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EMPLOYMENT DISCRIMINATION—The Age Discrimination in Employment Act Permits Recovery of Liquidated Damages Only Upon Showing of Employer's Outrageous Conduct in Violating the Act

Dreyer v. Arco Chemical Co. (1986)

The Age Discrimination in Employment Act (ADEA),1 like Title VII of the Civil Rights Act of 1964,2 shields individuals from adverse employment actions based on the individual's membership in a protected class.3 Both statutes also provide for the recovery of backpay should a


In 1964, prior to the passage of the ADEA, President Johnson issued an executive order prohibiting age discrimination in employment under federal contracts. See Exec. Order No. 11,141, 3 C.F.R. 491 (1961-1981). In addition, it had been urged during the debate prior to enactment of Title VII of the Civil Rights Act of 1964 that the aged be included as a protected group under Title VII. See 110 CONG. REC. 2596-98 (1964) (remarks of Reps. Pucinski, Dowdy, Sikes, and Colmer). It was believed, however, that age discrimination posed different problems than those present in discrimination based on race, sex, religion or national origin. See id. at 2599 (remarks of Rep. Goodell). Instead, Congress directed the Secretary of Labor to report on the special problems of age discrimination. See U.S. DEP'T OF LABOR, REPORT TO THE CONGRESS ON AGE DISCRIMINATION IN EMPLOYMENT UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964 (1965).


   It shall be an unlawful employment practice for an employer—
   (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
   (2) to limit, segregate, or classify his employees or applicants for employment 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 individual's race, color, religion, sex, or national origin.


3. The ADEA provides:

   It shall be unlawful for an employer—
   (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensa-
plaintiff prevail in a civil action against an employer. Unlike Title VII, however, the ADEA provides for the recovery of liquidated damages in

- tion, terms, conditions, or privileges of employment, because of such individual's age;
- (2) to limit, segregate, or classify his 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 individual's age . . .

29 U.S.C. § 623(a) (1982). In order to be in the class protected by the ADEA, the individual must be at least 40 but less than 70 years of age. Id. § 631(a) (1982).

4. The ADEA provides for two primary enforcement mechanisms. Under 29 U.S.C. § 626(b) (1982) the Equal Employment Opportunity Commission (EEOC) may bring suit on behalf of an individual for injunctive and monetary relief, or an individual may bring a civil action for such legal or equitable relief "as will effectuate the purposes of [the ADEA]." Id. § 626(c)(1). However, the right to individual suit terminates upon commencement of an action by the EEOC. Id.

The EEOC was created by Title VII of the Civil Rights Act of 1964. 42 U.S.C. §§ 2000e-4 (1982). Under the Act, the Commission was empowered to prevent the unlawful employment practices covered by Title VII. Id. § 2000e-5.

In 1978, enforcement power under the ADEA was transferred from the Secretary of Labor to the EEOC. See Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189 (1978). For a discussion of the impact of the transfer on the enforcement of the ADEA, see McKenry, supra note 1.

The ADEA provides:

- No civil action may be commenced by an individual . . . until 60 days after a charge alleging unlawful discrimination has been filed with the [EEOC]. . . .

Upon receiving such a charge, the [EEOC] shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion. . . .

For the period during which the [EEOC] is attempting to effect voluntary compliance with requirements of [the Act] through informal methods . . . the statute of limitations . . . shall be tolled, but in no event for a period in excess of one year.


While the scope of this casebrief is limited to age discrimination employer practices, it should be noted that the ADEA also applies to employment agencies and labor organizations. See 29 U.S.C. § 623(b), (c) (1982).
cases of willful violations of the Act. The issue of what conduct constitutes a willful violation of the ADEA was recently addressed by the United States Court of Appeals for the Third Circuit in Dreyer v. ARCO Chemical Co.  

Prior to its decision in Dreyer, the Third Circuit had held that proof that the defendant had "discharged the employee because of age and that the discharge was voluntary and not accidental, mistaken, or inadvertent," was sufficient to establish a willful violation of the ADEA. The standard adopted by the Third Circuit in Burroughs was called into question after the Supreme Court's decision in Trans World Airlines, Inc.

Although the ADEA specifically provides that "liquidated damages shall be payable only in cases of willful violations" of the Act, there is no statutory definition of willfulness. 29 U.S.C. § 626(b) (1982). Further, "the legislative history of the ADEA is silent on this point." Air Line Pilots Ass'n, Int'l v. Trans World Airlines, Inc., 713 F.2d 940, 956 (2d Cir. 1983).

Some guidance may be found in other areas of the law. For example, a finding of willfulness in the context of tort law is permitted where "the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow. . . ." See W. PROSSER & R. KEETON, THE LAW OF TORTS 213 (5th ed. 1984).

In addition, both civil and criminal statutes contain and define the "willfulness" standard. For a discussion of this standard in both contexts, see Comment, The Standard of Willfulness for Liquidated Damages Under the Age Discrimination in Employment Act, 32 EMORY L.J. 583, 586-88 (1983).

The ADEA has been described as a hybrid of Title VII and the FLSA in that "the prohibitions in the ADEA generally follow Title VII, but the remedies are those of the FLSA." SCHLEI & GROSSMAN, supra note 4, at 485. 7. 801 F.2d 651 (3d Cir. 1986), cert. denied, 107 S. Ct. 1348 (1987). For a discussion of the facts in Dreyer, see infra notes 16-24 and accompanying text.

8. Wehr v. Burroughs, 619 F.2d 276, 283 (3d Cir. 1980). Burroughs involved a discharged 44-year-old engineer who believed he had been a victim of age discrimination by the Burroughs Corporation because of the company's expressed desire to replace some older employees with "'young tigers.'" Id. at 278. The court found that "Congress did not intend to restrict the meaning of 'willful' . . . to intentional violations of the ADEA." Id. at 283.

The Third Circuit upheld the standard adopted in Burroughs as recently as 1984. See McDowell v. Avtex Fibers, Inc., 740 F.2d 214, 218 (3d Cir. 1984), vacated and remanded on other grounds, 469 U.S. 1202 (1985). In McDowell, a discharged employee of Avtex Fibers, Inc. brought an age discrimination claim under the ADEA. Id. at 214. The Third Circuit affirmed the trial court's finding of a willful violation of the ADEA. Id. at 215. The court further held that the trial court properly applied the Burroughs standard in finding the violation. Id. at 218. Since the lower court "[f]ound no basis for concluding that the plaintiff's discharge was not voluntary [or] that it was accidental, mistaken or inadvertent," the Third Circuit upheld the finding of "willfulness" under the Burroughs formulation. Id. at 219 (quoting Mem. Op. at 8, reprinted in App. 14) (emphasis supplied by Third Circuit).
v. Thurston. In Thurston, the United States Supreme Court held that the liquidated damages provision of the Act must be interpreted in a way that would not permit "an award of double damages in almost every case," as would necessarily be the result under the Burroughs rule. The Court stated that "[t]he legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature."

Following the Supreme Court's holding in Thurston, the Third Circuit, in Dreyer, held that, in addition to the employer's knowledge that its conduct violated the ADEA when it terminated an employee because of age, "there must be some additional evidence of outrageous conduct" on the employer's part to warrant recovery of liquidated damages. For a discussion of the facts of Thurston, see infra note 31. 13

Note, however, that neither punitive damages nor damages for emotional distress or pain and suffering are generally recoverable under the ADEA. See, e.g., Smith v. Office of Personnel Management, 778 F.2d 258 (5th Cir. 1985), cert. denied, 469 U.S. 111 (1985). For a discussion of the facts of Thurston, see infra note 31.

10. Id. at 128.
11. Id.
12. Id. at 125; see also Smith & Leggette, Recent Issues in Litigation Under the Age Discrimination in Employment Act, 41 Ohio St. L.J. 349, 368-69 (1980) (liquidated damages under ADEA intended as substitute for punitive damages); Note, Damage Remedies, supra note 4, at 68-80 (same). But see C. Sullivan, M. Zimmerman & C. Richards, Federal Statutory Law of Employment Discrimination 779 (1980) (liquidated damages under ADEA not intended as punitive).

The court stated that "where an employer makes a decision such as termination of an employee because of age, the employer will or should have known that the conduct violated the [ADEA]." Dreyer, 801 F.2d at 658. The court reasoned that "[a]s employers are required to post ADEA notices, it would be virtually impossible for an employer to show that he was unaware of the Act and its potential applicability." Id. at 656 (quoting Thurston, 469 U.S. at 128).

13. Id. at 658. The court relied on the Restatement (Second) of Torts and suggested that it serve as a guide in assessing punitive damages. Id. at 657-58.
cording to the Third Circuit, liquidated damages must “be based on evidence that does not merely duplicate that needed for the compensatory damages.”

Dorothy Dreyer was a sixty year old computer operator in the Financial Controls Department of ARCO Chemical Company who had worked in ARCO's Beaver Valley plant since 1959. During a corporate reorganization in 1981 and 1982, ARCO consolidated the subunits of one of its divisions, reducing the size of its work force at the Beaver Valley plant and affecting the Financial Controls Department. As a result of the reorganization, Dreyer's job was eliminated and a new position created which consolidated the duties of computer operator and data entry. The plant's data entry supervisor, who was thirty-eight years of age, was chosen to fill the new position, and Dreyer was terminated. Dreyer filed suit in the United States District Court for the Western District of Pennsylvania, claiming that her termination violated the ADEA and that the termination was intentional and willful.

Specifically, the court stated that “the trier of fact can properly consider [inter alia] the character of the defendant's act, [and] the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause.” Id. at 658 (quoting RESTATMENT (SECOND) OF TORTS § 908(2) (1977)). As to what would constitute sufficient additional evidence supporting a finding of a willful violation, see infra notes 51-54 and accompanying text.

15. Dreyer, 801 F.2d at 658. For a further discussion of the Third Circuit's holding in Dreyer, see infra notes 30-57.

16. Dreyer, 801 F.2d at 655. Dreyer and another plaintiff, Naomi Strayer, a 56 year-old secretary to the manager of the Financial Controls Department, filed suit together, claiming that their dismissal violated the ADEA. Id. at 653-54. Although the jury returned a verdict for both plaintiffs, only Dreyer was awarded statutory liquidated damages. Id. at 654. Because the focus of this casebrief concerns the Third Circuit's discussion of the liquidated damages issue, the details of Strayer's claim are not discussed.

17. Id. at 655.

18. Id. at 652. The Financial Controls Department was reduced from 26 to 18 employees. Id.

19. Id. at 655.

20. Id. Dreyer had been offered the opportunity to voluntarily retire under a special retirement plan applicable to employees over the age of 55. Id. at 652-53. She rejected the offer and, after her termination, accepted early retirement under protest. Id. at 653. This issue was rendered moot, however, as ARCO did not contend that her acceptance of the early retirement benefits precluded her from exercising her rights under the ADEA. Id.

21. Id. at 653.

22. Id. In an age discrimination case alleging individual disparate treatment on the basis of circumstantial evidence, the burdens of production and proof are governed by the United States Supreme Court's decision in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In McDonnell Douglas, the Supreme Court set forth a three-part scheme for allocating the burden of production in Title VII cases. Dreyer, 801 F.2d at 653. This scheme was first applied by the Third Circuit in Smithers v. Bailar, 629 F.2d 892, 894 (3d Cir. 1980). Id. For a further discussion of the McDonnell Douglas scheme, see SCHLEI & GROSS-MAN, supra note 4, at 13-15, 497-502.

As the Dreyer court explained the McDonnell Douglas formulation, the plaintiff
Based on the parties' stipulation as to damages, the jury returned a verdict for Dreyer in the amount of $68,367.75. In addition, the jury found Dreyer's discharge to have been malicious and awarded her statutory liquidated damages in the amount of her backpay.

ARCO's principal argument on appeal to the Third Circuit was that the evidence presented at trial was insufficient to support a finding that it had violated the ADEA in discharging Dreyer and Strayer. ARCO's secondary argument, however, is of particular interest. Speculum must first prove a prima facie case. 801 F.2d at 653. The plaintiff must demonstrate that he: "(1) was discharged; (2) was qualified for the position; (3) was within the protected class at the time of discharge; [and] (4) was replaced by someone outside the protected class, or . . . by someone younger, or . . . show otherwise that his discharge was because of his age". Id. at 654.

The burden of production then "shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the plaintiff's discharge." Id. at 653. For example, while the plaintiff may allege that he was terminated on account of his age, he may in fact have been dismissed due to unsatisfactory work performance.

"If the employer meets this burden, the plaintiff must [then] show that the articulated reason is a pretext for a discrimination. Id. Notwithstanding the shifting burden of production, the plaintiff at all times "bears the ultimate burden of proving that age was 'a determinative factor' in the decision" to terminate. Id. (citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981); Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393, 1395 (3d Cir.), cert. denied, 469 U.S. 1087 (1984). See also Player, Proof of Disparate Treatment Under the Age Discrimination in Employment Act: Variations on a Title VII Theme, 17 GA. L. REV. 621 (1983).

At trial, ARCO's articulated legitimate reason for dismissal was that ARCO officials, in deciding who should fill the new combined position of computer operator and data entry, had compared Dreyer's qualifications with those of the 38 year-old data entry supervisor and concluded that the latter was better qualified to fill the new position. Dreyer, 801 F.2d at 655. Dreyer's argument at trial regarding pretext was based "on the theory that once her job was eliminated, she should have been given either the new job . . . or another comparable job for which she was qualified." Id. She challenged ARCO's evidence that she was less qualified than the 38 year-old and attacked the evaluation process, producing evidence that her 1981 performance evaluation had been made by the same 38 year-old woman. Id. "Dreyer also stressed that she had not been offered any other available position although there were jobs in the restructured Financial Controls Department for which she was qualified and which she had filled in the past." Id. For example, two payroll clerk jobs were given to younger women, aged 27 and 40, who had little or no experience in those jobs. Id. Additionally, women significantly younger than Dreyer were given positions in data entry. Id.

23. Id. at 653. This amount represented Dreyer's backpay. Id.

24. Id. Thus, Dreyer's total award was $136,725.50. Id. Dreyer's co-plaintiff, Strayer, recovered $66,043.99 in backpay. Id. However, Strayer was not awarded liquidated damages. Id.

25. ARCO's motions for judgment notwithstanding the verdict and for a new trial were denied by the district court. Id.

26. Id. Specifically, ARCO argued that it had demonstrated to the trial court, legitimate, nondiscriminatory reasons for discharging the two plaintiffs. Id. ARCO urged that plaintiffs had failed to prove that ARCO's decision to terminate plaintiffs' employment was pretextual and that one of the plaintiffs, Strayer, had not even established a prima facie case of age discrimination. Id.

27. With regard to ARCO's principal argument on appeal, the Third Cir-
cifically, ARCO argued that the evidence presented at trial was insufficient to meet the requisite standard of willfulness under the ADEA, a standard, according to ARCO, that had to comply with the holding of Thurston.28

In attempting to articulate the standard for a finding of willfulness under the ADEA, Judge Sloviter, writing for a unanimous court,29 reviewed the Burroughs standard for finding a willful violation, i.e., that "[i]t is sufficient 'to prove that the company discharged the employee because of age and that the discharge was voluntary and not accidental, mistaken, or inadvertent.'"30 In light of the Supreme Court's decision in Thurston, however, the court found it necessary to reevaluate the Burroughs standard.31 In so doing, the Third Circuit first noted the Court's

"... found that plaintiffs had presented sufficient evidence such that "a jury . . . could have concluded that Strayer's and Dreyer's age . . . played a part in ARCO's selection of them for termination." Dreyer, 801 F.2d at 655. In sum, the court stated:

[B]oth Dreyer and Strayer presented prima facie cases of age discrimination. ARCO presented evidence from which a jury could conclude that it retired the plaintiffs for reasons other than age. Much of the evidence before the jury required its evaluation of the credibility of the witnesses. Plaintiffs introduced evidence to show pretext. The jury chose to accept plaintiffs' evidence that the asserted reasons were pretextual.

Id. at 655-56 (emphasis added).

29. The case was argued before Judges Sloviter, Stapleton and District Judge Longobardi, sitting by designation. Dreyer, 801 F.2d at 652.
30. Id. at 657 (quoting Wehr v. Burroughs Corp., 619 F.2d 276, 283 (3d Cir. 1980)) (citations omitted). The Burroughs court went on to state that "it would also be sufficient to prove that the discharge was precipitated in reckless disregul of consequences." 619 F.2d at 283. For a further discussion of Burroughs, see supra note 8.
31. 469 U.S. 111 (1985). In Thurston, TWA, concerned that its retirement policy regarding flight engineers violated the ADEA prohibitions against mandatory retirement because of age, adopted a plan permitting an employee with "flight engineer status" at age 60 to continue working in that capacity. Id. at 115. However, the plan did not give 60 year-old captains the right to begin training automatically as flight engineers. Id. at 116. Instead, a captain could remain with TWA only if he were able to obtain flight engineer status through bidding procedures outlined in the collective bargaining agreement between TWA and the Air Line Pilots Association (ALPA). Id. These procedures required a captain to submit a "'standing bid'" for the position of flight engineer prior to his 60th birthday. Id. When a vacancy occurred, it was to be assigned to the most senior captain with a standing bid. Id. If no vacancy occurred prior to his 60th birthday, or if the captain lacked sufficient seniority to bid successfully for the vacancies that did occur, the captain was retired. Id.

However, under the collective bargaining agreement, a captain displaced for any reason other than age did not have to resort to the bidding procedures. Id. The Court noted:
emphasis that "'[t]he legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature.'"32 The court then quoted the standard held by the Thurston Court to be acceptable,33 noting that under Thurston, conduct is willful if "'the employer . . . knew or showed reckless disregard for . . . whether its conduct was prohibited by the ADEA.'"34

For example, a captain unable to maintain the requisite first-class medical certificate [required for the position of captain] may displace automatically, or "bump," a less senior flight engineer. The medically disabled captain's ability to bump does not depend on the availability of a vacancy. Similarly, a captain whose position is eliminated due to reduced manpower needs can "bump" a less senior flight engineer. Even if a captain is found to be incompetent to serve in that capacity, he is not discharged, but is allowed to transfer to a position as flight engineer without resort to the bidding procedures.

*Id.* at 116-17 (footnotes omitted).

The Court held that TWA's transfer policy discriminated against protected individuals on the basis of age, and thus violated the ADEA, concluding that the discriminatory transfer policy "permits the forced retirement of captains on the basis of age." *Id.* at 124-25.

32. *Dreyer*, 801 F.2d at 656 (quoting Trans World Airlines, Inc. v. Thurston, 469 U.S. at 125). The original ADEA bill incorporated § 16(a) of the Fair Labor Standards Act, which imposes criminal liability for a willful violation. See 113 Cong. Rec. 2199 (1967) (remarks of Sen. Javits); see also Comment, supra note 5, at 596-99. However, citing the difficult problems of proof that would arise under a criminal provision and the possibility that an employer's invocation of the fifth amendment might impede investigation, conciliation and enforcement, Senator Javits proposed that the criminal penalty in cases of willful violation be eliminated and double damage liability in a civil action be substituted. 113 Cong. Rec. 7076 (1967) (remarks of Sen. Javits).

33. *Dreyer*, 801 F.2d at 656.

34. *Id.* (quoting Thurston, 469 U.S. at 128). The Thurston Court held, however, that TWA's conduct was not a willful violation because it had adopted its transfer policy only after having conferred with its attorneys and with the ALPA in an attempt to bring its retirement policy in line with the ADEA and to comply with its collective bargaining agreement. *Thurston*, 469 U.S. at 129-30.

In adopting the "knew or showed reckless disregard" standard, the Thurston Court rejected the argument that an employer's conduct is willful if the employer is "'cognizant of an appreciable possibility that the employees involved [are] covered by the [ADEA].'" *Id.* at 127. Similarly, the Court rejected the view of some courts that a willful violation will be found simply where the employer knows that the ADEA is "'in the picture.'" *Id.* at 127-28.

The "in the picture" standard of willfulness was originally developed in connection with determining whether the two-year statute of limitations for ADEA violations or the three-year statute of limitations for willful ADEA violations applied in a particular case. Section 6 of the Portal-to-Portal Act of 1947 (PPA), which is incorporated in both the ADEA and the FLSA, provides for a two-year statute of limitations period unless the violation is willful, in which case the limitations period is extended to three years. 29 U.S.C. § 255(a) (1982); see also Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139, 1142 (5th Cir. 1971), cert. denied, 409 U.S. 948 (1972); Comment, supra note 5, at 588-96 (analyzing the requirement of "willfulness" in the FLSA and ADEA statute of limitations provisions).

The "in the picture" standard was then extended by the Fifth and Tenth Circuits to apply to the definition of willfulness for the purpose of assessing
The Third Circuit noted that "many cases since Thurston have ex-

-liquidated damages. See Hedrick v. Hercules, Inc., 658 F.2d 1088, 1096 (5th Cir. 1981); Mistretta v. Sandia Corp., 639 F.2d 588, 595 (10th Cir. 1980). Under this standard, however, because employers are required to post ADEA notices, the employee's burden of proving employer knowledge of the Act's application is easily met. Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 156 n.10 (7th Cir. 1981). An award of liquidated damages will thus be virtually automatic, a result both courts and commentators have found to be contrary to congressional intent. See id. at 154-55; Comment, supra note 5, at 606 ("in the picture" standard inconsistent with statutory language of ADEA damages provision).

In addition to the "in the picture" standard, there were, prior to Thurston, roughly three other standards utilized by the courts to find willful violations of the ADEA. See Note, Liquidated Damages and Statute of Limitations Under the "Willful" Standard of the Fair Labor Standard Act and Age Discrimination in Employment Act: Repercussions of Trans Airlines, Inc. v. Thurston, 24 Washburn L.J. 516, 531-36 (1985) [hereinafter Note, Liquidated Damages]. These three standards have been categorized as follows: 1) If the employer intended to violate the ADEA, the court will find a willful violation of the Act. See, e.g. Loeb v. Textron, Inc., 600 F.2d 1008, 1020 n.27 (1st Cir. 1979); 2) If the employer knew or should have known that its actions violated the Act, liquidated damages will be awarded. See, e.g., Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 155-56 (7th Cir. 1981); Spagnulo v. Whirlpool Corp., 641 F.2d 1109, 1114 (4th Cir.), cert. denied, 454 U.S. 860 (1981); Kelly v. American Standard, Inc., 640 F.2d 974, 980 (9th Cir. 1981); 3) If the employer acted with reckless disregard of the consequences of its actions, a willful violation of the ADEA will be found. See, e.g., Blackwell v. Sun Elec. Corp., 696 F.2d 1176, 1184 (6th Cir. 1983); Goodman v. Heublein, Inc., 645 F.2d 127, 131 (2d Cir. 1981); Wehr v. Burroughs Corp., 619 F.2d 276, 283 (3d Cir. 1980).

For a thorough discussion of these various standards, see Note, Liquidated Damages, supra, at 531-36. For additional discussion of the different standards, see Syvock v. Milwaukee Mfg. Co., 665 F.2d 149, 154-56 (7th Cir. 1981). See also Richards, supra note 4, at 327-36; Comment, supra note 5, at 603-16; Comment, Age Discrimination, supra note 4, at 229-34; Note, The Meaning of "Willful" Under the Liquidated Damages Provision of the Age Discrimination in Employment Act, 68 Iowa L. Rev. 333, 340-48 (1983) [hereinafter Note, Meaning of "Willful"]; Note, Damage Remedies, supra note 4, at 76-80.

In rejecting the "in the picture" standard, the Thurston Court noted that such a standard would allow the recovery of liquidated damages even if the employer acted reasonably and in good faith. Thurston, 469 U.S. at 128 n.22. The Court explained that the FLSA, as originally enacted, was interpreted as allowing liquidated damages any time there was a violation of the Act. Id. According to the Thurston Court, Congress' enactment of the PPA reflected its dissatisfaction with that harsh interpretation. Id. Section 11 of the PPA provides the employer with a defense to a mandatory award of liquidated damages if it can show good faith and reasonable grounds for believing it was not in violation of the FLSA. See 29 U.S.C. § 260 (1982); see also Note, Liquidated Damages, supra, at 522-23 (discussing whether good faith test should be subjective or objective).

While the Thurston Court noted that section 7(b) of the ADEA does not incorporate section 11 of the PPA, it stated that, "[n]evertheless, we think that the same concerns are reflected in the proviso to § 7(b) of the ADEA." 469 U.S. at 128 n.22. The Court further stated that Congress could not have intended to permit the recovery of liquidated damages if the employer acted reasonably and in good faith. Id.; see also Note, Meaning of "Willful," supra, at 337 (determining appropriate definition of willful requires consideration of availability of good faith defense; they "are interdependent issues that must be resolved in concert."). But see Elliott v. Group Medical & Surgical Serv., 714 F.2d 556, 558 n.2 (5th Cir. 1983) (trial court has discretion to determine amount, if any, of liquidated dam-
tracted from it the 'dual knew or showed reckless disregard' test of willfulness to all claimed violations of the ADEA. 35 However, the court reasoned that this test was not required in all age discrimination cases.

Under *Thurston*, courts may take into account the employer's good faith upon a finding of willfulness. See, e.g., Whitfield v. City of Knoxville, 756 F.2d 455 (6th Cir. 1985). However, the question remains whether the good faith defense is even necessary. Because the FLSA, unlike the ADEA, did not contemplate two levels of culpability, liquidated damages, as the *Thurston* Court pointed out, were recoverable for every violation of the Act, 469 U.S. at 128 n.22. Its apparent dissatisfaction with this interpretation of the FLSA prompted Congress to enact the Portal-to-Portal Act of 1947. *Id.* (citing Lorillard v. Pons, 434 U.S. 575, 581-82, n.8 (1978)). Section 11 of the PPA provides the employer with a good faith defense to a mandatory award of liquidated damages. See 29 U.S.C. § 260 (1982). While the ADEA does not incorporate this section of the PPA, it is clear that the ADEA does provide for its own two-tiered liability scheme. See id. § 626(b) (providing for liquidated damages only in cases of willful violations of ADEA).

Prior to *Thurston*, most courts took the view that section 11 of the PPA was not incorporated into the ADEA. Consequently, courts held that either a good faith defense would not be available to the employer, or the employer's good faith would be irrelevant upon a finding of willfulness. See, e.g., Rose v. National Cash Register Corp., 703 F.2d 225 (6th Cir.) (good faith defense not available to employer), cert. denied, 464 U.S. 939 (1983); Blackwell v. Sun Elec. Corp., 696 F.2d 1176 (6th Cir. 1983) (employer's good faith does not necessarily preclude liquidated damages); Goodman v. Heublein, Inc., 645 F.2d 127 (2d Cir. 1981) (good faith defense not available to employer); Wehr v. Burroughs Corp., 619 F.2d 276 (3d Cir. 1980) (same); Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979) (court need not make finding as to employer's good faith); see also Richards, *supra* note 4, at 327-31 (Section 11 of PPA not applicable to ADEA).

35. Dreyer, 801 F.2d at 656 (emphasis added). For a discussion of these cases, see *infra* note 76. It should be noted that the "knew or showed reckless disregard" standard set forth in *Thurston* has not been universally well-received. One district court called it "senseless," stating:

Under what circumstances can an act of 'intentional' discrimination be other than the product of willfulness? It is only another example of how trial courts are expected to rationally apply what appear to be irrational standards. I would hold the liquidated damages provisions, as applied to age discrimination cases, to be unconstitutional as denying due process because of vagueness and indefiniteness.


However, while intentional discrimination, if evidence of such is presented, *will* constitute willfulness, this would appear to be the correct result. Not all violations will be deemed willful, however, under the *Thurston* standard. For a further discussion of the question of how effectively the *Thurston* standard distinguishes willful from non-willful cases, see *infra* notes 76-85 and accompanying text. See also Richards, *supra* note 4, at 335 (pre-*Thurston* commentary advocating knowledge or reckless disregard standard); Comment, *supra* note 5, at 617-18 (same); Note *Meaning of "Willful,"* *supra* note 34, at 357 (same). But see Comment, *Age Discrimination, supra* note 4, at 254 (advocating low threshold knowledge requirement with requirement that employer must have acted in bad faith).
According to the Third Circuit, a distinction must be made between cases involving the adoption of a policy that allegedly violates the ADEA ("policy" cases), and those cases involving employer decisions directed at individual employees ("individual" cases). 36

According to the Dreyer court, while the "knew or showed reckless disregard" standard is "particularly apt" where an employer policy is involved, 38 the "standard is not easily incorporated in cases alleging disparate treatment in a discrete employment situation." 39 “Because the

36. Dreyer, 801 F.2d at 656. While it may seem more convenient to refer to "policy" cases as disparate impact cases, and to "individual" cases as disparate treatment cases, that terminology would be inexact. Disparate treatment refers to situations involving either discrete employment situations or an employer policy evidencing an intent to discriminate. In these situations, the plaintiff must prove an intent to discriminate, although as an alternative to presenting direct evidence of intent to discriminate, the plaintiff may rely on indirect evidence under the McDonnell Douglas three-part scheme described supra, at note 22. See Schlei & Grossman, supra note 4, at 13-15.

A plaintiff in a disparate impact case will normally be challenging a facially neutral employer policy that has the effect of discriminating against a protected group; here, intent to discriminate is irrelevant. See Griggs v. Duke Power Co., 401 U.S. 424 (1971); see also Schlei & Grossman, supra note 4, at 162-64, 191-92. Because a discriminatory, though facially neutral employer policy may be found to be either willful or not, depending on whether the employer showed reckless disregard for whether the policy violated the ADEA, and thus could fall into either category, use of the term "disparate impact" seems imprecise in the context of willful ADEA violations. Likewise, because disparate treatment can refer both to discrete employment decisions and employer policy situations, the term will be avoided.


37. 801 F.2d at 656.

38. As an example of employer "policy" case, the Third Circuit cited Whitfield v. City of Knoxville, 756 F.2d 455 (6th Cir. 1985). In Whitfield, the City of Knoxville notified 23 policemen and 33 firemen that they were to be involuntarily retired in light of budget shortfalls. Id. at 458. This notification was made pursuant to a City Charter provision authorizing the involuntary retirement of firemen and policemen with 25 years of service who had reached the age of 50. Id. Following Thurston, the court adopted the "knew or showed reckless disregard" standard, but found that because it was unclear at that time whether the ADEA applied to state and local governments, the City did not have actual knowledge that the involuntary retirement provision violated the ADEA. Id. at 463-64. Further, the court found that the City's reliance on several district court decisions was "reasonable as a matter of law" and thus, did not constitute recklessness. Id. at 464. The appellate court also noted the district court's finding that the defendants had acted in good faith. Id. For a discussion of the issue of good faith in this context, see supra note 34. It is now settled that the ADEA does apply to state and local governments. See Equal Employment Opportunity Comm'n v. Wyoming, 460 U.S. 226 (1983).

39. 801 F.2d at 656. This is to be distinguished from the "policy" cases, in which "it is meaningful to inquire whether the employer knew that the action
willful' inquiry arises only after the employer has been found to be liable under the ADEA, the fact-finder would already have found that the employer used age as a 'determinative' factor in the employment decision.”

Thus, the danger arises that use of the standard in connection with a discrete employment decision made on the basis of age would in effect allow the recovery of liquidated damages any time there was an ADEA violation. Because the Court in Thurston clearly rejected such a result, the Third Circuit concluded that it “must interpret the liquidated damages provision in a way that would not permit ‘an award of double damages in almost every case.’” The court then sought to define "a standard for willfulness that distinguishes between a violation, which is almost always intentional, and a willful violation, leading to [liquidated] damages.”

Noting that Congress intended for liquidated damages to be punitive in nature, the Third Circuit turned to the Restatement (Second) of Torts in an effort to develop the proper standard. Specifically, the court noted that the Restatement provides that “punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.” Therefore, was in violation of the Act or whether it acted in reckless disregard of the prohibitions of the ADEA.” Id.

Id. at 657.

Id. “As employers are required to post ADEA notices, it would be virtually impossible for an employer to show that he was unaware of the Act and its potential applicability.” Id. at 656 (quoting Thurston, 469 U.S. at 128). The Dreyer court pointed out that in Thurston, the Supreme Court rejected the "liquidated damages in every case" interpretation. Id. at 657 (citing Thurston, 469 U.S. at 128 n.22). Thus, in an "individual" case, the "knew" prong of the test will almost always be satisfied. Id. at 656. Therefore, the Dreyer court concluded that "for similar reasons, an inquiry into 'reckless disregard', which is an alternate to 'knew', would also not be meaningful to most disparate treatment claims.” Id. at 656-57.

Id. at 657 (quoting Thurston, 469 U.S. at 128). The Court in Thurston stated that "[b]oth the legislative history and the structure of the statute show that Congress intended a two-tiered liability scheme.” 469 U.S. at 128. The Dreyer court further stated that "we must interpret the liquidated damages provision in a manner that effectuates this intent.” 801 F.2d at 657 (citation omitted).

Dreyer, 801 F.2d at 657.

Dreyer, 801 F.2d at 657.

Dreyer, 801 F.2d at 657; see also supra note 12. Compare this intention with the purpose of liquidated damages under the FLSA, which are intended as compensatory rather than punitive. Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 593 (1942); Heiar v. Crawford County, Wis., 746 F.2d 1190, 1202 (7th Cir. 1984), cert. denied, 472 U.S. 1027 (1985); Thompson v. Sawyer, 678 F.2d 257, 281 (D.C. Cir. 1982); Marshall v. Brunner, 668 F.2d 748, 755 (3d Cir. 1982). Such damages are intended to compensate an employee for any losses suffered as a result of the wrongful retention of his pay. Brooklyn Sav. Bank v. O’Neil, 324 U.S. 697, 707 (1945).

Dreyer, 801 F.2d at 657.

Restatement (Second) of Torts § 908(1) (1977) (emphasis added). While approving of this formulation, the court rejected the "general standard
the court reasoned, the essence of punitive damages is that "they may be awarded 'for conduct that is outrageous.'" 47

The Third Circuit thus held that "'[w]here an employer makes a decision such as termination of an employee because of age, . . . liqui-
dated damages [must] be based on evidence that does not merely duplicate that needed for compensatory damages.'” 48 As the employer will or should have known that the conduct violated the ADEA,49 there must be some additional evidence of outrageous conduct.50

The court then listed several kinds of evidence that would warrant a finding of willfulness, such as a previous violation of the ADEA,51 the termination of an employee at a time that would deprive the employee of an imminent pension,52 or a systematic purge of older people from

for punitive damages," which "encompasses an inquiry into 'defendant's evil motive or his reckless indifference to the rights of others.'” Dreyer, 801 F.2d at 657 (quoting Restatement (Second) of Torts § 908(2) (1977)). The court also noted that the "need to show 'evil motive or bad purpose' as an element of willfulness" was expressly disclaimed by the Supreme Court. Id. (citing Thurston, 469 U.S. at 126 n.19).

47. Dreyer, 801 F.2d at 657 (quoting Restatement (Second) of Torts § 908(2) (1977)) (emphasis supplied by the court).
48. Id. at 658.
49. Id. For a discussion of the “knew or showed reckless disregard” standard enunciated in Thurston, see supra note 34 and accompanying text.
50. Dreyer, 801 F.2d at 658. The court noted that, in assessing punitive damages, the fact-finder could properly consider the character of the defendant's act and the nature and extent of the harm to the plaintiff. Id. (citing Restatement (Second) of Torts § 908(2)). The court adopted the “outrageous conduct” standard after examining previous Third Circuit cases concerning punitive damages. Id. at 657-58. For example, in Berroyer v. Hertz, the court relied on comment b to section 908(2) of the Restatement which provides:

Since the purpose of punitive damages is not compensation of the plaintiff but punishment of the defendant and deterrence, these damages can be awarded only for conduct for which this remedy is appropriate—which is to say, conduct involving some element of outrage similar to that usually found in crime.

672 F.2d 334, 340 (3d Cir. 1982) (quoting Restatement (Second) of Torts § 908(2) comment b (1977)) (emphasis supplied by the court). Similarly, in Acosta v. Honda Motor Co., the criterion for awarding punitive damages in the context of strict liability was declared to be "outrageous" or similar conduct. 717 F.2d 828, 841 (3d Cir. 1983). Finally, in Zippertubing v. Teleflex, Inc., the court stated that, in cases of intentional conduct, the award of punitive damages rests on whether there was evidence of malice. 757 F.2d 1401, 1413 (3d Cir. 1985). In Zippertubing, the Third Circuit stated that "'[s]omething more than the mere commission of the tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or 'malice'” Id. (quoting Grillo v. Board of Realtors, 91 N.J. Super. 202, 232, 219 A.2d 635, 652 (Ch. Div. 1966)).

51. Dreyer, 801 F.2d at 658. Such a previous violation "might warrant imposition of liquidated damages to effectuate the deterrent purpose underlying the willfulness provision.” Id.
52. Id. Such employer action "might show the 'outrageousness' of conduct that would warrant double damages.” Id.
the employee staff.\textsuperscript{53} However, in most cases, the court stated, "as is true of punitive damages generally, the appropriateness of the award will be dependent upon an ad hoc inquiry into the particular circumstances."\textsuperscript{54}

Applying the standard developed by the court to the facts of the case before it, the Third Circuit concluded that the evidence produced by Dreyer fell short of the minimum evidence needed to support a finding of willfulness under the ADEA.\textsuperscript{55} Nor were there any other aggravating factors warranting punitive damages.\textsuperscript{56} While there was evidence that ARCO failed to appoint Dreyer to other available jobs filled by younger employees, the court concluded that such evidence demonstrated at most a violation of the ADEA, "but not the outrageous conduct needed to distinguish a violation from willful action."\textsuperscript{57}

It is submitted that the Third Circuit's approach in \textit{Dreyer} has certain merits of a practical nature. Preliminarily, the court set forth a standard for measuring the propriety of liquidated damages in the "individual" category of age discrimination cases that is less susceptible to widely divergent interpretations, i.e., above and beyond the evidence of em-

\textsuperscript{53.} \textit{Id.} Here, "[t]he circumstances of the violation itself may be so egregious . . . that double damages might be warranted to effectuate the punitive aspect of the willful section." \textit{Id.} The court noted that the list was not intended to be exclusive. "We cannot," the court stated, "provide a litany of situations that would warrant a factfinder in finding willfulness." \textit{Id.}

\textsuperscript{54.} \textit{Id.}

\textsuperscript{55.} \textit{Id.} Because Dreyer failed to produce the "'minimum quantum'" required to support a finding of willfulness, she was not entitled to liquidated damages. \textit{Id.} As was noted by the court, "ARCO was undeniably in the process of restructuring and reducing the employee personnel of the plant and the Financial Controls Department in which [Dreyer] worked," and Dreyer "'[d]id not contend that elimination of her job was a pretext to terminate her.'" \textit{Id.} Therefore, the court concluded that the evidence did not support the conclusion that "Dreyer's discharge was part of a pattern of conduct to involuntarily terminate personnel in the protected group." \textit{Id.} This conclusion was reached despite Dreyer's demonstration that ARCO had done an "'age analysis'" of its employee population. \textit{Id.} Specifically, Dreyer compared the ages of employees in the Financial Controls Department before and after the reorganization. \textit{Id.} The court, however, noted that the majority of the older employees in the department had voluntarily accepted early retirement. \textit{Id.} Therefore, Dreyer's evidence failed to establish a pattern of involuntary terminations, according to the court. \textit{Id.} For a summary of the evidence presented by Dreyer and ARCO, see \textit{supra} notes 16-22.

\textsuperscript{56.} \textit{Dreyer}, 801 F.2d at 658. Presumably, the court would find that evidence of employer conduct such as that discussed \textit{supra} at notes 47-49 would constitute "aggravating circumstances." For example, if ARCO had previously violated the ADEA or if Dreyer's termination had deprived her of an imminent pension, the court may have found ARCO's conduct to have been "willful."

\textsuperscript{57.} \textit{Id.} at 658-59. The Third Circuit thus affirmed the order of the district court denying ARCO's motion for judgment notwithstanding the verdict with respect to the jury's finding of liability of Strayer and Dreyer and the award of damages. \textit{Id.} at 659. However, the district court's order was reversed insofar as it upheld the jury finding of willfulness and the award of double damages to Dreyer. \textit{Id.}
ployer conduct required simply to prove a violation of the Act, there must be additional evidence of outrageous conduct such as to justify punitive damages. Moreover, the two-tiered standard promulgated in Dreyer is in accord with the Supreme Court's express desire that there not be liquidated damages in almost every case, and the Court's finding that the legislative history and structure of the statute show that Congress indeed intended a two-tiered liability scheme. As a result, while employers must certainly continue to disregard age as a factor in making individual employment decisions, they may be assured that double damages will likely be the exception rather than the rule, awardable only upon a showing of serious misconduct. In sum, under Dreyer, it is no longer sufficient for a plaintiff to show merely that the dismissal was "voluntary."

Nevertheless, while the result in Dreyer appears sound and even desirable from a practical standpoint, the reasoning and approach of the court warrant the following observations. First, neither the statute itself nor the Supreme Court's holding in Thurston indicate that Congress recognized a distinction between "policy" cases and "individual" cases in formulating a standard for imposing liquidated damages. Second, in establishing this distinction, the Third Circuit has substituted the statutory standard with a common law punitive damages standard—outrageousness—a standard which is divorced not only from the language of the ADEA, but also from Thurston's express holding that a violation of the ADEA is willful if the employer either knew or showed reckless disregard for whether its conduct was prohibited by the ADEA. Finally, the distinction made by the court in Dreyer between "policy" and "indi-

58. Id. at 658. For a discussion of the Third Circuit's analysis in reaching this standard, see supra notes 30-50 and accompanying text.
59. Thurston, 469 U.S. at 128.
60. Id. The Thurston Court "decline[d] to interpret the liquidated damages provision of [the ADEA] in a manner that frustrates this intent." Id.
61. For some examples of outrageous conduct warranting the award of liquidated damages, see supra notes 51-54 and accompanying text. Although these examples were not intended by the Dreyer court to be all-inclusive, the nature of the conduct involved in each example suggests that the "routine" ADEA case would not involve such conduct.
62. The "voluntary" standard is most closely associated with the Third Circuit's decision in Wehr v. Burroughs Corp., 619 F.2d 276 (1980). In Burroughs, the Third Circuit held that, in order to prove "willfulness" under the ADEA, it was sufficient to prove that the discharge of the employee was "voluntary and not accidental, mistaken, or inadvertent." Id. at 283. For a further discussion of the Burroughs standard, see supra notes 8 & 30 and accompanying text.
63. For a discussion of the difference between "policy" and "individual" cases, see supra notes 36-39 and accompanying text.
64. The Dreyer court relied on the RESTATEMENT (SECOND) OF TORTS § 908 in arriving at its "outrageousness" standard. 801 F.2d at 657.
65. Thurston, 469 U.S. at 128.
vidual" cases is a needless one on both policy and practical grounds.\textsuperscript{66}

With regard to the first point, there is no language anywhere in the ADEA suggesting that a distinction should be made between "policy" and "individual" cases.\textsuperscript{67} In addition, section 7(b), which also contains the "willful" provision, speaks only of "violations" of the Act, without reference to the existence of different kinds of violations.\textsuperscript{68} Nor did the Court in \textit{Thurston} make reference to the possible application of a separate "willful" standard to policy cases as distinguished from individual cases.\textsuperscript{69} Indeed, the Third Circuit did not rely on language in either the statute or \textit{Thurston} in creating this distinction. The court simply declared the distinction,\textsuperscript{70} and explained the "danger" of using the "knew or showed reckless disregard" standard in individual cases.\textsuperscript{71}

As to the second point, the Third Circuit's perceived need for such a distinction has led it away from the task of interpreting the statute, and into the realm of judicially creating a new standard for liquidated damages, when in fact one already exists in the statute. In construing section 7(b) of the ADEA, the inquiry should be whether the employer's conduct was "willful," a fact clearly recognized by the Third Circuit in \textit{Burroughs} when it stated: "The starting point in any case is to ascertain the degree of culpability intended by Congress when using 'willful.' "\textsuperscript{72} But in \textit{Dreyer}, the Third Circuit relied solely on the Supreme Court's restatement of the legislative history emphasizing that liquidated damages were

\begin{itemize}
\item \textsuperscript{66} For a discussion of why the distinction made by the court is unnecessary, see \textit{infra} notes 75-85 and accompanying text.
\item \textsuperscript{67} See generally Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1982).
\item \textsuperscript{68} Id. § 626(b) ("[L]iquidated damages shall be payable only in cases of willful violations of this Act.").
\item \textsuperscript{69} The Court spoke only of "violations." See \textit{Thurston}, 469 U.S. at 128-29.
\item \textsuperscript{70} \textit{Dreyer}, 801 F.2d at 656. For a further discussion of the court's reasoning on this point, see \textit{supra} note 36 and accompanying text.
\item \textsuperscript{71} The "danger" of using the \textit{Thurston} "knew or showed reckless disregard" standard for discrete employment situations, according to the court in \textit{Dreyer}, is that such a standard would "in effect allow the recovery of liquidated damages any time there was a violation of the Act." \textit{Id.} at 657. The court was quick to point out that such a result was inconsistent with the \textit{Thurston} Court's interpretation of congressional intent. \textit{Id.}
\item \textsuperscript{72} \textit{Burroughs}, 619 F.2d at 282. The \textit{Burroughs} court relied on a Florida district court case which defined "willful" as encompassing those " 'violations which are intentional, knowing or voluntary as distinguished from accidental.' " 619 F.2d at 282-83 (quoting Hodgson v. Hyatt, 318 F. Supp. 390, 392-93 (N.D. Fla. 1970)). This was essentially the same formulation adopted in \textit{Burroughs}. For a discussion of the \textit{Burroughs} standard, see \textit{supra} notes 8 & 30 and accompanying text.
\end{itemize}

Although \textit{Hodgson} involved the definition of "willful" under the FLSA, the \textit{Burroughs} court noted that section 6(a) of the PPA which extends the statute of limitations for willful violations of the FLSA from two years to three years, is specifically incorporated into section 7(e) of the ADEA, 29 U.S.C. § 626(e)(1) (1982). \textit{Burroughs}, 619 F.2d at 282-83.
intended to be punitive in nature. The court then concentrated not on defining "willful," but rather on establishing a standard for awarding punitive damages, concluding that "outrageous conduct" is required.

It would be easy to understand, if not approve, such judicial disregard for the language of a statute if indeed there was a "danger" that failing to distinguish between policy and individual ADEA cases would inappropriately result in liquidated damages in virtually all individual cases under the "knew or showed reckless disregard" standard of Thurston. It is submitted, however, that the "danger" has been grossly overstated and that neither policy nor practicality justify such a distinction.

The Third Circuit, in Dreyer, the only circuit to have done so, distinguished individual from policy cases and set forth a new standard—outrageousness—for determining willfulness in individual ADEA cases. The court was concerned that use of the Thurston "knew or showed reckless disregard" standard in these cases would frustrate the congressional intent to establish a two-tiered liability scheme, and in the court's view, allow the recovery of liquidated damages any time there was a violation of the Act. However, it is clear that the "knew or showed reckless disregard" test functions just as effectively in individual, as in policy cases, in distinguishing willful violations from other violations of the ADEA. Moreover, such a standard fosters greater care on the part of employers in their dealings with protected employees.

The Third Circuit stated in Dreyer that because the willful inquiry

73. For a discussion of this aspect of the Dreyer opinion, see supra note 44 and accompanying text.
74. For a discussion of this aspect of the Dreyer opinion, see supra notes 46 and 47 and accompanying text.
75. This perceived "danger" forms the basis for the distinction made by the court between "policy" and "individual" age discrimination cases. See Dreyer, 801 F.2d at 656-57.
77. For a discussion of the Third Circuit's reasoning in this regard, see supra notes 39-43 and accompanying text.
arises only after the employer has been found to have used age as a determinative factor in the employment decision, and the employer will have known of the requirements of the ADEA, willfulness will be found in virtually all individual cases. However, on policy grounds, this is as it should be. It is quite clear that if the employer knew that (or, under the Thurston definition, showed reckless disregard for the question of whether) the strictures of the ADEA applied to a particular employment decision, but nevertheless chose to make that decision with age as a determinative factor, the employer acted willfully. It is not at all clear why the Third Circuit felt compelled to further insulate the employer from double liability by adding an additional hurdle to a willfulness finding. The court's approach in this instance appears oriented more toward reaching a desired result than in fulfilling the wishes of Congress and the Supreme Court. It appears that the Dreyer court sympathized with ARCO for its lack of outrageous or offensive conduct with respect to Dreyer's discharge, and was reluctant to "punish" ARCO by requiring the company to pay liquidated damages. The court may have been swayed by ARCO's assertion that the terminations of Dreyer and Strayer were simply the result of "some dedicated people making tough decisions during tough times." Nevertheless, ARCO surely knew (or if it did not, was reckless in not knowing) of the ADEA's prohibitions and that Dreyer was protected under the Act, and was found to have used age as a determinative factor in Dreyer's discharge. Therefore, ARCO's discharge of Dreyer was certainly willful under the Thurston standard. ARCO's policy should have been to review all employment decisions to ensure that age was not a factor in the thinking of those who made those decisions. Even if a court later found that age was a determinative factor in the employment decision, appropriate documentation of the decision-making process would show a reasonable effort to comply with the ADEA, and not recklessness. Such conduct by ARCO would seem to effectively insulate it from double liability.

Further, even if the "knew or showed reckless disregard" standard resulted in findings of willfulness in all individual cases, it could nevertheless be argued that Congress intended all cases in this class to fall within the willful category of the two-tiered scheme. Nonetheless, it is submitted that just as the "knew or showed reckless disregard" test effectively weeds out the willful from the non-willful policy cases, so also does it serve to differentiate between those individual cases where a will-

78. Dreyer, 801 F.2d at 656-57. For a discussion of this aspect of the court's opinion, see supra note 41 and accompanying text.

79. For a discussion of the traditional tort definition of willful, see supra note 5.


81. See Thurston, 469 U.S. at 129-30 (describing steps taken by TWA to ensure compliance with the ADEA).
fulness finding is appropriate, and those where it is not. Just as there will be cases in the policy category where the employer did not know or show reckless disregard for whether its actions were prohibited by the ADEA, there will be individual cases where the same is true, illustrating the lack of practical necessity in the Third Circuit's distinction.

In the policy category of cases, *Thurston* itself presents an example of circumstances where the employer violated the ADEA but did not know or show reckless disregard for whether it had committed the violation.\(^82\) Having consulted counsel regarding its new transfer policy, there was "no indication that TWA was ever advised by counsel that its . . . policy discriminated against captains on the basis of age."\(^83\) Thus, TWA did not know that its conduct violated the ADEA. As to reckless disregard, the Court found that TWA might simply have overlooked the discriminatory aspect of the new plan in focusing on the larger overall problem, i.e., bringing its retirement policy into compliance with new provisions of the ADEA while simultaneously observing the terms of the collective bargaining agreement.\(^84\)

Similarly, there are situations in the individual category of cases where, though the employer's conduct might be found by a jury to have violated the ADEA, the employer would not be found to have known or shown reckless disregard for whether the conduct was prohibited. Thus, an employer contemplating a decision affecting protected employees such as a discharge from employment or reduction in the work force may, after review, reasonably believe that the actions contemplated are not in violation of the ADEA, i.e., that age was not a factor. Such a step may not convince a jury that age was not, ultimately, a factor in the decision, but should suffice to establish that the employer was not careless in its appreciation of the impact of the ADEA. Alternatively, a court may find that while reasonable minds could differ on the evidence presented as to whether age was a determinative factor in a particular employment decision, nevertheless, "the thin nature of the evidence presented" could not warrant the conclusion that the employer knew or showed reckless disregard for whether its conduct was prohibited by the ADEA.\(^85\) In sum, if the employer does not exhibit reckless disregard for whether its actions will violate the ADEA and, in fact, takes steps to en-

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82. See id. at 111; see also Whitfield v. City of Knoxville, 756 F.2d 455 (6th Cir. 1985). For a discussion of *Whitfield*, see supra note 38.

83. *Thurston*, 469 U.S. at 129. For a discussion of TWA's actions concerning its transfer policy, see supra note 31 and accompanying text.

84. *Thurston*, 469 U.S. at 130.

85. Smith v. Consolidated Mut. Water Co., 787 F.2d 1441, 1443 (10th Cir. 1986) (evidence supported finding of ADEA violation, but not of "willful" violation); see also Gilkerson v. Toastmaster, Inc., 770 F.2d 133, 137 (8th Cir. 1985) (neither facts nor reasonable inferences supported jury finding that violation was "willful"); Williams v. Caterpillar Tractor Co., 770 F.2d 47, 50 (6th Cir. 1985) (evidence supported finding of violation of ADEA but did not support finding of "willfulness").
sure compliance, or if the evidence of willfulness is otherwise insufficient, liquidated damages will not be awarded in an individual case.

The Third Circuit has thus propagated a standard for willfulness under the ADEA that substitutes a judicially created requirement—outrageousness—for the statutory requirement of willfulness. This new standard affords an extra measure of protection for an employer in an ADEA case by allowing a court to dispose of a verdict for liquidated damages more easily. Now, a court need simply find an absence of outrageous conduct, rather than inquire whether sufficient evidence was presented by a plaintiff such that reasonable minds could differ over the question of the employer’s knowledge or reckless disregard for whether his conduct was in violation of the ADEA. Moreover, the proposed standard would seem to discourage employers who are contemplating employment decisions having repercussions for ADEA-protected employees from adopting policies involving the review of those decisions. The new standard may even encourage recklessness since employers will come to believe that their behavior must be outrageous for liquidated damages to be recoverable. Thus, while those cases that are now brought in the Third Circuit will not usually result in liquidated damages, it would seem logical to conclude that if increased recklessness, or decreased caution, is the result of the Dreyer decision, there will be an increase in the volume of ADEA cases. Reconsideration by the Third Circuit of its opinion in Dreyer would thus seem to be in order, so that its standard for awarding liquidated damages in age discrimination cases is in line with the standard in Thurston.

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86. See Note, Meaning of “Willful”, supra note 34, at 356-57 (reckless disregard standard promotes policies of the ADEA by encouraging employees to know more about the ADEA and the implications of their actions under the Act).