (3d Cir. 1993).

But see Weissman v. Congregation Shaare Emeth, 38 F.3d 1038, 1044 (8th Cir. 1994) ("[T]here may be cases involving lay employees in which the relationship between the employee and the employer is so pervasively religious that it is impossible to engage in an age-discrimination inquiry without serious risk of offending the First Amendment."); Powell v. Stafford, 859 F. Supp. 1343, 1349 (D. Colo. 1994) ("[T]he determination as to who is an appropriate person to teach Roman Catholic theology at Machebeuf is for

¶ 22.04 Private Actions and Public Actions.

29 U.S.C. § 626

Recordkeeping, investigation, and enforcement

. . .

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: ***Provided***, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

The failure of the aggrieved party to comply with the EEOC notice requirement of § 626(d) within the time specified does not deprive a court of jurisdiction of a civil action.[1] Rather, the requirement is analogous to a statute of limitations and, thus, is

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the Archdiocese, not the government through the ADEA or this secular court.").

[1] Dartt v. Shell Oil Co., 539 F.2d 1256 (10th Cir. 1976), *aff'd by equally divided court*, 434 U.S. 99 (1977); Bonham v. Dresser Indus., Inc., 569 F.2d 187 (3d Cir. 1977), *cert. denied*, 439 U.S. 821 (1978);

subject to waiver, estoppel and equitable tolling.[2] Presumably, the notice requirement of § 626(d) is written notice,[3] although there is some authority for the effectiveness of oral notice.[4] The requirement that no action be filed until sixty days following the giving of notice has been held to be jurisdictional.[5]

"The filing of a notice of intention to sue is not required as an incantatory formality but for the definite practical purposes of inducing the Secretary to initiate conciliation and to alert him that he should consider whether to sue before the grievant himself sues."[6] It follows that the notice should be sufficiently detailed to enable the Secretary to engage in such efforts.[7]

Kephart v. Institute of Gas Tech., 581 F.2d 1287 (7th Cir. 1978), *cert. denied*, 450 U.S. 959 (1981); Nielsen v. Western Elec. Co., 603 F.2d 741 (8th Cir. 1979); Coke v. General Adjustment Bureau, Inc., 616 F.2d 785 (5th Cir. 1980); Wright v. Tennessee, 628 F.2d 949 (6th Cir. 1980); Kennedy v. Whitehurst, 690 F.2d 951 (D.C. Cir. 1982); Sawchik v. E.I. Du Pont de Nemours & Co., 783 F.2d 635 (6th Cir. 1986); Pruet Prod. Co. v. Ayles, 784 F.2d 1275 (5th Cir. 1986); Van Amerongen v. Chief Indus., Inc., 635 F. Supp. 1200 (N.D. Ill. 1986); Harris v. WGN Cont. Broad. Co., 650 F. Supp. 568 (N.D. Ill. 1986); Goss v. Pan Am. World Airways, Inc., 654 F. Supp. 1306 (S.D.N.Y. 1987).

[2] Sawchik v. E.I. Du Pont de Nemours & Co., 783 F.2d 635 (6th Cir. 1986); Dillman v. Combustion Eng'g, Inc., 784 F.2d 57 (2d Cir. 1986); Pruet Prod. Co. v. Ayles, 784 F.2d 1275 (5th Cir. 1986); Galvan v. Bexar County, 785 F.2d 1298 (5th Cir.), *reh'g denied*, 790 F.2d 890 (5th Cir. 1986); Skoglund v. Singer Co., 403 F. Supp. 797 (D.N.H. 1975); Abbott v. Moore Business Forms, Inc., 439 F. Supp. 643 (D.N.H. 1977); Algea v. Schweiker, 529 F. Supp. 163 (D. Md. 1981); Franci v. Avco Corp., 538 F. Supp. 250 (D. Conn. 1982); Shultz v. Dempster Sys., Inc., 561 F. Supp. 1230 (E.D. Tenn. 1983); Galvin v. Vermont, 598 F. Supp. 144 (D. Vt. 1984).

[3] Hays v. Republic Steel Corp., 531 F.2d 1307 (5th Cir. 1976); Reich v. Dow Badische Co., 575 F.2d 363 (2d Cir.), *cert. denied*, 439 U.S. 1006 (1978); Woodard v. Western Union Tel. Co., 650 F.2d 592 (5th Cir. Unit B 1981); Greene v. Whirlpool Corp., 708 F.2d 128 (4th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984); Burgett v. Cudahy Co., 361 F. Supp. 617 (D. Kan. 1973); Hughes v. Beaunit Corp., 12 Empl. Prac. Dec. (CCH) 11092, 12 Fair Empl. Prac. Cas. (BNA) 1564 (E.D. Tenn. 1976); Carter v. Crown Hosiery Mills, 22 Fair Empl. Prac. Cas. (BNA) 1816 (M.D.N.C. 1978), *aff'd*, 618 F.2d 96 (4th Cir.), *cert. denied*, 447 U.S. 924 (1980); Fulton v. NCR Corp., 472 F. Supp. 377 (W.D. Va. 1979); Pieckelun v. Kimberly-Clark Corp., 493 F. Supp. 93 (E.D. Pa. 1980); Flaherty v. Itek Corp., 500 F. Supp. 309 (D. Mass. 1980).

[4] Woodford v. Kinney Shoe Corp., 369 F. Supp. 911 (N.D. Ga. 1973); Sutherland v. SKF Indus., Inc., 419 F. Supp. 610 (E.D. Pa. 1976); Conklin v. RCA Corp., 16 Fair Empl. Prac. Cas. (BNA) 950 (E.D. Pa. 1976); Noto v. JFD Elec. Corp., 446 F. Supp. 92 (E.D.N.C. 1978); Mull v. Arco Durethene Plastics, Inc., 599 F. Supp. 158 (N.D. Ill. 1984), *aff'd*, 784 F.2d 284 (7th Cir. 1986).

[5] Mizuguchi v. Molokai Elec. Co., 411 F. Supp. 590 (D. Haw. 1976); Bengochea v. Norcross, Inc., 464 F. Supp. 709 (E.D. Pa. 1979).

[6] Cowlishaw v. Armstrong Rubber Co., 425 F. Supp. 802, 807 (E.D.N.Y. 1977).

[7] Powell v. Southwestern Bell Tel. Co., 494 F.2d 485 (5th Cir.), *reh'g denied*, 498 F.2d 1402 (5th Cir. 1974); Grossfield v. W.B. Saunders Co., 1 Empl. Prac. Dec. (CCH) 9941, 1 Fair Empl. Prac. Cas. (BNA) 624 (E.D.N.Y. 1968); Conklin v. RCA Corp., 431 F. Supp. 342 (E.D. Pa. 1977); Pirone v. Home Ins. Co., 507 F. Supp. 1281 (S.D.N.Y. 1981), *aff'd*, 742 F.2d 1430 (2d Cir. 1983); Comfort v. Rensselaer Polytechnic Inst., 575 F. Supp. 258 (N.D.N.Y. 1983).