



SCOTUS SETTLES CIRCUIT SPLIT ON ADEA

A CASE FOR THE AGES

Sarah Nash

THE SUPREME COURT'S FIRST CASE from its 2018 Term dealt with a spectacularly simple issue of statutory interpretation, answering once and for all a long-unresolved question under the Age Discrimination in Employment Act of 1967 ("ADEA"). Does the ADEA's employee numerosity requirement apply to state entities as well as private companies? The answer, as articulated by a unanimous¹ court in *Mount Lemmon Fire District v. Guido*, depends entirely on the meaning of the word "also."²

Passed in 1967, the ADEA is geared towards preventing workplace discrimination against older individuals. Specifically, it protects applicants and employees over the age of 40³ from arbitrary discrimination in hiring, firing, compensation, and many other forms of adverse employment action.⁴ It fills much the same role for age as Title VII of the Civil Rights Act

Sarah Nash practices in the Washington, DC office of PilieroMazza PLLC.

¹ The case was 8-0; Justice Kavanaugh did not participate in consideration of the case.

² 586 U.S. ___, 139 S. Ct. 22, 27 (2018).

³ See 29 U.S.C. § 631 ("The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.")

⁴ 29 U.S.C. § 621(b).

(“Title VII”) does for race, gender, religion, and national origin, and as the Americans with Disabilities Act (“ADA”) does for those with disabilities.⁵ As with Title VII, the ADEA when first enacted strictly regulated private employers; in the ADEA’s case, private employers with 25 or more employees.⁶ However, just as Congress amended Title VII in 1972 to include state and local government entities, it amended the ADEA in 1974 to do the same. Well, as it turns out, not quite the same. Indeed, had it been the same, Congress might have spared courts and parties alike quite a bit of debate over the matter. Instead, Congress amended the two statutes in two very different ways.

With Title VII, Congress drafted the amendment to state:

- (a) The term “person” includes one or more individuals, *governments, governmental agencies, political subdivisions*, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.
- (b) The term “employer” means a *person* engaged in an industry affecting commerce who has fifteen or more employees. . . .⁷

In other words, Congress added public entities to the category of “person,” the definition of which was integral to the meaning of “employer.” A public entity is a person; a person with 15 employees is an employer; ergo, a public entity with at least 15 employees is an employer. *Q.E.D.* The amendment to the ADEA took a different twist involving some additional definitional acrobatics. The ADEA amendment was drafted to read as follows:

The term ‘employer’ means a person engaged in an industry affecting commerce who has twenty or more employees
The term *also means* (1) any agent of such a person, and (2) a *State or political subdivision of a State*⁸

⁵ See 42 U.S.C. §§ 2000e(b), 12111(5)(A). While Title VII and the ADEA were passed in the 1960s (1964 and 1967 respectively), the ADA grew out of a different era and did not become law until 1990.

⁶ Pub. L. No. 90-202, § 11(b), 81 Stat. at 605.

⁷ 42 U.S.C. § 2000e (emphasis added).

⁸ 29 U.S.C. § 630(b) (emphasis added). The amendment also reduced the employee threshold from 25 to 20 employees.

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Rather than amending the definition of the word “person,” Congress went straight to the source and amended the definition of the word “employer.” In other words, an employer is a person with at least 20 employees *and a state entity is also an employer*. This left a question that was unique to the ADEA amendment, and squarely addressed by the Title VII amendment: did the ADEA apply to public entities with fewer than 20 employees?

The Court of Appeals for the Seventh Circuit was the first circuit court to interpret the reach of the ADEA in this context. In 1986, it ruled in *Kelly v. Wauconda Park District* that the ADEA’s legislative history revealed that its proscriptions did not apply to state entities with fewer than 20 employees.⁹ The court reached its holding by relying on ambiguity in the statute – ambiguity that by the court’s estimation necessitated a review of the legislative history – and then relying heavily on committee reports stating that the “main purpose in amending the [ADEA and Title VII] was to put public and private employers on the same footing.”¹⁰ And, to accomplish this result, the 20-employee minimum must be applied to public entities as it is to private entities. After *Kelly*, the Sixth, Eighth, and Tenth Circuits answered the question in the same way.¹¹

For the next 30 years or so, courts generally seemed united in this view of the law, until 2014, when the U.S. District Court for the Northern District of Alabama held in *Holloway v. Water Works & Sewer Board* that the ADEA language clearly did not apply a numerosity requirement to public entities.¹² Until then, the Equal Employment Opportunity Commission (“EEOC”), the agency responsible for ADEA enforcement, appeared relatively alone in its position that the ADEA applied to all state entities regardless of size.¹³ In 2017, the Ninth Circuit stacked the deck in *Guido v. Mount*

⁹ 801 F.2d 269, 272 (7th Cir. 1986).

¹⁰ *Id.* at 271.

¹¹ *Cink v. Grant County*, 635 F. App’x. 470 (10th Cir. 2015); *Palmer v. Arkansas Council on Economic Educ.*, 154 F.3d 892 (8th Cir. 1998); *EEOC v. Monclova*, 920 F.2d 360 (6th Cir. 1990).

¹² 24 F. Supp. 3d 1112, 1117 (N.D. Ala. 2014) (“This language is clear, and there is no indication in the statute that Congress intended to import the twenty-employee requirement from the first definition of employer into the second definition. Therefore, no recourse to the legislative history is necessary or proper.”)

¹³ See *Guido*, 139 S. Ct. at 27 (“For 30 years, the [EEOC] has consistently interpreted the ADEA as we do today.”) (citing EEOC Compliance Manual: Threshold Issues § 2-III(B)(1)(a)(i),

Lemmon Fire District.¹⁴ The Ninth Circuit focused not on the legislative history that other courts had evaluated in previous decisions, but on the meaning of the word “also” in the amendment. According to the court:

The word ‘also’ is a term of enhancement; it means ‘in addition; besides’ and ‘likewise; too.’ As used in this context, ‘also’ adds another definition to a previous definition of a term – it does not clarify the previous definition.¹⁵

This meaning, said the court, made the ADEA *unambiguous*; it applied to public entities regardless of size.

In the wake of the Ninth Circuit’s decision and creation of a circuit split, the Supreme Court granted certiorari in *Guido*.¹⁶ A Ninth Circuit decision declaring wholly *unambiguous* a provision that four other circuits had found to be ambiguous seemed ripe for reversal. And the Ninth Circuit is no stranger to reversal. Indeed, of the 14 cases appealed to the Supreme Court from the Ninth Circuit in the 2018 Term, only two were affirmed, making it the circuit court with the highest reversal rate. Put another way, in the 2018 Term, the Court reversed 12 Ninth Circuit cases, two fewer cases than it decided from the Sixth, Seventh, Eighth, and Tenth Circuits combined.¹⁷

Justice Ruth Bader Ginsburg wrote the opinion for a unanimous Court. In an opinion of fewer than 1,700 words, Justice Ginsburg dealt with the question of ADEA application even more briskly than the Ninth Circuit had. According to the Court, the “also means” language in the amendment unambiguously “add[s] new categories of employers to the ADEA’s reach.”¹⁸ While Congress had every opportunity to provide that the term “employer” also means a State or political subdivision of a State *that has twenty or more employees*, it failed to do so. “This Court is not at liberty to insert the absent

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¹⁴ 859 F.3d 1168, 1175 (9th Cir. 2017), cert. granted, 138 S. Ct. 1165 (2018), and aff’d, 139 S. Ct. 22 (2018).

¹⁵ *Id.* at 1172 (citing Webster’s New Collegiate Dictionary 34 (1973)).

¹⁶ 139 S. Ct. at 25.

¹⁷ SCOTUS decisions by Circuit, Ballotpedia, available at ballotpedia.org/Supreme_Court_cases,_October_term_2018-2019 (last visited Sept. 29, 2019).

¹⁸ *Id.* at 25.

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qualifier.”¹⁹ The Court found additional validation for its reading of the phrase “also means” in other Federal statutes and in the broader implications of any other meaning.²⁰

The Court was unpersuaded by the petitioner’s argument (bolstered by a number of not-for-profit *amici curiae* dedicated to advancing the interests of state and local government officials) that Title VII was meant to serve as a model for the ADEA’s amendments. After all, if Congress had meant for the same rule to apply to the ADEA, wouldn’t it have used the same language?²¹ Instead, the Court found parallels with the Fair Labor Standards Act (“FLSA”), the law establishing Federal minimum wage and overtime requirements.²² According to the Court, “[t]he better comparator is the FLSA, on which many aspects of the ADEA are based.”²³ Unlike Title VII, “Congress amended the [FLSA] . . . to reach all government employers regardless of their size.”²⁴ The Court found the similarities between the ADEA and the FLSA compelling. Of course, unlike the ADEA, the FLSA also reaches all private employers regardless of size. In this respect, other than a handful of state discrimination laws, the ADEA is alone in its distinction between private and public numerosity.

Of all the many cases that have examined the language employed in the ADEA’s 1974 amendment, not one has explained why Congress drafted the amendment the way it did. On the one hand, courts that have found the language ambiguous have decried the result as unintentional.²⁵ On the

¹⁹ *Id.* at 26.

²⁰ *Id.*

²¹ Indeed, this is but one difference between the ADEA and Title VII. “Unlike Title VII, which has been amended to explicitly authorize discrimination claims where an improper consideration was ‘a motivating factor’ for the adverse action, see 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B), the ADEA does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor.” *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009). It should be noted that in *Gross*, the Court split 5-4.

²² 29 U.S.C. § 201, *et seq.*

²³ 139 S. Ct. at 26.

²⁴ *Id.* at 23, 27 (citing 88 Stat. 58, 29 U.S.C. § 203(d), (x)).

²⁵ Indeed, according to the Seventh Circuit in *Kelly v. Wauconda Park Dist.*, 801 F.2d 269, 273 (7th Cir. 1986), “applying the ADEA to government employers with less than twenty employees would lead to some anomalous results which we do not believe Congress would have intended.”

other, the Supreme Court and the few others in its camp have never needed to answer the question. One theory, voiced by respondents in *Guido*, is that the ADEA's similarities to the FLSA make it a hybrid between a labor code, interested in "bring[ing] people into the workforce[,] keep[ing] them there, and achiev[ing] full employment of older individuals," and "a substantive anti-discrimination law."²⁶ This may explain the blended approach which distinguishes a numerosity requirement for private employers, but no such requirement for public entities. Whether this rationale holds merit is difficult to say. Ultimately, as explained by the Court, the clear meaning of the statute and additive qualities of the word "also" make understanding Congress' intent irrelevant.

The impact of the Court's decision on public entities is likely to be somewhat narrow. By the time *Guido* was decided, 30 states already prohibited age discrimination by public entities regardless of size.²⁷ What's more, state entities sued by individuals under the ADEA (as opposed to by the EEOC) are *immune* from monetary damages; a fact that significantly limits financial liability, regardless of the size of the entity.²⁸ On the other hand, the take-away from the Court's holding in *Guido* is that unlike private entities, no public entity is immune from the ADEA's prohibitions against

²⁶ Respondent's Oral Argument, *Mount Lemmon Fire District v. Guido*, Oyez, available at www.oyez.org/cases/2018/17-587 (last visited Sept. 29, 2019); see also Respondent's Brief, *Mount Lemmon Fire Dist. v. Guido*, 139 S. Ct. 22, 2018 WL 3323729 at *26-27 (2019) ("The Secretary explained that age-based limitations in employment were 'rarely . . . based on the sort of animus motivating some other forms of discrimination,' but they 'deprived the national economy of the productive labor of millions of individuals and imposed on the governmental treasury substantially increased costs in unemployment insurance and federal Social Security benefits.'"); see also *Lorillard v. Pons*, 434 U.S. 575, 578 (1978) ("The bill that was ultimately enacted is something of a hybrid, reflecting, on the one hand, Congress' desire to use an existing statutory scheme and a bureaucracy with which employers and employees would be familiar and, on the other hand, its dissatisfaction with some elements of each of the pre-existing schemes.")

²⁷ Respondent's Brief, *Mount Lemmon Fire Dist. v. Guido*, 139 S. Ct. 22, 2018 WL 3323729 at *39 (2018) ("Thirty states – including several, such as Alaska and Wyoming, that are 'rural and sparsely populated,' have such laws covering all political subdivisions, regardless of size. And several other states have numerosity requirements in the single digits for such entities.") (citations omitted).

²⁸ Brief of Amici Curiae AARP, et al., *Mount Lemmon Fire Dist. v. Guido*, 139 S. Ct. 22, 2018 WL 3435302 at *34 (2018) (citing *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000)).

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age discrimination. Regardless of Congressional intent, the message that small public entities are to be held to a higher Federal standard than small private entities carries its own weight, certain to influence future legislation.

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