

EXTENDING PROTECTION UNDER THE AGE DISCRIMINATION IN
EMPLOYMENT ACT TO APPOINTED STATE JUDGES

EEOC v. State of Vermont, 904 F.2d 794 (2d Cir. 1990)

In *EEOC v. State of Vermont*,¹ the Second Circuit Court of Appeals held that appointed state judges are entitled to the Age Discrimination in Employment Act's (ADEA or the Act)² protection against discriminatory practices.³ In so holding the Second Circuit concluded that appointed state judges do not fall within the Act's exception for "appointees on a policymaking level."⁴

In 1982, the Vermont Senate confirmed the gubernatorial appointment of Louis P. Peck to the state supreme court.⁵ In 1987, the Vermont General Assembly voted to retain Justice Peck for a second six-year term.⁶ The Vermont Constitution provides for mandatory retirement of all

1. 904 F.2d 794 (2d Cir. 1990).

2. Age Discrimination in Employment Act of 1967, § 11(f), 29 U.S.C. §§ 621-34 (1985 & Supp. 1990). For a general overview of the ADEA, see Mawdsley, *Protecting Older Workers: Enforcement of ADEA*, 54 EDUC. L. REP. (West) 399 (Aug. 31, 1989).

3. 29 U.S.C. § 623(a)(1) provides: "It shall be 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."

4. The ADEA, with certain exceptions, generally protects all employees from employer discrimination on the basis of age. Section 630(f) provides:

The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision (Emphasis added).

29 U.S.C. § 630(f)(1985 & Supp. 1990) (emphasis added).

5. *E.E.O.C. v. State of Vermont*, 904 F.2d 794, 796 (2d Cir. 1990). The Vermont Constitution provides:

The Governor, with the advice and consent of the Senate, shall fill a vacancy in the office of the . . . associate justice of the Supreme Court . . . from a list of nominees presented to him by a judicial nominating body established by the General Assembly

VT. CONST., ch. II, § 32.

6. 904 F.2d at 796. The Vermont Constitution provides:

The justices of the Supreme Court . . . shall hold office for terms of six years At the end of the initial six year term . . . the question of his continuance in office shall be submitted to the General Assembly and he shall continue in office for another term of six years unless a majority of the members of the General Assembly . . . voting on the question vote against his continuing in office.

VT. CONST., ch. II, § 34.

judges and justices upon reaching age seventy.⁷ Thus, when Justice Peck turned seventy in December of 1988, the state scheduled his retirement for the following June.⁸

Justice Peck filed an age discrimination complaint with the Equal Employment Opportunity Commission (EEOC).⁹ After failed attempts to negotiate on Justice Peck's behalf, the EEOC filed suit against Vermont's Court Administrator.¹⁰ The complaint charged that Vermont's mandatory retirement provision violated the ADEA's prohibition of age discrimination.¹¹ The United States District Court for the District of Vermont held that the ADEA precluded application of Vermont's retirement provision to appointed state judges.¹² The Second Circuit affirmed, and *held*: the ADEA protects appointed state judges from mandatory retirement because such judges do not fall within ADEA's exception for appointees on a policymaking level.¹³

7. The Vermont Constitution provides that [a]ll [appointed] justices of the Supreme Court . . . shall be retired at the end of the calendar year in which they attain seventy years of age VT. CONST., ch. II, § 35.

8. 904 F.2d at 796.

9. *Id.* Congress established the EEOC as part of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-4 (1981), as amended by Act of Mar. 27, 1978, Pub. L. No. 95-251, § 2(a)(11), 92 Stat. 183. Congress directed the EEOC to "prevent any person from engaging in any unlawful employment practice." 42 U.S.C. § 2000e-5(a) (1981).

10. EEOC v. State of Vermont, 717 F. Supp. 261, 262 (D. Vt. 1989). Congress authorized the EEOC to bring a civil action against an employer on behalf of a person charging a discriminatory labor practice. 42 U.S.C. § 2000e-5(b) (1981).

The State Office of the Court Administrator is responsible for administering and enforcing the retirement provision of Vermont's constitution as it relates to judges and justices. 717 F. Supp. at 262.

11. 904 F.2d at 796. See *supra* note 3 for the relevant ADEA language. The EEOC sought injunctions against application of the retirement provision generally and as applied to Justice Peck, as well as monetary relief for Justice Peck and others adversely affected by the provision. 904 F.2d at 796-97.

12. 904 F.2d at 797.

13. *Id.* at 800. See *supra* note 4 for exceptions to ADEA's protection. The Second Circuit also rejected the state's claim that the tenth amendment prohibits congressional interference with Vermont's purview over state judicial structure. 904 F.2d at 802 (citing *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 550 (1985)). See also *Schlitz v. Commonwealth of Virginia*, 681 F. Supp. 330, 332 (E.D. Va. 1988), *rev'd on other grounds*, 854 F.2d 43 (4th Cir. 1988). In *Schlitz*, the court stated that the claim that the tenth amendment bars federal intervention in the appointment of state judges "might have been more persuasive during the reign of the 'traditional governmental function' concept of *National League of Cities v. Usery*, 426 U.S. 833 [(1976), however,] it must . . . fail under the Supreme Court's [more recent] analysis in *Garcia*." The court noted that the Supreme Court in *Garcia* cited with approval *EEOC v. Wyoming*, 460 U.S. 226, 236 (1983), in which the Court upheld the extension of ADEA protection to state and local governments. 681 F. Supp. at 332. For a general overview of sovereign immunity, see *Lopez, The Constitutional Doctrines*

Congress enacted the Age Discrimination in Employment Act of 1967¹⁴ to promote the employment of older workers¹⁵ based on their ability rather than their age.¹⁶ The Act protects state employees¹⁷ from age discrimination.¹⁸ However, the Act excepts certain employees from protection, including "appointees on a policymaking level."¹⁹

of State Immunity From Federal Regulation and Taxation After Garcia v. San Antonio Metropolitan Transit Authority, 4 J.L. & POL. 89 (1987). This Comment does not address the issue of state sovereignty and federal intervention.

14. See *supra* note 2.

15. The Act's protections apply to any individual who is "at least 40 years of age." 29 U.S.C. § 631(a) (Supp. 1990). Originally, the Act only protected workers until they reached the age of sixty-five, but Congress amended the Act in 1978 to raise the upper limit to seventy years of age. In 1986 Congress removed the upper limit altogether and afforded protection to all individuals forty years of age or more. See *Age Discrimination in Employment Act Amendments of 1978*, § 12, 29 U.S.C. § 631(a) (1985) (raising upper limit of Act's coverage to 70), *amended by Age Discrimination in Employment Act Amendments of 1986*, § 2(c)(1), 29 U.S.C. § 631(a) (Supp. 1990) (eliminating upper limit altogether).

16. The Senate committee recommending passage of the ADEA stated:

[I]ts purpose is threefold: to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; and to help employers and workers find ways of meeting problems arising from the impact of age on employment.

S. REP. NO. 95-493, 95th Cong., 1st Sess. 2, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 504, 505.

17. In 1974, Congress amended the definition of the term "employer" within the ADEA to read: "The term 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, and any interstate agency . . ." *Fair Labor Standards Amendments Act of 1974*, 29 U.S.C. § 630(b)(2) (1985).

18. See *supra* note 3.

19. In addition to removing appointees on a policymaking level from protection, the Act also excludes elected officials and their immediate advisers from coverage. See *supra* note 4. It is settled that appointed state judges do not constitute immediate advisers within the meaning of the Act. See *E.E.O.C. v. State of Vermont*, 717 F. Supp. 261, 264 (D. Vt. 1989) (appointed state-court judge only exempted from the Act's protection if he is "an appointee on the policymaking level"); *Schlitz v. Commonwealth of Virginia*, 681 F. Supp. 330, 333 (E.D. Va. 1988) (plain language of the Act indicates that appointed state judges are protected). *But see Apkin v. Treasurer & Receiver General*, 401 Mass. 427, 517 N.E.2d 141 (1988) (appointed state judges not protected because the Act does not preempt state constitution's mandatory retirement provision).

Some courts, however, invoke the elected officials exception to exclude appointed state judges from the Act's protection. These courts reason that it is nonsensical to extend coverage to appointed state judges but not elected state judges because their stations and responsibilities are identical. See *Apkin v. Treasurer and Receiver General*, 401 Mass. 427, 435, 517 N.E.2d 141, 146 (1988) ("The application of the 1986 Amendment to state judges, making a distinction between elected and appointed judges, would produce a helter-skelter, irrational pattern throughout the country."); *E.E.O.C. v. State of Illinois*, 721 F. Supp. 156, 159 (N.D. Ill. 1989) (no principled basis exists to treat appointed judges differently from elected judges). *But see Diamond v. Cuomo*, 70 N.Y.2d 338, 514 N.E.2d 1356 (1987) (distinction between elected and appointed state officials under ADEA does not offend equal protection).

Legislative history directly addressing the ADEA's paragraph of exceptions is sparse. E.E.O.C. v.

In the absence of Supreme Court guidance,²⁰ lower courts widely differ in their treatment of the ADEA's paragraph of exceptions.²¹ The outcome often depends on the relative weight a court gives to: (1) structural interpretation of the paragraph's plain language;²² (2) analysis of the Act's underlying legislative intent;²³ and (3) examination in light of constitutional considerations.²⁴ Most courts addressing the issue exclude appointed state judges from ADEA protection.²⁵

In *Schlitz v. Virginia*,²⁶ the plaintiff charged that the state violated the ADEA in denying him reappointment to a Circuit Court Judgeship in the City of Portsmouth. In denying the state's motion to dismiss, the court became the first to extend ADEA protection to appointed state judges,²⁷ thereby precluding application of Virginia's mandatory retire-

State of Vermont, 904 F.2d 794, 798 (2d Cir. 1990). However, the ADEA's definition of "employee" is based on identical wording in Title VII of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e(f) (1985) (EEOA). The legislative history of the EEOA provision is instructive in interpreting the ADEA definition. It states:

It is the intention of the [Title VII] conferees to exempt elected officials and members of their personal staffs, and persons appointed by such elected officials as advisors or to policymaking positions at the highest levels of the departments or agencies of State or local governments, such as cabinet officers, and persons with comparable responsibilities at the local level. It is the conferees intent that this exemption shall be construed narrowly.

Joint Explanatory Statement of Managers at the Conference on H.R. 1746, H. REP. NO. 238, 92d Cong., 1st Sess., reprinted in part in 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2179, 2180 [hereinafter *Joint Statement*].

20. On November 26, 1990 the Supreme Court granted certiorari in *Gregory v. Ashcroft* to decide the issue discussed in this Case Comment. 898 F.2d 598 (8th Cir.), cert. granted, 111 S. Ct. 507 (1990). Arguments are scheduled for the late Spring of 1991 and a decision should be handed down in June of 1991.

21. See *infra* notes 25-31, 34-38, 43-47, 50-53. For text of the exceptions paragraph, see *supra* note 4.

22. See *infra* notes 25-31, 39, 51-53, 60-61.

23. See *infra* notes 32-33, 37-38, 46-47, 54-56, 62-66.

24. See *Gregory v. Ashcroft*, 898 F.2d 598, 606 (8th Cir.) (Missouri's mandatory retirement provision does not violate the equal protection clause of the fourteenth amendment), cert. granted, 111 S. Ct. 507 (1990); *E.E.O.C. v. Commonwealth of Massachusetts*, 858 F.2d 52, 53-54 (1st Cir. 1988) (Massachusetts' constitutional provision mandating retirement of state judges at age seventy valid absent clearer evidence of congressional intent to preempt under its supremacy clause power).

25. See *infra* notes 33, 35-36, 43-47.

26. 681 F. Supp. 330, 331 (E.D. Va. 1988), rev'd on other grounds, 854 F.2d 43 (4th Cir. 1988).

27. The Fourth Circuit reversed based solely on legislative immunity. 854 F.2d at 45-6. The Fourth Circuit did not address the district court's interpretation of the ADEA. Instead, the court stated that "[w]e are being asked to consider whether the Assembly's purported motives for declining to re-elect plaintiff are a pretext for age discrimination. This inquiry, in our view, runs squarely afoul of the doctrine of legislative immunity." *Id.* at 45. The Fourth Circuit explained that legislative immunity is the protection extended to actions taken within the "sphere of legitimate legislative

ment provision.²⁸ Interpreting the Act's plain language, the court held that the similarities between employment as a judge and other traditional forms of employment²⁹ rendered inapplicable the ADEA's policymaking appointee exception.³⁰ The court rejected the state's argument that appointed judges should be treated the same as elected judges, who do not receive the Act's protections.³¹ Because Congress plainly intended to distinguish between elected and appointed officials generally³² and displayed no intent to specially exempt judges from the Act, the court construed the ADEA broadly³³ to apply to appointed judges who fit the statutory definition of "employees."³⁴

The First Circuit reached the opposite conclusion in *EEOC v. Commonwealth of Massachusetts*.³⁵ The court determined that judges fit within the ADEA's exception for "appointees on a policymaking

activity, shielding them from judicial review." *Id.* at 45 (citing *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)).

28. 681 F. Supp. at 334. This determination agreed with the EEOC's formal opinion at the time that appointed state judges fall within the ADEA's definition of employees. *E.E.O.C. Formal Opinion to the Honorable Claude Pepper*, E.E.O.C. COMP. MAN. (BNA) N:1001 (April 7, 1987).

29. 681 F. Supp. at 333. The court noted that judges draw salaries, work under the direction and authority of the state, and perform other employee duties and thus "must be deemed employees of and in need of the same protections afforded the remainder of the employed population." *Id.* (citation omitted).

30. *See supra* note 4.

31. 681 F. Supp. at 334.

32. *Id.* Because the ADEA does not directly address judges in any manner, the court found congressional intent to distinguish between elected and appointed officials generally, branding the defendant's argument that no basis exists for distinguishing elected from appointed judges "narrow." *Id.* The court noted that Congress may have excluded elected, but not appointed, officials from the Act's protection in the belief that the electorate will not discriminate on the basis of age, and thus such protection is unnecessary. *Id.* *But cf. supra* note 19.

33. *Id.* at 333. The court recognized that the ADEA "broadly prohibits arbitrary discrimination in the work place based on age." *Id.* (quoting *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 120 (1985)). The court also noted that the defendant mischaracterized the clear statement rule "by demanding explicit mention of each official to be included within the scope of the ADEA." 681 F. Supp. at 333. *But see supra* note 4, *infra* note 44.

34. *Id.* at 334. In addition, the court rejected summarily the state's contention that judges are policymakers. *Id.* at 331 n.1.

35. 858 F.2d 52 (1st Cir. 1988). The court framed the issue in terms of whether Congress intended to limit significantly "the power of the people of . . . Massachusetts to determine its qualifications of judges." *Id.* at 53. In holding that Congress failed to display such an intention in its enactment of the ADEA, the court indicated that only an extremely clear statement of such an intent would suffice because "the tenure of state judges is a question of exceeding importance to each state, and a question traditionally left to be answered by each state. Any federal encroachment . . . in this area, therefore, strikes very close to the heart of state sovereignty." *Id.* at 54.

level,"³⁶ relying on the modern judge's undeniable role as a decision maker.³⁷ The court also addressed the relevant legislative history concerning the exceptions paragraph³⁸ and concluded that Congress intended to apply the exception for appointees equally to employees in all three branches of government.³⁹ The First Circuit rejected the contention that the exception for appointees on a policymaking level only applies to appointees who work closely with elected officials.⁴⁰ The court interpreted the Act's language as excepting two categories of appointees: advisers, whether policymakers or not; and policymakers, whether advisers or not.⁴¹ Finally, the court found it "nonsensical" to exclude elected, but not appointed, judges from the Act's protection when their duties are identical.⁴²

36. See *supra* note 4.

37. 858 F.2d at 55-56. The First Circuit rejected as unrealistic a characterization of judges as "mechanized law-and-fact processors, scientifically applying settled principles of law to established fact patterns." *Id.* at 54.

Similarly, in *In Re Stout*, 559 A.2d 489 (Pa. 1989), the court denied a judge protection from Pennsylvania's mandatory retirement provision. The *Stout* court held that the duties of a modern judge involve policymaking, given the definition of "policy" as: "a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions . . ." *Id.* at 495 (quoting WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 910 (1985 ed.)). In concluding that Justice Stout did engage in policymaking within this definition, the court noted that a justice's constitutional duties included the exercise of supervisory authority over all the courts, the appointment of a court administrator, the duty to prescribe general rules governing the courts, the promulgation of regulations and directives having the force of statutes, and the abrogation of common law rules during the course of their decision-making process. *Id.* But see *EEOC v. State of New York*, 729 F. Supp. 266, 270 n.3 (S.D.N.Y.), *rev'd on other grounds*, 907 F.2d 316 (2d Cir. 1990) (citing a memorandum by the New York State Administrative Board concluding that appointed judges are not "high policymakers" and do not fall within any of the other exceptions to the Act in support of holding that the ADEA applies to New York's appointed state judges).

38. 858 F.2d at 55. The court actually analyzed Title VII's legislative history because its definition of "employees" is identical to that adopted by Congress in the ADEA. *Id.* See *Lorillard v. Pons*, 434 U.S. 575, 584 (1978) (provisions of the ADEA derived *in haec verba* from Title VII). See *also supra* note 19.

39. 858 F.2d at 55-56. The court noted concerns raised by Senator Ervin during consideration of Title VII's amendments that Title VII's protections not apply to "top decisionmakers" in any of the three branches. *Id.* at 55 (citing 118 CONG. REC. 1837 (1972)). In response to Senator Ervin's concerns Congress did not distinguish between those employed in the different branches of government. *Id.*

40. 858 F.2d at 55.

41. *Id.* at 55-56 (citing *Joint Statement, supra* note 19, at 2137, 2179). In refuting the EEOC's contention that the ADEA requires a close, working relationship to an elected official, the court called for a "slightly different understanding of who is a policymaker for purposes of the exception." 858 F.2d at 56.

42. *Id.* at 57. See *also supra* notes 19, 31.

The Eighth Circuit followed the First Circuit's lead⁴³ and held the ADEA inapplicable to state appointed judges in *Gregory v. Ashcroft*.⁴⁴ In *Gregory*, the court focused on the similarity of a judge's thought process to that of an executive appointee and concluded that judges are policy-makers.⁴⁵ It then interpreted the structure of the exceptions paragraph to suggest that Congress intended to exclude both appointed and elected judges.⁴⁶ Finally, the court rejected the *Schlitz* court's analysis of the Act's legislative history;⁴⁷ instead finding a congressional intent to apply the ADEA's exceptions to all three branches of government.⁴⁸

In *EEOC v. State of Vermont*,⁴⁹ the Second Circuit became the first circuit court to hold the ADEA exception for appointees on a policymaking level⁵⁰ inapplicable to appointed state judges, effectively extending ADEA protection from discriminatory employment practices to such judges.⁵¹ The court first examined the structural framework of the ADEA's exceptions paragraph.⁵² The court emphasized Congress'

43. See *supra* notes 34-41.

44. 898 F.2d 598, 604 (8th Cir.), *cert. granted*, 111 S. Ct. 507 (1990). Four Missouri judges claimed that the state's mandatory retirement provision violated the ADEA. *Id.* at 599. Like the First Circuit in *EEOC v. Commonwealth of Massachusetts*, 858 F.2d 52 (1st Cir. 1988), the Eighth Circuit framed the issue in terms of whether Congress displayed a clear intent to supersede state authority over its judicial system, again raising the high hurdle of sovereignty. 898 F.2d at 600. See *supra* note 34.

45. 898 F.2d at 601. The Eighth Circuit noted that, "[w]ithin the boundaries established by settled law," judges exercise the same sort of discretion, self-restraint, and thoughtful judgment as appointees in the legislative and executive branches. *Id.* at 601-02. *But see supra* note 36. *Cf.* *Spell v. McDaniel*, 824 F.2d 1380, 1386 (4th Cir. 1987) (finding police officers equivalent to policymakers, despite the municipality retaining ultimate authority); *Owens v. Fulton County*, 690 F. Supp. 1024 (N.D. Ga. 1988) (district attorneys are policymakers for purposes of civil rights claim). The court then described the many administrative and supervisory functions of judges within the Missouri court system. 898 F.2d at 602.

46. 898 F.2d at 602. The court rejected the Judge's claim that because Congress placed the exception for "appointees on a policymaking level" between exceptions relevant primarily to the legislative and executive branches of government, policymaking judges warrant similar protection. *Id.* See *supra* note 4 for text of the exceptions paragraph. The court found this interpretation implausible deeming it unlikely that Congress intended to protect appointed state judges while exempting elected ones. 898 F.2d at 602. See *supra* notes 19, 31.

47. 898 F.2d at 601. See *supra* notes 25-33.

48. 898 F.2d at 602. The court found that Congress considered the judiciary an "agency" of state government. *Id.* at 603. Thus, the phrase "policymaking positions at the highest levels of . . . agencies of State . . ." in the exceptions paragraph makes the policymaker exception applicable to appointed state judges. *Id.* (emphasis added). See *supra* note 4 for text of the exceptions paragraph.

49. 904 F.2d 794 (2d Cir. 1990).

50. See *supra* note 4.

51. 904 F.2d at 797.

52. *Id.* at 797-98. See *supra* note 4.

placement of the exception for "appointees on a policymaking level" between those for "persons chosen to be on [an elected official's] personal staff" and for an elected official's "immediate advisers."⁵³ Given the nature of the surrounding exceptions, the court concluded that Congress intended all three exceptions to apply only to employees working closely with elected officials, and not to state judges.⁵⁴

Second, the court reviewed the legislative history of the exceptions paragraph.⁵⁵ The court noted the explanation given by the senator who recommended the exception for appointees on a policymaking level.⁵⁶ The court concluded that Congress adopted the provision under this senator's assumption that it applied only to employees of the executive and legislative branches.⁵⁷

Finally, the Second Circuit asserted that, even if the ADEA's exceptions are not limited to executive and legislative employees, appointed state judges are still protected because judges do not traditionally make policy—they resolve disputes.⁵⁸ The court asserted that judges generally rely on the other branches of government to fashion policy, then interpret, clarify or apply those policies to resolve disputes.⁵⁹ The court noted the tentative nature of lower court decisions, which are subject to rever-

53. 904 F.2d at 798. See *supra* note 4 for text of the exceptions paragraph.

54. *Id.* The court invoked principles of statutory construction to determine that if Congress wanted to exclude a wider group of policymakers than those working closely to elected officials, it would have placed the "policymaking employee" exception at the end of the series, rather than in the middle. *Id.* But see *supra* note 45; *infra* notes 60-61.

55. 904 F.2d at 798. The Second Circuit actually considered the legislative history pertaining to the adoption of the definition of "employee" in Title VII. See also *supra* notes 19-37.

56. 904 F.2d at 799-80. The Senate originally adopted the amendment to Title VII's definition of "employee" without the "appointees on a policymaking level" language. However, Senator Jacob Javits of New York succeeded in his efforts to clarify the amendment, explaining: "I was thinking more in terms of a cabinet . . . who would do the main and important things. That is what I would define those things expressly to mean." *Id.* (citing 118 CONG. REC. 4097 (1972)). The court found this explanation indicative of Congress' intent to apply the exception only to legislative or executive appointees, and not to judges. 904 F.2d at 800. But see *supra* note 38.

57. 904 F.2d at 800. The court noted that Congress mentioned judges only briefly at the outset, the debate focusing on elected officials and other executive employees. *Id.* (citing *Joint Statement*, *supra* note 19 at 2137, 2179, 2180).

58. 904 F.2d at 800.

59. *Id.* at 800-01. See also *King v. Snide*, 144 Vt. 395, 479 A.2d 752, 756 (1984) ("If the main thrust of a statute seems unfair or unjust, the remedy must be sought in a legislative change."); 87-88 Op. Vt. Att'y Gen. 3 (August 7, 1987) (though courts weigh policy considerations and render decisions with policy implications, in so doing they act as the reviewers of the policies of others rather than as the "makers" of policy themselves). But see *EEOC V. Commonwealth of Massachusetts*, 680 F. Supp. 455, 462 (D. Mass. 1988) ("[i]t is nevertheless clear that 'policymaking' is indisputably a part of the function of judging"); *Gregory v. Ashcroft*, 898 F.2d 598, 601 (8th Cir.), *cert. denied*,

sal at any time by a higher authority.⁶⁰

The Second Circuit's conclusion that the ADEA extends protection from discriminatory practices to appointed state judges is persuasive. The court correctly interpreted the structure of the ADEA's definition of "employee."⁶¹ If Congress intended to exclude from ADEA protection a broad category of independent, appointed employees, such as judges, it would have placed such an exemption apart or at the end of its list of exemptions, and not between two other exceptions clearly related only to executive or legislative employees.⁶²

Second, the Second Circuit's analysis of the paragraph's legislative history is compelling.⁶³ In light of the Act's stated purpose of preventing age discrimination against most state employees,⁶⁴ logic dictates that Congress intended to except only elected officials and certain close associates, such as appointed advisers.⁶⁵ The electorate determines these officials' tenure, and thus no protection from employer discrimination is necessary.⁶⁶ The distinction contemplated in the exceptions paragraph lies not between appointed and elected judges, but rather between appointed and elected officials, generally.⁶⁷

Finally, the Second Circuit wisely recognized that a judge's traditional function does not include policymaking.⁶⁸ Judges resolve disputes between parties. In so doing they properly limit their decisions to the interpretation or clarification of policies established by a legislative or

111 S. Ct. 507 (1990) ("[j]udges must exercise the same sort of discretion in decisionmaking . . . that is required of 'appointee[s] on the policymaking level' in the executive and legislative branches.").

60. 904 F.2d at 801. *But see* EEOC v. Commonwealth of Massachusetts, 858 F.2d 52, 56 (1st Cir. 1988) ("each judge, . . . no matter how lowly, . . . is at the very top of his particular 'policymaking' chain of command").

61. 904 F.2d at 797-98. *See supra* notes 51-53 and accompanying text.

62. *See supra* notes 51-53 and accompanying text. *See also supra* note 4 for the text of the exceptions paragraph. *But see* Gregory v. Ashcroft, 898 F.2d 598, 602 (8th Cir.), *cert. granted*, 111 S. Ct. 507 (1990) (stating that such a limited reading of the policymaking level exception would result in none of the four categories of exceptions from the coverage of the ADEA applying to appointed employees in the judicial branch, and doubting that Congress intended this result).

63. *See supra* notes 54-56.

64. *See supra* notes 16, 27 and accompanying text.

65. 904 F.2d at 798. *But see* EEOC v. Commonwealth of Massachusetts, 858 F.2d 52, 55 (1st Cir. 1988) (Congress intended to except all policymakers, whether an adviser to an executive or legislative official or not).

66. *See supra* note 31 and accompanying text.

67. *See* Schlitz v. Virginia, 681 F. Supp. 330, 334 (E.D. Va. 1988). *See supra* note 31 and accompanying text.

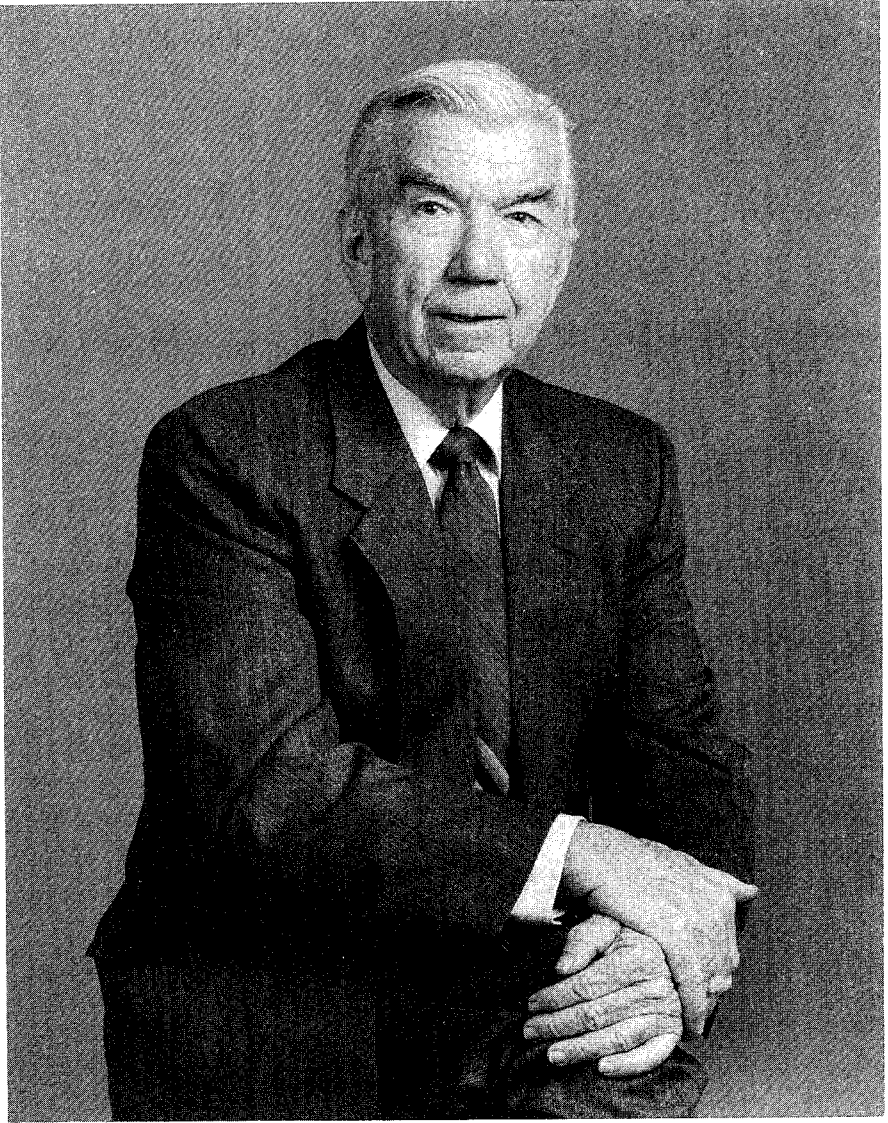
68. *But cf. supra* notes 36, 44 and accompanying text.

executive body.⁶⁹

The *Vermont* decision correctly interprets the ADEA's definition of "employee" and places appropriate weight on the nature of a judge's traditional functions. By extending ADEA protection to appointed state judges, the Second Circuit affirmed Congress' clear intent to protect appointed state judges as it does other state appointees.

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69. 904 F.2d at 801. *See supra* note 28. *But see* In Re Stout, 559 A.2d 489, 495-96 (Pa. 1989) ("To suggest that a Justice . . . is not involved in policymaking matters is to ignore the character of the duties and responsibilities imposed upon members of the Court . . .").



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IN MEMORY OF F. HODGE O'NEAL

The Editors and Staff of the Washington University Law Quarterly dedicate the third F. Hodge O'Neal Corporate and Securities Law Symposium to the life and memory of Professor F. Hodge O'Neal. We hope this annual symposium will continue to impact the practice and study of corporate law, an area in which his scholarship has dominated for so many years. His inspirational wisdom, as well as his genial southern accent, collegiality, humorous anecdotes, and love for ballroom dancing will be long remembered.