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THE HAZEN PAPER TEST AND PUBLIC SECTOR HIRINGS

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I. THE HAZEN PAPER TEST

In *Hazen Paper v. Biggins*, 507 U.S. 604 (1993), the United States Supreme Court held that a decision to fire someone based on pension or compensation concerns might violate the Employee Retirement Income Security Act of 1974, but is not discriminatory treatment on the basis of age and thus does not violate the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621. The plaintiff in this case was terminated when he was 62 years old, just weeks before his pension was to vest. The Supreme Court reasoned that even when a motivating factor such as pension status is correlated with age, the employer's decision to terminate the employee does not violate the ADEA as long as the decision was based on something other than age. That is because the evils the ADEA was designed to prevent were the misconception that an employee's competence or performance diminishes with age. When the employment decision is not made because of age, the decision is not behavior the ADEA was designed to prevent. However, the Supreme Court held that these other factors must not be used as a proxy for age. *Id.* at 609.

The test for what has become known as the *Hazen Paper* "exception" or "special case" is derived from the Supreme Court's explicit language limiting its holding:

> We do not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination. Pension status may be a proxy for age, not in the sense that the ADEA makes the two factors equivalent…but in the sense that the employer may suppose a correlation between the two factors and act accordingly.

507 U.S. at 612-613

The key for scrutinizing the *Hazen Paper* exception of a "proxy for age" case is what the employer supposes about age. See also, *EEOC v. City of Independence*, 471 F.3d 891, 896 (8th Cir. 2006) (employer leave donation program and age were correlated by statements from program administrator such as "I didn't know you were that old" and "you're of retirement age…you can't draw donated leave time"). On the one hand, an employer might view age as a good characteristic because of the knowledge and experience it brings. Only where discrimination is shown by the employer's reliance upon retirement or pension status as negative reliance on age and age-based stereotypical thinking is the ADEA implicated. *See, Dilla v. West*, 4 F.Supp.2d 1130, 1142 (M.D. Ala. 1998) (no evidence that employer based decision on inaccurate and stigmatizing age-based stereotypes such as generalized assumption that older workers have a greater propensity to retire than younger workers).

In 2008, the Supreme Court had a chance to analyze its *Hazen Paper* special case/proxy for age test and found differences in treatment of employees were not unlawful because they were not actually motivated by age. *Kentucky Retirement Systems v. E.E.O.C.* 554 U.S. 135, 143 (2008). Kentucky's Retirement Plan allows for pension eligibility either upon the employee having attained 20 years of service or upon employees having attained 5 years of service plus the age of 55. The Supreme Court found that pension status remains analytically distinct from age because "one can easily conceive of decisions that are actually made 'because of' pension status and not

age." *Id*. Second, although it is possible that pension status could be a "proxy for age," it is telling that all employees are promised disability retirement benefits prior to the time he or she is eligible for such benefits. *Id*. at 144. Also, Congress has approved programs for calculating permanent disability benefits that use age as a factor. Third, there is a clear non-age-related rationale for the disparity, namely that the whole purpose of Kentucky's plan is to treat disabled workers as if they had become disabled after, rather than before, they were retirement eligible. *Id*. at 145. "The plan turns on pension eligibility and nothing more" and actually can work to the benefit of older workers. *Id*. at 146. Finally, Kentucky's system does not rely on any stereotypical assumptions that the ADEA sought to eradicate and there would be great difficulty in creating a plan that did not take age into account. *Id*. at 147. "Where an employer adopts a pension plan that includes age as a factor, and that employer then treats employees differently based on pension status, a plaintiff, to state a disparate-treatment claim under the ADEA, must adduce sufficient evidence to show that the differential treatment was "actually motivated" by age, not pension status." *Id*. at 148.

II. INCONSISTENY ACROSS CIRCUITS

Federal district courts and circuit courts are all over the place in applying the *Hazen Paper* "proxy for age" test, with courts often overruling and distinguishing from one another. Often there is no direct evidence of age discrimination, so the *McDonnell Douglas* analysis is applied and the dispute focuses on whether age was a motivating factor in the decision. Notwithstanding the employer's decision-making process, the protected trait (age) must have actually played a role in the process and had a determinative influence. The "special case" mentioned in *Hazen Paper* is where certain considerations, such as salary level or retirement eligibility, could be a "proxy for age" test in the sense that the employer supposes a correlation between the factor and age and acts accordingly. It thus comes down to whether there is a genuine issue over what the employer supposed about age at the time of the employment decision. For example, was the employer relying on stereotypical age assumptions, such as older employees are more likely to retire, and using this to disguise the employer's age-motivated bias.

A number of courts have specifically discussed retirement eligibility in the context of "proxy for age" discrimination cases. One issue that can complicate the analysis is that retirement can be fairly synonymous with age and not very analytically distinct (unlike pension benefits). But the *Hazen Paper* holding is specific and clear: "[w]hen the employer's decision is wholly motivated by factors other than age" there is no discrimination "even if the motivating factor is correlated with age." 507 U.S. at 611; *see Schiltz v. Burlington Northern Railroad,* 115 F.3d 1407 (salary costs, seniority and retirement eligibility are permissible considerations under the ADEA).

The following is a sampling of circuit decisions:

- Second Circuit

  In *Hedges v. Town of Madison*, the plaintiff alleged he was fired by the Madison Police Department because he was nearing the age of retirement. 456 F.App'x 22, 23 (2d. Cir. 2012). The Second Circuit found dismissal of plaintiff's claims was proper because even if

Madison fired plaintiff to keep him from his pension, it would not violate the ADEA. The plaintiff failed to support an allegation that pension status was used as a proxy for age. *Id*.

- Third Circuit

In *Erie County Retirees Ass'n v. County of Erie, Pa.,* the Third Circuit found that Medicare eligibility does not just merely correlate with age, rather eligibility follows ineluctably upon reaching age 65. 220 F.3d 193, 211 (3d. Cir. 2000). Thus, Medicare status is a direct "proxy for age" and is parallel to the "special case" mentioned in *Hazen Paper*. The fact that the county had no malevolent motive or hostile age-based stereotypes is irrelevant because a policy explicitly based on a prohibited motive is illegal regardless of the underlying motive. *Id*. at 212.

- Fifth Circuit

Moore v. Eli Lilly & Co., was decided by the Fifth Circuit ten days after the *Hazen Paper* decision and the holding is a bit murky on how it applies the Supreme Court's analysis. 990 F.2d 812 (5th Cir. 1993). Bottom-line, the Fifth Circuit held that making training investments based on age was a legitimate business decision because it could predict long-term employment. *Id*. at 818

- Sixth Circuit

In *Sharp v. Aker Plant Services Group, Inc*., the Sixth Circuit found a special case situation as indicated in the *Hazen Paper* analysis and made very clear that evidence was established that a hiring and firing decision was based on age. 726 F.3d 789, 799 (6th Cir. 2013). Hudson, who was in charge of hiring for Aker, stated that he kept one employee (Kirkpatrick) and fired plaintiff Sharp because Sharp was "of the same age [as Hudson] and we're all going to retire and I had an opportunity to bring the next generation[ ] in, so that's what we decided to do." *Id*. The Sixth Circuit found that the case boiled down to the fact "Aker picked Kirkpatrick because he is younger. Aker's asserted business concern—potential longevity with the company—is nothing more than a proxy for age." *Sharp*, 726 F.3d at 800. The court noted in other cases there was no mention or only oblique mention of age. Again the court said, "Hudson stated in essence that Aker's succession plan was to hire or retain younger workers at the expense of older workers because it was more likely that the former would stay with the company longer than the latter." *Id*. at 801. There was no analytical step between an employee's longevity with the company and his age. Potential longevity was used as a proxy for age, therefore, summary judgment for Aker was inappropriate. *Id*. However, in a previous case, the Sixth Circuit found that no one at the corporation made direct references to the plaintiff's age and there was no other evidence of a pretext for age discrimination. *Woythal v. Tex–Tenn Corp*., 112 F.3d 243, 247 (6th Cir. 1997).

- Seventh Circuit

In a case out of the Seventh Circuit, an employer inquired into an employee's retirement age but not his age directly. *Colosi v. Electri–Flex Co.,* 965 F.2d 500, 502 (7th Cir. 1992). The

Seventh Circuit refused to find age bias based on retirement plans stating "a company has a legitimate interest in learning its employees' plans for the future." *Id*.

- Eighth Circuit

In *Tramp v. Associated Underwriters*, plaintiff Tramp brought an ADEA and ADA claim against Associated Underwriters claiming she had been terminated on the basis of age, race, disability, and sex. 768 F.3d 793, 798 (8th Cir. 2014). The Eighth Circuit reversed the district court's grant of summary judgment by finding that "fact issues existed as to whether employer's desire to reduce its insurance premiums for health insurance was a proxy for employee's age." *Id*. at 804. The Eighth Circuit heavily quoted from the *Hazen Paper* decision saying, "[w]hatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome." *Id*. at 801 (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)). Also, there is no discrimination "[w]hen the employer's decision is wholly motivated by factors other than age ... even if the motivating factor is correlated with age." *Id*. (quoting *Hazen Paper*, 507 U.S. at 611).

In *Lee v. Rheem Mfg. Co.,* the Eighth Circuit affirmed the district court's grant of summary judgment to the employer. 432 F.3d 849 (8th Cir. 2005). The plaintiff argued there was direct evidence of age discrimination during his interview that included the interviewer stating "things have changed a lot," asking if the plaintiff would be "able to grasp new processes," and stating Rheem Mfg. must plan for the future. *Id*. at 853. Also, the interviewers asked the plaintiff how long he planned to work there if hired. Although Lee's expected years of work is related to his age, "factors other than age, but which may be correlative with age, do not implicate the prohibited stereotype, and are thus not prohibited considerations." *Schiltz v. Burlington Northern R.R.*, 115 F.3d 1407, 1412 (8th Cir. 1997) (citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993)).

- Ninth Circuit

In *E.E.O.C. v. California Micro Devices Corp*., the district court looked at whether selecting an employee for layoff because he expresses an intent to leave the company or retire a year and a half before, constitutes age discrimination under the ADEA. 869 F.Supp. 767, 770 (D. Ariz. 1994). The court distinguished the present case from *Hazen Paper* by stating that the plaintiff (Spillane) previously stated intent to retire was based on his age, not his years of service at CMD. *Id*. at 771. The court found that whether CMD's decision to lay off Mr. Spillane was based on his age was a genuine issue of material fact. *Id*. at 773. Mr. Spillane provided sufficient evidence to support a prima facie case of age discrimination including, that he was 62, the oldest in his department, received satisfactory (often outstanding) performance reviews, and CMD retained younger employees with less qualifications. *Id*. Once the burden shifted to the defendant, CMD's only response was that it was Mr. Spillane's impending absence, not his age, which caused his selection for layoff. *Id*. at 774. But based on previous Ninth Circuit cases, there were genuine issues of fact on whether CMD's action was impermissibly based on Mr. Spillane's age vis-a-vi his retirement status.

See *EEOC v. Local 350, Plumbers & Pipefitters*, 982 F.2d 1305 (9th Cir. 1992), amended & superseded, 998 F.2d 641 (9th Cir. 1992); *E.E.O.C. v. Borden*, 724 F.2d 1390 (9th Cir. 1984), overruled, in part, on other grounds. Further, Spillane testified that if anyone would have asked him about his retirement, he would have said he did not plan on retiring soon because of financial restraints. *Id*.

- Eleventh Circuit

In a case out of Alabama, the court looked at whether hiring a candidate based on retirement eligibility, where age and retirement eligibility are directly correlated, violated the ADEA. *Dilla v. West*, 4 F.Supp.2d 1130, 1132 (M.D. Ala. 1998), *judgment aff'd*, 179 F.3d 1348, 76 Empl. Prac. Dec. (CCH) P 46175 (11th Cir. 1999). The court found that there was no violation of the ADEA where the employer does not base its decision on inaccurate and stigmatizing age-based stereotypes, such as a generalized assumption that older workers have a great propensity to retire than younger workers. Three plaintiffs claimed they were denied a position at Fort Rucker based on their age. *Id*. at 1136. The court read the "special case" discussed in *Hazen Paper* to establish "only that discrimination under the ADEA may be shown by demonstrating that the employer's professed reliance upon retirement or pension status was intended to conceal the fact that the decision was actually based upon prohibited stereotypes regarding the employees' ages. That is, the employer must have exploited the perfect or near-perfect correlation between retirement or pension status and age to mask his true reliance on age and age-based stereotypical thinking." *Id*. at 1142.

The defendant in the *Dilla* case proffered sufficient evidence to prove that the panel-members focused on the candidates' retirement eligibility and not age or age-based assumptions in the promotion decision. *Id*. at 1143. Due to budgetary restraints, they sought to hire an air traffic controller who was qualified but whose experience did not qualify him for a higher salary. *Id*. at 1144. Salary costs and seniority are permissible considerations under the ADEA. *Id*. (*See Schiltz v. Burlington Northern Railroad*, 115 F.3d 1407, 1411–12 (8th Cir. 1997) (other citations omitted). The court also concluded that there was a lack of circumstantial evidence of age discrimination because the decision was motivated by legitimate, non-age considerations, such as retirement-eligibility and cost-savings. *Id*. at 1147.

III. ILLUSTRATIVE CASE – *Hilde v City of Eveleth*, 777 F.3d 998 (2015)

Leroy Hilde was employed by the City of Eveleth, Minnesota for nearly 30 years. Hilde alleged that he was not promoted to the chief of police position because of his age (51) in violation of the Age Discrimination in Employment Act (ADEA). Hilde sued the city in United States District Court, District of Minnesota. The district court determined that Hilde had not met his burden of demonstrating a disputed issue of material fact on any of his claims, and dismissed the case on summary judgment.

On review, the Eighth Circuit Court of Appeals reversed the district court determining that while there was no direct evidence linking Hilde's age to the city's hiring decision there was circumstantial evidence that the police commission (a 3-member citizen board) used Hilde's

retirement eligibility as a proxy for age in order to discriminate against him. The Eighth Circuit analyzed this case under *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) and held that a fact issue existed on whether the city had impermissibly used Hilde's retirement eligibility as a proxy for age. In doing so, it relied heavily on the allegation that a commissioner made a post-decision, single stray remark connecting Hilde's *retirement eligibility* to the hiring decision. There was no evidence in the record of any age-based practices or ageist statements by city decision-makers. Nor was there any statistical evidence in the record indicating the city's hiring practices have ever disproportionately impacted employees because of their age. Notwithstanding the absence of these crucial facts/evidence, the panel held that because the commissioners were aware Hilde was pension eligible due to vesting at 50 years old, and may have used this as a factor in its hiring decision, this was enough on its own to create a fact issue on whether the city used retirement eligibility as a proxy for age discrimination.

Unlike other circuits applying the *Hazen Paper* rule (and other 8th Circuit panels) the *Hilde* panel attached/inferred a motive of age animus to the knowledge and use of retirement eligibility as a potential factor in the hiring decision. The city argued that retirement eligibility has been recognized as a permissible and lawful factor as long as it is not used by an employer as a proxy for age discrimination. The Eighth Circuit had previously followed *Hazen Paper* and upheld employment decisions motivated by factors other than age (such as retirement eligibility, salary or seniority), even when such factors correlated with age, because, under *Hazen Paper*, such reliance does not constitute age discrimination. *Conney v. Union Pac. R.R. Co.*, 258 F.3d 731, 735 (8th Cir. 2001); *Lee v. Rheem Mfg. Co*., 432 F.3d 849, 853 (8th Cir. 2006); *EEOC v. McDonnell Douglas Corp*., 191 F.3d 948, 951 (8th Cir. 1999) (citing *Hanebrink v. Brown Shoe* Co., 110 F.3d 644, 647 (8th Cir. 1997) (simply considering a candidate's retirement plans or retirement eligibility is not age discrimination); *Slather v. Sather Trucking Corp*., 78F.3d 415 (8th Cir. 1996) (decision to terminate employee solely because of salary or length of service is not age discrimination); *Thomure v. Phillips Furniture Co*., 30 F.3d 1020 (8th Cir. 1994) (employer can take into account salary, while ignoring age, even though correlation between two). However, the Hilde panel decision determined that reliance on retirement eligibility could be unlawful age discrimination and sent the case back for a jury trial. The city's petition for rehearing and hearing en banc was denied and the case was settled pre-trial.

IV. SPECIAL DANGERS OF *HAZEN PAPER* TEST TO PUBLIC SECTOR HIRING/PROMOTION CASES

Under the reasoning in the *Hilde* case and similarly minded decisions, nearly every legal challenge to a hiring or promotion process in which there is knowledge of a candidate's age-based pension or retirement status could have the potential to survive summary judgment and require a trial. There is a particular risk of excessive litigation over public sector hiring processes where employee retirement pension plans are created by government bodies thereby making all eligibility criteria available to the public and widely circulated. In other words, it is fairly common to have information about a candidate's pension and retirement status if the candidate is or was a public employee. However, the key for scrutinizing the *Hazen Paper* exception or "proxy for age" case is what the employer *supposes about age*. See, *EEOC v. City of*

Independence, 471 F.3d 891, 896 (8th Cir. 2006) (emphasis added). On the one hand, an employer might view age as a good characteristic because of the knowledge and experience it brings; on the other hand, an employer might view age as a negative.

Even though pension eligibility in the public sector is invariably correlated with age (in Minnesota pension benefits vests at 50 years old for law enforcement personnel) this fact alone does not establish any discriminatory animus on the part of the employer who will have knowledge and access to pension status information. In the *Hilde* case the panel's opinion was based on the *court's* supposition that the commissioners believed Hilde "uncommitted to [the police chief] position because his age made him retirement-eligible" and that this equals "age-stereotyping that the ADEA prohibits" even though no evidence existed connecting commissioners' view of Hilde's age and lack of commitment. The danger is that under this approach, nearly every legal challenge to a hiring process in which there is knowledge of a candidate's age-based pension status would survive summary judgment and require a trial. There is also a particular risk of excessive litigation over public sector hiring processes where employee retirement pension plans are created by government bodies thereby making all eligibility criteria available to the public and widely circulated.

V. CONCLUSION AND RECOMMENDATIONS

While there must be something more than the existence of a factor that correlates with age to show that the factor was a "proxy for age" discrimination, retirement eligibility is so closely linked to age that courts may have difficulty in applying the *Hazen Paper* test to cases involving an employer's knowledge and use of retirement eligibility in an ADEA claim, particularly in public sector employment challenges. However, a "proxy for age" situation should not exist where consideration of a candidate's retirement eligibility is due to the legitimate hiring criterion of time commitment to the job, and additional evidence is needed before a court finds pension status a proxy for unlawful age discrimination. One way to help the public employer make clear this distinction (and thus make clear the record for the court) is to train decision makers to document a candidate's responses to questions about time commitment and goals related to the new job. Especially in higher lever positions where transitions are costly and disruptive, the employer should clearly articulate why time commitment is a legitimate and important consideration. Then the employer must make sure any decision that uses the information provided by a candidate is based solely on legitimate criterion such as the impending absence or financial impact of an early departure, and not on any negative assumptions or biases associating a candidate's age with his/her retirement status or plans.