

# Age Discrimination in Employment

Upon considering the federal civil rights laws, it is common to think of those prohibiting race discrimination, gender discrimination, and disability discrimination. Awareness is often less for, and yet litigation is increasingly frequent under, the Age Discrimination in Employment Act (ADEA). This statute makes it unlawful for an employer “to fail or refuse to hire or to discharge ... or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.” Its coverage only applies to individuals who are at least 40 years of age. The administering agency is the Equal Employment Opportunities Commission (EEOC).



The following case and question-and-answer discussion explore recent case law concerning various applications of the ADEA that involve educators.

## The Case

From July 2007 to July 2012, Josette Ripoll served as the principal of an elementary school in Louisiana’s Recovery School District. Her extensive prior experience included five years as an assistant principal, and a year as a principal of another elementary school.

The district evaluated schools using performance scores based primarily on students’ scores on state-mandated achievement tests. Based on escalating point totals for each letter grade, Ripoll’s school was D-rated from 2009

to 2011 and F-rated in 2012.

In January 2012, Ripoll received a performance evaluation that included six of the 23 items in the “developing” category and a goal for a significant increase in the school performance score.

At the end of the 2011-2012 school year, when Ripoll was 61 years old, the central administration decided to terminate her based on the lack of progress in her school’s performance score and her failure to properly evaluate her staff. After a termination hearing, the district offered her a teaching position, which she refused. The district replaced her with a 33-year-old from out-of-state who had no administrative experience.

Ripoll filed suit in federal court, claiming that the district had violated the ADEA.

## What do you think was the judicial outcome of the appeal?

In *Ripoll v. Dobard* (2015), the 5th Circuit Court of Appeals upheld summary judgment in favor of the school district. The court applied the well-established multistep test for ADEA cases based on circumstantial evidence. Ripoll’s primary challenge was to the trial court’s conclusion that she had failed to show sufficient evidence for a jury to conclude that the district’s reasons were merely a pretext for age discrimination. However, the appellate court rejected her various allegations of pretext as insufficient.

For example, in response to her claim that the human resources director had told her she was being dismissed because of her age, the court found fatal that she had not proffered the specific basis for the human resource director’s knowledge of her alleged statement, while it was undisputed that various other administrators had participated in the termination decision.

## Would the same judicial outcome have been likely if the alleged age discrimination occurred in terms of not being hired as a principal, rather than being fired?

The answer will depend on the specific facts of the case, but the prevailing odds favor the district defendants based on the applicable multistep test. For example, in *Hiser v. Grand Ledge Public Schools* (2011), a federal court in Michigan granted a district’s motion for summary judgment for the ADEA claim of a teacher who was not selected as an elementary school principal. The court rejected her reliance on central administrators’ casual comments to establish pretext—that is to say that their real reason was age discrimination. For example, the court concluded that the superintendent’s statement that the successful candidate was “a nice young man” was, in the context of this case, “an

isolated comment neither directed at [the plaintiff] nor related to the employment decision.”

Serving as a partially contrasting example, in *Stennett v. Tupelo Public School District* (2015), the 5th Circuit reversed the summary judgment that had been in favor of the district, concluding that the plaintiff had established a genuine factual issue as to the final, pretext step. The plaintiff, who had spent 20 years in the district, including heading the alternative school, unsuccessfully applied for seven positions at age 66 after the district outsourced the alternative school. The appellate court identified the following cumulative combination of factors to rule that “a rational jury *could*—not probably would—conclude that the employer’s proffered non-discriminatory hiring rationale was pretextual”: the district failed to even interview her for five of the seven positions despite her exemplary qualifications; the district also failed to rehire the other three oldest employees at the alternative school; and the district’s reasons largely relied on subjective considerations and qualifications not listed in the job postings.

**What would happen if the plaintiff-educator relied on direct evidence rather than the multistep test for circumstantial evidence of age discrimination under the ADEA?**

Such evidence is often more difficult to obtain, but the key question is whether it preponderantly proves that the employer would not have taken this action except for the plaintiff’s advanced age. For example, in *Scheick v. Tecumseh Public Schools* (2014), an experienced 60-year-old principal claimed that his nonrenewal violated the ADEA based on the superintendent’s statement to him during his last performance review that the school board wanted him to retire; the superintendent’s statement the next day that the board “wanted someone younger” in the position; and the superintendent’s repeating the second statement a month later.

In rejecting summary judgment for the district, the 6th Circuit concluded that although the retirement statement did not constitute direct evidence of age discrimination, the other two statements, taken together along with the district’s evidence of limited but increasing dissatisfaction with the principal’s performance and a temporary budget crisis, were sufficient to reserve the this causation issue for a jury’s determination.

**What if, instead, the plaintiff’s claim was retaliation under the ADEA for informally protesting or filing formal charges specific to employment discrimination based on age?**

For retaliation, the plaintiff-employee must, as a threshold matter, show that he or she engaged in a protected employee activity; adverse action by the employer, either after or contemporaneous with the employee’s protected activity; and a causal connection between the employee’s protected activity and the employer’s adverse action.

If so, then the legitimate-reason and pretext steps of aforementioned multistep test for age discrimination apply. In most of the recent court cases specific to retaliation under the ADEA, the employee fatally fell on one of these hurdles. For example, in *Daniel v. School District of Philadelphia* (2015), the 3rd Circuit affirmed the summary judgment for the district, concluding that the teacher failed to show the requisite causal connection.

**As an alternative or additional basis for suit, do some states also have civil rights acts that prohibit age discrimination in employment?**

Yes, but the applicable analysis usually follows the ADEA model. For example, in *Rosenberg v. Kipp Inc.* (2014), an appellate court in Texas ruled that a teacher terminated at a charter school did not establish the requisite prima facie case under the Texas human rights law. Similarly, in *Dorman v. Pine Hill Board of Education* (2009), a non-renewed music teacher was unsuccessful

in her alternative age-based claims of pretext and hostile environment under the New Jersey Law Against Discrimination.

**Conclusion**

As our population of principals and teachers age in light of the change in the trajectory of both school enrollments and the overall economy, claims under the ADEA are becoming more frequent. The trend in the outcomes clearly presents an uphill slope for the plaintiff educators, whether they are principals or teachers.

For example, in an empirical analysis of ADEA case law in the K-12 context for the period 2000 to 2013, Paige and Zirkel (2014) found that approximately 80 percent of the rulings were conclusively in favor of the district defendants, with the rest being inconclusive (i.e., denials of district motions for dismissal or summary judgment). Nevertheless, the continuing frequency of the cases, the emotional and economic costs of defending such suits, and the hidden favorable outcomes of unpublished cases and settlements temper these seemingly insulating judicial outcomes.

Consequently, the message is that principals in their role in the selection process and in their duties for effective supervision and accountability should not shy away from applying merit-based performance principles regardless of the age of the affected employees. Yet, they equally need to be prudent in their words and deeds to avoid the objective perception that adverse employment actions may have been based instead on age. For example, think twice before making comments about injecting “new blood” into the system and getting rid of “dead wood.” Similarly, examine carefully whether staff decisions based on the lower salaries of new employees may create a legitimate impression of disparate treatment based on age. ■

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