ROSSITER.WPD-Age Discrimination (5/23/2005)
UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PAUL F. ROSSITER,
Plaintiff,

v. CIVIL ACTION NO. 02-12192-MBB

JOHN E. POTTER, Postmaster General,
and THE UNITED STATES POSTAL SERVICE,
Defendants.

MEMORANDUM AND ORDER RE:
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
(DOCKET ENTRY # 31)

May 23, 2005

BOWLER, U.S.M.J.

Pending before this court is a motion for summary judgment filed by defendants John E. Potter ("Potter"), Postmaster General, and the United States Postal Service ("USPS") (collectively: "defendants"). Defendants move for summary judgment against the claim brought by plaintiff Paul Rossiter ("Rossiter") that Potter and the USPS violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 et seq., when defendants failed to offer Rossiter employment. (Docket Entry # 31). Defendants also submit that: (1) the USPS is not a proper party defendant under the ADEA; (2) Rossiter is barred from recovering damages other than back pay under the ADEA; and (3) Rossiter is not entitled to a jury trial under the ADEA. (Docket Entry # 32). After conducting a hearing on May 2,

2005, this court took the motion (Docket Entry # 31) under advisement.

PROCEDURAL BACKGROUND

Rossiter alleges that he suffered discrimination on account of his age when defendants refused to offer him employment as a letter carrier in January 2001. Rossiter's original complaint contained claims of age discrimination against Potter and the USPS pursuant to the ADEA and Massachusetts General Laws chapter 151B ("chapter 151B"). (Docket Entry # 1). On May 16, 2003, the court granted defendants' motion to dismiss both the federal and state claims pursuant to Rule 12(b), Fed. R. Civ. P.[1] (Docket Entry # 9). On appeal, the Court of Appeals for the First Circuit reversed the court's order of dismissal as to the ADEA claim and remanded the case for further proceedings. (Docket Entry # 18). Defendants have now filed a motion for summary judgment and supporting memorandum as to the remaining ADEA claim. (Docket Entry ## 31 & 32).

STANDARD OF REVIEW

[1] The court dismissed the chapter 151B claim on the basis that the ADEA provides an exclusive remedy for federal employees alleging age discrimination and dismissed the ADEA claim on the ground that the statute of limitations had run. (Docket Entry # 10).

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Seaboard Surety Co. v. Town of Greenfield, 370 F.3d 215, 218 (1st Cir. 2004). A factual issue is "genuine" where "the evidence on the point is such that a reasonable jury, drawing favorable inferences, could resolve the fact in the manner urged by the nonmoving party." Blackie v. State of Maine, 75 F.3d 716, 721 (1st Cir. 1996). A factual issue is "material" where it "has the potential to alter the outcome of the suit under the governing law." Blackie v. State of Maine, 75 F.3d at 721.

The burden initially rests with the party seeking summary judgment to demonstrate that "no genuine issue of material fact exists." National Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 735 (1st Cir. 1995). To forestall summary judgment, however, the nonmovant must put forth "specific facts, in suitable evidentiary form, to . . . establish the presence of a trialworthy issue." Triangle Trading Co. v. Robroy Ind., Inc., 200 F.3d 1, 2 (1st Cir. 1999) (quoting Morris v. Government Development Bank of Puerto Rico, 27 F.3d 746, 748 (1st Cir. 1994)). Factual disputes must be resolved in a "light most favorable to the non-moving party, drawing all reasonable

inferences in that party's favor." Barbour v. Dynamics Research Corp., 63 F.3d 32, 36 (1st Cir. 1995).

FACTUAL BACKGROUND[2]

This case arose in or around 2000 when Rossiter sought and was subsequently denied employment as a letter carrier with the USPS. Candidates applying for positions with the USPS must first pass the following requirements: a written exam, a drug test, a criminal background check, a medical exam and, finally, an interview with a department supervisor. Upon completion of the interview process, a decision as to whether or not to hire the individual candidate is made.

Rossiter passed the USPS written exam in April 2000 and shortly thereafter passed a drug test in September of the same year. Sometime in early December 2000 Rossiter was contacted by the USPS and informed that he had been selected for an interview. On December 14, 2000, Froio, manager of the Allston, Massachusetts post office, interviewed Rossiter for a letter carrier position in the postal department of the Boston district. Throughout the relevant time period, Froio was the person

[2] Facts are taken from the depositions, affidavits and the agreed upon facts set forth in the parties' Local Rule 56.1 statements. Citations to the record are only provided for direct quotes. The factual record sets forth different accounts of what took place during the December 14, 2000 interview between Rossiter and Stephen Froio ("Froio") and their January 29, 2001 conversation. For the purpose of summary judgment, however, the record is construed in a light most favorable to the nonmovant Rossiter.

responsible for making hiring decisions for those candidates that he interviewed.

At the time of his interview, Rossiter had accumulated nearly 20 years of experience working in various customer service positions, including work as a waiter and as a chauffeur. Rossiter further testifies that he had an "impeccable driving license record."[3] (Docket Entry # 36, Ex. A, p. 30). Rossiter was then 46 years old.

Rossiter admits to being nervous during his interview at the Allston branch. Froio noted in his deposition that Rossiter appeared "very fidgety in his chair" and "was unable to make eye contact" during the course of the interview. (Docket Entry # 32, Ex. 2, p. 43). According to Froio, Rossiter's persistent nervousness during the interview "made [Froio] feel uncomfortable." (Docket Entry # 32, Ex. 2, p. 42).[4]

Over the course of the interview, Rossiter was posed standard questions similar to those posed to all other letter carrier candidates regarding conscientiousness, adaptability, and the ability to cooperate with others and handle conflict. Froio

[3] During the pre-orientation process with the USPS, Rossiter was informed that among the qualifications of letter carrier included the need for driving throughout Boston.

[4] When asked during his deposition whether nervousness or lack of eye contact undermines one's "ability to handle customer service," however, Froio's response was ambivalent: that "[n]ervousness in and of itself may not." (Docket Entry # 32, Ex. 2, p. 47).

concedes that he found Rossiter's responses to the questions regarding conscientiousness and adaptability to be acceptable. According to Froio's testimony, however, when Rossiter was asked to describe a situation involving workplace conflict he was unable to do so. As a result, Froio found it difficult to assess Rossiter in regard to that category.

Towards the conclusion of the interview, Rossiter was given a scenario involving an irate customer whose check had been mis-delivered and asked how he would respond in the situation. According to Rossiter, his response was to explain that it was "[his] first day on the job" and offer to "call the manager of the postal unit to see if [they] could rectify the problem immediately." (Docket Entry # 36, Ex. B, p. 29). Froio's recollection of Rossiter's response, however, differs. Froio claims to have been dissatisfied with Rossiter's response to the scenario, stating that Rossiter merely "dodge[d] the bullet" by making excuses that he wasn't responsible. (Docket Entry # 32, Ex. 2, p. 53).

On or about January 4, 2001, Rossiter received a letter from the USPS informing him that he was not selected for a position as a letter carrier. On January 29, 2001, Rossiter contacted Froio by telephone to inquire as to the reason for not being selected. Froio informed Rossiter that the primary basis for his decision was Rossiter's display of nervousness during the interview. At

some point during this conversation, Rossiter asked Froio if age was a factor in the decision not to hire him. According to Rossiter, Froio responded that "it didn't help you any" and "I would understand – if you were 20 years younger, I would understand your nervousness and I would have selected you, yet a man your age, with your experience, I couldn't understand you being nervous."[5] (Docket Entry # 36, Ex. A, p. 36).

During a separate conversation between Rossiter and Froio on January 19, 2001, Rossiter requested that Froio reconsider Rossiter's application. Froio told Rossiter that there were no other letter carrier positions available. Soon after receiving his letter of rejection, however, Rossiter received two postcards in the mail from the USPS informing him that it was still accepting applicants for letter carriers in the Boston district. From January to spring of 2001, the USPS continued to interview and hire individuals for letter carrier positions. Following his rejection by the USPS, Rossiter was hired for a position with the United Parcel Service. The position bears similar

[5] Froio's account of the January 29, 2001 phone conversation differs substantially from Rossiter's testimony. Froio disputes that he was ever directly asked by Rossiter if age was a motivating factor in his decision not to hire Rossiter. Although Froio admits to having said something to the effect of "I could understand you being nervous if you were younger, but with your life experiences I wouldn't expect you to be so nervous," he disputes having made the comment, "[I]t didn't help you any," in reference to Rossiter's age. (Docket Entry # 36, Ex. A, p. 56).

responsibilities and requirements to that of a letter carrier with the USPS.

DISCUSSION

Section 623(a) of the ADEA makes it unlawful for an employer "to *fail or refuse to hire* . . . any individual or otherwise discriminate against any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1) (emphasis added). Defendants argue that Rossiter failed to present sufficient evidence that Froio's hiring decision was the result of unlawful age animus. This court disagrees.

Allegations of disparate treatment under the ADEA and like employment discrimination statutes may proceed under either a "mixed-motive" or a "pretext" analysis. Cruz-Ramos v. Puerto Rico Sun Oil Co., 202 F.3d 381, 384 (1st Cir. 2000) (citing Fernandes v. Costa Bros. Masonry, 199 F.3d 572, 579-581 (1st Cir. 1999), abrogated on other grounds by Desert Palace, Inc. v. Costa, 539 U.S. 90, 101-102 (2003)). While the plaintiff may assert both modes of analysis simultaneously, at the appropriate juncture in the litigation the trial court must ultimately determine which framework to apply. Price Waterhouse v. Hopkins, 490 U.S. 228, 247 n. 12 (1989). In the instant case, because Rossiter has ultimately satisfied his burden under a mixed-motive

analysis by presenting direct evidence of discriminatory animus there remains no need to invoke the pretext framework.

Mixed-motive analysis is appropriate where evidence exists that both legitimate and illegitimate factors played motivating parts in the adverse employment action. Price Waterhouse v. Hopkins, 490 U.S. at 241-42. The plaintiff in a mixed-motive case bears the initial burden of demonstrating that "an illegitimate factor played a substantial role in a particular employment decision." Vesprini v. Shaw Industries, Inc., 221 F.Supp.2d 44, 56 (D.Mass.), aff'd, 315 F.3d 37 (1st Cir. 2002). The burden then shifts to the employer to "prove that it would have made the same decision even if it had not taken the protected characteristic into account."[6] Vesprini v. Shaw Industries, Inc., 315 F.3d at 41 (internal quotations omitted). The Supreme Court in Desert Palace clarified that the plaintiff's initial burden may be satisfied with either direct or circumstantial evidence.[7] Desert Palace, Inc. v. Costa, 539 U.S.

[6] Rossiter cites a different mixed-motive standard found in Desert Palace, in which defendants may assert only a "partial affirmative defense" by demonstrating that the same employment decision would have been made regardless of the impermissible motive. Desert Palace, Inc. v. Costa, 539 U.S. at 94-95. This standard would allow a court to award certain equitable relief and attorney's fees even where a defendant satisfies his or her burden. While this standard correctly applies to cases under Title VII, it does not apply to cases under the ADEA. See Dominguez-Cruz v. Suttle Caribe, Inc., 202 F.3d 424, 429 n.4 (1st Cir. 2000).

[7] Prior to Desert Palace, the First Circuit, along with other courts of appeals, required direct evidence of discriminatory

at 101-102. While the standard of evidence needed to trigger a mixed-motive analysis is somewhat uncertain in the wake of Desert Palace, a plaintiff must nevertheless show, at a minimum, "that there was differential treatment in an employment action and that the adverse employment decision was caused at least in part by a forbidden bias." Hillstrom v. Best Western TLC Hotel, 354 F.3d 27, 31 (1st Cir. 2003).

The central evidence of Rossiter's case is his January 29, 2001 conversation with Froio following the letter of rejection. Interpreting the facts of this conversation in a light most favorable to Rossiter, this court concludes that Rossiter satisfied this burden. Froio's remark, "[I]f you were 20 years younger, I would understand your nervousness and I would have selected you, yet a man your age, with your work experience, I

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animus to trigger the mixed-motive analysis. See Fernandes v. Costa Bros. Masonry, 199 F.3d at 580 ("[w]hat is required [to trigger mixed-motive analysis] is . . . direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision;" quoting Price Waterhouse v. Hopkins, 490 U.S. at 277 (O'Connor, J., concurring), abrogated by Desert Palace, Inc. v. Costa, 539 U.S. at 101-102). Because Desert Palace specifically addressed claims arising under Title VII of the Civil Rights Act, there may be a question as to whether the same standard applies to mixed-motive cases under the ADEA. The First Circuit has indicated that the Desert Palace standard does extend to the ADEA. See Hillstrom v. Best Western TLC Hotel, 354 F.3d 27, 30-31 (1st Cir. 2003); Estades-Negroni v. Associates Corp. Of North America, 345 F.3d 25 (1st Cir. 2003), vacated, 362 F.3d 874 (1st Cir. 2004). Even if the direct evidence requirement remained applicable to ADEA cases, at stated infra, Rossiter has produced direct evidence of animus. Rossiter's case would therefore survive even under the former standard.

couldn't understand you being nervous," if taken as true, constitute direct evidence of discrimination. Moreover, when asked directly whether Rossiter's age was a contributing factor in Froio's hiring decision, Froio responded that, "[I]t didn't help [Rossiter] any." These comments certainly could not be categorized as "stray remarks" made by an individual not involved in the decision-making process. See Gonzalez v. El Dia, Inc., 304 F.3d 63, 69 (1st Cir. 2002) ("'stray workplace remarks,' as well as statements made by nondecisionmakers . . . are insufficient, standing alone, to establish either pretext or the requisite discriminatory animus") (citing Straughn v. Delta Air Lines, Inc., 250 F.3d 23, 36 (1st Cir. 2001), and Laurin v. Providence Hosp., 150 F.3d 52, 58 (1st Cir. 1998)). Froio conducted Rossiter's interview and made the ultimate decision regarding Rossiter's employment with the USPS. Froio's comments were a direct response to Rossiter's inquiry as to the basis for his decision.

Defendants, in turn, argue that Froio's statement does not evidence discriminatory motive but, rather, merely reflects Froio's expectation that "a person the plaintiff's age and with the plaintiff's twenty-plus years of experience in the service industry" would perform better in an interview. (Docket Entry # 32). This explanation, however, fails to account for the statement, "I would have selected you," which underscores a

direct causal relationship between the alleged age animus and Froio's hiring decision. Froio's comment was neither "ambiguous" nor "isolated." Lehman v. Prudential Ins. Co. of America, 74 F.3d 324, 329 (1st Cir. 1996) ("isolated, ambiguous remarks are insufficient, by themselves, to establish discriminatory intent").

Considering Froio's position as a decisionmaker and the context in which the alleged remarks were made, Rossiter has produced sufficient evidence from which a reasonable jury could find that the decision not to hire him was motivated in part by age animus. Whether or not Froio made these remarks alleged by Rossiter is a question of material fact.

The mixed-motive inquiry does not end here. This court may still award summary judgment if defendants demonstrate that Rossiter would not have been hired for the letter carrier position even if his age had not been taken into account. According to Froio, Rossiter was not selected largely because of his nervousness during the interview. The alleged comments made by Froio during the January 29, 2001 phone conversation, however, indicate that it was Rossiter's nervousness *combined* with his age that prompted Froio's non-select decision. As an additional basis for the non-select decision, Froio notes his dissatisfaction with certain answers given by Rossiter to questions posed during the interview. In particular, Froio notes

Rossiter's response to the irate customer scenario.[8] Rossiter's characterization of his response, however, differs substantially from that of Froio.[9] Given the material factual disputes surrounding the asserted grounds for the non-select decision, summary judgment is not appropriate as to Rossiter's substantive claim under the ADEA.

Proper Party Defendant

Defendants argue that summary judgment should be granted as to Rossiter's claim against the USPS on the basis that the USPS is not a proper party defendant under the ADEA. This court agrees.

Claims of age discrimination against the federal government are governed by 29 U.S.C. § 633a. In contrast to Title VII, the ADEA does not state who should be named as proper defendants in such actions nor has the First Circuit addressed this issue. In support of their motion, defendants cite a line of cases in which other courts of appeals have held that, as with Title VII, the head of the appropriate department, agency or unit is the only proper defendant in an ADEA action against the federal

[8] See Froio's deposition. (Docket Entry # Ex. 2, p. 52).

[9] According to Froio, Rossiter responded to the scenario by making excuses and disclaiming responsibility. Rossiter asserts that his response was to contact the manager of the postal unit to see if the problem could be rectified.

government. See, e.g., Honeycutt v. Long, 861 F.2d 1346, 1348-1349 (5th Cir. 1988); Romain v. Shear, 799 F.2d 1416, 1418 (9th Cir. 1986), cert. denied, 481 U.S. 1050 (1987); Ellis v.United States Postal Service, 748 F.2d 835, 838 (7th Cir. 1986).[10] Of these cases, only Ellis specifically involves a suit brought against the USPS.

In opposition to defendants' motion, Rossiter raises the argument that Congress broadly waived the sovereign immunity of the USPS in passing the Postal Reorganization Act of 1970, 39 U.S.C. § 401(1) ("PRA"). Rossiter cites Franchise Tax Board v. USPS, 467 U.S. 512, 520 (1984), finding that the waiver of sovereign immunity granted by section 401(1) is to be construed broadly. Section 401(1) states that the USPS shall have among its general powers the power "to sue and be sued *in its official name*." 39 U.S.C. § 401(1) (emphasis added). The Seventh Circuit in Ellis, did not address the issue of whether section 401(1) would impact suits under the ADEA. Roughly two years after Ellis

[10] The courts in both Honeycutt and Ellis noted that the ADEA provision applicable to federal employees, 29 U.S.C. § 633a, was patterned after the federal workplace counterpart in Title VII. Honeycutt v. Long, 861 F.2d at 1349; Ellis v. United States Postal Service, 748 F.2d at 838. "[W]hen a section of the ADEA can be traced to a similar section of Title VII, the two provisions should be construed consistently." Ellis v. Long, 748 F.2d at 838 (citing Oscar Mayer and Co. v. Evans, 441 U.S. 750, 755-756 (1979)); see also Lavery v. Marsh, 918 F.2d 1022, 1025 (1st Cir. 1990) (ADEA amendment governing federal employment was intended to be "substantially similar to" provision governing federal employment in Title VII).

was decided, however, the Supreme Court in Loeffler v. Frank, 486 U.S. 549 (1988), determined that claims against the USPS created by special statutory schemes, such as Title VII or the ADEA, are in fact subject to the general waiver clause of the PRA. Loeffler v. Frank, 486 U.S. at 561 (prejudgment interest could be recovered against USPS under Title VII).

The Court in Loeffler very briefly addressed the issue of whether any conflict arises from requirements that the agency head be named as the defendant and the language of section 401(1) making the USPS amenable to suit "in its official name." The Court found that "such a distinction between a suit against the head of an agency and a suit against the agency itself [was] irrelevant to the force of a 'sue and be sued' clause." Loeffler v. Frank, 486 U.S. at 562 n. 8 (citing Federal Housing Administration, Region No. 4 v. Burr, 309 U.S. 242, 249-250 (1940)). "Whenever the head of the Postal Service acts in his official capacity, he is acting in the name of the Postal Service." Loeffler v. Frank, 486 U.S. at 562 n. 8. In accordance with this reasoning, requiring Rossiter to name the Postmaster General as defendant does not function to narrow the scope of the USPS' immunity under the ADEA. Loeffler's ruling does not supercede the decisions in Ellis, Romain and Honeycutt.

This court therefore decides this matter in accordance with the line of cases cited by defendants. Summary judgment is

granted in defendants favor on this matter and the count against the USPS is dismissed. Only Potter remains as a defendant in this action.

Damages

Defendants assert that Rossiter is barred from collecting damages other than back pay. Specifically, defendants argue that under section 633a of the ADEA, governing federal employees, recovery of both compensatory and liquidated damages is prohibited.[11] Rossiter, in turn, asserts that section 633a allows for additional recovery in the form of both front pay and liquidated damages. For reasons stated below, this court finds that Rossiter is barred from recovering compensatory and liquidated damages, but may recover front pay.

In his opposition, Rossiter does not dispute that he is barred from collecting compensatory damages under the ADEA. The First Circuit in Vazquez v. Eastern Airlines, Inc., 579 F.2d 107, 112 (1st Cir. 1979), decided against allowing compensatory damages for pain and suffering under the ADEA. Rossiter is therefore ineligible for compensatory damages in this action.

Turning next to the issue of liquidated damages, section 626(b) of the ADEA provides for recovery of "liquidated damages

[11] The complaint contains a prayer for monetary damages including "loss of income, loss of benefits, loss of reputation, loss of valuable job rights, emotional distress and other damages." (Docket Entry # 1).

. . . in cases of willful violations." 29 U.S.C. § 626(b). Section 626(b), however, applies to employees in the private sector. The enforcement mechanism for claims against the federal government is provided for in section 633a of the statute. Section 633a(f) provides:

> Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title . . . and the provisions of this section."

29 U.S.C. § 633a(f). Therefore, the express provision for liquidated damages for willful violations found in section 626(b) is not applicable to cases involving federal entities.

While the First Circuit has not yet decided this particular issue, "courts have generally held . . . that liquidated damages may not be recovered in actions by federal employees." Andrew M. Campbell, *What Constitutes Willful Violation under Age Discrimination in Employment Act (29 U.S.C.A. §§ 626 et seq.) Entitling Victim to Liquidated Damages*, 165 A.L.R. Fed. 1, § 2(b) (2004). This court agrees and finds that liquidated damages are not recoverable in actions against the federal government under the ADEA.

Rossiter further argues that he is allowed to recover future damages in the form of front pay. Under the ADEA, courts maintain equitable power to "award front pay when plaintiff has 'no reasonable prospect of obtaining comparable alternative

employment.'" Kelley v. Airborne Freight Corp., 140 F.3d 335, 353 (1st Cir. 1998) (quoting Powers v. Grinnell Corp., 915 F.2d 34, 42 (1st Cir. (1990)). Front pay is awarded only in cases where reinstatement is impossible or impracticable. Kelley v. Airborne Freight Corp., 140 F.3d at 353; Wildman v. Lerner Stores Corp., 771 F.2d 605, 615 (1st Cir. 1985), abrogated on other grounds by Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711, 717-718 (1987). This court was unable uncover through its research any case law deeming front pay damages unavailable to federal employees under the ADEA. At least one other circuit has allowed a plaintiff to recover front pay under section 633a of the ADEA. See Lewis v Federal Prison Industries, Inc., 953 F.2d 1277 (11th Cir. 1992). Bearing in mind the aforementioned limitation, Rossiter may proceed in seeking damages for front pay in addition to back pay under the ADEA.

Defendants' motion for summary judgment is therefore granted to the extent that Rossiter may not recover either compensatory or liquidated damages. Rossiter may, however, seek recovery of front pay.

Right to a Trial by Jury

Rossiter concedes that he has no right to a trial by jury under the ADEA. The Supreme Court in Lehman v. Nakshian, 453

U.S. 156 (1981), held that Congress did not provide the right to a jury trial for federal employees bringing claims under the ADEA. Lehman v. Nakshian, 453 U.S. at 168-169. The Court reasoned, in part, that section 633a of the ADEA, extending relief to federal employees, was "patterned directly after" Title VII, which likewise provided no right to a jury trial. Lehman v. Nakshian, 453 U.S. at 163-164 & n.15. Congress later amended Title VII to provide the right to jury trials for private as well as government employees through the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 1981a(c)(1) (1991)). The question then is what impact the 1991 amendments to Title VII have on actions under the ADEA. Through the course of its research, this court was able to uncover only one other case addressing this issue: Guillory-Wuerz v. Brady, 785 F.Supp. 889 (D.Colo. 1992). The court in Guillory-Wuerz concluded that the 1991 amendments granting jury trials to Title VII plaintiffs did not extend to the ADEA. Guillory-Wuerz v. Brady, 785 F.Supp. at 891. After "carefully examin[ing] the newly enacted provisions of the [Civil Rights Act of 1991]" the court was "unable to find any language overruling Lehman or providing a right to a jury trial in ADEA cases." Guillory-Wuerz v. Brady, 785 F.Supp. at 891. The court explained:

> [t]he 1991 Act extends compensatory damages and punitive damages and a right to a jury trial to victims of intentional discrimination who have brought actions under

> Title VII, the Americans With Disabilities Act of 1990 and the Rehabilitation Act of 1973 . . . Noticeably absent in these sections of the 1991 Act is any reference to age or the ADEA.

Guillory-Wuertz v. Brady, 785 F.Supp. at 891. The Supreme Court, in fact, recently employed similar reasoning in its decision in Smith v. City of Jackson, Miss., in which the Court determined that prior interpretation of disparate impact language found in the ADEA was not altered by the 1991 amendments to Title VII. Smith v. City of Jackson, Miss., 125 S. Ct. 1536, 1545 (2005) ("[w]hile the relevant 1991 amendments [regarding disparate impact claims] expanded the coverage of Title VII, they did not amend the ADEA or speak to the subject of age discrimination").

Based on the reasoning found in Guillory-Wuerz and Smith, this court concludes that Lehman remains good law with respect to its interpretation of the ADEA. Summary judgment is therefore granted in defendants' favor on this matter and Rossiter's request for a trial by jury is denied.

CONCLUSION

In accordance with the foregoing discussion, defendants' motion for summary judgment (Docket Entry # 31) is **ALLOWED** to the following extent: the USPS is dismissed as a party to this action; Rossiter is not entitled to seek compensatory or liquidated damages; and Rossiter's request for a jury trial is

denied. The motion (Docket Entry # 31) is otherwise **DENIED**.

/s/ Marianne B. Bowler
MARIANNE B. BOWLER
United States Magistrate Judge