

Kimmel

age not ^{suspect} program scrutiny

Civil only, AARP talked to us in the Hill.

(AARP is committed, but has other things)
Need to speak to the Hill.

Equal Right Equalization Act - Atascadero - limited fix

What's the class?

Don't link to ADA fix

24th VII

Sup Ct. Equal Pay Act reminded - worked. 3 classes of protection
- race
- sex
- age

Next Steps

DOS/CLD - Labor - will draft bill

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

KIMEL ET AL., v. FLORIDA BOARD OF REGENTS ET AL.

**CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT**

No. 98–791. Argued October 13, 1999– Decided January 11, 2000*

The Age Discrimination in Employment Act of 1967 (ADEA or Act), as amended, makes it unlawful for an employer, including a State, “to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual’s age.” 29 U. S. C. §623(a)(1). Petitioners, three sets of plaintiffs, filed suit under the ADEA against respondents, their state employers. Petitioners’ suits sought money damages for respondents’ alleged discrimination on the basis of age. Respondents in all three cases moved to dismiss the suits on the basis of the Eleventh Amendment. The District Court in one case granted the motion to dismiss, while in each of the remaining cases the District Court denied the motion. All three decisions were appealed and consolidated before the Eleventh Circuit. Petitioner United States intervened on appeal to defend the constitutionality of the ADEA’s abrogation of the States’ Eleventh Amendment immunity. In a divided panel opinion, the Eleventh Circuit held that the ADEA does not abrogate the States’ Eleventh Amendment immunity.

Held: Although the ADEA does contain a clear statement of Congress’ intent to abrogate the States’ immunity, that abrogation exceeded Congress’ authority under §5 of the Fourteenth Amendment. Pp. 7–28.

(a) The ADEA satisfies the simple but stringent test this Court uses to determine whether a federal statute properly subjects States to suits by individuals: Congress made its intention to abrogate the

* Together with No. 98–796, *United States v. Florida Board of Regents et al.*, also on certiorari to the same court.

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States' immunity unmistakably clear in the language of the statute. *Dellmuth v. Muth*, 491 U. S. 223, 228. The ADEA states that its provisions "shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section." 29 U. S. C. §626(b). Section 216(b), in turn, authorizes employees to maintain actions for backpay "against any employer (including a public agency) in any Federal or State court of competent jurisdiction" Section 203(x) defines "public agency" to include "the government of a State or political subdivision thereof," and "any agency of . . . a State, or a political subdivision of a State." The text of §626(b) forecloses respondents' claim that the existence of an enforcement provision in the ADEA itself renders Congress' intent to incorporate §216(b)'s clear statement of abrogation ambiguous. Congress' use of the phrase "court of competent jurisdiction" in §216(b) also does not render its intent to abrogate less than clear. Finally, because the clear statement inquiry focuses on *what* Congress did enact, not *when* it did so, the Court will not infer ambiguity from the sequence in which a clear textual statement is added to a statute. Pp. 8–13.

(b) This Court held in *EEOC v. Wyoming*, 460 U. S. 226, 243, that the ADEA constitutes a valid exercise of Congress' Article I Commerce Clause power. Congress' powers under Article I, however, do not include the power to subject States to suit at the hands of private individuals. *Seminole Tribe of Fla. v. Florida*, 517 U. S. 44, 72–73. Section 5 of the Fourteenth Amendment does grant Congress the authority to abrogate the States' sovereign immunity. *Fitzpatrick v. Bitzer*, 427 U. S. 445, 456. Pp. 13–16.

(c) Section 5 of the Fourteenth Amendment is an affirmative grant of power to Congress. *City of Boerne v. Flores*, 521 U. S. 507, 517. That power includes the authority both to remedy and to deter the violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text. Congress cannot, however, decree the *substance* of the Fourteenth Amendment's restrictions on the States. *Id.*, at 519. The ultimate interpretation and determination of the Amendment's substantive meaning remains the province of the Judicial Branch. This Court has held that for remedial legislation to be appropriate under §5, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.*, at 520. Pp. 16–18.

(d) The ADEA is not "appropriate legislation" under §5 of the Fourteenth Amendment. The ADEA's purported abrogation of the States' sovereign immunity is accordingly invalid. Pp. 18–27.

(1) The substantive requirements the ADEA imposes on state and

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local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act. Age is not a suspect classification under the Equal Protection Clause. See, e.g., *Gregory v. Ashcroft*, 501 U. S. 452, 470. States therefore may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest. The rationality commanded by the Equal Protection Clause does not require States to match age distinctions and the legitimate interests they serve with razorlike precision. Rather, a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests. That age proves to be an inaccurate proxy in any individual case is irrelevant. Judged against the backdrop of this Court's equal protection jurisprudence, it is clear that the ADEA is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne, supra*, at 532. 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. Petitioners' reliance on the "bona fide occupational qualification" defense of §623(f)(1) is misplaced. This Court's decision in *Western Air Lines, Inc. v. Criswell*, 472 U. S. 400, conclusively demonstrates that the defense is a far cry from the rational basis standard the Court applies to age discrimination under the Equal Protection Clause. Although it is true that the existence of the defense makes the ADEA's prohibition of age discrimination less than absolute, the Act's substantive requirements nevertheless remain at a level akin to the Court's heightened scrutiny cases under the Equal Protection Clause. The exception in §623(f)(1) that permits employers to engage in conduct otherwise prohibited by the Act "where the differentiation is based on reasonable factors other than age" confirms, rather than disproves, the conclusion that the ADEA extends beyond the requirements of the Equal Protection Clause. That exception makes clear that the employer cannot rely on age as a proxy for an employee's characteristics, *Hazen Paper Co. v. Biggins*, 507 U. S. 604, 611, whereas the Constitution permits such reliance, see, e.g., *Gregory, supra*, at 473. Pp. 18–24.

(2) That the ADEA prohibits very little conduct likely to be held unconstitutional, while significant, does not alone provide the answer to the §5 inquiry. Difficult and intractable problems often require powerful remedies, and this Court has never held that §5 precludes Congress from enacting reasonably prophylactic legislation. One means by which the Court has determined the difference between a statute that constitutes an appropriate remedy and one that attempts to substantively re-

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define the States' legal obligations is by examining the legislative record containing the reasons for Congress' action. See, e.g., *City of Boerne*, *supra*, at 530–531. A review of the ADEA's legislative record as a whole reveals that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age. Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation. That failure confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field. Pp. 24–27.

(e) Today's decision does not signal the end of the line for employees who find themselves subject to age discrimination at the hands of their state employers. Those employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State of the Union. Pp. 27–28.

139 F. 3d 1426, affirmed.

O'CONNOR, J., delivered the opinion of the Court, Parts I, II, and IV of which were joined by REHNQUIST, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., and Part III of which was joined by REHNQUIST, C. J., and STEVENS, SCALIA, SOUTER, GINSBURG, and BREYER, JJ. STEVENS, J., filed an opinion dissenting in part and concurring in part, in which SOUTER, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed an opinion concurring in part and dissenting in part, in which KENNEDY, J., joined.

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SUPREME COURT OF THE UNITED STATES

Nos. 98–791 and 98–796

98–791 J. DANIEL KIMEL, JR., ET AL., PETITIONERS
v.
FLORIDA BOARD OF REGENTS ET AL.

98–796 UNITED STATES, PETITIONER
v.
FLORIDA BOARD OF REGENTS ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

[January 11, 2000]

JUSTICE O'CONNOR delivered the opinion of the Court.

The Age Discrimination in Employment Act of 1967 (ADEA or Act), 81 Stat. 602, as amended, 29 U. S. C. §621 *et seq.* (1994 ed. and Supp. III), makes it unlawful for an employer, including a State, “to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual’s age.” 29 U. S. C. §623(a)(1). In these cases, three sets of plaintiffs filed suit under the Act, seeking money damages for their state employers’ alleged discrimination on the basis of age. In each case, the state employer moved to dismiss the suit on the basis of its Eleventh Amendment immunity. The District Court in one case granted the motion to dismiss, while in each of the remaining cases the District Court denied the motion. Appeals in the three cases were consolidated before the Court of Appeals for the Eleventh

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Circuit, which held that the ADEA does not validly abrogate the States' Eleventh Amendment immunity. In these cases, we are asked to consider whether the ADEA contains a clear statement of Congress' intent to abrogate the States' Eleventh Amendment immunity and, if so, whether the ADEA is a proper exercise of Congress' constitutional authority. We conclude that the ADEA does contain a clear statement of Congress' intent to abrogate the States' immunity, but that the abrogation exceeded Congress' authority under §5 of the Fourteenth Amendment.

I

A

The ADEA makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U. S. C. §623(a)(1). The Act also provides several exceptions to this broad prohibition. For example, an employer may rely on age where it "is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." §623(f)(1). The Act also permits an employer to engage in conduct otherwise prohibited by §623(a)(1) if the employer's action "is based on reasonable factors other than age," §623(f)(1), or if the employer "discharge[s] or otherwise discipline[s] an individual for good cause," §623(f)(3). Although the Act's prohibitions originally applied only to individuals "at least forty years of age but less than sixty-five years of age," 81 Stat. 607, 29 U. S. C. §631 (1964 ed., Supp. III), Congress subsequently removed the upper age limit, and the Act now covers individuals age 40 and over, 29 U. S. C. §631(a). Any person aggrieved by an employer's violation of the Act "may bring a civil action in any court of competent juris-

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diction" for legal or equitable relief. §626(c)(1). Section 626(b) also permits aggrieved employees to enforce the Act through certain provisions of the Fair Labor Standards Act of 1938 (FLSA), and the ADEA specifically incorporates §16(b) of the FLSA, 29 U. S. C. §216(b).

Since its enactment, the ADEA's scope of coverage has been expanded by amendment. Of particular importance to these cases is the Act's treatment of state employers and employees. When first passed in 1967, the ADEA applied only to private employers. See 29 U. S. C. §630(b) (1964 ed., Supp. III) (defining term "employer" to exclude "the United States, a corporation wholly owned by the Government of the United States, or a State or political subdivision thereof"). In 1974, in a statute consisting primarily of amendments to the FLSA, Congress extended application of the ADEA's substantive requirements to the States. Fair Labor Standards Amendments of 1974 (1974 Act), §28, 88 Stat. 74. Congress accomplished that expansion in scope by a simple amendment to the definition of "employer" contained in 29 U. S. C. §630(b): "The term [employer] also means . . . a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State" Congress also amended the ADEA's definition of "employee," still defining the term to mean "an individual employed by any employer," but excluding elected officials and appointed policymakers at the state and local levels. §630(f). In the same 1974 Act, Congress amended 29 U. S. C. §216(b), the FLSA enforcement provision incorporated by reference into the ADEA. 88 Stat. 61. Section 216(b) now permits an individual to bring a civil action "against any employer (including a public agency) in any Federal or State court of competent jurisdiction." Section 203(x) defines "[p]ublic agency" to include "the Government of a State or political subdivision thereof," and "any agency of . . . a State, or a political subdivision of a State." Finally, in the 1974 Act,

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Congress added a provision prohibiting age discrimination generally in employment at the Federal Government. 88 Stat. 74, 29 U. S. C. §633a (1994 ed. and Supp. III). Under the current ADEA, mandatory age limits for law enforcement officers and firefighters— at federal, state, and local levels— are exempted from the statute's coverage. 5 U. S. C. §§3307(d), (e); 29 U. S. C. §623(j) (1994 ed., Supp. III).

B

In December 1994, Roderick MacPherson and Marvin Narz, ages 57 and 58 at the time, filed suit under the ADEA against their employer, the University of Montevallo, in the United States District Court for the Northern District of Alabama. In their complaint, they alleged that the university had discriminated against them on the basis of their age, that it had retaliated against them for filing discrimination charges with the Equal Employment Opportunity Commission (EEOC), and that its College of Business, at which they were associate professors, employed an evaluation system that had a disparate impact on older faculty members. MacPherson and Narz sought declaratory and injunctive relief, backpay, promotions to full professor, and compensatory and punitive damages. App. 21–25. The University of Montevallo moved to dismiss the suit for lack of subject matter jurisdiction, contending it was barred by the Eleventh Amendment. No party disputes the District Court's holding that the University is an instrumentality of the State of Alabama. On September 9, 1996, the District Court granted the University's motion. *MacPherson v. University of Montevallo*, Civ. Action No. 94–AR–2962–S (ND Ala., Sept. 9, 1996), App. to Pet. for Cert. in No. 98–796, pp. 63a–71a. The court determined that, although the ADEA contains a clear statement of Congress' intent to abrogate the States' Eleventh Amendment immunity, Congress did not enact

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or extend the ADEA under its Fourteenth Amendment §5 enforcement power. *Id.*, at 67a, 69a–70a. The District Court therefore held that the ADEA did not abrogate the States' Eleventh Amendment immunity. *Id.*, at 71a.

In April 1995, a group of current and former faculty and librarians of Florida State University, including J. Daniel Kimel, Jr., the named petitioner in one of today's cases, filed suit against the Florida Board of Regents in the United States District Court for the Northern District of Florida. Complaint and Demand for Jury Trial in No. 95–CV–40194, 1 Record, Doc. No. 2. The complaint was subsequently amended to add as plaintiffs current and former faculty and librarians of Florida International University. App. 41. The plaintiffs, all over age 40, alleged that the Florida Board of Regents refused to require the two state universities to allocate funds to provide previously agreed upon market adjustments to the salaries of eligible university employees. The plaintiffs contended that the failure to allocate the funds violated both the ADEA and the Florida Civil Rights Act of 1992, Fla. Stat. §760.01 *et seq.* (1997 and Supp. 1998), because it had a disparate impact on the base pay of employees with a longer record of service, most of whom were older employees. App. 42–45. The plaintiffs sought backpay, liquidated damages, and permanent salary adjustments as relief. *Id.*, at 46. The Florida Board of Regents moved to dismiss the suit on the grounds of Eleventh Amendment immunity. On May 17, 1996, the District Court denied the motion, holding that Congress expressed its intent to abrogate the States' Eleventh Amendment immunity in the ADEA, and that the ADEA is a proper exercise of congressional authority under the Fourteenth Amendment. No. TCA 95–40194–MMP (ND Fla., May 17, 1996), App. to Pet. for Cert. in No. 98–796, pp. 57a–62a.

In May 1996, Wellington Dickson filed suit against his employer, the Florida Department of Corrections, in the

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United States District Court for the Northern District of Florida. Dickson alleged that the state employer failed to promote him because of his age and because he had filed grievances with respect to the alleged acts of age discrimination. Dickson sought injunctive relief, backpay, and compensatory and punitive damages. App. 83–109. The Florida Department of Corrections moved to dismiss the suit on the grounds that it was barred by the Eleventh Amendment. The District Court denied that motion on November 5, 1996, holding that Congress unequivocally expressed its intent to abrogate the States' Eleventh Amendment immunity in the ADEA, and that Congress had authority to do so under §5 of the Fourteenth Amendment. *Dickson v. Florida Dept. of Corrections*, No. 5:9cv207–RH (ND Fla., Nov. 5, 1996), App. to Pet. for Cert. in No. 98–796, pp. 72a–76a.

The plaintiffs in the *MacPherson* case, and the state defendants in the *Kimel* and *Dickson* cases, appealed to the Court of Appeals for the Eleventh Circuit. The United States also intervened in all three cases to defend the ADEA's abrogation of the States' Eleventh Amendment immunity. The Court of Appeals consolidated the appeals and, in a divided panel opinion, held that the ADEA does not abrogate the States' Eleventh Amendment immunity. 139 F. 3d 1426, 1433 (1998). Judge Edmondson, although stating that he believed "good reason exists to doubt that the ADEA was (or could have been properly) enacted pursuant to the Fourteenth Amendment," *id.*, at 1430, rested his opinion on the ADEA's lack of unmistakably clear language evidencing Congress' intent to abrogate the States' sovereign immunity. *Ibid.* He noted that the ADEA lacks any reference to the Eleventh Amendment or to the States' sovereign immunity and does not contain, in one place, a plain statement that States can be sued by individuals in federal court. *Id.*, at 1430–1431. Judge Cox concurred in Judge Edmondson's ultimate conclusion that

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the States are immune from ADEA suits brought by individuals in federal court. *Id.*, at 1444. Judge Cox, however, chose not to address “the thorny issue of Congress’s intent,” *id.*, at 1445, but instead found that Congress lacks the power under §5 of the Fourteenth Amendment to abrogate the States’ Eleventh Amendment immunity under the ADEA. *Ibid.* He concluded that “the ADEA confers rights far more extensive than those the Fourteenth Amendment provides,” *id.*, at 1446, and that “Congress did not enact the ADEA as a proportional response to any widespread violation of the elderly’s constitutional rights.” *Id.*, at 1447. Chief Judge Hatchett dissented from both grounds. *Id.*, at 1434.

We granted certiorari, 525 U. S. 1121 (1999), to resolve a conflict among the Federal Courts of Appeals on the question whether the ADEA validly abrogates the States’ Eleventh Amendment immunity. Compare *Cooper v. New York State Office of Mental Health*, 162 F. 3d 770 (CA2 1998) (holding that the ADEA does validly abrogate the States’ Eleventh Amendment immunity), cert. pending, No. 98–1524; *Migneault v. Peck*, 158 F. 3d 1131 (CA10 1998) (same), cert. pending, No. 98–1178; *Coger v. Board of Regents of the State of Tenn.*, 154 F. 3d 296 (CA6 1998) (same), cert. pending, No. 98–821; *Keeton v. University of Nev. System*, 150 F. 3d 1055 (CA9 1998) (same); *Scott v. University of Miss.*, 148 F. 3d 493 (CA5 1998) (same); and *Goshtasby v. Board of Trustees of the Univ. of Ill.*, 141 F. 3d 761 (CA7 1998) (same), with *Humenansky v. Regents of Univ. of Minn.*, 152 F. 3d 822 (CA8 1998) (holding that the ADEA does not validly abrogate the States’ Eleventh Amendment immunity), cert. pending, No. 98–1235; and 139 F. 3d 1426 (CA11 1998) (case below).

II

The Eleventh Amendment states:

“The Judicial power of the United States shall not

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be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Although today's cases concern suits brought by citizens against their own States, this Court has long "understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." *Seminole Tribe of Fla. v. Florida*, 517 U. S. 44, 54 (1996) (quoting *Blatchford v. Native Village of Noatak*, 501 U. S. 775, 779 (1991)). Accordingly, for over a century now, we have made clear that the Constitution does not provide for federal jurisdiction over suits against nonconsenting States. *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U. S. ___, ___ (1999) (slip op., at 2–3); *Seminole Tribe*, *supra*, at 54; see *Hans v. Louisiana*, 134 U. S. 1, 15 (1890). Petitioners nevertheless contend that the States of Alabama and Florida must defend the present suits on the merits because Congress abrogated their Eleventh Amendment immunity in the ADEA. To determine whether petitioners are correct, we must resolve two predicate questions: first, whether Congress unequivocally expressed its intent to abrogate that immunity; and second, if it did, whether Congress acted pursuant to a valid grant of constitutional authority. *Seminole Tribe*, *supra*, at 55.

III

To determine whether a federal statute properly subjects States to suits by individuals, we apply a "simple but stringent test: Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Dellmuth v. Muth*, 491 U. S. 223, 228 (1989) (quoting *Atascadero State Hospital v. Scanlon*, 473 U. S. 234, 242 (1985)). We agree with petitioners that

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the ADEA satisfies that test. The ADEA states that its provisions "shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section." 29 U. S. C. §626(b). Section 216(b), in turn, clearly provides for suits by individuals against States. That provision authorizes employees to maintain actions for backpay "against any employer (including a public agency) in any Federal or State court of competent jurisdiction" Any doubt concerning the identity of the "public agency" defendant named in §216(b) is dispelled by looking to §203(x), which defines the term to include "the government of a State or political subdivision thereof," and "any agency of . . . a State, or a political subdivision of a State." Read as a whole, the plain language of these provisions clearly demonstrates Congress' intent to subject the States to suit for money damages at the hands of individual employees.

Respondents maintain that these statutory sections are less than "unmistakably clear" for two reasons. Brief for Respondents 15. First, they note that the ADEA already contains its own enforcement provision, §626(c)(1), which provides in relevant part that "[a]ny 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." Respondents claim that the existence of §626(c)(1) renders Congress' intent to incorporate the clear statement of abrogation in §216(b), the FLSA's enforcement provision, ambiguous. The text of the ADEA forecloses respondents' argument. Section 626(b) clearly states that the ADEA "shall be enforced in accordance with the powers, remedies, and procedures provided in [section 216(b)] and subsection (c) of this section." §626(b) (emphasis added). In accord with that statutory language, we have explained repeatedly that §626(b) incorporates the FLSA's enforcement provisions, and that

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those remedial options operate together with §626(c)(1). See *McKennon v. Nashville Banner Publishing Co.*, 513 U. S. 352, 357 (1995) (“[The ADEA’s] remedial provisions incorporate by reference the provisions of the Fair Labor Standards Act of 1938”); *Hoffman-La Roche Inc. v. Sperling*, 493 U. S. 165, 167 (1989) (“[T]he ADEA incorporates enforcement provisions of the Fair Labor Standards Act of 1938, and provides that the ADEA shall be enforced using certain of the powers, remedies, and procedures of the FLSA” (citation omitted)); *Lorillard v. Pons*, 434 U. S. 575, 582 (1978) (“[B]ut for those changes Congress expressly made [in the ADEA], it intended to incorporate fully the remedies and procedures of the FLSA”). Respondents’ argument attempts to create ambiguity where, according to the statute’s text and this Court’s repeated interpretations thereof, there is none.

Respondents next point to the phrase “court of competent jurisdiction” in §216(b), and contend that it makes Congress’ intent to abrogate less than clear. Relying on our decision in the distinct context of a state waiver of sovereign immunity, *Kennecott Copper Corp. v. State Tax Comm’n*, 327 U. S. 573 (1946), respondents maintain that perhaps Congress simply intended to permit an ADEA suit against a State only in those cases where the State previously has waived its Eleventh Amendment immunity to suit. We disagree. Our decision in *Kennecott Copper* must be read in context. The petitioner there contended that Utah had waived its Eleventh Amendment immunity to suit in federal court through a state statute that authorized taxpayers to pay their taxes under protest and “thereafter bring an action in any court of competent jurisdiction for the return thereof” *Id.*, at 575, n. 1 (quoting Utah Code Ann. §80–5–76 (1943)). Although the statute undoubtedly provided for suit against the State of Utah in its own courts, we held that the statute fell short of the required “clear declaration by a State of its consent

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to be sued in the *federal* courts.” 327 U. S., at 579–580 (emphasis added). Section 216(b) contains no such ambiguity. The statute authorizes employee suits against States “in any *Federal or State* court of competent jurisdiction.” §216(b) (emphasis added). That language eliminates the ambiguity identified in *Kennecott Copper*—whether Utah intended to permit suits against the sovereign in state court only, or in state and federal court. Under §216(b), the answer to that question is clear—actions may be maintained in federal and state court. That choice of language sufficiently indicates Congress’ intent, in the ADEA, to abrogate the States’ Eleventh Amendment immunity to suits by individuals.

Although JUSTICE THOMAS concedes in his opinion that our cases have never required that Congress make its clear statement in a single section or in statutory provisions enacted at the same time, *post*, at 7, he concludes that the ADEA lacks the requisite clarity because of the “sequence of events” surrounding the enactment and amendment of §§216(b) and 626(b), *post*, at 4. JUSTICE THOMAS states that he is unwilling to assume that when Congress amended §216(b) in 1974, it recognized the consequences that amendment would have for the ADEA. *Post*, at 5. We respectfully disagree. The fact that Congress amended the ADEA itself in the same 1974 Act makes it more than clear that Congress understood the consequences of its actions. Indeed, Congress amended §216(b) to provide for suits against States in precisely the same Act in which it extended the ADEA’s substantive requirements to the States. See 1974 Act, §6(d)(1), 88 Stat. 61 (amending §216(b)); §28(a), 88 Stat. 74 (extending ADEA to the States). Those provisions confirm for us that the effect on the ADEA of the §216(b) amendment was not mere happenstance. In any event, we have never held that Congress must speak with different gradations of clarity depending on the specific circumstances of the

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relevant legislation (e.g., amending incorporated provisions as opposed to enacting a statute for the first time). The clear statement inquiry focuses on *what* Congress did enact, not *when* it did so. We will not infer ambiguity from the sequence in which a clear textual statement is added to a statute.

We also disagree with JUSTICE THOMAS' remaining points, see *post*, at 7–12. Although the ADEA does contain its own enforcement provision in §626(c)(1), the text of §626(b) acknowledges §626(c)(1)'s existence and makes clear that the ADEA also incorporates §216(b), save as indicated otherwise in §626(b)'s proviso. See §626(b) ("The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in section [n] . . . 216 (except for subsection (a) thereof) . . . and subsection (c) of this section" (emphasis added)). We fail to see how the interpretation suggested by JUSTICE THOMAS, under which §626(b) would carry over only those §216(b) "embellishments" not already provided for in §626(c)(1) *except for* the authorization of suits against States, see *post*, at 9, could be a permissible one. To accept that interpretation, for example, one would have to conclude that Congress intended to incorporate only the portion of §216(b)'s third sentence that provides for collective actions, but not the part of the very same sentence that authorizes suits against States. See §216(b) ("An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated").

JUSTICE THOMAS also concludes that §216(b) itself fails the clear statement test. *Post*, at 10–12. As we have already explained, the presence of the word "competent" in §216(b) does not render that provision less than "unmis-

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takably clear." See *supra*, at 10–11. JUSTICE THOMAS' reliance on a single phrase from our decision in *Employees of Dept. of Public Health and Welfare of Mo. v. Department of Public Health and Welfare of Mo.*, 411 U. S. 279 (1973), see *post*, at 11, as support for the contrary proposition is puzzling, given his separate argument with respect to §6(d)(2)(A) of the 1974 Act. Crucial to JUSTICE THOMAS' argument on that front is his acknowledgement that Congress *did* intend in the 1974 amendments to permit "FLSA plaintiffs who had been frustrated by state defendants' invocation of Eleventh Amendment immunity under *Employees* to avail themselves of the newly amended §216(b)." *Post*, at 5; see also *post*, at 11–12. We agree with the implication of that statement: In response to *Employees*, Congress clearly intended through "the newly amended §216(b)" to abrogate the States' sovereign immunity. In light of our conclusion that Congress unequivocally expressed its intent to abrogate the States' Eleventh Amendment immunity, we now must determine whether Congress effectuated that abrogation pursuant to a valid exercise of constitutional authority.

IV
A

This is not the first time we have considered the constitutional validity of the 1974 extension of the ADEA to state and local governments. In *EEOC v. Wyoming*, 460 U. S. 226, 243 (1983), we held that the ADEA constitutes a valid exercise of Congress' power "[t]o regulate Commerce . . . among the several States," Art. I, §8, cl. 3, and that the Act did not transgress any external restraints imposed on the commerce power by the Tenth Amendment. Because we found the ADEA valid under Congress' Commerce Clause power, we concluded that it was unnecessary to determine whether the Act also could be supported by Congress' power under §5 of the Fourteenth Amendment.

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Wyoming, 460 U. S., at 243. But see *id.*, at 259–263 (Burger, C. J., dissenting). Resolution of today's cases requires us to decide that question.

In *Seminole Tribe*, we held that Congress lacks power under Article I to abrogate the States' sovereign immunity. 517 U. S., at 72–73. "Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Id.*, at 72. Last Term, in a series of three decisions, we reaffirmed that central holding of *Seminole Tribe*. See *College Savings Bank*, 527 U. S., at ____ (slip op., at 4); *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U. S. ____, ____ (1999) (slip op., at 6–7); *Alden v. Maine*, 527 U. S. ____, ____ (1999) (slip op., at 1–2). Indeed, in *College Savings Bank*, we rested our decision to overrule the constructive waiver rule of *Parden v. Terminal R. Co. of Ala. Docks Dept.*, 377 U. S. 184 (1964), in part, on our *Seminole Tribe* holding. See *College Savings Bank*, *supra*, at ____ (slip op., at 16) ("Recognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*"). Under our firmly established precedent then, if the ADEA rests solely on Congress' Article I commerce power, the private petitioners in today's cases cannot maintain their suits against their state employers.

JUSTICE STEVENS disputes that well-established precedent again. Compare *post*, at 1–7, with *Alden*, *supra*, at ____ (slip op., at 1–58) (SOUTER, J., dissenting); *College Savings Bank*, 527 U. S., at ____ (slip op., at 2, n. 2) (STEVENS, J., dissenting); *id.*, at ____ (slip op., at 7–13) (BREYER, J., dissenting); *Florida Prepaid*, *supra*, at ____ (slip op., at 18–19) (STEVENS, J., dissenting); *Seminole Tribe*, 517 U. S., at 76–100 (STEVENS, J., dissenting); *id.*, at

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100–185 (SOUTER, J., dissenting). In *Alden*, we explained that, “[a]lthough the sovereign immunity of the States derives at least in part from the common-law tradition, the structure and history of the Constitution make clear that the immunity exists today by constitutional design.” 527 U. S., at ____ (slip op., at 23–24). For purposes of today’s decision, it is sufficient to note that we have on more than one occasion explained the substantial reasons for adhering to that constitutional design. See *id.*, at ____ (slip op., at 2–45); *College Savings Bank*, *supra*, at ____ (slip op., at 1–2, 20–24); *Seminole Tribe*, *supra*, at 54–55, 59–73; *Pennsylvania v. Union Gas Co.*, 491 U. S. 1, 30–42 (1989) (SCALIA, J., concurring in part and dissenting in part). Indeed, the present dissenters’ refusal to accept the validity and natural import of decisions like *Hans*, rendered over a full century ago by this Court, makes it difficult to engage in additional meaningful debate on the place of state sovereign immunity in the Constitution. Compare *Hans*, 134 U. S., at 10, 14–16, with *post*, at 5–6. Today we adhere to our holding in *Seminole Tribe*: Congress’ powers under Article I of the Constitution do not include the power to subject States to suit at the hands of private individuals.

Section 5 of the Fourteenth Amendment, however, does grant Congress the authority to abrogate the States’ sovereign immunity. In *Fitzpatrick v. Bitzer*, 427 U. S. 445 (1976), we recognized that “the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of §5 of the Fourteenth Amendment.” *Id.*, at 456 (citation omitted). Since our decision in *Fitzpatrick*, we have reaffirmed the validity of that congressional power on numerous occasions. See, e.g., *College Savings Bank*, *supra*, at ____ (slip op., at 2); *Florida Prepaid*, *supra*, at ____ (slip op., at 7–8); *Alden*, *supra*, at ____ (slip op., at 46–48); *Seminole Tribe*, *supra*, at 59. Accordingly, the private petitioners in these cases may maintain their ADEA suits against the

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States of Alabama and Florida if, and only if, the ADEA is appropriate legislation under §5.

B

The Fourteenth Amendment provides, in relevant part:

"Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

As we recognized most recently in *City of Boerne v. Flores*, 521 U. S. 507, 517 (1997), §5 is an affirmative grant of power to Congress. "It is for Congress in the first instance to determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference." *Id.*, at 536 (quoting *Katzenbach v. Morgan*, 384 U. S. 641, 651 (1966)). Congress' §5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment. Rather, Congress' power "to enforce" the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text. 521 U. S., at 518.

Nevertheless, we have also recognized that the same language that serves as the basis for the affirmative grant of congressional power also serves to limit that power. For example, Congress cannot "decree the *substance* of the Fourteenth Amendment's restrictions on the States. . . . It

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has been given the power to enforce,' not the power to determine *what constitutes* a constitutional violation." *Id.*, at 519 (emphases added). The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch. *Id.*, at 536. In *City of Boerne*, we noted that the determination whether purportedly prophylactic legislation constitutes appropriate remedial legislation, or instead effects a substantive redefinition of the Fourteenth Amendment right at issue, is often difficult. *Id.*, at 519–520. The line between the two is a fine one. Accordingly, recognizing that "Congress must have wide latitude in determining where [that line] lies," we held that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.*, at 520.

In *City of Boerne*, we applied that "congruence and proportionality" test and held that the Religious Freedom Restoration Act of 1993 (RFRA) was not appropriate legislation under §5. We first noted that the legislative record contained very little evidence of the unconstitutional conduct purportedly targeted by RFRA's substantive provisions. Rather, Congress had uncovered only "anecdotal evidence" that, standing alone, did not reveal a "widespread pattern of religious discrimination in this country." *Id.*, at 531. Second, we found that RFRA is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.*, at 532.

Last Term, we again had occasion to apply the "congruence and proportionality" test. In *Florida Prepaid*, we considered the validity of the Eleventh Amendment abrogation provision in the Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act). We held that the statute, which subjected States to patent infringement suits, was not appropriate legislation under

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§5 of the Fourteenth Amendment. The Patent Remedy Act failed to meet our congruence and proportionality test first because “Congress identified no pattern of patent infringement *by the States*, let alone a pattern of constitutional violations.” 527 U. S., at ____ (slip op., at 11) (emphasis added). Moreover, because it was unlikely that many of the acts of patent infringement affected by the statute had any likelihood of being unconstitutional, we concluded that the scope of the Act was out of proportion to its supposed remedial or preventive objectives. *Id.*, at ____ (slip op., at 18–19). Instead, “[t]he statute’s apparent and more basic aims were to provide a uniform remedy for patent infringement and to place States on the same footing as private parties under that regime.” *Id.*, at ____ (slip op., at 19). While we acknowledged that such aims may be proper congressional concerns under Article I, we found them insufficient to support an abrogation of the States’ Eleventh Amendment immunity after *Seminole Tribe*. *Florida Prepaid*, *supra*, at ____ (slip op., at 19–20).

C

Applying the same “congruence and proportionality” test in these cases, we conclude that the ADEA is not “appropriate legislation” under §5 of the Fourteenth Amendment. Initially, the substantive requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act. We have considered claims of unconstitutional age discrimination under the Equal Protection Clause three times. See *Gregory v. Ashcroft*, 501 U. S. 452 (1991); *Vance v. Bradley*, 440 U. S. 93 (1979); *Massachusetts Bd. of Retirement v. Murgia*, 427 U. S. 307 (1976) (*per curiam*). In all three cases, we held that the age classifications at issue did not violate the Equal Protection Clause. See *Gregory*, *supra*, at 473; *Bradley*, *supra*, at 102–103, n. 20, 108–112; *Murgia*, *su-*

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pra, at 317. Age classifications, unlike governmental conduct based on race or gender, cannot be characterized as “so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.” *Cleburne v. Cleburne Living Center, Inc.*, 473 U. S. 432, 440 (1985). Older persons, again, unlike those who suffer discrimination on the basis of race or gender, have not been subjected to a “history of purposeful unequal treatment.” *Murgia, supra*, at 313 (quoting *San Antonio Independent School Dist. v. Rodriguez*, 411 U. S. 1, 28 (1973)). Old age also does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it. 427 U. S., at 313–314. Accordingly, as we recognized in *Murgia*, *Bradley*, and *Gregory*, age is not a suspect classification under the Equal Protection Clause. See, e.g., *Gregory, supra*, at 470; *Bradley, supra*, at 97; *Murgia, supra*, at 313–314.

States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest. The rationality commanded by the Equal Protection Clause does not require States to match age distinctions and the legitimate interests they serve with razor-like precision. As we have explained, when conducting rational basis review “we will not overturn such [government action] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government’s] actions were irrational.” *Bradley, supra*, at 97. In contrast, when a State discriminates on the basis of race or gender, we require a tighter fit between the discriminatory means and the legitimate ends they serve. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U. S. 200, 227 (1995) (“[Racial] classifications are constitutional only if they are narrowly tailored measures

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that further compelling governmental interests"); *Mississippi Univ. for Women v. Hogan*, 458 U. S. 718, 724 (1982) (holding that gender classifications are constitutional only if they serve "important governmental objectives and . . . the discriminatory means employed 'are substantially related to the achievement of those objectives'" (citation omitted)). Under the Fourteenth Amendment, a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests. The Constitution does not preclude reliance on such generalizations. That age proves to be an inaccurate proxy in any individual case is irrelevant. "[W]here rationality is the test, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Murgia, supra*, at 313 (quoting *Dandridge v. Williams*, 397 U. S. 471, 485 (1970)). Finally, because an age classification is presumptively rational, the individual challenging its constitutionality bears the burden of proving that the "facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Bradley, supra*, at 111; see *Gregory, supra*, at 473.

Our decisions in *Murgia*, *Bradley*, and *Gregory* illustrate these principles. In all three cases, we held that the States' reliance on broad generalizations with respect to age did not violate the Equal Protection Clause. In *Murgia*, we upheld against an equal protection challenge a Massachusetts statute requiring state police officers to retire at age 50. The State justified the provision on the ground that the age classification assured the State of the physical preparedness of its officers. 427 U. S., at 314–315. Although we acknowledged that Officer Murgia himself was in excellent physical health and could still perform the duties of a state police officer, we found that the statute clearly met the requirements of the Equal Protection Clause. *Id.*, at 311, 314–317. "That the State

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chooses not to determine fitness more precisely through individualized testing after age 50 [does not prove] that the objective of assuring physical fitness is not rationally furthered by a maximum-age limitation." *Id.*, at 316. In *Bradley*, we considered an equal protection challenge to a federal statute requiring Foreign Service officers to retire at age 60. We explained: "If increasing age brings with it increasing susceptibility to physical difficulties, . . . the fact that individual Foreign Service employees may be able to perform past age 60 does not invalidate [the statute] any more than did the similar truth undercut compulsory retirement at age 50 for uniformed state police in *Murgia*." 440 U. S., at 108. Finally, in *Gregory*, we upheld a provision of the Missouri Constitution that required judges to retire at age 70. Noting that the Missouri provision was based on a generalization about the effect of old age on the ability of individuals to serve as judges, we acknowledged that "[i]t is far from true that all judges suffer significant deterioration in performance at age 70," "[i]t is probably not true that most do," and "[i]t may not be true at all." 501 U. S., at 473. Nevertheless, because Missouri's age classification was subject only to rational basis review, we held that the State's reliance on such imperfect generalizations was entirely proper under the Equal Protection Clause. *Ibid.* These decisions thus demonstrate that the constitutionality of state classifications on the basis of age cannot be determined on a person-by-person basis. Our 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.

Judged against the backdrop of our equal protection jurisprudence, it is clear that the ADEA is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to

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prevent, unconstitutional behavior." *City of Boerne*, 521 U. S., at 532. 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. The ADEA makes unlawful, in the employment context, all "discriminat[ion] against any individual . . . because of such individual's age." 29 U. S. C. §623(a)(1). Petitioners, relying on the Act's exceptions, dispute the extent to which the ADEA erects protections beyond the Constitution's requirements. They contend that the Act's prohibition, considered together with its exceptions, applies only to arbitrary age discrimination, which in the majority of cases corresponds to conduct that violates the Equal Protection Clause. We disagree.

Petitioners stake their claim on §623(f)(1). That section permits employers to rely on age when it "is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." Petitioners' reliance on the "bona fide occupational qualification" (BFOQ) defense is misplaced. Our interpretation of §623(f)(1) in *Western Air Lines, Inc. v. Criswell*, 472 U. S. 400 (1985), conclusively demonstrates that the defense is a far cry from the rational basis standard we apply to age discrimination under the Equal Protection Clause. The petitioner in that case maintained that, pursuant to the BFOQ defense, employers must be permitted to rely on age when such reliance has a "rational basis in fact." *Id.*, at 417. We rejected that argument, explaining that "[t]he BFOQ standard adopted in the statute is one of reasonable necessity, not reasonableness," *id.*, at 419, and that the ADEA standard and the rational basis test are "significantly different," *id.*, at 421.

Under the ADEA, even with its BFOQ defense, the State's use of age is *prima facie* unlawful. See 29 U. S. C.

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§623(a)(1); *Western Air Lines*, 472 U. S., at 422 (“Under the Act, employers are to evaluate employees . . . on their merits and not their age”). Application of the Act therefore starts with a presumption in favor of requiring the employer to make an individualized determination. See *ibid.* In *Western Air Lines*, we concluded that the BFOQ defense, which shifts the focus from the merits of the individual employee to the necessity for the age classification as a whole, is “meant to be an extremely narrow exception to the general prohibition’ of age discrimination contained in the ADEA.” *Id.*, at 412 (citation omitted). We based that conclusion on both the restrictive language of the statutory BFOQ provision itself and the EEOC’s regulation interpreting that exception. See 29 CFR §1625.6(a) (1998) (“It is anticipated that this concept of a [BFOQ] will have limited scope and application. Further, as this is an exception to the Act it must be narrowly construed”). To succeed under the BFOQ defense, we held that an employer must demonstrate either “a substantial basis for believing that *all or nearly all employees* above an age lack the qualifications required for the position,” or that reliance on the age classification is necessary because “it is *highly impractical* for the employer to insure by individual testing that its employees will have the necessary qualifications for the job.” 472 U. S., at 422–423 (emphases added). Measured against the rational basis standard of our equal protection jurisprudence, the ADEA plainly imposes substantially higher burdens on state employers. Thus, although it is true that the existence of the BFOQ defense makes the ADEA’s prohibition of age discrimination less than absolute, the Act’s substantive requirements nevertheless remain at a level akin to our heightened scrutiny cases under the Equal Protection Clause.

Petitioners also place some reliance on the next clause in §623(f)(1), which permits employers to engage in conduct otherwise prohibited by the Act “where the differen-

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tiation is based on reasonable factors other than age." This exception confirms, however, rather than disproves, the conclusion that the ADEA's protection extends beyond the requirements of the Equal Protection Clause. The exception simply makes clear that "[t]he employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly." *Hazen Paper Co. v. Biggins*, 507 U. S. 604, 611 (1993). Under the Constitution, in contrast, States may rely on age as a proxy for other characteristics. See *Gregory*, 501 U. S., at 473 (generalization about ability to serve as judges at age 70); *Bradley*, 440 U. S., at 108–109, 112 (generalization about ability to serve as Foreign Service officer at age 60); *Murgia*, 427 U. S., at 314–317 (generalization about ability to serve as state police officer at age 50). Section 623(f)(1), then, merely confirms that Congress, through the ADEA, has effectively elevated the standard for analyzing age discrimination to heightened scrutiny.

That the ADEA prohibits very little conduct likely to be held unconstitutional, while significant, does not alone provide the answer to our §5 inquiry. Difficult and intractable problems often require powerful remedies, and we have never held that §5 precludes Congress from enacting reasonably prophylactic legislation. Our task is to determine whether the ADEA is in fact just such an appropriate remedy or, instead, merely an attempt to substantively redefine the States' legal obligations with respect to age discrimination. One means by which we have made such a determination in the past is by examining the legislative record containing the reasons for Congress' action. See, e.g., *Florida Prepaid*, 527 U. S., at ____–____ (slip op., at 11–18); *City of Boerne*, 521 U. S., at 530–531. "The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to

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another, lesser one." *Id.*, at 530 (citing *South Carolina v. Katzenbach*, 383 U. S. 301, 308 (1966)).

Our examination of the ADEA's legislative record confirms that Congress' 1974 extension of the Act to the States was an unwarranted response to a perhaps inconsequential problem. Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation. The evidence compiled by petitioners to demonstrate such attention by Congress to age discrimination by the States falls well short of the mark. That evidence consists almost entirely of isolated sentences clipped from floor debates and legislative reports. See, e.g., S. Rep. No. 93-846, p. 112 (1974); S. Rep. No. 93-690, p. 56 (1974); H. R. Rep. No. 93-913, pp. 40-41 (1974); S. Rep. No. 93-300, p. 57 (1973); Senate Special Committee on Aging, *Improving the Age Discrimination Law*, 93d Cong., 1st Sess., 14 (Comm. Print 1973); 113 Cong. Rec. 34742 (1967) (remarks of Sen. Steiger); *id.*, at 34749 (remarks of Rep. Donohue); 110 Cong. Rec. 13490 (1964) (remarks of Sen. Smathers); *id.*, at 9912 (remarks of Sen. Sparkman); *id.*, at 2596 (remarks of Rep. Beckworth). The statements of Senator Bentsen on the floor of the Senate are indicative of the strength of the evidence relied on by petitioners. See, e.g., 118 Cong. Rec. 24397 (1972) (stating that "there is ample evidence that age discrimination is broadly practiced in government employment," but relying on newspaper articles about federal employees); *id.*, at 7745 ("Letters from my own State have revealed that State and local governments have also been guilty of discrimination toward older employees"); *ibid.* ("[T]here are strong indications that the hiring and firing practices of governmental units discriminate against the elderly . . .").

Petitioners place additional reliance on Congress' consideration of a 1966 report prepared by the State of Cali-

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for California on age discrimination in its public agencies. See Hearings on H. R. 3651 et al. before the Subcommittee on Labor of the House of Representatives Committee on Education and Labor, 90th Cong., 1st Sess., pp. 161-201 (1967) (Hearings) (reprinting State of California, Citizens' Advisory Committee on Aging, Age Discrimination in Public Agencies (1966)). Like the assorted sentences petitioners cobble together from a decade's worth of congressional reports and floor debates, the California study does not indicate that the State had engaged in any *unconstitutional* age discrimination. In fact, the report stated that the majority of the age limits uncovered in the state survey applied in the law enforcement and firefighting occupations. Hearings 168. Those age limits were not only permitted under California law at the time, see *ibid.*, but are also currently permitted under the ADEA. See 5 U. S. C. §§3307(d), (e); 29 U. S. C. §623(j) (1994 ed., Supp. III). Even if the California report had uncovered a pattern of unconstitutional age discrimination in the State's public agencies at the time, it nevertheless would have been insufficient to support Congress' 1974 extension of the ADEA to every State of the Union. The report simply does not constitute "evidence that [unconstitutional age discrimination] had become a problem of national import." *Florida Prepaid*, *supra*, at ____ (slip op., at 13).

Finally, the United States' argument that Congress found substantial age discrimination in the private sector, see Brief for United States 38, is beside the point. Congress made no such findings with respect to the States. Although we also have doubts whether the findings Congress did make with respect to the private sector could be extrapolated to support a finding of *unconstitutional* age discrimination in the public sector, it is sufficient for these cases to note that Congress failed to identify a widespread pattern of age discrimination by the States. See *Florida Prepaid*, 527 U. S., at ____ (slip op., at 11).

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A review of the ADEA's legislative record as a whole, then, reveals that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age. Although that lack of support is not determinative of the §5 inquiry, *id.*, at ____ (slip op., at 17–18); *City of Boerne*, 521 U. S., at 531–532, Congress' failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field. In light of the indiscriminate scope of the Act's substantive requirements, and the lack of evidence of widespread and unconstitutional age discrimination by the States, we hold that the ADEA is not a valid exercise of Congress' power under §5 of the Fourteenth Amendment. The ADEA's purported abrogation of the States' sovereign immunity is accordingly invalid.

D

Our decision today does not signal the end of the line for employees who find themselves subject to age discrimination at the hands of their state employers. We hold only that, in the ADEA, Congress did not validly abrogate the States' sovereign immunity to suits by private individuals. State employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State of the Union.* Those

*See Alaska Stat. Ann. §18.80.010 *et seq.* (1998); Ariz. Rev. Stat. Ann. §41–1401 *et seq.* (1999); Ark. Code Ann. §§21–3–201, 21–3–203 (1996); Cal. Govt. Code Ann. §12900 *et seq.* (West 1992 and Supp. 1999); Colo. Rev. Stat. §24–34–301 *et seq.* (1998); Conn. Gen. Stat. §46a–51 *et seq.* (1999); Del. Code Ann., Tit. 19, §710 *et seq.* (Supp. 1998); Fla. Stat. Ann. §§112.044, 760.01 *et seq.* (1997 and Supp. 1998); Ga. Code Ann. §45–19–21 *et seq.* (1990 and Supp. 1996); Haw. Rev. Stat. §378–1 *et seq.* (1993 and Cum. Supp. 1998); Idaho Code §67–5901 *et seq.* (1995 and Supp. 1999); Ill. Comp. Stat., ch. 775, §5/1–101 *et seq.* (1998); Ind. Code

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avenues of relief remain available today, just as they were before this decision.

Because the ADEA does not validly abrogate the States' sovereign immunity, however, the present suits must be dismissed. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

 §22-9-2-1 *et seq.* (1993); Iowa Code §216.1 *et seq.* (1994 and Supp. 1999); Kan. Stat. Ann. §44-1111 *et seq.* (1993 and Cum. Supp. 1998); Ky. Rev. Stat. Ann. §344.010 *et seq.* (Michle 1997 and Supp. 1998); La. Rev. Stat. Ann. §23:311 *et seq.* (West 1998); *id.*, §51:2231 *et seq.* (West Supp. 1999); Me. Rev. Stat. Ann., Tit. 5, §4551 *et seq.* (1998-1999 Supp.); Md. Ann. Code, Art. 49B, §1 *et seq.* (1998 and Supp. 1999); Mass. Gen. Laws §151:1 *et seq.* (West 1997 and Supp. 1998); Mich. Comp. Laws §37.2101 *et seq.* (West 1985 and Supp. 1999); Minn. Stat. §363.01 *et seq.* (1991 and Supp. 1999); Miss. Code Ann. §25-9-149 (1991); Mo. Rev. Stat. §213.010 *et seq.* (1994 and Cum. Supp. 1998); Mont. Code Ann. §49-1-101 *et seq.* (1997); Neb. Rev. Stat. §48-1001 *et seq.* (1998); Nev. Rev. Stat. §613.310 *et seq.* (1995); N. H. Rev. Stat. Ann. §354-A:1 *et seq.* (1995 and Supp. 1998); N. J. Stat. Ann. §§10:3-1, 10:5-1 *et seq.* (West 1993 and Supp. 1999); N. M. Stat. Ann. §28-1-1 *et seq.* (1996); N. Y. Exec. Law §290 *et seq.* (McKinney 1993 and Supp. 1999); N. C. Gen. Stat. §126-16 *et seq.* (1999); N. D. Cent. Code §14-02.4-01 *et seq.* (1997 and Supp. 1999); Ohio Rev. Code Ann. §4112.01 *et seq.* (1998); Okla. Stat., Tit. 25, §1101 *et seq.* (1991 and Supp. 1999); Ore. Rev. Stat. §659.010 *et seq.* (1997); 43 Pa. Cons. Stat. §951 *et seq.* (1991 and Supp. 1999); R. I. Gen. Laws §28-5-1 *et seq.* (1995 and Supp. 1997); S. C. Code Ann. §1-13-10 *et seq.* (1986 and Cum. Supp. 1998); Tenn. Code Ann. §4-21-101 *et seq.* (1998); Tex. Lab. Code Ann. §21.001 *et seq.* (1996 and Supp. 1999); Utah Code Ann. §34A-5-101 *et seq.* (Supp. 1999); Vt. Stat. Ann., Tit. 21, §495 *et seq.* (1987 and Supp. 1999); Va. Code Ann. §2.1-116.10 *et seq.* (1995 and Supp. 1999); Wash. Rev. Code §49.60.010 *et seq.* (1994); W. Va. Code §5-11-1 *et seq.* (1999); Wis. Stat. Ann. §111.01 *et seq.* (West 1997 and Supp. 1998); Wyo. Stat. Ann. §27-9-101 *et seq.* (1999).

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SUPREME COURT OF THE UNITED STATES

Nos. 98–791 and 98–796

J. DANIEL KIMEL, JR., ET AL., PETITIONERS
98–791 v.
FLORIDA BOARD OF REGENTS ET AL.

UNITED STATES, PETITIONER
98–796 v.
FLORIDA BOARD OF REGENTS ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

[January 11, 2000]

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting in part and concurring in part.

Congress' power to regulate the American economy includes the power to regulate both the public and the private sectors of the labor market. Federal rules outlawing discrimination in the workplace, like the regulation of wages and hours or health and safety standards, may be enforced against public as well as private employers. In my opinion, Congress' power to authorize federal remedies against state agencies that violate federal statutory obligations is coextensive with its power to impose those obligations on the States in the first place. Neither the Eleventh Amendment nor the doctrine of sovereign immunity places any limit on that power. See *Seminole Tribe of Fla. v. Florida*, 517 U. S. 44, 165–168 (1996) (SOUTER, J., dissenting); *EEOC v. Wyoming*, 460 U. S. 226, 247–248 (1983) (STEVENS, J., concurring).

The application of the ancient judge-made doctrine of

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sovereign immunity in cases like these is supposedly justified as a freestanding limit on congressional authority, a limit necessary to protect States' "dignity and respect" from impairment by the National Government. The Framers did not, however, select the Judicial Branch as the constitutional guardian of those state interests. Rather, the Framers designed important structural safeguards to ensure that when the National Government enacted substantive law (and provided for its enforcement), the normal operation of the legislative process itself would adequately defend state interests from undue infringement. See generally Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *Colum. L. Rev.* 543 (1954).

It is the Framers' compromise giving each State equal representation in the Senate that provides the principal structural protection for the sovereignty of the several States. The composition of the Senate was originally determined by the legislatures of the States, which would guarantee that their interests could not be ignored by Congress.¹ The Framers also directed that the House be composed of Representatives selected by voters in the several States, the consequence of which is that "the states are the strategic yardsticks for the measurement of interest and opinion, the special centers of political activity, the separate geographical determinants of national as well as local politics." *Id.*, at 546.

¹The Federalist No. 45, p. 291 (C. Rossiter ed. 1961 (J. Madison)) ("The State governments may be regarded as constituent and essential parts of the federal government The Senate will be elected absolutely and exclusively by the State legislatures. . . . Thus, [it] will owe its existence more or less to the favor of the State governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious than too overbearing towards them").

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Whenever Congress passes a statute, it does so against the background of state law already in place; the propriety of taking national action is thus measured by the metric of the existing state norms that Congress seeks to supplement or supplant.² The persuasiveness of any justification for overcoming legislative inertia and taking national action, either creating new federal obligations or providing for their enforcement, must necessarily be judged in reference to state interests, as expressed in existing state laws. The precise scope of federal laws, of course, can be shaped with nuanced attention to state interests. The Congress also has the authority to grant or withhold jurisdiction in lower federal courts. The burden of being haled into a federal forum for the enforcement of federal law, thus, can be expanded or contracted as Congress deems proper, which decision, like all other legislative acts, necessarily contemplates state interests. Thus, Congress can use its broad range of flexible legislative tools to approach the delicate issue of how to balance local and national interests in the most responsive and careful manner.³ It is

²When Congress expanded the ADEA in 1974 to apply to public employers, all 50 States had some form of age discrimination law, but 24 of them did not extend their own laws to public employers. See App. to Brief for Respondents 1a-25a.

³Thus, the present majority's view does more than simply aggrandize the power of the Judicial Branch. It also limits Congress' options for responding with precise attention to state interests when it takes national action. The majority's view, therefore, does not bolster the Framers' plan of structural safeguards for state interests. Rather, it is fundamentally at odds with that plan. Indeed, as JUSTICE BREYER has explained, forbidding private remedies may necessitate the enlargement of the federal bureaucracy and make it more difficult "to decentralize governmental decisionmaking and to provide individual citizens, or local communities, with a variety of enforcement powers." *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U. S. ____ (1999) (slip op., at 13) (dissenting opinion); see also *Printz v. United States*, 521 U. S. 898, 976-978 (1997) (BREYER, J., dissenting).

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quite evident, therefore, that the Framers did not view this Court as the ultimate guardian of the States' interest in protecting their own sovereignty from impairment by "burdensome" federal laws.⁴

Federalism concerns do make it appropriate for Congress to speak clearly when it regulates state action. But when it does so, as it has in these cases,⁵ we can safely presume that the burdens the statute imposes on the sovereignty of the several States were taken into account

⁴The President also plays a role in the enactment of federal law, and the Framers likewise provided structural safeguards to protect state interests in the selection of the President. The electors who choose the President are appointed in a manner directed by the state legislatures. Art. II, §1, cl. 2. And if a majority of electors do not cast their vote for one person, then the President is chosen by the House of Representatives. "But in chusing the President" by this manner, the Constitution directs that "the Votes shall be taken by States, the Representatives from each State having one Vote." Art. II, §1, cl. 3 (emphasis added); see also Amdt. 12.

Moreover, the Constitution certainly protects state interests in other ways as well, as in the provisions of Articles IV, V, and VII. My concern here, however, is with the respect for state interests safeguarded by the ordinary legislative process. The balance between national and local interests reflected in other constitutional provisions may vary, see, e.g., *U. S. Term Limits, Inc. v. Thornton*, 514 U. S. 779 (1995), but insofar as Congress' legislative authority is concerned, the relevant constitutional provisions were crafted to ensure that the process itself adequately accounted for local interests.

I also recognize that the Judicial Branch sometimes plays a role in limiting the product of the legislative process. It may do so, for example, when the exercise of legislative authority runs up against some other constitutional command. See *Seminole Tribe of Fla. v. Florida*, 517 U. S. 44, 166-167 (1996) (SOUTER, J., dissenting). But in those instances, courts are not crafting wholly judge-made doctrines unrelated to any constitutional text, nor are they doing so solely under the guise of the necessity of safeguarding state interests.

⁵Because Congress has clearly expressed its intention to subject States to suits by private parties under the ADEA, I join Part III of the Opinion of the Court.

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during the deliberative process leading to the enactment of the measure. Those burdens necessarily include the cost of defending against enforcement proceedings and paying whatever penalties might be incurred for violating the statute. In my judgment, the question whether those enforcement proceedings should be conducted exclusively by federal agencies, or may be brought by private parties as well, is a matter of policy for Congress to decide. In either event, once Congress has made its policy choice, the sovereignty concerns of the several States are satisfied, and the federal interest in evenhanded enforcement of federal law, explicitly endorsed in Article VI of the Constitution, does not countenance further limitations. There is not a word in the text of the Constitution supporting the Court's conclusion that the judge-made doctrine of sovereign immunity limits Congress' power to authorize private parties, as well as federal agencies, to enforce federal law against the States. The importance of respecting the Framers' decision to assign the business of lawmaking to the Congress dictates firm resistance to the present majority's repeated substitution of its own views of federalism for those expressed in statutes enacted by the Congress and signed by the President.

The Eleventh Amendment simply does not support the Court's view. As has been stated before, the Amendment only places a textual limitation on the diversity jurisdiction of the federal courts. See *Atascadero State Hospital v. Scanlon*, 473 U. S. 234, 286–289 (1985) (Brennan, J., dissenting). Because the Amendment is a part of the Constitution, I have never understood how its limitation on the diversity jurisdiction of federal courts defined in Article III could be "abrogated" by an Act of Congress. *Seminole Tribe*, 517 U. S., at 93 (STEVENS, J., dissenting). Here, however, private petitioners did not invoke the federal courts' diversity jurisdiction; they are citizens of the same State as the defendants and they are asserting claims that

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arise under federal law. Thus, today's decision (relying as it does on *Seminole Tribe*) rests entirely on a novel judicial interpretation of the doctrine of sovereign immunity,⁶ which the Court treats as though it were a constitutional precept. It is nevertheless clear to me that if Congress has the power to create the federal rights that these petitioners are asserting, it must also have the power to give the federal courts jurisdiction to remedy violations of those rights, even if it is necessary to "abrogate" the Court's "Eleventh Amendment" version of the common-law defense of sovereign immunity to do so. That is the essence of the Court's holding in *Pennsylvania v. Union Gas Co.*, 491 U. S. 1, 13-23 (1989).

I remain convinced that *Union Gas* was correctly decided and that the decision of five Justices in *Seminole Tribe* to overrule that case was profoundly misguided. Despite my respect for *stare decisis*, I am unwilling to accept *Seminole Tribe* as controlling precedent. First and foremost, the reasoning of that opinion is so profoundly mistaken and so fundamentally inconsistent with the Framers' conception of the constitutional order that it has forsaken any claim to the usual deference or respect owed to decisions of this Court. *Stare decisis*, furthermore, has less force in the area of constitutional law. See, e.g., *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 406-410 (1932) (Brandeis, J., dissenting). And in this instance, it is but a hollow pretense for any State to seek refuge in *stare decisis*' protection of reliance interests. It cannot be credibly maintained that a State's ordering of its affairs with respect to potential liability under federal law requires adherence to *Seminole Tribe*, as that decision leaves open

⁶Under the traditional view, the sovereign immunity defense was recognized only as a matter of comity when asserted in the courts of another sovereign, rather than as a limitation on the jurisdiction of that forum. See *Schooner Exchange v. McFaddon*, 7 Cranch 116, 136 (1812) (Marshall, C. J.); *Nevada v. Hall*, 440 U. S. 410, 414-418 (1979).

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a State's liability upon enforcement of federal law by federal agencies. Nor can a State find solace in the *stare decisis* interest of promoting "the evenhanded . . . and consistent development of legal principles." *Payne v. Tennessee*, 501 U. S. 808, 827 (1991). That principle is perverted when invoked to rely on sovereign immunity as a defense to deliberate violations of settled federal law. Further, *Seminole Tribe* is a case that will unquestionably have serious ramifications in future cases; indeed, it has already had such an effect, as in the Court's decision today and in the equally misguided opinion of *Alden v. Maine*, 527 U. S. ____ (1999). Further still, the *Seminole Tribe* decision unnecessarily forces the Court to resolve vexing questions of constitutional law respecting Congress' §5 authority. Finally, by its own repeated overruling of earlier precedent, the majority has itself discounted the importance of *stare decisis* in this area of the law.⁷ The kind of judicial activism manifested in cases like *Seminole Tribe*, *Alden v. Maine*, *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U. S. ____ (1999), and *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U. S. ____ (1999), represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises.

Accordingly, I respectfully dissent.

⁷See, e.g., *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U. S., at ____ (slip op., at 8–14) (overruling *Parden v. Terminal R. Co. of Ala. Docks Dept.*, 377 U. S. 184 (1964)); *Seminole Tribe*, 517 U. S., at 63–73 (overruling *Pennsylvania v. Union Gas Co.*, 491 U. S. 1 (1989)); *Pennhurst State School and Hospital v. Halderman*, 465 U. S. 89, 127, 132–137 (1984) (STEVENS, J., dissenting) ("[T]he Court repudiates at least 28 cases, spanning well over a century of this Court's jurisprudence").

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SUPREME COURT OF THE UNITED STATES

Nos. 98–791 and 98–796

J. DANIEL KIMEL, JR., ET AL., PETITIONERS
98–791 v.
FLORIDA BOARD OF REGENTS ET AL.

UNITED STATES, PETITIONER
98–796 v.
FLORIDA BOARD OF REGENTS ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

[January 11, 2000]

JUSTICE THOMAS, with whom JUSTICE KENNEDY joins,
concurring in part and dissenting in part.

In *Atascadero State Hospital v. Scanlon*, 473 U. S. 234 (1985), this Court, cognizant of the impact of an abrogation of the States' Eleventh Amendment immunity from suit in federal court on "the usual constitutional balance between the States and the Federal Government," reaffirmed that "Congress may abrogate . . . only by making its intention unmistakably clear in the language of the statute." *Id.*, at 242. This rule "assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Will v. Michigan Dept. of State Police*, 491 U. S. 58, 65 (1989) (quoting *United States v. Bass*, 404 U. S. 336, 349 (1971)). And it is especially applicable when this Court deals with a statute like the Age Discrimination in Employment Act of 1967 (ADEA), whose substantive mandates extend to "elevator operators, janitors, charwomen, security guards, secretaries, and the like in every office building in a State's governmental hierarchy."

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Employees of Dept. of Public Health and Welfare of Mo. v. Department of Public Health and Welfare of Mo., 411 U. S. 279, 285 (1973). Because I think that Congress has not made its intention to abrogate “unmistakably clear” in the text of the ADEA, I respectfully dissent from Part III of the Court’s opinion.¹

I

It is natural to begin the clear statement inquiry by examining those provisions that reside within the four corners of the Act in question. Private petitioners and the government correctly observe that the ADEA’s substantive provisions extend to the States as employers, see 29 U. S. C. §623(a) (providing that “[i]t shall be unlawful for an employer” to engage in certain age discriminatory practices); §630(b) (defining “employer” to include “a State or a political subdivision of a State”); §630(f) (defining “employee” as “an individual employed by any employer”), and that the ADEA establishes an individual right-of-action provision for “aggrieved” persons, see §626(c)(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”). Since, in the case of a state employee, the only possible defendant is the State, it is submitted that Congress clearly expressed its intent that a state employee may qualify as a “person aggrieved” under §626(c)(1) and bring suit against his state employer in federal court.

While the argument may have some logical appeal, it is squarely foreclosed by precedent— which explains the Court’s decision to employ different reasoning in finding a clear statement, see *ante*, at 9. In *Employees*, we con-

¹I concur in Parts I, II, and IV of the Court’s opinion because I agree that the purported abrogation of the States’ Eleventh Amendment immunity in the ADEA falls outside Congress’ §5 enforcement power.

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fronted the pre-1974 version of the Fair Labor Standards Act (FLSA), which clearly extended as a substantive matter to state employers, and included the following private right-of-action provision: "Action to recover such liability may be maintained in any court of competent jurisdiction." *Employees, supra*, at 283 (quoting 29 U. S. C. §216(b) (1970 ed.)). We held that this language fell short of a clear statement of Congress' intent to abrogate. The FLSA's substantive coverage of state employers could be given meaning through enforcement by the Secretary of Labor, which would raise no Eleventh Amendment issue, 411 U. S., at 285–286, and we were "reluctant to believe that Congress in pursuit of a harmonious federalism desired to treat the States so harshly" by abrogating their Eleventh Amendment immunity, *id.*, at 286. See also, e.g., *Dellmuth v. Muth*, 491 U. S. 223, 228 (1989) (holding that Congress had not clearly stated its intent to abrogate in a statute that authorized "parties aggrieved . . . to bring a civil action . . . in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy") (quoting 20 U. S. C. §1415(e)(2) (1982 ed.)).

The ADEA is no different from the version of the FLSA we examined in *Employees*. It unquestionably extends as a substantive matter to state employers, but does not mention States in its right-of-action provision: "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." 29 U. S. C. §626(c)(1). This provision simply does not reveal Congress' attention to the augmented liability and diminished sovereignty concomitant to an abrogation of Eleventh Amendment immunity. "Congress, acting responsibly, would not be presumed to take such action silently." *Employees, supra*, at 284–285.

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II

Perhaps recognizing the obstacle posed by *Employees*, private petitioners and the government contend that the ADEA incorporates a clear statement from the FLSA. The ADEA's incorporating reference, which has remained constant since the enactment of the ADEA in 1967, provides: "The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section." 29 U. S. C. §626(b). It is argued that §216(b)—one of the incorporated provisions from the FLSA—unequivocally abrogates the States' immunity from suit in federal court. That section states in relevant part that "[a]n action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction." 29 U. S. C. §216(b).

But, as noted in the above discussion of *Employees*, §216(b) was not always so worded. At the time the ADEA was enacted in 1967, a relatively sparse version of §216(b)—which *Employees* held insufficient to abrogate the States' immunity—provided that an "[a]ction to recover such liability may be maintained in any court of competent jurisdiction." 29 U. S. C. §216(b) (1964 ed.). It was not until 1974 that Congress modified §216(b) to its current formulation. Fair Labor Standards Amendments of 1974 (1974 Amendments), §6(d)(1), 88 Stat. 61.

This sequence of events suggests, in my view, that we should approach with circumspection any theory of "clear statement by incorporation." Where Congress amends an Act whose provisions are incorporated by other Acts, the bill under consideration does not necessarily mention the incorporating references in those other Acts, and so fails to inspire confidence that Congress has deliberated on the consequences of the amendment for the other Acts. That is the

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case here. The legislation that amended §216(b), §6(d)(1) of the 1974 Amendments, did not even acknowledge §626(b). And, given the purpose of the clear statement rule to “assur[e] that the legislature has in fact faced” the issue of abrogation, *Will*, 491 U. S., at 65 (quoting *Bass*, 404 U. S., at 349), I am unwilling to indulge the fiction that Congress, when it amended §216(b), recognized the consequences for a separate Act (the ADEA) that incorporates the amended provision.

To be sure, §28 of the 1974 Amendments, 88 Stat. 74, did modify certain provisions of the ADEA, which might suggest that Congress understood the impact of §6(d)(1) on the ADEA. See *ante*, at 11. But §6(d)(2)(A), another of the 1974 Amendments, suggests just the opposite. Section 6(d)(2)(A) added to the statute of limitations provision of the FLSA, 29 U. S. C. §255, a new subsection (d), which suspended the running of the statutory periods of limitation on “any cause of action brought under section 16(b) of the [FLSA, 29 U. S. C. §216(b)] . . . on or before April 18, 1973,” the date *Employees* was decided, until “one hundred and eighty days after the effective date of [the 1974 Amendments].” The purpose of this new subsection—revealed not only by its reference to the date *Employees* was decided, but also by its exception for actions in which “judgment has been entered for the defendant on the grounds other than State immunity from Federal jurisdiction”—was to allow FLSA plaintiffs who had been frustrated by state defendants’ invocation of Eleventh Amendment immunity under *Employees* to avail themselves of the newly amended §216(b).² It appears, how-

²That Congress had this purpose in mind as to the FLSA does not mean that the product of Congress’ efforts— the amended §216(b)—qualifies as a clear statement. The amended §216(b)’s description of the forum as “any Federal . . . court of competent jurisdiction,” 29 U. S. C. §216(b) (emphasis added), is ambiguous insofar as a Federal

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ever, that Congress was oblivious to the impact of §6(d)(2)(A) on the ADEA. The new §255(d), by operation of §7(e) of the ADEA, 29 U. S. C. §626(e) (1988 ed.) (“Sec-tio[n] 255 . . . of this title shall apply to actions under this chapter”),³ automatically became part of the ADEA in 1974. And yet the new §255(d) could have no possible application to the ADEA because, as the Court observes, *ante*, at 11 (citing §28(a) of the 1974 Amendments), the ADEA’s substantive mandates did not even apply to the States until the 1974 Amendments. Thus, before 1974, there were no ADEA suits against States that could be affected by §255(d)’s tolling provision. If Congress had recognized this “overinclusiveness” problem, it likely would have amended §626(e) to incorporate only §§255(a)–(c). Cf. §626(b) (incorporating “the powers, remedies, and procedures provided in sectio[n] . . . 216 (*except for subsection (a) thereof*)” (emphasis added)). But since Congress did not do so, we are left to conclude that Congress did not clearly focus on the impact of §6(d)(2)(A) on the ADEA. And Congress’ insouciance with respect to the impact of §6(d)(2)(A) suggests that Congress was similarly inatten-tive to the impact of §6(d)(1).

Insofar as §6(d)(2)(A) is closer to §6(d)(1) in terms of space and purpose than is §28, the implication I would draw from §6(d)(2)(A) almost certainly outweighs the inference the Court would draw from §28. In any event, the notion that §28 of the 1974 Amendments evidences

 court might not be “competent” unless the State defendant consents to suit. See *Infra*, at 10–12. My present point is simply that, even as-suming the amended §216(b) qualifies as a clear statement, the 1974 Congress likely did not contemplate the impact of the new §216(b) on the ADEA.

³The ADEA was amended in 1991 to remove the incorporating refer-ence. See Civil Rights Act of 1991, §115, 105 Stat. 1079, 29 U. S. C. §626(e).

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Congress' awareness of every last ripple those amendments might cause in the ADEA is at best a permissible inference, not "the unequivocal declaration which . . . is necessary before we will determine that Congress intended to exercise its powers of abrogation." *Dellmuth*, 491 U. S., at 232.

The Court advances a more general critique of my approach, explaining that "we have never held that Congress must speak with different gradations of clarity depending on the specific circumstances of the relevant legislation" *Ante*, at 11–12. But that descriptive observation, with which I agree, is hardly probative in light of the fact that a "clear statement by incorporation" argument has not to date been presented to this Court. I acknowledge that our previous cases have not required a clear statement to appear within a single section or subsection of an Act. *Pennsylvania v. Union Gas Co.*, 491 U. S. 1, 7–10 (1989), overruled on other grounds, *Seminole Tribe of Fla. v. Florida*, 517 U. S. 44 (1996); see also *id.*, at 56–57 (confirming clear statement in one statutory subsection by looking to provisions in other subsection). Nor have our cases required that such separate sections or subsections of an Act be passed at the same time. *Union Gas*, *supra*, at 7–13, and n. 2 (consulting original provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 and 1986 amendments to that Act). But, even accepting *Union Gas* to be correctly decided, I do not think the situation where Congress amends an incorporated provision is analogous to *Union Gas*. In the *Union Gas* setting, where the later Congress actually amends the earlier-enacted Act, it is reasonable to assume that the later Congress focused on each of the various provisions, whether new or old, that combine to express an intent to abrogate.

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III

Even if a clarifying amendment to an incorporated provision might sometimes provide a clear statement to abrogate for purposes of the Act into which the provision is incorporated, this is not such a case for two reasons. First, §626(b) does not clearly incorporate the part of §216(b) that establishes a private right-of-action against employers. Second, even assuming §626(b) incorporates §216(b) in its entirety, §216(b) itself falls short of an “unmistakably clear” expression of Congress’ intent to abrogate the States’ Eleventh Amendment immunity from suit in federal court.

A

I do not dispute that §626(b) incorporates into the ADEA some provisions of §216(b). But it seems to me at least open to debate whether §626(b) incorporates the portion of §216(b) that creates an individual private right of action, for the ADEA already contains its own private right-of-action provision—§626(c)(1). See *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 358 (1995) (“The ADEA . . . contains a vital element found in both Title VII and the Fair Labor Standards Act: It grants an injured employee a right of action to obtain the authorized relief. 29 U.S.C. §626(c)”); 1 B. Lindemann & P. Grossman, *Employment Discrimination Law* 573–574 (3d ed. 1996) (“The ADEA grants any aggrieved person the right to sue for legal or equitable relief that will effectuate the purposes of the Act” (citing §626(c)(1)) (footnote omitted)). While the right-of-action provisions in §626(c) and §216(b) are not identically phrased, compare §626(c)(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”), with §216(b) (“An action to recover the liability prescribed in either of the preceding sentences may be maintained

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against any employer (including a public agency) in any Federal or State court of competent jurisdiction . . .), they are certainly similar in function.

Indeed, if §216(b)'s private right-of-action provision were incorporated by §626(b) and hence available to ADEA plaintiffs, the analogous right of action established by §626(c)(1) would be wholly superfluous— an interpretive problem the Court does not even pause to acknowledge. To avoid the overlap, one might read the ADEA to create an *exclusive* private right-of-action in §626(c)(1), and then to add various embellishments, whether from elsewhere in the ADEA, see §626(c)(2) (trial by jury), or from the incorporated parts of the FLSA, see, e.g., §216(b) (collective actions); *ibid.* (attorney's fees); *ibid.* (liquidated damages).⁴

Of course the Court's interpretation— that an ADEA plaintiff may choose §626(c)(1) or §216(b) as the basis for his private right of action— is also plausible. "But such a permissible inference, whatever its logical force, would remain just that: a permissible inference. It would not be the unequivocal declaration which . . . is necessary before we will determine that Congress intended to exercise its powers of abrogation." *Dellmuth*, 491 U. S., at 232. Apparently cognizant of this rule, the Court resorts to extrinsic evidence: our prior decisions. See, e.g., *ante*, at 10 ("[T]he ADEA incorporates enforcement provisions of the Fair Labor Standards Act of 1938, and provides that the ADEA shall be enforced using certain of the powers, remedies, and procedures of the FLSA" (alteration in original)) (quoting *Hoffmann-La Roche Inc. v. Sperling*, 493 U. S. 165, 167 (1989) (citation omitted)). But judicial opinions, especially those issued subsequent to the enact-

⁴The ADEA expressly limits this last remedy to "cases of willful violations." 29 U. S. C. §626(b); see *Lorillard v. Pons*, 434 U. S. 575, 581 (1978).

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ments in question, have no bearing on whether Congress has clearly stated its intent to abrogate in the text of the statute. How could they, given that legislative history— which at least antedates the enactments under review— is “irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment”? *Dellmuth, supra*, at 230. In any event, *Hoffmann-La Roche*, which did not present the question of a State’s Eleventh Amendment immunity,⁵ is perfectly consistent with the view that the ADEA incorporates only “extras” from the FLSA, not overlapping provisions. *Hoffmann-La Roche* involved the ADEA’s incorporation of FLSA’s authorization of collective actions, which follows §216(b)’s individual private right-of-action provision, see §216(b) (“An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves *and other employees similarly situated*” (emphasis added)), and so may be viewed as falling outside the overlap described above.⁶

⁵That the *Hoffmann-La Roche* Court did not consider §216(b)’s implications for the Eleventh Amendment clear statement rule is apparent from its selective quotation of §216(b)— omitting the words “(including a public agency).” See *Hoffmann-La Roche, Inc. v. Sperling*, 493 U. S., at 167–168 (“This controversy centers around one of the provisions the ADEA incorporates, which states, in pertinent part, that an action may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated”) (alteration in original)) (quoting 29 U. S. C. §216(b) (1982 ed.)).

⁶The other two cases upon which the Court relies, see *ante*, at 10 (citing *McKennon v. Nashville Banner Publishing Co.*, 513 U. S. 352, 357 (1995), and *Lorillard v. Pons, supra*, at 582), are also consistent with the view that the ADEA incorporates only “extras” from the FLSA, not overlapping provisions. In neither case did we consider whether the ADEA incorporates the part of §216(b) that creates a private action

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B

Even if §626(b) incorporates §216(b)'s individual right-of-action provision, that provision itself falls short of "unmistakable" clarity insofar as it describes the forum for suit as "any Federal or State court of *competent* jurisdiction." §216(b) (emphasis added). For it may be that a federal court is not "competent" under the Eleventh Amendment to adjudicate a suit by a private citizen against a State unless the State consents to the suit. As we explained in *Employees*, "[t]he history and tradition of the Eleventh Amendment indicate that by reason of that barrier a federal court is not *competent* to render judgment against a *nonconsenting* State." 411 U. S., at 284 (emphasis added). The Court suggests, *ante*, at 12, that its ability to distinguish a single precedent, *ante*, at 10 (discussing *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U. S. 573 (1946)), illuminates this aspect of §216(b). But the Court neither acknowledges what *Employees* had to say on this point nor explains why it follows from the modern §216(b)'s clarity *relative* to the old §216(b) that the modern §216(b) is clear enough as an *absolute* matter to satisfy the *Atascadero* rule, which requires "unmistakable" clarity.

That is not to say that *the FLSA as a whole* lacks a clear statement of Congress' intent to abrogate. Section 255(d) elucidates the ambiguity within §216(b). Section 255(d), it will be recalled, suspended the running of the statute of limitations on actions under §216(b) brought against a State or political subdivision on or before April 18, 1973 (the date *Employees* was decided) until "one hundred and eighty days after the effective date of the [1974 Amendments], except that such suspension shall not be applicable if in such action judgment has been entered for the

"against any employer (including a public agency) in any Federal or State court of competent jurisdiction."

Opinion of THOMAS, J.

defendant on the grounds other than *State immunity from Federal jurisdiction*." §255(d) (emphasis added). As I explained in Part II,⁷ however, not only does §255(d) on its face apply only to the FLSA, but Congress' failure to amend the ADEA's general incorporation of §255, 29 U. S. C. §626(e) (1988 ed.), strongly suggests that Congress paid scant attention to the impact of §255(d) upon the ADEA. Accordingly, I cannot accept the notion that §255(d) furnishes clarifying guidance in interpreting §216(b) for ADEA purposes, whatever assistance it might provide to a construction of §216(b) for FLSA purposes.⁸

* * *

For these reasons, I respectfully dissent from Part III of the Court's opinion.

⁷ *Supra*, at 5-6.

⁸ While §255 once was incorporated by the ADEA, see §7(e), 81 Stat. 605, 29 U. S. C. §626(e) (1988 ed.), the ADEA was amended in 1991 to remove the incorporating reference, see Civil Rights Act of 1991, §115, 105 Stat. 1079, 29 U. S. C. §626(e). The current "unavailability" of §255(d) for ADEA purposes perhaps explains why the Court, which purports to examine only the statute in its current form, *ante*, at 12, does not rely on §255(d). But, as I have explained, without the light §255(d) sheds on §216(b), §216(b) falls short of a clear statement of Congress' intent to abrogate.

ADEA

- Support for doing something

- What kind approach

Brood bill

→ Beyond ADA to address lots of other problems

Narrow bill

~~ADA~~

2 way

① 1967 - ADEA

② 1975 Act - ^{Ames Pigante Act ADA} special study bill

if recep. can't down bond on bond

- Want to do something, ~~Act~~

- Civil Rights meeting ~~ADA~~ broader mtg.

- CRD + EEOC drafting bill

Next Steps

- CRD + EEOC get something done

- AARP discussing w/ friends in the Hill

- Call a larger mtg

3/8/00 cont.

- Def. of program = codes, race = 1984 funding scheme - TITLE VI & TITLE VII

- State Pension Plans - make sure it covers this

- Qs + As

- 2 pages

★

- keep it simple.

Questions

- Admin. bill

- How introduced.

Next Steps

Widen

cust?

Ellen says ??

Middle (AARP)

Jason
Seth

ADCA - 3/8/00

Ellen
disunion
Wade
Bill ?

Issue #1

How we address the criminal issue

Broader
more focused

(AARP) make sure we
can not just
just fix

1975 - Can't discuss if more health = Title III = very broad = does not cover
employment, especially under

NO private C/A - covers only profits & salary

IF Am 1975, create private C/A + broader remedial scheme: no limit.

remedial - speedy

canon

- If amend 1967, create private C/A w/pt states using the speedy clause
+ tests Simply a restoration of law prior to criminal

- Amending ADCA - may politically be easier. - make sure not too narrow.

+ Support on the bill

+ Wade = some support of this but needs to have some

Concern of political risk - keep narrow to address work

may want to change other parts of ADCA, business groups have
been quiet.

DRAFT BILL

- Build up the findings

- Def. "Program & Activity" - depending on the entity...

Grime City - Department approach not it to stress practical results the
entire state covered.

- Continued to waiver provision

- Tie back funds to employment > Clarify the finding

- State Institutional = trying to cover all the states

Municipalities not covered need to have a decision relying on criminal
clarity (hr)

- Sig. Date = can wait a while at

- Effective Date = retroactive? - can't be after the 31

- Notice required - to decide if to take it.

Age Discrim. Act Mtg (ADEA)

2/29/00

Civil RT, DOJ

Bill Taylor

Nat'l Sr. ^{Adm.} Rts Law CTR

Wade Henderson

EEOC

AARP

① Address ~~kinzel~~ ~~kinzel~~ rule only, or more broad?
Eddie - chance can get consensus on ~~kinzel~~
only

- amend Age Disc. Act? Can't use 14th amend, ^{or} ~~comm~~ ^{claus}
nd to use other clause $\Rightarrow$ Spending clause.
EEOC sue States? Nd to make sure
authority is there.

② AARP -

- fear opening ADEA
- cd be opened to benefit business comty.
- Benefit of opening worth cost of hurting millions?
- + Support addressing kinzel, but nd to be
careful.
- issue of early retirement is biggest among their group.
- main areas of ADEA:
 - $\Rightarrow$ employ ben
 - $\Rightarrow$ hiring
 - $\Rightarrow$ forced retirement litigation
- AARP wouldn't be able to weigh in until saw.
- But, must raise issue - whether thru ADA or ADEA ^{or} ~~broaden~~ ^{bill}.
- Also, want to amend ADA. Project that other cases
in future will cover broadly. (e: disabilities Act is
not just employment.

Practically, may be easier to amend Spending clause than ADEA.

- Statute by state amendment approach $\Rightarrow$ hard. may be seen as beyond Congl intent.

- Lots of alternatives under Broader bill approach.

(3) - NCSCLC

- Talk to EEOC about using regl authority about disparate impact.

- Kinzel - ADEA of i.D. popns most affected & create waiver longer acc'dj to ea university.

lished that the jury's verdict is against the weight of the evidence. Thus, we hold that there was no abuse of discretion by the trial judge in denying the motion for a new trial on liability.²

IV. CONCLUSION

We agree with the district court's denial of Defendant's motions for a judgment as a matter of law and denial of Defendant's motion for new trial because the evidence presented at trial supports the jury's finding of intentional national-origin discrimination against Defendant. We also hold that the trial court did not abuse its discretion in its evidentiary rulings and jury instructions. The liability and amended damages judgment of the district court are

AFFIRMED.

BAILEY v. CANAN

U.S. District Court,
Southern District of Indiana,
Indianapolis Division

DONALD BAILEY, on behalf of himself and all others similarly situated, Plaintiff v. DAN CANAN, Mayor, City of Muncie, individually and in his official capacity, JOSEPH WINKLE, Chief of Police, individually and in his official capacity, and THE CITY OF MUNCIE, INDIANA, Defendants, No. IP 97-1483-C M/S, January 25, 2000

AGE DISCRIMINATION IN EMPLOYMENT ACT

1. Equal protection ▶106.0433 ▶106.1305 ▶108.6901

Federal district court, which lacks subject-matter jurisdiction over ADEA claims against state entity, lacks jurisdiction to decide protected-age former employer's ADEA claim against city in view of U.S. Supreme Court's observations that ADEA prohibits substantially more state employment decisions and

practices than would likely be held unconstitutional under applicable equal-protection, rational-basis standard, that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age, and that there was no reason to believe that broad prophylactic legislation was necessary in this field.

2. Reassignment ▶106.1352

Protected-age police detective cannot seek relief under ADEA for his reassignment from position in which he investigated forgeries to general investigator position following certain incident in which he violated numerous department rules, where reassignment was purely lateral move that did not affect his rank, hours, pay, seniority, and benefits and thus did not constitute adverse action; his transfer from one area of detective work to another, standing alone, is simply not adverse, there is no indication that his responsibilities changed in material way, and transfer changed only types of cases that he worked on.

3. Suspension ▶106.13278 ▶106.1344

City that suspended protected-age police officer for 10 days after incident in which he violated numerous police department rules, did not violate ADEA, despite contention that its willingness to drop formal charges against him in exchange for his retirement creates factual issue as to whether charges were as serious as city alleged, where police chief stated that he had raised issue of retirement to spare officer embarrassment, officer offers neither evidence that deficiencies found during investigation were illegitimate nor facts implying that suspension was not warranted, he points to no facts leading to inference that city's concerns about public perception or lawsuit were pretext for age discrimination or suggesting that those reasons were not legitimate ones on which city should base decision about suspension or reduction in rank, that charges against him were dropped after he retired reflects common sense because issue was moot, and younger officer received same suspension for his violation of similar department regulations.

4. Demotion ▶106.1350

City did not violate ADEA when it referred protected-age police detective's violations of numerous police department rules during certain incident to city police and fire merit commission to consider penalty of reduction in rank, despite his contention that charges against him were dropped after he re-

² Plaintiff's attorney also requests that this Court sanction Defendant for filing a frivolous appeal. Indeed, we are at a loss as to what basis in law supports Defendant's belief that the district court erred when it refused to admit a photograph, in which Zigelman was not even pictured, of his "minority" friends at his son's bar mitzvah as evidence of Zigelman's lack of discriminatory animus in promoting Plaintiff. Otherwise, by and large, Defendant's arguments are sufficiently based in law and fact.

tired creates factual issue as to whether charges were severe enough to warrant such referral, where he offers no facts that suggest that city lied about its reasons for recommending reduction in rank, that rebut charges against him, or that discredit findings of internal investigation team.

5. Demotion ▶106.1325 ▶106.1350

Fact that city, which recommended that protected-age police officer be demoted in rank for violating numerous police department rules during certain incident, recommended that younger officer be discharged for his role in incident implies that protected-age officer benefited from his age and experience rather than suffered for it.

6. Retirement ▶106.1363

City did not violate ADEA when it suggested that protected-age police officer, who had violated numerous police department rules during certain incident, retire rather than face embarrassing disciplinary action, despite contention that he retired as result of harassment from number of false charges against him, where he has not provided evidence, as opposed to self-serving testimony, that charges against him were false.

Steven C. Smith (Smith Ragains & Cotton), Anderson, Ind., for plaintiff.

Frank E. Gilkison (Beasley Gilkison Rutherford Buckles & Clark, L.L.P.), Muncie, Ind., for defendant Dan Canan.

Donald S. Smith and Pamela G. Schneeman (Riley Bennett & Egloff), Indianapolis, Ind., for defendants Joseph Winkle and City of Muncie.

Full Text of Opinion

LARRY J. MCKINNEY, District Judge: — This cause is before the Court on motion for summary judgment of defendants, Dan Canan, Mayor, City of Muncie (the "City"), Joseph Winkle, Chief of Police, and the City of Muncie, Indiana (collectively "Defendants"). The Defendants have also filed a motion that the court accept all of Defendants' statements of material fact as true and uncontroverted pursuant to Local Rule 56.1(g) because the plaintiff, Donald Bailey ("Bailey"), failed to comply with the requirements set forth in Local Rule 56.1(f)(2). In addition, the Defendants have moved to strike certain factual assertions made by Bailey in his brief in opposition to the Defendants' motion for summary judgment.

The Court has reviewed the materials submitted by the parties and for the

reasons stated herein, the Court **GRANTS** in part and **DENIES** in part the Defendants' motion to accept their statements of material fact as true and uncontroverted. In addition, the Court **GRANTS** in part and **DENIES** in part the Defendants' motion to strike various factual assertions in Bailey's brief in opposition to Defendants' motion for summary judgment. Finally, the Court **GRANTS** the Defendants' motion for summary judgment.

I. PROCEDURAL BACKGROUND

Bailey filed a charge of age discrimination with the Equal Employment Opportunity Commission ("EEOC") on March 20, 1997 and he received notice that his charge was dismissed along with a right to sue letter that was dated June 6, 1997. Bailey filed his original action on September 5, 1997.¹ Bailey asserts that the Court has jurisdiction over these matters pursuant to 29 U.S.C. §§621 and 623, 42 U.S.C. §1983 and 28 U.S.C. §§1331 and 1343(a)(3).

Bailey filed a second amended complaint on September 30, 1998 alleging that the City had discriminated against him because of his age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§621-34. Pursuant to 42 U.S.C. §1983, Bailey also alleged that under color of state law Muncie Mayor Dan Canan ("Mayor Canan") and Muncie Chief of Police Joseph Winkle ("Chief Winkle") had violated his right to due process guaranteed to him by the Fourteenth Amendment to the U.S. Constitution by suspending him for ten days without opportunity for a hearing and by denying him the opportunity to appeal his superior's determination to invoke the suspension. The Defendants filed a motion for summary judgment on August 5, 1999 asserting there are no genuine issues of material fact on the questions of whether the City had legitimate, non-discriminatory reasons for its employment decisions involving Bailey, and whether Bailey had a legally protected interest in a suspension of less than ten days, and therefore, no right to a hearing either before or after such a suspension. Having reviewed the procedural background, the Court now turns to a brief overview of the standards governing its decision.

¹ Bailey does not state the date he received the EEOC's notice of dismissal and right to sue letter, so the Court cannot determine whether Bailey timely filed his original complaint. September 5, 1997 is the ninety-first day after the date marked on the EEOC's notice. The Court will assume for purposes of this motion that Bailey received the EEOC's notice at least one day after it was dated by the EEOC.

II. SUMMARY JUDGMENT STANDARD

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

The moving party has the initial burden to show the absence of genuine issues of material fact. See *Schroeder v. Barth*, 969 F.2d 421, 423 (7th Cir. 1992). This burden does not entail producing evidence to negate claims on which the opposing party has the burden of proof. See *Green v. Whiteco Indus., Inc.*, 17 F.3d 199, 201 & n.3 (7th Cir. 1994). The party opposing a summary judgment motion bears an affirmative burden of presenting evidence that a disputed issue of material fact exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Scherer v. Rockwell Int'l Corp.*, 975 F.2d 356, 360 [59 FEP Cases 1301] (7th Cir. 1992). The opposing party must "go beyond the pleadings" and set forth specific facts to show that a genuine issue exists. See *Hong v. Children's Mem. Hosp.*, 993 F.2d 1257, 1261 [61 FEP Cases 1244] (7th Cir. 1993), cert. denied, 511 U.S. 1005 [64 FEP Cases 480] (1994). This burden cannot be met with conclusory statements or speculation, see *Weihaupt v. American Med. Ass'n*, 874 F.2d 419, 428 [49 FEP Cases 1162] (7th Cir. 1989), but only with appropriate citations to relevant admissible evidence. See Local Rule 56.1; *Brasic v. Heinemann's Inc., Bakeries*, 121 F.3d 281, 286 [74 FEP Cases 943] (7th Cir. 1997); *Waldrige v. American Hoechst Corp.*, 24 F.3d 918, 923-24 (7th Cir. 1994). Evidence sufficient to support every essential element of the claims on which the opposing party bears the burden of proof must be cited. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

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

datory. *Celotex Corp.*, 477 U.S. at 322-23; *Shields Enters.*, 975 F.2d at 1294.

The summary judgment standard is applied with added rigor in employment discrimination cases because of the crucial role played by motive, intent and credibility in resolving such cases. *Pitasi v. Gartner Group, Inc.*, 184 F.3d 709, 714 [80 FEP Cases 600] (7th Cir. 1999). However, even when discriminatory intent is at issue, the evidence must not only address the issue of intent, but also relate to the specific employment decision in question. *Cowan v. Glenbrook Security Serv., Inc.*, 123 F.3d 438, 443 [78 FEP Cases 325] (7th Cir. 1997). Further, the non-movant will not defeat summary judgment merely by pointing to self-serving allegations or conclusory statements in affidavits without other evidentiary support. *Cliff v. Board of Sch. Comm'rs*, 42 F.3d 403, 408 [66 FEP Cases 988] (7th Cir. 1994) (citing *McDonnell v. Courtnia*, 990 F.2d 963, 969 (7th Cir. 1993)). Accord *Chapple v. National Starch & Chem. Co.*, 178 F.3d 501, 504 [161 LRRM 2321] (7th Cir. 1999).

Pursuant to Southern District of Indiana Local Rule 56.1 ("L.R. 56.1"), the moving party is required to submit a Statement of Material Fact that complies with L.R. 56.1(f). L.R. 56.1(a)(1). Similarly, the non-moving party is required to provide a Response to Statement of Material Facts that complies with the same section. See L.R. 56.1(b)(1). In addition, any facts that the non-moving party wishes to add to the Statement of Material Fact must be filed as a separate Statement of Additional Material Fact, that must also comply with L.R. 56.1(f). L.R. 56.1(b)(1). Section (f) provides in pertinent part:

(f) *Requirements for Factual Statements and Responses Thereto.*

(1) *Format and Numbering.* The Statement of Material Facts shall consist of numbered sentences. The Response to Statement of Material Facts must be numbered to correspond with the sentence numbers of the Statement of Material Facts, preferably with each respective factual statement repeated therein. Any Statement of Additional Material Facts must consist of numbered sentences and start with the next number after the last numbered sentence in the Statement of Material Facts. . . .

(2) *Format of Factual Assertions.* Each material fact set forth in a Statement of Material Facts, Response to Statement of Material Facts, Statement of Additional Material Facts must consist of concise, numbered sentences with the contents of each sentence limited as far as practicable to a single factual proposition. Each stated material fact shall be substantiated by specific citation to record evidence. . . .

(3) *Format of Objections to Asserted Material Facts or Cited Evidence.* Objections to material facts and/or cited evidence shall (to the extent practicable) set forth the grounds for

the objection in a concise, single sentence, with citation to appropriate authorities.

L.R. 56.1(f)(1)-(3). Finally, the rule also provides that "[i]n determining the motion for summary judgment, the Court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy, except to the extent that such facts are specifically controverted or objected to in compliance with L.R. 56.1(f)." L.R. 56.1(g).

The Court may use its discretion in deciding how strictly to enforce compliance with L.R. 56.1. See L.R. 56.1(k); see also *Bradley v. Work*, 154 F.3d 704, 708 (7th Cir. 1998) (finding that the district court in that case "was within its discretion to insist on compliance with [L.R.] 56.1").

III. DISCUSSION

A. FACTUAL BACKGROUND

The majority of the facts set out herein were provided by the Defendants. Defendants set out 161 individual statements of material fact in a section of their brief. Defs.' Br. In Supp. Of Mot. For Summ. J. at 1-26. Bailey, however, failed to respond by admitting, denying or objecting by individual paragraph as required by L.R. 56.1. Instead, Bailey provided a one sentence blanket denial of all the facts set forth by the Defendants. Pl.'s Answer To Defs.' Mot. For Summ. J. ¶1. In addition, Bailey set out in his own version of the facts in his brief in opposition to the Defendants' motion, however, did not provide citation to relevant evidence of the kind admissible at trial for each statement or number each statement of fact separately. Pl.'s Br. In Opp'n To Defs.' Mot. For Summ. J. at 1-4. Bailey clearly did not follow the dictates of L.R. 56.1, or attempt to comply with the spirit of the rule. Nevertheless, the Defendants did make a reply to Bailey's statement of the facts by numbering the sentences, then making the appropriate objection or response by the numbered paragraph. Defs.' Reply To Pl.'s Add'l Mat'l Facts And Mot. To Strike at 3-21.

As stated by the Seventh Circuit, L.R. 56.1 "serve[s] to notify the parties of the factual support for their opponent's arguments, but more importantly inform the court of the evidence and arguments in an organized way—thus facilitating its judgment of the necessity for trial." *Little v. Cox's Supermarkets*, 71 F.3d 637, 641 (7th Cir. 1995). Furthermore, "a party contesting summary judgment has a responsibility under [rules such as L.R. 56.1] to 'highlight which factual averments are in conflict as well as what record evidence there is

to confirm the dispute.'" *Id.* (quoting *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 922 (7th Cir. 1994)).

By not following the requirements of L.R. 56.1, Bailey has made it difficult for this Court to determine whether there are issues of material fact in dispute. Such a situation does not favor Bailey because, as the non-movant, he bears the burden of coming "forward with evidence that would reasonably permit the finder of fact to find in [his] favor on a material question" and if the Court cannot easily find such evidence, the Defendants may win easily. *Waldridge*, 24 F.3d at 920. *Accord Liu v. T & H Machine, Inc.*, 191 F.3d 790, 796 (7th Cir. 1999); *Alder v. Glickman*, 87 F.3d 956, 958 [72 FEP Cases 433] (7th Cir. 1996).

In addition, under L.R. 56.1, Bailey is required to make an "effort to identify with specificity what factual issues were disputed. . . [and] supply the requisite citations to the evidentiary record." *Waldridge*, 24 F.3d at 922. Here, Bailey failed to "identify with specificity" the facts in dispute, depending instead upon the Court or, as it happens, the Defendants, to point out where factual disputes lie. It is impossible to tell from Bailey's version of the facts which facts are uncontroverted and which are contested. Without the Defendants' objections to individual sentences in the statement of facts contained in Bailey's brief, this Court would have no choice but to accept Defendants' version of the facts as uncontroverted. But, because the Defendants in this case chose to make a detailed response to the facts offered by Bailey, in appropriate form, some of Bailey's proffered facts will survive.

However, the Court will only consider those facts that Bailey presents in his brief for which he provides proper citation to evidence of the kind designated by Federal Rule of Civil Procedure 56(c). Facts that Bailey submits without proper citation to submitted evidence are stricken. Accordingly, the facts of this case in the light most favorable to Bailey follow.

Bailey was born on December 30, 1938 and joined the Muncie Police Department ("MPD") on January 27, 1970 at the age of 32. See Bailey Dep. at 13-14; Hargis Aff., Letter from Cordell Campbell, Pres. Police Pension Bd., to Muncie Police and Fire Merit Comm. (the "Commission"). Generally, Bailey's performance at the department was rated as satisfactory or above satisfactory for the period between 1970 to 1994. See Weller Aff. To Authenticate Bus. Rec. (hereinafter "Weller Aff. I"), Bailey Job Perf. Reviews. In addition, at least one

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direct supervisor described Bailey's work as average or above average, and other supervisors who had occasion to observe Bailey's work also deemed it as such. *See* Davis Aff. ¶9; *see also* Denney Aff. ¶5; McClellan Aff. ¶4; Williams Aff. ¶5. Further, although Bailey received a few reprimands for misconduct during his career, he also received commendations for work on particular cases. Weller Aff. I, Bailey Reprimands & Commendations.

Sometime in 1996, a captain in the department, and apparently others of similar rank, learned at staff meetings of Chief Winkle's desire to transfer older officers to less desirable positions and replace them with younger officers.² Davis Aff. ¶7; McClellan Aff. ¶5-6. In addition, Chief Winkle referred to older officers on the force as "dead wood," "dead weight," or "lazy." Davis Aff. ¶¶5, 6. Upon hearing about Chief Winkle's alleged plan, Bailey and fellow officer Sergeant Jan McClellan ("McClellan"), visited Mayor Canan to express their concern about it.³ McClellan Aff. ¶5-6. Mayor Canan indicated to the officers that he understood their concerns and would take care of the situation. *See id.* ¶7. Soon after that, Bailey openly challenged Chief Winkle about the plan in a department meeting.⁴ Bailey Dep. at 27.

At the time of these events, Bailey held a detective position on the MPD in which he investigated "forgeries, stolen checks, [and] anything to do with stolen and forged credit cards." Bailey Dep. at 24-25. He had held this position for approximately two years prior to December 1996. Bailey Dep. at 13-14. In December 1996, Bailey was fifty-eight years old. *Id.* at 24-25. It was with this backdrop that the incidents occurred that led to Bailey's ten day suspension and subsequently his retirement.

On the morning of December 3, 1996, Bailey and fellow police officer, Michael McDonald ("McDonald"), both wearing plain clothes, left the Muncie Police Station (the "Station") in Bailey's assigned, unmarked police car to get breakfast. Bailey Dep. at 13, 135-37; Bailey Statement at 2, 14-16. Bailey and

McDonald heard a "be on the lookout" ("BOL") call over the police dispatch radio in the car on their way to breakfast. Bailey Dep. at 13; Bailey Statement at 2. Bailey heard MPD Officer Craig ("Craig") report that he had spotted a person named Danny Fletcher ("Fletcher"), who had recently been released from jail, was armed with an automatic weapon and had threatened to kill his ex-girlfriend, in the area of First Street and Kilgore. Bailey Dep. at 13-14; Bailey Statement at 2. Bailey and McDonald were near the intersection in question, and when they arrived there, they saw Craig's marked patrol car with its lights and siren on in high-speed pursuit of Fletcher. Bailey Statement at 3. Bailey and McDonald joined the pursuit, in part because Bailey knew Fletcher and Bailey thought he could help diffuse the situation with Fletcher. *Id.* at 2, 15; Bailey Statement at 7.

However, Bailey and McDonald failed to inform MPD dispatch that they were joining Craig. Bailey Statement at 5; Weller Aff. I, MPD Internal Investigation Report No. 96-51974 (Dec. 11, 1996), at 1 (hereinafter "Int. Invest. Rep."); Weller Aff. I, Letter from Chief Winkle and Deputy Chief Terry W. Winters to Sgt. Donald R. Bailey, Feb. 11, 1997 (hereinafter "Feb. 1997 Letter"). Apparently, this failure is a violation of the MPD rules and regulations regarding "Signal 10 Runs" and "Emergency Operation of Police Vehicles." Weller Aff. I, Policies & Procedures Nos. 86-9-22-055, 86-9-22-063 (hereinafter "MPD Pol. & Ps."); Feb. 1997 Letter. Nevertheless, Bailey and McDonald continued in pursuit of Fletcher, following Craig, outside the Muncie city limits, through Yorktown and Daleville and onto Interstate Sixty-Nine ("I-69"). Bailey Dep. at 15; Feb. 1997 Letter at 2. By the time Fletcher and his pursuers were heading outside Muncie, other state, county and local law enforcement officials had joined the pursuit. Bailey Statement at 5; Weller Aff. I, James Peters' Statement to Detective Brian Buroker, Indiana State Police Dep't (hereinafter "Peters' Statement") at 6; Int. Invest. Rep. at 2; Feb. 1997 Letter at 2. After the pursuit had gone through Daleville, Sergeant Jim Peters ("Peters") issued an order over the police radio system that all police cars, except for officers Craig and Mench ("Mench"), should discontinue the pursuit. Peters' Statement at 6; Int. Invest. Rep. at 1; Feb. 1997 Letter at 2. However, Bailey did

² Defendants admit this fact for purposes of this summary judgment motion only. Defs.' Reply To Pl.'s Add'l Mat'l Facts And Mot. To Strike at 13.

³ Defendants admit this fact for purposes of this summary judgment motion only. Defs.' Reply To Pl.'s Add'l Mat'l Facts And Mot. To Strike at 10-11.

⁴ Defendants admit this fact. Defs.' Reply To Pl.'s Add'l Mat'l Facts And Mot. To Strike at 9.

⁵ Defendants admit this fact for purposes of this summary judgment motion only. Defs.' Reply To Pl.'s Add'l Mat'l Facts And Mot. To Strike at 8.

⁶ Officer McDonald was born on May 21, 1957 and began his service to the MPD on July 21, 1991. Weller Aff. II ¶4. Thus, on December 3, 1996, McDonald was 39 years old and had served on the police force for approximately five and a half years.

⁷ Bailey disputes that anything he did during the Fletcher pursuit and stand-off were in violation of MPD policies or procedures, yet he offers no evidence to controvert the findings of the MPD.

not hear the order because he had inadvertently turned his radio off when he began the pursuit.¹ Bailey Dep. at 82; Bailey Statement at 4. Bailey's failure to have his radio on in this circumstance was considered by his management and his fellow police officers as negligent and in violation of MPD rules and regulations. MPD Pol. & Ps. Nos. 86-9-22-055, 86-9-22-063; Feb. 1997 Letter.

At some point during the continued chase, Bailey's car became the lead car in pursuit of Fletcher. Bailey Statement at 5; Peters' Statement at 7. Even though Peters had issued an order over the radio that officers should not fire their weapons at Fletcher's car, McDonald failed to heed this order, and with Bailey's knowledge, and apparently consent, McDonald leaned out the car window, while the vehicle was moving at high speed, and fired at least one shot at Fletcher's car. Bailey Statement at 8, 10; McDonald Statement at 8, 14; Int. Invest. Rep. at 8, 10. After McDonald fired the shots, Bailey attempted to maneuver his car in front of Fletcher's vehicle in order to slow Fletcher down and at one point the two cars collided, but did not stop. Bailey Statement at 11; McDonald Statement at 11; Int. Invest. Rep. at 1, 3. Officers also used stop sticks in an attempt to disable Fletcher's vehicle. Bailey Statement at 9; Peters' Statement at 10; Breena Wysong Aff. To Authenticate Bus. Recs., *Muncie Man Kills Self After I-69 Chase*, The Star Press, Dec. 4, 1996, at 1A (hereinafter "Star Press Article"). Fletcher continued driving, however, until he reached a rest area at which he stopped; the pursuing police also stopped and surrounded Fletcher's vehicle. Bailey Dep. at 15; Bailey Statement at 9.

Several of Bailey's and McDonald's actions during the chase were considered by MPD management and MPD internal investigation officers as violations of MPD rules and regulations; some of them were considered violations of direct orders by a superior officer. MPD Pol. & Ps. Nos. 86-9-22-055, 86-9-22-063; Int. Invest. Rep. at 1-2; Feb. 1997 Letter at 1-5.

Once at the rest area, Bailey pulled his car up very close to Fletcher's car before contacting his supervisors or other law enforcement officials on site

to discuss the appropriate tactical approach. Bailey Statement at 13-14; Peters' Statement at 12; Int. Invest. Rep. at 3; Feb. 1997 Letter at 3. Shortly after parking his car, Bailey exited the vehicle and walked up to Fletcher's car. Bailey Dep. at 15; Int. Invest. Rep. at 2; Feb. 1997 Letter at 3. When he reached Fletcher's vehicle, Bailey noticed that Fletcher was pointing a shot gun to his own chest. Bailey Statement at 14-15. Bailey began talking with Fletcher trying to convince him to put the shot gun down and surrender. Bailey Dep. at 17; Bailey Statement at 14-15. Apparently, during the discussion, Bailey watched Fletcher consume pills that made Fletcher drowsy, shook Fletcher awake when he fell asleep, and returned the car's keys to Fletcher after Fletcher had voluntarily thrown them out of the car. Bailey Dep. at 17, 158-59; Bailey Statement at 15-16; Int. Invest. Rep. at 2, 3. These acts were considered by MPD management as in poor judgment. Feb. 1997 Letter at 2. The standoff ended when Fletcher shot himself in the chest. Bailey Dep. at 17-18; Feb. 1997 Letter at 2. Bailey then reached into Fletcher's car, grabbed the gun and threw it butt first to the ground, which could have caused the weapon to fire a second time. Bailey Dep. at 18; Bailey Statement at 18-19; Int. Invest. Rep. at 2.

Bailey was stunned and in shock following the incident. Bailey Dep. at 18-19; Int. Invest. Rep. at 3-4. Craig drove Bailey and McDonald back to Muncie City Hall at approximately 10:39 a.m. Bailey Dep. at 4-6; Weller Aff. I, Jack Craig Supplemental Police Rep. (hereinafter "Craig Rep."). Once the officers arrived at City Hall, the Indiana State Police and the MPD interviewed Bailey and McDonald about the incident. Bailey Statement at 1; McDonald Statement at 1; Weller Aff. I, Bailey Garrity Warning (hereinafter "Bailey Garrity"); Weller Aff. I, McDonald Garrity Warning (hereinafter "McDonald Garrity").

Even though it seemed to Bailey that he was interviewed about the incident immediately following the event, see Bailey Dep. at 20, the Indiana State Police interviewed Bailey at approximately 2:12 p.m. Bailey Statement at 1. When that interview concluded, Bailey was interviewed by the MPD. Bailey Garrity. Bailey was advised that the MPD interview was for the purpose of "administrative matters relating to the official business of the MPD" and not for the "purpose of instituting a criminal action against [him]." *Id.* Although advised of his right to consult with an attorney before questioning, Bailey did not make such a request. *Id.*

¹In contrast to this statement made by Bailey, during investigation of the Fletcher chase, McDonald recalled hearing a lot of "radio traffic." Weller Aff. I, Michael McDonald Statement to Detective Brian Buroker, Indiana State Police Dep't at 4, 10 (hereinafter "McDonald Statement"). This factual dispute is not dispositive on the issues of this case.

The Indiana State Police interviewed McDonald after Bailey at approximately 3:27 p.m. McDonald Statement at 1. However, the MPD interviewed McDonald at approximately 11:07 a.m. McDonald Garrity. Like Bailey, McDonald was also advised that the interview was for the purpose of "administrative matters relating to the official business of the MPD" and not for the "purpose of instituting criminal action against [him]," and that he had the right to talk with an attorney before making his statements. *Id.* McDonald consulted an attorney before answering any questions. *Id.*

On the day following the Fletcher chase, McDonald was told to report to Chief Winkle's office to discuss McDonald's disregard of Peters' orders during the Fletcher chase. Weller Aff. I, Letter from Chief Joseph R. Winkle to Michael A. McDonald, Dec. 4, 1996. At the meeting, McDonald was suspended for ten days for disregarding the orders. Weller Aff. I, Letter from Chief Joseph R. Winkle to Michael A. McDonald, Dec. 5, 1996. He was also informed that further disciplinary action might be warranted depending upon the results of the ongoing internal investigation into the incident. *Id.* After the investigation, Chief Winkle suggested to the Commission that McDonald be fired. Weller Aff. I, Letter from Chief Joseph R. Winkle to Michael J. Szakaly, Feb. 6, 1997 (hereinafter "McDonald Termination Letter"). After a hearing on the issue, the Commission accepted Chief Winkle's recommendation. Hargis Aff., Minutes of the Muncie Police/Fire Merit Commission Meeting, Oct. 16, 1997, at 2.

On the day following the Fletcher chase, December 4, 1996, Chief Winkle ordered Bailey to report for a "Fitness for Duty Evaluation" on December 6, 1996, and placed Bailey on administrative leave until Chief Winkle could evaluate the psychologist's report. Weller Aff. I, Letter from Chief Winkle to Sgt. Donald Bailey, Dec. 4. On December 5, 1996, Bailey visited his own doctor, who issued a note that Bailey was to remain off work until the doctor gave him permission to return. Weller Aff. I, Note from Dr. James L. Dunn, Dec. 5, 1996.

About a week after the Fletcher chase, Bailey returned to the office. See Bailey Dep. at 101, 115. That day Chief Winkle orally informed Bailey that the investigation into the incident was not complete, however, Bailey could prob-

ably expect some suspension time.⁹ See Bailey Dep. at 106, 116. Bailey decided at that point that he would retire rather than go through a suspension and a potential merit commission review. See Bailey Dep. at 116. Bailey talked with MPD Administrative Captain Weller ("Weller") about retirement and at the same meeting asked Weller to draft the papers necessary to effectuate the retirement. Weller Aff. II ¶¶6-8. A few days later, however, Bailey changed his mind, and the MPD allowed him to withdraw his retirement papers. Bailey Dep. at 116; Weller Aff. II ¶¶8-11.

Bailey returned to work on January 2, 1997. See Bailey Dep. at 57, 117. However, on January 8, 1997, Bailey presented two notes from his doctor stating that Bailey should not work for an indefinite period of time. Weller Aff. I, Prescription Notes, Jan. 8, 1997 (hereinafter "Doctor's Notes"). Upon inquiry by the MPD, Bailey's doctor, Dr. James L. Dunn ("Dr. Dunn"), provided further explanation that Bailey was suffering from situational anxiety, depression and hypertension. Weller Aff. I, Letter from Dr. James L. Dunn to Captain Baird Davis, Jan. 9, 1997 (hereinafter "Doctor's Letter I"). Dr. Dunn recommended that Bailey not return to work until at least January 28, 1997, at which time the doctor would reevaluate the situation. *Id.* Dr. Dunn signed a release for Bailey to return to work part-time on January 27, 1997. Weller Aff. I, Letter from Dr. James L. Dunn to Captain Baird Davis, Jan. 27, 1997 (hereinafter "Doctor's Letter II").

On January 28, 1997, Terri Rickel ("Rickel"), First Vice President, American National Bank in Muncie, and others met with Chief Winkle on behalf of the Community Financial Institutions Security Committee ("CFISC") to discuss the MPD's response to bank alarms and check fraud cases. Rickel Aff. ¶¶9-10, 15-16; Rickel Aff. Ex. D; Utt Aff. ¶¶11-12; Winkle Aff. ¶¶4-6. During the meeting, Rickel told Chief Winkle that CFISC's member banking institutions were concerned about the attention Bailey was paying to their check fraud cases. Rickel Aff. ¶¶17-18; Winkle Aff. ¶¶7-8. Rickel requested that Chief

⁹There is a discrepancy in Bailey's testimony about exactly what Chief Winkle told him at this informal meeting. At one point in his deposition Bailey testified that Chief Winkle told him to expect a two or three day suspension. Bailey Dep. at 106. However, in another part of his deposition, Bailey testified that Chief Winkle told him he was facing a ten day suspension and a hearing in front of the merit commission. Bailey Dep. at 116. In his statement of the facts, Bailey said: "While on medical leave and upon learning of [Chief] Winkle's intention to suspend him for ten (10) days, Bailey requested that his retirement papers be drawn up."

Winkle rectify the situation with Bailey. Rickel Aff. ¶19; Utt Aff. ¶14; Winkle Aff. ¶9. Immediately thereafter, Winkle removed Bailey from the check fraud investigation position and replaced him with Officer Steve Bell ("Bell"). Winkle Aff. ¶10. Bell was younger than Bailey.¹⁰ See *id.* at 56-58; Weller Aff. II ¶5. After the switch, CFISC members were satisfied with Bell's work. Rickel Aff. ¶21; Utt Aff. ¶16.

When Bailey reported to work after his medical leave,¹¹ he found out about his reassignment to the general investigation area of the detective division. See Bailey Dep. at 117. Even though this was a different assignment, Bailey testified that he did not mind the change. Bailey Dep. at 118. In addition, the change did not affect Bailey's rank, hours, pay, seniority or benefits. Weller Aff. II ¶¶13-14.

Although he was back at work, Bailey perceived that he was being harassed.¹² Bailey Dep. at 118-121. Specifically, Bailey's superiors challenged his long-term customary dress code and his long-term routine work habits and also accused Bailey of a variety of work rule violations. Bailey Dep. at 31, 118-121. Bailey recalled several specific incidents where a Lieutenant Irelan made the reprimands. *Id.* at 118-121.

In early February 1997, the MPD internal affairs team completed its investigation of the Fletcher chase. Winkle Aff. ¶12. Chief Winkle reviewed the report and recommended to the Commission on February 6, 1997, that it terminate McDonald's employment with the

department. Winkle Aff. ¶12; McDonald Termination Letter.

In contrast, on February 10, 1997, Chief Winkle issued a written order to Bailey requiring him to appear in Chief Winkle's office the next day to discuss disciplinary action related to the Fletcher chase. Weller Aff. I, Letter from Joseph R. Winkle to Sgt. Donald R. Bailey, Feb. 10, 1997 (hereinafter "Feb. 1997 Order"). The order informed Bailey that he had the right to bring a representative from the Fraternal Order of Police ("FOP") to the meeting with him in accordance with the collective bargaining agreement between the FOP and the City. *Id.* Bailey appeared in Chief Winkle's office with his chosen representative at the appropriate time. Bailey Dep. at 110. During the meeting, Chief Winkle suggested to Bailey that if he was still planning to retire, then disciplinary action against him, including suspension and a Commission hearing, would be moot. Bailey Dep. at 58; Winkle Aff. ¶17. Bailey responded that he had not decided whether he was going to retire. Winkle Aff. ¶18. Then, Chief Winkle told Bailey about the outside pressures that would require him to make some type of disciplinary recommendation to the Commission. *Id.* ¶¶15-16. Those pressures included the seriousness of the findings by the internal investigation team, the public criticism of the MPD's handling of the Fletcher chase, and the City's concern about the possibility of a wrongful death action by Fletcher's family. *Id.* ¶¶14-15. Chief Winkle also read to Bailey the formal letter describing the errors Bailey made during the Fletcher chase and the MPD policies and procedures that Bailey violated during the incident. Bailey Dep. at 114; Winkle Aff. ¶21; Feb. 1997 Letter. The letter informed Bailey that he was suspended for ten days without pay for his actions. Feb. 1997 Letter. In addition to the letter of suspension, Chief Winkle also read to Bailey the letter he was submitting to the Commission recommending that Bailey's rank be reduced from sergeant to patrolman. Winkle Aff. ¶20; Weller Aff. I, Letter from Joseph R. Winkle to Michael J. Szakaly, Feb. 11, 1997 (hereinafter "Bailey Demotion Letter"). Chief Winkle asked Bailey if he had any questions. Bailey said no, then left the meeting without comment. Bailey Aff. at 114.

Once Bailey had returned to work after his suspension, by letter dated February 28, 1997, the Commission notified Bailey that it would hold a hearing on March 26, 1997 to consider his conduct during the Fletcher chase. Hargis Aff., Letter from Mike Szakaly to Donald Bailey, Feb. 28, 1997 (hereinafter "Hearing Notice"). On March 21,

¹⁰ Bailey offered this fact without proper citation to the record. See Pl.'s Br. In Opp. To Defs.' Mot. For Summ. J. at 3. Defendants admitted this fact, while objecting to Bailey's proffer without proper citation, and in addition, included Bell's birth date and his age when he assumed the check investigations duty in their own statement of the facts. Defs.' Reply to Pl.'s Add'l Mat'l Facts and Mot. To Strike at 18; Defs.' Br. In Supp. Of Mot. For Summ. J. at 116. The Court finds the statement here is a reasonable inference drawn from the facts provided by the Defendants.

¹¹ There is no specific date in the record for Bailey's return to work. The Defendants point to an attendance record submitted as a business record with Weller's affidavit, however, that document bears no designation of the year it records. In addition, the document has codes in the boxes underneath the numbers corresponding to the days of the months, however, the codes do not correspond to the key on the same page. Thus, the document's contents is not decipherable by the Court, therefore, the Court will not use this document in deciding this motion.

¹² This statement comes from the evidence that Bailey cites for his "factual statement," that "In this capacity [as general investigator after medical leave] Bailey continued to experience harassment." The Defendants point out that Bailey's statement in his brief is not a statement of fact, but rather a legal conclusion. However, that Bailey felt he was harassed is not a legal conclusion and can be found in the evidence Bailey cites to for the statement he gave. See Bailey Dep. at 121, *ls.* 14-15 ("It was more retaliation, more harassment.").

1997, the Delaware Superior Court issued a temporary restraining order against the Commission to prevent it from conducting the disciplinary hearing. Hargis Aff. Ex. E. Apparently, the temporary restraining order was granted because the Commission's Hearing Notice did not give Bailey fair notice of the claims against him. Weller Aff. II ¶23. Subsequently, the MPD drafted a more thorough description of Bailey's violations of MPD policies and procedures and disciplinary action by the Commission resumed. Weller Aff. I, Letter from Chief Joseph R. Winkle to Michael J. Szakaly, Apr. 21, 1997 (hereinafter "Revised Charges"); Weller Aff. II ¶25.

Then, in early July 1997, Captain Anthony R. Mench ("Mench"), told Bailey that the Delaware County Prosecutor's Office had complained about how Bailey had handled evidence and prepared to testify in a trial. Bailey Dep. at 183-86; Weller Aff. I, Letter from Captain Anthony R. Mench to Chief Joe Winkle, July 4, 1997. Bailey felt this was the "last straw" in a continued pattern of harassment. Bailey Dep. at 184-85. In fact, Bailey protested to Mench that the MPD was trying to get rid of "older officers," then Bailey informed Mench of his intention to retire. Mench Aff. ¶¶8-9; Bailey Dep. at 185. When he left Mench's office, Bailey went to Weller's office to request that the Captain prepare his retirement papers. Bailey Dep. at 188. Bailey's last day of work at the MPD was July 7, 1997. Weller Aff. I, Letter from Donald R. Bailey to Chief Joseph R. Winkle, July 7, 1997 (hereinafter "Retirement Letter"). Subsequently, all charges against him pending at the Commission were dropped. Hargis Aff., Minutes of Muncie Police/Fire Merit Commission Meeting, Oct. 2, 1997. Having recited the facts of this case, the Court will now turn to the application of the law to these facts.

B. ADEA Claim

Bailey has brought his claim under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§621-34. The ADEA is designed "to promote employment of older persons based on their ability rather than age, and to prohibit arbitrary age discrimination in employment." 29 U.S.C. §621(b). Specifically, the ADEA makes it unlawful for an employer "to discharge any individual or otherwise discriminate against any individual ... because of such individual's age" and "to limit, segregate, or classify employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individ-

ual's age." *Id.* §§623(a)(1)-(2). However, it is not "unlawful for an employer ... to take any action otherwise prohibited ... [in] this section where age is a bona fide occupational qualification ... or where the differentiation is based on reasonable factors other than age" *Id.* §623(f)(1).

[1] Originally the ADEA did not apply to state and local government employers, however, in 1974 Congress modified the definition of employer to include such entities. See *Johnson v. Mayor & City Council of Baltimore*, 472 U.S. 353, 356 [57 FEP Cases 1839] (1985) (citing 29 U.S.C. §630(b)); *Kopec v. City of Elmhurst*, 193 F.3d 894, 896-97 [80 FEP Cases 1842] (7th Cir. 1999); *Roche v. City of Chicago*, 24 F.3d 882, 883 [64 FEP Cases 1077] (7th Cir. 1994). In a recent Supreme Court decision, the Court held that "in the ADEA, Congress did not validly abrogate the States' sovereign immunity to suits by private individuals." *Kimel v. Florida Bd. of Regents*, Nos. 98-791, 98-796, 2000 WL 14165, at *18 [81 FEP Cases 970] (U.S. Jan. 11, 2000). In making this determination, the Court applied the "congruence and proportionality" test first articulated in *City of Boerne v. Flores*, 521 U.S. 507, 520 [74 FEP Cases 62] (1997). *Id.* at *12. The Court reasoned that the ADEA "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 *15. Moreover, "Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age[.]" therefore, there was "no reason to believe that broad prophylactic legislation was necessary in this field." *Id.* at *17. Thus, it appears that this Court does not have jurisdiction to decide Bailey's claim of age discrimination against the City.

If the Court did have such jurisdiction, to state an individual claim for age discrimination under the ADEA, plaintiffs must offer direct evidence of discrimination, or use the indirect, burden-shifting, method of proof described in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 [5 FEP Cases 965] (1973). See *Testerman v. EDS Tech. Prods. Corp.*, 98 F.3d 297, 301 [72 FEP Cases 959] (1996). Using the direct method, a plaintiff may prove discrimination by providing evidence that the factfinder may interpret as the employer's acknowledgment of discriminatory intent. See *Chiaramonte v. Fashion Bed Group, Inc.*, 129 F.3d 391, 396 [76 FEP Cases 251] (7th Cir. 1997). For it to suc-

ceed, such evidence must clearly demonstrate the motivation of the person who made the contested employment decision. *See Id.* (citing *Cheek v. Peabody Coal Co.*, 97 F.3d 200, 203 [71 FEP Cases 1775] (7th Cir. 1996)). For an individual age discrimination claim, a plaintiff must prove that age was the determining factor in that decision. *See Id.*; *Testerman*, 98 F.3d at 301.

If an employee cannot provide direct evidence of discrimination, he or she may adopt the traditional burden-shifting method of proof first articulated in *McDonnell Douglas*, and refined in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 [25 FEP Cases 113] (1981) and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 [62 FEP Cases 96] (1993). Although this framework was originally applied only to Title VII claims, it has been adapted to age discrimination claims under the ADEA. *See McCoy v. WGN Continental Broad. Co.*, 957 F.2d 368, 371 [58 FEP Cases 350] (7th Cir. 1992) (quoting *Orman v. WLS-TV*, 846 F.2d 448, 452 [46 FEP Cases 1392] (7th Cir. 1988)). Ordinarily, in an ADEA case, this approach is based on the legitimate assumption that the plaintiff was doing fine in his or her job, then lost it, and was replaced by someone younger. *Hartley v. Wisconsin Bell, Inc.*, 124 F.3d 887, 889 [75 FEP Cases 701] (7th Cir. 1997). An employee may establish a prima facie case by showing:

1. Membership in a protected age group;
2. Satisfactory job performance;
3. An adverse employment action, such as a discharge; and
4. That substantially younger, similarly-situated employees were treated more favorably.

Chiaromonte, 129 F.3d at 398 (citing *O'Connor v. Consolidated Coin Caterers Corp.* [517 U.S. 308], 116 S. Ct. 1307, 1310 [70 FEP Cases 486] (1996)).

By establishing these elements of a prima facie case of age discrimination, the employee will enjoy a rebuttable presumption of discrimination that shifts the burden of production to the employer to articulate "a legitimate, nondiscriminatory reason" for the adverse employment action." *See Testerman*, 98 F.3d at 302 (citing *McDonnell Douglas*, 411 U.S. at 802; *Burdine*, 450 U.S. at 253). "[T]he defendant must clearly set forth, through the introduction of admissible evidence, reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." *Hicks*,

509 U.S. at 507 (quoting *Burdine*, 450 U.S. at 254) (alteration in original). However, the ultimate burden of persuasion on the issue of intentional discrimination remains with the plaintiff. *See Id.*; *Testerman*, 98 F.3d at 303. If the employer succeeds in providing evidence of a nondiscriminatory reason for the adverse action, the presumption dissolves and the burden of production shifts back to the plaintiff "to prove by a preponderance of the evidence that the legitimate reasons offered by the [employer] were not its true reasons, but were a pretext for discrimination." *Testerman*, 98 F.3d at 302-03 (quoting *Burdine*, 450 U.S. at 253). *See also Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1122 [63 FEP Cases 1016] (7th Cir. 1994). To demonstrate pretext, "a plaintiff must show more than that the employer's decision was incorrect; the plaintiff must also show the employer lied about its proffered explanation." *Abioye v. Sundstrand Corp.*, 164 F.3d 364, 368 [78 FEP Cases 1840] (7th Cir. 1998). Poor judgment on the part of the employer does not suffice. *Id.*

Some ADEA plaintiffs may choose to provide evidence that the employer made the adverse employment decision for "mixed motives," or for both legitimate and discriminatory reasons. *See Id.* at 369; *see also Gleason v. Mesirou Fin., Inc.*, 118 F.3d 1134, 1140 [74 FEP Cases 1365] (7th Cir. 1997) (describing mixed motive under Title VII analysis). Under the mixed motive theory, an employee may rely on either direct or circumstantial evidence to establish discriminatory intent. *See Abioye*, 164 F.3d at 369 (citing *Gleason*, 118 F.3d at 1140). "The defendant employer may then avoid a finding of liability by proving that it would have made the same decision even if the plaintiff was not ... above a certain age." *Id.* (citing *Gleason*, 118 F.3d at 1140). An employee must provide more than "some" evidence of a discriminatory motive to overcome overwhelming evidence of a "wholly legitimate reason for the employment decision." *Id.* (quoting *Trahant v. Royal Indemnity Co.*, 121 F.3d 1094, 1098 [78 FEP Cases 1880] (7th Cir. 1997)).

Bailey claims that the City discriminated against him because of his age in four instances: 1) when the City reassigned him to general investigator and replaced him with a younger employee; 2) when the City suspended him for ten days after the investigation of the Fletcher incident; 3) when the City recommended to the Commission that it demote Bailey; and 4) when the City forced him to retire as a result of the harassment and false charges of misconduct against him.

"The *McDonnell Douglas* presumption is only a 'procedural device' intended to establish an order of proof and production, not a means of deciding the merits. *Hicks*, 509 U.S. at 521.

The City makes varied arguments as to each alleged adverse action, therefore, the Court will discuss each of Bailey's assertions and the City's arguments in turn.

[2] 1. **Reassignment to General Investigator.**—The City argues that Bailey's transfer, as a purely lateral move that did not affect his rank, salary or other job criteria, does not rise to the level of an adverse action. Therefore, Bailey cannot seek relief under the ADEA for that action. The Court agrees.

The ADEA only forbids discriminatory acts against an individual "with respect to his compensation, terms, conditions, or privileges of employment," or acts by an employer that limit, segregate, or classify "employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee." *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 273 [70 FEP Cases 1639] (7th Cir. 1996). In other words, to establish a *prima facie* case, Bailey must establish that the action taken by the City was adverse. Bailey has failed to establish this element.

A purely lateral transfer, or one "that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action. A transfer involving no reduction in pay and no more than a minor change in working conditions will not do either." *Id.* at 274 (citing *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 456-57 [65 FEP Cases 941] (7th Cir. 1994); *Cady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132 [61 FEP Cases 1193] (7th Cir. 1993); *Spring v. Sheboygan Area School Dist.*, 865 F.2d 883 [48 FEP Cases 1606] (7th Cir. 1989)). Bailey's transfer from one area of detective work to another, standing alone, is simply not adverse. In addition, there is no indication in the record that Bailey's responsibilities as a detective changed in a material way. His rank, hours, pay, seniority, and benefits remained the same. *Weller Aff. II* ¶13-14. The facts reflect that the transfer changed only the types of cases Bailey worked on.

In fact, the change in job that Bailey experienced does not rise to the level of change experienced by an employee in another case in which the Seventh Circuit found no adverse employment action. See *Williams*, 85 F.3d at 274. In *Williams*, a pharmaceutical salesperson was transferred from one division to another, selling a completely different product line. *Id.* at 272. The change affected his sales and correspondingly, his commission pay. *Id.* at 272, 274. The Seventh Circuit found this change did not rise to the level of an adverse employment action, even with the change

in commission pay, because it was a purely lateral transfer and the lower sales also hurt the employer. *Id.* at 274. Bailey cannot even argue that the change in his responsibilities changed his pay or any other material aspect of his job. In addition, Bailey himself admitted that he did not have a problem with the change. See *Bailey Dep.* at 118. Under these circumstances, it is stretching the definition of "adverse" too far to consider Bailey's transfer to the general investigation area an adverse employment decision.

[3] 2. **Ten Day Suspension.**—The City argues that it had legitimate, non-discriminatory reasons for suspending Bailey for ten days after its investigation of the Fletcher chase. The reasons it offers include the severity of the findings of the internal investigation team, the number of procedural violations Bailey committed during the Fletcher incident, the public criticism of the MPD for how it handled that event, and the possibility of a wrongful death suit against the City by Fletcher's family.

Bailey asserts that the City's willingness to drop the formal charges against him in exchange for his retirement creates a genuine issue of material fact on the question of whether the charges were as serious as the City alleges. His retirement, Bailey argues, would not change public perception or change the City's potential liability. Therefore, there is a genuine issue of material fact, he asserts, on whether the City's suggestion of retirement was pretext for age discrimination.

Although the repeated and continual suggestion of retirement in lieu of termination in other cases has sufficed to rebut an employer's articulated legitimate, non-discriminatory reason for a termination, see *Greenberg v. Union Camp Corp.*, 48 F.3d 22, 28-29 [67 FEP Cases 120] (1st Cir. 1995); *Sischo-Nowne v. Merced Comm. College Dist.*, 934 F.2d 1104, 1108, 1112 [56 FEP Cases 250] (9th Cir. 1991), the suggestion of retirement and the drop of the charges, without more, can not rebut the City's evidence of a legitimate non-discriminatory reason for Bailey's suspension. There is no dispute here that Chief Winkle asked Bailey if he had considered retirement. Chief Winkle stated by affidavit that he did so to spare Bailey the embarrassment of a suspension, Commission hearing, and potential demotion. *Winkle Aff.* ¶16-18. The Seventh Circuit has recognized that this is a legitimate reason for suggesting retirement without evidence that "the identified deficiency in [the employee's] work performance was pretextual." *Kaniff v. Allstate Ins. Co.*, 121 F.3d 258, 263 [75 FEP Cases 1067] (7th Cir. 1997).

Bailey offers no evidence that the deficiencies found by his peers during the investigation of the Fletcher incident were illegitimate. Moreover, Bailey does not offer facts that imply that a suspension was not warranted based on the findings of the internal investigation team or in some other way offer alternative facts that rebut those findings.

Further, Bailey does not point to facts that would lead to an inference that the City's concerns about public perception or a lawsuit was pretext for discrimination on account of his age. Nor does Bailey point to facts that suggest those reasons were not legitimate ones on which the City should base its decision about a suspension or reduction in rank. Finally, the fact that the charges before the Commission were dropped against him after he retired does not tend to suggest that the deficiencies his peers identified were not serious. What it does reflect is common sense because the issue was moot since Bailey no longer worked for the MPD. Further, the seriousness of the charges are reflected in the Commission's action to proceed with its case after Bailey had obtained a temporary restraining order. Rather than dropping the charges then, it provided a more detailed hearing notice and rescheduled the hearing. These actions suggest that the Commission viewed the charges as sufficient enough to warrant a hearing about the correct disciplinary action to take.

In addition, McDonald, a younger worker, received the same suspension for his violation of similar department regulations, which supports the City's decision to give the same suspension to Bailey. The City had a legitimate, non-discriminatory reason for suspending Bailey for ten days that Bailey has not rebutted with evidence of pretext.

[4] 3. Recommendation to Commission of Reduction in Rank.—The City argues that the nature and severity of Bailey's misconduct during the Fletcher incident warranted its referral to the Commission. In addition, the recommended penalty for Bailey's misconduct was less severe than that recommended for McDonald's misconduct during the same incident, further supporting the City's assertion of a legitimate, non-discriminatory reason for its actions.

In rebuttal, Bailey argues that the fact the charges against him were dropped after he retired creates a material issue on the question of whether the charges were severe enough to warrant such a referral. Further, Bailey asserts McDonald was disciplined and suspended on more than one occasion by the MPD, therefore, whether his situation could be compared to that of McDonald

is a material issue of fact that warrants a jury trial.

Bailey's arguments fail for the simple reason that he offers no additional facts that suggest the City lied about its reasons for recommending a reduction in his rank. As discussed above, the fact that the City dropped the charges against him after his retirement does not call into question the severity of Bailey's misconduct. Once Bailey retired, the charges against him became moot. Further, Bailey offers no facts in rebuttal about the actual charges against him. According to the letter he was given by Chief Winkle describing his misconduct, Bailey violated fourteen different MPD rules, policies or procedures during the Fletcher incident. Feb. 1997 Letter. In addition, the internal investigators stated that Bailey had endangered his own life as well as that of others by not following police procedure. Int. Invest. Rep. at 2-5. Bailey offers no evidence that would rebut the "seriousness" of such charges by his peers. All of Chief Winkle's decisions were based upon the findings of the internal investigation. The only testimony that contradicts the findings of the internal investigation team is Bailey's own self-serving and conclusory statements that the charges against him were unfounded. Moreover, Bailey presents no evidence or even alleges facts to discredit the findings of the internal investigation team. Those findings clearly indicate that Bailey failed to follow many MPD procedures and in fact endangered his own life as well as those of other officers.

[5] Finally, Bailey's assertion that comparing him to McDonald is inappropriate cannot succeed. Bailey has no direct evidence that the decision to recommend a demotion was based on age. Therefore, Bailey must provide indirect evidence of discrimination. To establish a prima facie case by circumstantial proof, Bailey must assert that a younger employee was treated differently in similar circumstances. See *Chiaramonte*, 129 F.3d at 398 (citing *O'Connor v. Consolidated Coin Caterers Corp.* [517 U.S. 308], 116 S.Ct. 1307, 1310 [70 FEP Cases 486] (1996)). The most logical comparison to make in this case, where both Bailey and a younger officer were involved in the relevant incident, is a comparison between Bailey and that younger officer. Certainly other considerations, such as additional suspensions for each person is relevant, however, Bailey offers no relevant evidence on this point for either himself or Mc-

Donald." In addition, the fact that Bailey was treated more favorably than McDonald in regard to the Fletcher incident, implies that Bailey benefited from his age and experience rather than suffered for it.

The City had a legitimate, non-discriminatory reason for referring Bailey to the Commission and recommending that the Commission demote Bailey as punishment for his conduct during the Fletcher incident. Bailey has failed to rebut this reason with relevant evidence of pretext.

[6] 4. **Forced Into Retirement by Harassment with a Multitude of False Charges.**—The City argues that Bailey retired voluntarily, not as a result of harassment from a number of false charges against him. Further, any question by Chief Winkle to Bailey about Bailey's reconsideration of his prior decision to retire occurred after Bailey faced legitimate reasons for disciplinary action. Therefore, Bailey was not faced with continued harassment about retiring.

Bailey counters that at the time of Chief Winkle's question, Bailey's performance was not an issue because the charges against him were false. First, his supervisors in the check fraud area never received complaints about his work, therefore, he could not be a sub-standard employee. Further, Bailey claims that he had not violated any work rules or made any sanctionable errors during the Fletcher incident. Finally, Bailey asserts that he did not mishandle evidence and testimony in a criminal matter as suggested in July 1997. Instead, when Chief Winkle asked Bailey about retirement, he faced equally negative choices: Either retire to escape from suspension and possible demotion or potentially jeopardies his retirement benefits by fighting the charges against him and be wrongfully terminated as a result. Bailey asserts that whether this was a "choice" at all is a question for a jury.

Bailey has not provided the Court with evidence that the charges about his conduct in the Fletcher incident or the allegations of his mishandling of testimony and evidence in a criminal trial were false. Nor does Bailey allege or state that he was "hounded about retirement despite evidence of adequate performance." *Kaniff*, 121 F.3d at 263.

"Bailey offered a summary of the suspensions in the MPD for the years 1992 to 1998 in support of this statement. However, the Court cannot determine from the document entered whether it is authentic, and more importantly, who the data is referring to. The information lists the violation and the disciplinary action by officer number not officer name. Without more, this Court has no way of knowing who committed the violations listed. Thus, Bailey's proffered evidence is irrelevant to this question.

That his supervisor in the check fraud area had not received complaints about his work, but the department transferred him anyway, is not enough evidence of age discrimination by the City to rebut the evidence of Bailey's professional errors. The Court has already discussed that "[i]n the circumstances of this case, the suggestion of retirement does not rise to the level of direct evidence of age discrimination." *Id.* Without evidence that the deficiencies in his work performance cited by the City were pretextual, Bailey has not met his burden of production on the issue of discriminatory intent.

This holds true even if the Court were to accept Bailey's argument for pretext related to the City's decision to reassign him to the general investigation area. The evidence that Bailey's supervisor was unaware of the banking community's dissatisfaction with Bailey's work in the check fraud area cannot overcome the City's strong evidence of legitimate, non-discriminatory reasons for suggesting Bailey retire rather than face embarrassing disciplinary action. Bailey has not provided evidence that the City's statements about his misconduct in the Fletcher incident and in the July criminal case were false or lies. He has merely offered self-serving testimony that the charges against him were fabricated. Such conclusory statements will not overcome a showing of legitimate, non-discriminatory reasons for employment actions.

In summary, this Court does not have jurisdiction to hear Bailey's age discrimination claims against the City. If it did have jurisdiction, Bailey's assertion that the City discriminated against him when it transferred him into the general investigation group fails because that change was not an adverse employment action. Further, with reference to the City's disciplinary decisions regarding Bailey's misconduct during the Fletcher incident and the July criminal case, Bailey has not overcome the City's proffered evidence of legitimate, non-discriminatory reasons for those actions. For these reasons, the City's motion for summary judgment on Bailey's ADEA claim should be **GRANTED**.

C. §1983

Bailey brought an additional claim against Chief Winkle and Mayor Canan in both their official and individual capacities pursuant to 42 U.S.C. §1983."

"suit against state or municipal officials in their official capacities is considered by the Court as a claim against the City. See *Sterling v. United States*, 85 F.3d 1225, 1229 (7th Cir. 1996) (stating that "an official capacity action against a government employee is essentially a suit against the government entity itself"). In order to succeed, a

Bailey alleges that the ten day suspension imposed upon him by Chief Winkle on February 11, 1997 violated his Fourteenth Amendment right to procedural due process. The Defendants do not dispute that Bailey was not provided a hearing before his suspension. See Defs.' Reply Br. at 12.

Section 1983 provides a remedy for violations of civil rights that are protected by the U.S. Constitution or other federal law. That section states, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

42 U.S.C. §1983. Therefore, in order to survive a motion for summary judgment under §1983, Bailey must provide evidence that a material issue of fact exists on one of two elements: (1) conduct by a person acting under color of state law; (2) that deprived him of rights, privileges, or immunities secured by the Constitution or laws of the United States, proximately causing injury. *Larson v. City of Beloit*, 130 F.3d 1278, 1282 (7th Cir. 1997); *Brown v. City of Lake Geneva*, 919 F.2d 1299, 1301 (7th Cir. 1990).

The element the parties focus on is whether Bailey has shown that the City, Chief Winkle and/or Mayor Canan deprived him of a his constitutionally protected right to procedural due process. Thus, the questions for the Court are whether Bailey had a life, liberty or property interest in employment, and if that answer is affirmative, what process was due before Bailey was suspended. See *Larson*, 130 F.3d at 1282; *Moulton v. Vigo County*, 150 F.3d 801, 804 [14 IER Cases 269] (7th Cir. 1998). Whether Bailey had a property interest in his job is a matter of state law. See *Moulton*, 150 F.3d at 804; see also *Larson*, 130 F.3d at 1282 (citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 [1 IER Cases 23] (1972)). "Protected property interests can arise from such state law sources as statutes, contracts, legally binding rules and regulations, or the 'unwritten common law' of employment." *Moulton*, 150 F.3d at 804 (quoting *Lawshe v. Simpson*, 16 F.3d 1475, 1480

plaintiff in a § 1983 action against a municipality must show that the enforcement of a municipal policy or custom caused the alleged constitutional deprivation and its consequential damages. See *Collins v. City of Harker Heights*, 503 U.S. 115, 122-23 [7 IER Cases 233] (1992); *City of Canton v. Harris*, 489 U.S. 378, 385-86 (1989). The parties do not address these issues, therefore, the Court need not address them further.

(7th Cir. 1994) (citations omitted)). In Indiana, a police officer is an employee of the city and their relationship is defined by contract. See *Wencke v. City of Indianapolis*, 429 N.E.2d 295, 297 (Ind. Ct. App. 1981) (citing *inter alia State ex rel. Palm v. City of Brazil*, 73 N.E.2d 485 (1947)); see also *Bernhardt v. State*, 479 N.E.2d 1367, 1369 (Ind. Ct. App. 1985), *trans. denied*. Relevant statutory provisions apply if such provisions were expressly incorporated into the contract. See *Wencke*, 429 N.E.2d at 297.

In the case at bar, the Defendants argue that in Indiana, although police officers have a property interest in their jobs by statute, they "have no legally protected property interest in suspensions of less than [ten] days." Defs.' Br. In Supp. Of Mot. For Summ. J. at 36 (citing *State ex rel. Dunlap v. Cross*, 403 N.E.2d 885, 888 (Ind. Ct. App. 1980)). Defendants rely upon *State ex rel. Dunlap v. Cross*, 403 N.E.2d 885 (Ind. Ct. App. 1980), and other cases for the proposition that the Indiana Supreme Court has upheld as constitutional the suspension of police officers for a period up to ten days because "'due process does not require that every single question be open to appeal.'" Defs.' Br. In Supp. Of Mot. For Summ. J. at 36 (quoting *City of Crown Point v. Knesek*, 499 N.E.2d 261, 262 (Ind. 1986) and citing *Dortch v. Lugar*, 266 N.E.2d 25, 46 (Ind. 1971)). The Court does not agree with the Defendants' reasoning.

The threshold issue in this case is whether Bailey has a property interest in continuous employment and the scope or nature of that property right. Thus, the Court must first look for evidence that the City has created a property right for police officers in continuous employment or that the City and police officers had contracted for a property right in continuous employment. Then the Court must discover the nature of that property right.

Absent other evidence of an employment contract, in determining whether a police officer has a property right in continuous employment, courts look at the specific statutes and ordinances that regulate the hiring and firing of police officers. See *Harrison v. City of Greenfield*, 966 F.2d 315, 315-16 (7th Cir. 1992); *Garraghty v. Jordan*, 830 F.2d 1295, 1299 (4th Cir. 1987); *Smith v. Eaton*, 910 F.2d 1469, 1471 n.4 (7th Cir. 1990) (citing *Parrett v. City of Connersville*, 737 F.2d 690, 694 (7th Cir. 1984)), *cert. denied*; *State ex rel. Dunlap v. Cross*, 403 N.E.2d 885, 886-87 (Ind. Ct. App. 1980); *cf. City of Michigan City v. Austin*, 442 N.E.2d 705, 707-08 (Ind. Ct. App. 1983) (applying same reasoning to fire fighters). Specifically, the Seventh Circuit has held that the language of Indiana

Code §36-8-3-4 (formerly Indiana Code §18-1-11-3) provides police officers a property right in continuous employment. See *Smith*, 910 F.2d at 1471 n.4; *Parrett*, 737 F.2d at 694. However, an Indiana court that interpreted Indiana Code §18-1-11-3, found that police officers had a property right in employment, however, the limit of that property right did not extend to suspensions of ten days or less. *Dunlap*, 403 N.E.2d at 888.

The statute the Seventh Circuit relied upon, and that the Defendants cite to this Court provides in relevant part that "a member of the police or fire department holds office or grade until the member is dismissed or demoted by the safety board. ..." Ind. Code §36-8-3-4(b). In this case, the Defendants argue that this statute does confer such a property right on Bailey, but another statute limits that right. This Court does not agree that Indiana Code §36-8-3-4 applies to police officers in the City.

First, Indiana Code §36-8-3 sets out the role of a safety board and establishes rules for the government and discipline of police officers in second and third class cities. Ind. Code §§36-8-3-1 to 21. Within that chapter, section 36-8-3-4 describes the disciplinary procedures recommended by the Indiana legislature. That section states in relevant part:

(b) ... a member of the police or fire department holds office or grade until the member is dismissed or demoted by the safety board. ... [A] member may be disciplined by demotion, dismissal, reprimand, forfeiture, or suspension upon either:

- (1) conviction in any court of any crime; or
- (2) a finding and decision of the safety board that the member has been or is guilty of any one (1) or more of the following [list of causes].

Ind. Code §36-8-3-4(b) (emphasis added). The remainder of the section describes the relevant procedures for suspending a police officer, holding a hearing and appealing board decisions.

The City is one of the "second class" that has a full-time, paid police force, thus, on its face, that code chapter would apply to the City. See *City of Muncie v. Campbell*, 295 N.E.2d 379, 381 & n.1 (Ind. Ct. App. 1973) (stating that the merit provision at issue in that case, Indiana Code §19-1-14-19, concerned only the city of Muncie under Indiana Code §19-1-14-1, which restricts application of that chapter to "Cities of the Second Class located in counties of not less than 128,000 nor more than 138,000"). However, section 36-8-3-5 makes section 36-8-3-4 elective for a city or town that has a police and fire merit commission that is given the responsibility to establish merit systems for

their police and fire departments. Section 36-8-3-5 states:

Sections [36-8-3-13, 36-8-3-14, and 36-8-3-14.1 of this chapter do not apply to a police or fire department having a board or commission established by statute or ordinance to establish or administer policies based on merit for the appointment, promotion, demotion, and dismissal of members of the department, unless the establishing law specifically incorporates one (1) or more of those sections.

Ind. Code §36-9-3-5. See also *Austin*, 442 N.E.2d at 709-11 (discussing the changes in the Indiana statutes related to the creation and authority of police and fire merit commissions). The City has such a commission, therefore, if the Commission has not specifically incorporated section 36-8-3-4 into the City's merit system, that section does not apply to police officers employed there. From the evidence provided by the Defendants, it appears that the Commission never adopted section 36-8-3-4 into its merit system.

Instead, the City legislature readopted the old merit and disciplinary provisions under the grandfathering section that establishes the powers of each municipality to establish its own merit system. See Ind. Code §§36-8-3.5-1(a) to (b); see also *City of Evansville v. International Ass'n of Fire Fighters, Local 357*, 516 N.E.2d 57, 60 (Ind. 1987) (holding that Indiana Code §36-8-3.5 was the exclusive method by which a city may establish its own merit system for police and fire departments, but "any existing system may continue even though it does not comply with this statute, ... [provided that] if [the old system adopted] is [subsequently] repealed, any new system must be compatible with [Indiana Code §36-8-3.5]"). Specifically, that section provides in relevant part:

(a) This chapter applies to each municipality or township that has a full-time paid police or fire department. A municipality may exercise the power of establishing a merit system for its police or fire department under this chapter or by ordinance adopted under [Indiana Code §36-1-4-14]. This chapter does not affect merit systems established:

- (1) by ordinance under [Indiana Code §] 36-1-4-14, except was provided by subsection (e);
- or
- (2) by a prior statute, except as provided by subsection (b).

(b) If a city had a merit system for its police or fire department under the former [Indiana Code §§] 18-4-12, 19-1-7, 19-1-14, 19-1-14.2, 19-1-14.3, 19-1-14.5, 19-1-20, 19-1-21, 19-1-19, 19-1-19.5, 19-1-31, 19-1-31.5, or 19-1-37.5, it may retain that system by ordinance of the city legislative body passed before January 1, 1983. The ordinance must initially incorporate all provisions of the prior statute but may be amended by the legislative body after December 31, 1984. ...

Ind. Code §§36-8-3.5-1(a) to (b).

The City had a prior merit system under Indiana Code §19-1-14, one of the

provisions excepted in Indiana Code §36-8-3.5-1(b). See *Campbell*, 295 N.E.2d at 381 & n.1. Further, according to a certified copy of City Ordinance Number 924-82, in December 1982, the City's legislative body formally retained the merit system codified at Indiana Code §19-1-14, incorporating all of the provisions of the prior statute. See Defs.' Ex. 11. Bailey offers no rebuttal or challenge to this evidence, other than the conclusory statement that he denies all of the Defendant's allegations. In addition, Bailey presents no evidence that the City adopted Indiana Code §36-8-3-4 in part or in total at any time.

Looking at the statute that applies to the City, the Court finds no language similar to that in section 36-8-3-4 that "a member of the police ... department holds office or grade until the member is dismissed or demoted by the safety board." Instead, the language is more vague stating that the police chief may impose reprimands and suspensions from duty without pay for a period not exceeding ten (10) days. If such action is taken by a chief, such chief shall within forty-eight (48) hours thereafter notify the commission in writing of such action and the reasons therefor. All other dismissals, suspensions and punishments of members of the police ... department shall be by the commission and shall be for cause, and under the same rules of procedure including the right of appeal as are now or may hereafter be provided by laws pertaining thereto for cities of the second class

Ind. Code §19-1-14-19 (1982). It is not clear from this language that a police officer in the City has a property right in continuous employment.⁶ Although

⁶ The court in *State ex rel. Dunlap v. Cross*, 403 N.E.2d 885, 888 (Ind. Ct. App. 1980), considered a police officer's right to due process under Indiana Code § 18-1-11-3. That code section stated in part: "Any member of [the] ... police force who is dismissed from such force, as aforesaid, or is suspended therefrom for any period in excess of ten (1) days shall have the right to appeal to the circuit court. ..." Ind. Code § 18-1-11-3 (1976). The court held that this statute did not create a property right in a suspension of ten days or less. *Dunlap*, 403 N.E.2d at 888. The court reasoned that any property right the police officer had could only be found in the statute, and the statute had limited the property right to employment and declined to extend that right to suspensions of ten days or less. *Id.*

Arguably, under the *Dunlap* analysis, the statute setting out disciplinary actions in the City similarly limits the property right of police officers in that jurisdiction. However, the Court is not persuaded that the language of Indiana Code § 18-1-14-19 bestows a property right in continuous employment, limited by the suspension clause. There is no apparent grant of right to employment in the section at all.

Also, in contrast to the *Dunlap* court, the Seventh Circuit in *Parrett v. City of Connersville*, 737 F.2d 690, 694 (7th Cir. 1984), found that the property right conferred by Indiana Code § 18-1-11-3 was not so limited. In fact, the Seventh Circuit in a later decision, expressly rejected the *Dunlap* court's analysis stating that the *Dunlap* court placed great emphasis on the lack of appellate recourse in the statute for a suspension of less than 10 days. But as the Supreme Court has made clear, state procedures do not in them-

the statute clearly provides a disciplinary procedure that would deprive a police officer of employment for some period of time, "[p]roperty" cannot be defined by the procedures provided for its deprivation any more than can life or liberty." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 [1 IER Cases 424] (1985). Therefore, this Court does not find that this statute, standing alone, establishes a property right in employment for Bailey. In light of this analysis, if Bailey has a property right in continuous employment it must be found in the collective bargaining agreement between the City and the police force, some other contract of employment or a course of dealing.

Bailey points the Court to language in the letter ordering him to appear before Chief Winkle to discuss his involvement in the Fletcher incident. Specifically, the language informs Bailey that he has the right to bring a representative to the meeting with him pursuant to the collective bargaining agreement between the City and the police force, Feb. 1997 Order. Essentially, Bailey argues that this language, or the right to bring a representative with him itself, creates a genuine issue of fact about whether he was denied due process before deprivation of a property right in employment. However, without a copy of the collective bargaining agreement, this Court has no way of knowing whether Bailey's property rights in employment were different from those outlined in the City's merit system ordinance. Bailey offers no evidence of the collective bargaining agreement provisions or some other employment contract that confers upon him a property right in continuous employment. Regardless, even assuming Bailey could point the Court to such provisions, Bailey received all the process due under the circumstances.

If Bailey had a property interest in his continuous employment, the Defendants must have afforded him "notice and an opportunity to be heard prior to discipline." *Smith v. Town of Eaton*, 910

themselves decide the question of whether a property interest has been created. *Olim v. Wakinekona*, 461 U.S. 238, 250-51 (1983); *Hewitt v. Helms*, 459 U.S. 460, 471 (1983). Because we treat the plaintiff's suspensions, no matter what their length, as constituting the deprivation of a property interest, we need not concern ourselves with counsel's convoluted and at times incomprehensible time computations.

Id. at 1471-72 n.4. The *Parrett* and *Smith* courts were apparently focused on the language at the beginning of Indiana Code § 18-1-11-3 (and now Indiana Code §36-8-3-4(b)) stating: "Every member of the fire and police forces ... shall hold office until they are removed by said board." However, as discussed in the text above, that language, either in its old form or the new form, does not apply to the City.

F.2d 1469, 1472 (7th Cir. 1990) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547 [1 IER Cases 424] (1985); *Garrahty v. Jordan*, 830 F.2d 1295, 1299-1300 (4th Cir. 1987); *Pesce v. J. Sterling Morton High Sch.*, 830 F.2d 789, 793 (7th Cir. 1987); cf. *Goss v. Lopez*, 419 U.S. 565, 581 (1975)). The notice and opportunity to be heard need only be commensurate with the nature of the property interest at stake. *Loudermill*, 470 U.S. 532, 547 [1 IER Cases 424] (1985). A court must balance the interests at stake to determine the necessary process due: (1) the private interest in retaining employment; (2) the governmental interest in the expeditious removal of unsatisfactory employees; (3) the avoidance of administrative burdens, and (4) the risk of an erroneous employment decision. *See Id.* at 542-43. Some pre-adverse action opportunity to respond is the apparent touchstone. *See Id.* at 542 (discussing *Arnett v. Kennedy*, 416 U.S. 134 (1974) and *Barry v. Barchi*, 443 U.S. 55, 65 (1979)); *see also Goss v. Lopez*, 419 U.S. 565, 573-74 (1975) (stating that a student's opportunity to tell his or her side of the story before he or she is suspended helps guard against unwarranted deprivations).

Bailey's interest in avoiding suspension without pay must be measured with reference to both his loss in pay and his loss in standing amongst his peers and in the community. Bailey offers little evidence on this issue other than the number and length of suspensions of police officers during the time period 1992 to 1998. During that time period, the chief "gave a suspension of ten days approximately 17% of the times that suspensions were given at all. *See Pl.'s Ex. 6* (listing the suspensions given to police officers for the years 1992 to 1998 by either the chief or the Commission). This statistic suggests that a ten day suspension without pay would have some stigma attached to it. However, here Bailey returned to work after his suspension without a reduction in pay, rank or responsibility. Furthermore, additional discipline recommended to the Commission was to take place with the all the notice and hearing protections Bailey sought. Under these circumstances the property interest at stake does not appear substantial.

On the other side of the scale, the City's interests in having an effective and swift discipline system for its police officers is justified by the risk to the public when an officer disobeys the rules and regulations that are set to

ensure public safety. Courts agree that in police departments, "[t]he government's interest in curtailing insubordination and enforcing orders is fundamental to the maintenance of public order and safety." *Harrison*, 966 F.2d at 317 (adopting the lower court's language on this issue). *See also Kokkinis v. Ivkovich*, 185 F.3d 840, 846 [15 IER Cases 577] (7th Cir. 1999) ("Police departments are quasi-military organizations; public safety depends upon good order and discipline."); *Garrahty*, 830 F.2d at 1302 (stating that the "Irrealities of the work place, especially in the paramilitary environment of corrections departments, require that authority be respected and that discipline be swift"); *Dortch v. Lugar*, 266 N.E.2d 25, 46 (Ind. 1971) (holding that absent specific property rights in continuous employment, police officers are removable at will, without cause or a hearing); *Dunlap*, 403 N.E.2d at 887 (adopting the reasoning of a New York court that said: "Police officers occupy a unique status in the maintenance of law and order in a community and the public interests would be seriously jeopardized in the case of a police officer if he were allowed to be incompetent or charged with misconduct and it was required that he be retained in office pending the hearing of the charges or the preparation and service of the charges. In the case of police officers the power to temporarily and summarily suspend in the case of misconduct or incompetency is absolutely indispensable.") (quoting *McElroy v. Trojak*, 21 Misc.2d 145, 147 (N.Y. Sup. Ct. 1959)).

The public's safety was exactly the concern that led to the suspension in this case. During the Fletcher incident, Bailey had violated rules and regulations designed specifically to protect the public during emergency responses by the police. The fact that negative public perception about the department's handling of the situation motivated in part the decision to suspend Bailey lends further support for the importance to the City in having an effective and swift means for disciplining its police officers. Maintaining the public's confidence is important to any organization charged with keeping public order and safety. Correspondingly, effective and swift discipline can help ensure public confidence in the police department remains high. Moreover, discipline is a necessary element for maintaining a competent and efficient police department. *See Garrahty*, 830 F.2d at 1302. The City's decision to allow for suspensions of ten days without more opportunity for rebuttal by a police officer is not out of proportion to its interest in establishing an efficient system that

"The Court uses a generic term here because there are no facts that indicate whether Chief Winkle held the position of Chief of Police during the entire time frame referenced in the evidence.

will reinforce its goal to preserve public safety.

Furthermore, Chief Winkle made the decision to suspend Bailey based on information gathered by independent persons including two of Bailey's peers. In fact, the internal investigation team specifically stated that they felt Bailey had been honest in his answers to their questions and tried the best he could to prevent a bad situation from turning worse. Int. Invest. Rep. at 4. Bailey's perspective on the Fletcher incident was certainly heard by these unbiased persons before they made their report to Chief Winkle. Based on this sequence of events, with Bailey's participation in the evidence gathering phase by disinterested persons, the risk of an erroneous deprivation was lessened.

Arguably, the process due Bailey in this situation is similar to that owed a student who is suspended for violating a school rule or policy. See *Goss*, 419 U.S. at 577-84. In *Goss*, the Court decided that a student must be given notice and a hearing, however, the notice need only consist of an informal discussion with the disciplinarian about the alleged misconduct, with an opportunity for the student to tell his or her side of the story before the suspension is implemented. *Id.* at 582. The Court reasoned that "[t]o impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness." *Id.* at 583. However, allowing the student to tell his or her side of the story, "provide[s] a meaningful hedge against erroneous action" because the disciplinarian's "discretion would be more informed." *Id.* at 583-84.

Although the property interest may be of greater weight in the case of a police officer's suspension than that of a student's suspension, the need of the City to discipline its police officers for misconduct is no less acute than that of a school to discipline its students. In fact, the need for an efficient and effective discipline system in a police department is even more acute because the public's safety is directly affected. In addition, similar to the administrative cost scenario when a school seeks to suspend a student, the increased administrative burden of holding a hearing before suspending a police officer for ten days would likely outweigh the cost of the occasional erroneous penalty. This is particularly true in light of the independent investigation into the facts that occurred in Bailey's case before Chief Winkle made the suspension decision.

Thus, the process due a police officer who receives a ten day suspension without pay need be no more formal than that due a student being suspended from school. All that is required is notice to the police officer of the charges against him, verbally and in writing, from the decision-maker, with the opportunity to present his side of the story to ensure that the decision-maker is aware of inconsistent facts before the suspension is imposed.

In this case, Bailey received such due process. Bailey was given notice of the charges against him when Chief Winkle read the Feb. 1997 Letter to him, and subsequently when Bailey received the letter. Chief Winkle also gave Bailey the opportunity to respond to the charges after he had read them. See Bailey Dep. at 114. Bailey made the decision to keep silent. See *Id.* The fact that the charges were written up and the suspension term decided before the meeting does not change the fact that Bailey heard the charges against him and had an opportunity to correct Chief Winkle's perception immediately after Bailey learned the specific charges.

Finally, Bailey sued Mayor Canan and Chief Winkle in their personal capacities. The Court has found that there are no issues of material fact on the issue of a deprivation of rights. Even if Bailey's rights had been abridged, there are no genuine issues of material fact on the personal liability of the mayor or the chief.

To hold either defendant individually liable, Bailey must prove that the defendant was personally involved in depriving him of his Fourteenth Amendment rights. See *Gossmeier v. McDonald*, 128 F.3d 481, 494 [13 IER Cases 545] (7th Cir. 1997); *Wilson v. Town of Clayton*, 839 F.2d 375, 383-84 (7th Cir. 1987). "Section 1983 does not recognize a doctrine of superior's liability." *Wilson*, 839 F.2d at 383-84. Therefore, absent knowledge or reckless disregard of a subordinate's conduct and approval of the basis for it, a supervisor is not liable. See *Gossmeier*, 128 F.3d at 495. In addition to this principle, defendants in their individual capacities may raise a defense of qualified immunity. Qualified immunity is a doctrine that shields officials performing discretionary functions when their conduct does not violate a clearly established constitutional right. See *Id.* "A right is clearly established when its contours are sufficiently clear so that a reasonable official would realize that what he is doing violates that right." *Id.* Bailey bears the burden of proof that the right is clearly established and may do so by pointing to a closely analogous case or by showing "that the defendants' conduct is so vio-

lative of the constitutional right that reasonable officials would know that their conduct was unconstitutional without guidance from courts." *Id.* at 495-95.

Bailey's claim against Mayor Canan fails because he did not provide evidence that Mayor Canan was personally involved with the decision to suspend him for his role in the Fletcher incident. Bailey argues that Mayor Canan had knowledge of Chief Winkle's alleged plan to put older workers in less desirable jobs. Therefore, the mayor had knowledge that Chief Winkle would suspend Bailey without pay for ten days pursuant to his involvement in the Fletcher incident, without opportunity for a formal hearing. However, knowledge of one act or alleged plan does not give rise to an inference of knowledge of the other. Moreover, Bailey admitted during his deposition that he included Mayor Canan in the suit because Chief Winkle worked for the mayor. Bailey cannot hold Mayor Canan personally liable under §1983 absent direct involvement, knowledge or knowledge with reckless disregard of the consequences. Bailey's argument to the contrary fails because the inference that Bailey tries to establish does not support the allegation of a violation of due process.

Furthermore, either Mayor Canan or Chief Winkle can succeed under a qualified immunity defense. All of the Defendants were under the perception that Dunlap and other case law clearly established that a police officer had no right to due process with respect to a ten day suspension. *See Dunlap*, 403 N.E.2d at 885; *see also Dortch*, 266 N.E.2d at 46; *but see Smith*, 910 F.2d at 1471 n.4. However, as discussed above, it is not clear that a police officer in the City has a property right in continuous employment that would entitle him to due process at all. Therefore, because Chief Winkle in giving Bailey a ten day suspension was using his discretion in a manner consistent with the policies of the City and those policies were not clearly unconstitutional, Bailey may not hold either he or Mayor Canan personally liable for damages arising from the suspension.

In summary, with the evidence before the Court, Bailey did not establish that he had a property right in continuous employment that would trigger a right to due process before he was given a suspension. Even if there were such evidence, under the circumstances, Bailey was given all the process due him. Further, Bailey's claims against Mayor Canan and Chief Winkle in their personal capacities fail because Bailey did not provide evidence that Mayor Canan was directly involved in the suspension

decision, nor did Bailey provide evidence that the suspension without a hearing was clearly unconstitutional. The Defendant's motion for summary judgment on Bailey's §1983 claim should be **GRANTED**.

IV. CONCLUSION

For the reasons discussed above, the Defendants' motion to accept their statement of material fact as true and uncontroverted is **GRANTED** in part and **DENIED** in part. In addition, the Defendants' motion to strike is **GRANTED** in part and **DENIED** in part.

Bailey's claim of age discrimination against the City is not properly before this Court because the Court lacks subject matter jurisdiction over ADEA claims against a state entity. Even if the Court did have jurisdiction, Bailey did not provide evidence that the City's legitimate, non-discriminatory reasons for its employment decisions were pretext for age discrimination.

Similarly, Bailey's 42 U.S.C. §1983 claim alleging a violation of his Fourteenth Amendment right to procedural due process fails because Bailey did not provide evidence that he had a property right in continuous employment, and even if he had, the process he received was all that was due under the circumstances. Finally, Bailey did not provide evidence that Mayor Canan had personal involvement in the decision to suspend him that would subject the mayor to personal liability under 42 U.S.C. §1983; nor did Bailey provide evidence that either Chief Winkle or Mayor Canan had knowledge that the suspension violated a clearly defined constitutional right. For these reasons, the Defendants' motion for summary judgment is **GRANTED**.

IT IS SO ORDERED this 25th day of January, 2000.

BOONE v. GOLDIN

U.S. Court of Appeals,
Fourth Circuit

VERNET P. BOONE, Plaintiff-Appellant v. DANIEL S. GOLDIN, in his official capacity as Administrator, National Aeronautics and Space Administration, Defendant-Appellee, and CHARLES M. SOUTHALL, III, WAYNE C. HOGGE, BILLY W. BEASLEY, Defendants, No. 98-2085, May 17, 1999