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A Case for the Ages: Thompson and Preserving the ADEA Statutory Time to File

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A CASE FOR THE AGES: *THOMPSON* AND PRESERVING THE ADEA STATUTORY TIME TO FILE

Rachel Gadra Rankin*

ABSTRACT

In January 2021, the Sixth Circuit answered in Thompson v. Fresh Products, LLC*, a case of first impression, that an employer and employee may not contractually agree to shorten the statutory time-to-file period in the Age Discrimination in Employment Act (ADEA). In short, the ADEA's time-to-file provision requires an employee to file a claim with the Equal Employment Opportunity Commission (EEOC) within 180 days from the time they experienced alleged age discrimination. The employee may then bring private suit after sixty days from the time they filed with the EEOC, regardless of whether the EEOC has issued a Right to Sue Notice at that time.*

With no clear guidance from the statute's language or the Supreme Court, courts diverge on whether the ADEA's time-to-file period may be contractually shortened in private agreement. Argument in favor promotes the freedom to contract and asserts that the time-to-file period functions merely as a procedural mechanism. Argument against draws on protected filing times of other anti-discrimination

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statutes and asserts that the ADEA's time-to-file period is a non-waivable, substantive right created by the ADEA itself.

In Thompson*, the Sixth Circuit emphasized the similarities between the ADEA and Title VII of the Civil Rights Act of 1964 (Title VII) to reach its conclusion. This Note explores the question of whether likening the statutory time-to-file period under the ADEA to that of Title VII is a logical comparison. Although the ADEA's time-to-file should be protected to some extent as an inherent right created by the statute, it should not be protected on the basis of its similarities to Title VII. Because Title VII prevents a claimant from filing private suit until the EEOC issues a Right to Sue Notice, but the ADEA does not, comparing the two time-to-file periods is not the right approach. Instead, this Note calls for either Congress to clarify the function of ADEA time-to-file waivers by amending the statute, or for the Supreme Court to definitively answer this issue with binding precedent specifically as applied to the ADEA.*

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INTRODUCTION

Consider the following: You are an employer who just received notice of a federal lawsuit filed against you by a terminated employee. The employee alleges that they were discriminated against and wrongfully terminated because of their age under the Age Discrimination in Employment Act of 1967 (ADEA).[1] After reviewing the employment agreement that you and the employee signed at the start of their assignment, you breathe a sigh of relief; the agreement contains a provision limiting the employee's timeframe to bring any lawsuits, including those under the ADEA, to the shorter of either the time prescribed by law or four months from the date of the alleged discrimination.[2] The employment relationship ended five months ago.

You read the entirety of the ADEA and see that an employee (1) must file a claim with the Equal Employment Opportunity Commission (EEOC) prior to commencing private litigation and (2) has 180 days to do so.[3] However, you find no prohibition on contractually limiting an employee's timeframe to bring an ADEA suit. You feel confident that the employee's action is time-barred by the reasonable agreement that they willingly reviewed and signed prior to employment.[4]

1. *See generally* Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. § 621(b). The ADEA protects individuals who are forty years of age and older from age-based employment discrimination. 29 U.S.C. § 631(a).

2. This hypothetical language is modeled in part on the examples of contractual clauses at issue in the following cases: Badgett v. Fed. Express Corp., 378 F. Supp. 2d 613, 617 (M.D.N.C. 2005); Friedmann v. Raymour Furniture Co., No. CV 12-1307 (LDW) (AKT), 2012 U.S. Dist. LEXIS 149511, at *3–4 (E.D.N.Y. Oct. 16, 2012); Lugihibl v. Fifth Third Bank, No. 13 C 7193, 2015 U.S. Dist. LEXIS 31501, at *2 (N.D. Ill. Mar. 16, 2015); Johnson v. DaimlerChrysler Corp., C.A. No. 02-69 GMS, 2003 U.S. Dist. LEXIS 28026, at *8 (D. Del. Mar. 4, 2003).

3. 29 U.S.C. § 626(d)(1).

4. *See id.* § 626(f); *see also* Ord. of United Com. Travelers of Am. v. Wolfe, 331 U.S. 586, 608 (1947). The Supreme Court set a reasonableness standard for clauses of period limitations by asserting:

> [I]t is well established that, in the absence of a controlling statute to the contrary, a provision in a contract may validly limit, between the parties, the time for bringing an action on such contract to a period less than that prescribed in the general statute of limitations, provided that the shorter period itself shall be a reasonable period.

Id.

But you might be wrong. Although a plain reading of the ADEA's text may appear to make this a straightforward issue, judicial interpretation provides a myriad of contradictory results.[5] With no direct guidance from the Supreme Court on whether employment agreements may validly shorten the filing time of private anti-discrimination suits under federal law, district courts treat such agreements in divergent ways.[6] Some courts view a time limitations clause as a waiver and will enforce reasonable waivers if not prohibited by the applicable statute.[7] Other courts choose not to enforce such a clause, believing that important private and public interests are undermined if employees cannot freely bring federal anti-discrimination suits.[8]

Notably, in January 2021, the Sixth Circuit provided a newsworthy holding in *Thompson v. Fresh Products, LLC* when it became the first circuit court to address whether the ADEA statute of limitations may

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5. ANN-ELIZABETH OSTRAGER, KRYSTAL D. VALENTIN & OLIVIA P. BERCI, STATUTES OF LIMITATIONS: AGREEMENTS TO SHORTEN LIMITATIONS PERIODS ON EMPLOYEE CLAIMS, LEXIS (database updated May 2023) ("[B]oth federal and state laws vary widely across jurisdictions in their treatment of contracts to shorten limitations periods."); DANIEL P. O'MEARA, U. PA., WHARTON SCHOOL, PROTECTING THE GROWING NUMBER OF OLDER WORKERS: THE AGE DISCRIMINATION IN EMPLOYMENT ACT 51 (Lab. Rels. & Pub. Pol'y Ser. No. 33, 1989) (discussing how courts sometimes recognize an employee's waiver of rights despite the ADEA lacking an explicit authorization to do so, and such practice being the "subject of great controversy").

6. *See* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 273–74 (2009). Although the Supreme Court decided in *14 Penn Plaza* that a "substantive waiver of federally protected civil rights will not be upheld," it has not yet determined—and the content of the ADEA does not make clear—whether the period to bring a claim under the ADEA is a substantive or procedural right. *Id.* Some district courts have permitted shortening the limitations period for various employment law claims. *See, e.g.*, *Badgett*, 378 F. Supp. 2d at 626 (upholding a contractual limitations period of six months for *any* claims, including those arising under the Family Medical Leave Act (FMLA)); *Johnson*, 2003 U.S. Dist. LEXIS 28026, at *12 (upholding a contractual limitations period of six months for Title VII claims); Barfield v. Fed. Express Corp., 351 F. Supp. 3d 1041, 1051–52 (S.D. Tex. 2019). Other district courts have ruled against such contractual restrictions. *See, e.g.*, Wineman v. Durkee Lakes Hunting & Fishing Club, Inc., 352 F. Supp. 2d 815, 823 (E.D. Mich. 2005) (holding invalid a shortening of the FMLA's statute of limitations for public policy reasons); Mazurkiewicz v. Clayton Homes, Inc., 971 F. Supp. 2d 682, 689, 691 (S.D. Tex. 2013) (holding invalid shortening the statute of limitations for claims under the Americans with Disabilities Act and the Fair Labor Standards Act).

7. *See, e.g.*, *Badgett*, 378 F. Supp. 2d at 617, 626 (holding an employee's FMLA and Section 1981 claims as time-barred under a valid employment agreement clause limiting the time to bring any legal action against the employer to "the time prescribed by law or 6 months from the date of the event"); OSTRAGER ET AL., *supra* note 5. Note that the ADEA contains a subsection addressing waiver provisions, but this section fails to define what constitutes a "waiver." 29 U.S.C. § 626(f).

8. *See, e.g.*, *Wineman*, 352 F. Supp. 2d at 823; OSTRAGER ET AL., *supra* note 5.

be contractually shortened; in *Thompson*, the Sixth Circuit held that the time period to bring suit set forth by the ADEA is a "substantive, non-waivable" right that may not be altered by contract agreement.[9] Just two years prior, the same circuit court characterized the statutory time period of Title VII of the Civil Rights Act of 1964 (Title VII) as a substantive right in *Logan v. MGM Grand Detroit Casino*.[10] Although a different federal anti-discrimination statute, Title VII is substantially similar to the ADEA in many—but not all—respects, and courts often consider their similarities.[11] The Sixth Circuit accordingly built on its *Logan* decision to decide *Thompson*, despite years of its district courts holding that parties may contract to shorten the ADEA time-to-file period.[12] In *Thompson*, the court disagreed that the ADEA is procedurally different from Title VII and held that, because the ADEA largely mirrors Title VII, the ADEA's time-to-file period similarly cannot be contractually shortened.[13] The Supreme Court denied an opportunity to review *Logan* in October 2022, suggesting that the Sixth Circuit reached the correct conclusion, at least as related to Title VII.[14]

This Note discusses the intricacies of the *Thompson* holding and analyzes (1) whether likening the statutory time to file under the

9. 985 F.3d 509, 521 (6th Cir. 2021).

10. 939 F.3d 824, 829 (6th Cir. 2019).

11. Jacqueline Go, *Another Move Away from Title VII: Why* Gross *Got It Right*, 51 SANTA CLARA L. REV. 1025, 1044 (2011) (discussing how "courts have traditionally relied on precedent developed in Title VII cases for guidance on how to properly analyze claims arising under the ADEA").

12. *Thompson*, 985 F.3d at 521. *See* Dekarske v. Fed. Express Corp., 294 F.R.D. 68, 79 (E.D. Mich. 2013) (holding that a six-month limitation in an employment agreement validly restricted the ADEA time procedure); *see also* Smithson v. Hamlin Pub, Inc., No. 15-cv-11978, 2016 U.S. Dist. LEXIS 14820, at *17 (E.D. Mich. Feb. 8, 2016) (holding that a "180-day contractual limitations period would not effect a 'practical abrogation'" of the employee's right to file an ADEA claim (quoting Myers v. W.-S. Life Ins. Co., 849 F.2d 259, 262 (6th Cir. 1988))).

13. *Thompson*, 985 F.3d at 519–21; Robert Iafolla, *Employment Contract Power Faces Test in 6th Circuit Bias Case*, BLOOMBERG L. (July 27, 2020, 3:35 PM), https://news.bloomberglaw.com/daily-labor-report/employment-contract-power-faces-test-in-6th-circuit-bias-case [https://perma.cc/2JAS-MCFP] (analyzing Fresh Product's statement that "[c]ontractual limitations periods, like the one to which Thompson agreed to be bound, are not incompatible with the administrative process provided in the ADEA" because they are "significantly less elaborate than that provided in Title VII's statutory framework").

14. Petition for Writ of Certiorari, *Logan*, 939 F.3d 824 (No. 21-8061), *cert. denied*, 143 S. Ct. 159 (2022).

ADEA to that of Title VII is a logical comparison; and (2) whether other district and federal appellate courts should adopt a similar approach to that of the *Thompson* court. Part I outlines the theory of freedom of contract and the historical development of employment anti-discrimination law.[15] Part II compares the holdings of *Logan* and *Thompson* and examines whether other courts treat anti-discrimination time-to-file periods as substantive or procedural.[16] Part III proposes that, absent legislative action to clarify the waiver language of the ADEA, courts should unify in treating anti-discrimination statutory time-to-file periods as substantive for reasons other than those emphasized by the Sixth Circuit in *Thompson*.[17]

I. BACKGROUND

A. Freedom to Contract Versus Employee Constitutional Rights

A foundational principle of contract law is the freedom to contract.[18] This tenet promotes private autonomy by encouraging individuals to freely negotiate, to enter into agreements, and to bargain for the "exchange [of] property or labor without interference from others."[19] The Supreme Court recognizes this liberty to contract generally as an inherent right, and it values every citizen's ability to decide for themselves the nature and price of their services.[20] At the time of signing, freedom of contract even prioritizes the individual's discretionary right to agree to contract terms above the risk that

15. *See infra* Part I.

16. *See infra* Part II.

17. *See infra* Part III.

18. JOSEPH M. PERILLO, CONTRACTS § 1.3, at 4–5 (7th ed. 2014) (discussing how private contracts became valued in nineteenth-century England following a downfall of isolated casts within the feudal system).

19. Mark Pettit, Jr., *Freedom, Freedom of Contract, and the "Rise and Fall,"* 79 B.U. L. REV. 263, 282–83 (1999); RICHARD CRASWELL & ALAN SCHWARTZ, FOUNDATIONS OF CONTRACT LAW § 1.2, at 20 (1994) (viewing a contractual promise as one of "moral force" and "as a necessary corollary of individual liberty or autonomy").

20. Frisbie v. United States, 157 U.S. 160, 165–66 (1895); Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587, 610 (1936) (discussing that contracting for employment is protected by the Due Process Clause and that parties to a contract "have equal right to obtain from each other the best terms they can by private bargaining").

individual freedoms may be sacrificed in performance of such agreements.[21] Repeatedly, contract law theories based on private autonomy advance the argument that "any rule or obligation agreed to by the parties should be allowed to govern their relationship."[22]

Modern American jurisprudence, however, has seen increasing legislative limitations on freedom of contract, especially within the context of employment law.[23] Even the Supreme Court concedes that the right to contract is not absolute and that the government may generally restrain any employment agreement that contravenes public policy.[24] Although the freedom to contract is generally protected, employment agreements are subject to heightened scrutiny due to the need to mitigate unequal bargaining power between employers and their dependent employees.[25]

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21. CRASWELL & SCHWARTZ, *supra* note 19 ("While there may be a slight paradox in the notion that freedom must include the freedom to limit one's freedom in the future, advocates of this theory resolve that paradox in favor of allowing individuals to make binding promises.").

22. *Id.* at 21; *see also Morehead*, 298 U.S. at 610–11 (stating that "[l]egislative abridgement" of the freedom to contract is only permitted in "exceptional circumstances" because "[f]reedom of contract is the general rule and restraint the exception").

23. PERILLO, *supra* note 18 (discussing restrictions on employment agreements arising from federal and state laws addressing "minimum wages, hours, working conditions and required social insurance programs"); *see also* Chi., Burlington, & Quincy R.R. Co. v. McGuire, 219 U.S. 549, 567 (1911). In opining that the freedom of contract is a qualified, rather than substantive, right, the Supreme Court asserted that:

> There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.

Chi., Burlington, & Quincy R.R. Co., 219 U.S. at 567.

24. *Frisbie*, 157 U.S. at 165–66.

25. Hodnick v. Fidelity Tr. Co., 183 N.E. 488, 491 (Ind. Ct. App. 1932). In discussing contracts that run contrary to public policy, the Indiana Court of Appeals asserted that:

> The courts will keep in mind the principle that it is to the best interest of the public that persons should not be unnecessarily restricted in their freedom of contract and that their agreements are not to be held void as against public policy, unless they are clearly contrary to what the constitution, the legislature, or the judiciary have declared to be the public policy . . . .

Id.; ROBERT N. COVINGTON & JOSEPH A. SEINER, EMPLOYMENT LAW IN A NUTSHELL 3–4 (4th ed. 2017) (outlining that employees depend on employment for both social status and basic needs such as food, clothing, and housing); *see, e.g.*, Hall v. May Dep't Stores Co., 637 P.2d 126, 133 (Or. 1981) (discussing the general position of power that employers have over employees and the "relative dependency of the employee in the employment relationship").

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This unequal bargaining power between employers and employees is increasingly significant.[26] Twentieth century legislators enacted federal laws to mitigate the effects of this unfair relationship and to more readily protect an employee's constitutional right to be free from discrimination in the workplace.[27] Accordingly, four statutes eventually canonized the roots of federal employment law in the United States: (1) Title VII; (2) the ADEA; (3) the Americans with Disabilities Act (ADA); and (4) 42 U.S.C. § 1981 (Section 1981).[28] Since then, employment discrimination continues to be widely litigated as employers either misunderstand or disregard these essential regulations.[29] This Note focuses on the ADEA, but the recurring judicial procedure of relating the ADEA to Title VII requires a discussion of the similarities and differences between these two federal statutes, which is explored in Part II.[30]

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26. Allison E. McClure, *The Professional Presumption: Do Professional Employees Really Have Equal Bargaining Power When They Enter into Employment-Related Adhesion Contracts?*, 74 U. CIN. L. REV. 1497, 1506 (2006); Michael D. Birnhack, *Who Owns Bratz? The Integration of Copyright and Employment Law*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 95, 149–50 (2009) (asking whether it is unfair that employees often have no foothold in contracting with employers and that employers can abuse that power if left unchecked by the law).

27. WARREN FREEDMAN, THE EMPLOYMENT CONTRACT: RIGHTS AND DUTIES OF EMPLOYERS AND EMPLOYEES 56 (1989) ("Employees are protected against adverse employment action and wrongful discharge or dismissal by statutes against racial, religious, sexual, and age discrimination, inter alia, as well as against particular conduct on the part of the employer." (footnote omitted)).

28. SANDRA F. SPERINO, THE LAW OF EMPLOYMENT DISCRIMINATION § 1.01, at 2 (1st ed. 2019); *see generally* Title VII of the Civil Rights Act (Title VII) of 1964, 42 U.S.C. §§ 2000e-2000e-17; ADEA, 29 U.S.C. §§ 621-634; Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213; Section 1981 (Section 1981) of the 1866 Civil Rights Act, 42 U.S.C. § 1981.

29. FREEDMAN, *supra* note 27, at 55 ("[D]iscrimination in employment is probably the most litigated issue in employment contracts and employment relationships."); BARBARA T. LINDEMANN & DAVID D. KADUE, BUREAU OF NAT'L AFFS., INC., AGE DISCRIMINATION IN EMPLOYMENT LAW 4 (2003) ("The cost of age discrimination in terms of unused productive hours, social insurance, and welfare programs takes its toll on society at large.").

30. *See infra* Part II.

B. The Effect of a Statute of Limitations

A statute of limitations encourages both freedom of contract and promptness of legal action.[31] Establishing a limited period in which a plaintiff may assert a claim, the public policy advanced by this statutory mechanism is to free individuals from the ongoing threat of potential litigation, especially long after the alleged injury occurred.[32] However, when employees are permitted to contractually shorten the statutory time they have to bring a claim, is it proper to prioritize the employee's autonomy over protecting against an employer's superior bargaining power?[33] On one hand, a shortened time-to-file period further tips the scale of control in favor of the employer by reducing the chances of litigation and encouraging quick employment termination.[34] On the other hand, because contracts require the consent

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31. Badgett v. Fed. Express Corp., 378 F. Supp. 2d 613, 622 (M.D.N.C. 2005) (statutes of limitations reflect "the importance of the parties' freedom of contract absent clear policy to the contrary" and the underlying policy to "encourage promptness in bringing actions so as to avoid a loss of evidence from the death or disappearance of witnesses, destruction of documents, or failure of memory").

32. *Statute of Limitations*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "statute of limitations" as "[a] law that bars claims after a specified period; specif., a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued"); Ord. of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 348–49 (1944) ("Statutes of limitation . . . promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.").

33. FREEDMAN, *supra* note 27, at 3 (discussing how employment law strives to balance the individual rights of employees with employer prerogatives); Camelot Excavating Co. v. St. Paul Fire & Marine Ins. Co., 301 N.W.2d 275, 284 (Mich. 1981) (Levin, J., concurring). In *Camelot*, Judge Levin questioned whether public policy promoted by statutory limitation periods may be preempted by one party in a contract, asserting that:

> The rationale of the rule allowing parties to contractually shorten statutory periods of limitation is that the shortened period is a bargained-for term of the contract. Allowing such bargained-for terms may in some cases be a useful and proper means of allowing parties to structure their business dealings.
>
> In the case of an adhesion contract, however, where the party ostensibly agreeing to the shortened period has no real alternative, this rationale is inapplicable.
>
> . . . .
>
> Without this bargained-for element, what has occurred in practical terms is that one of the contracting parties has supplanted the period of limitation mandated by the Legislature.

Id.

34. MARC E. BERNSTEIN & SARA B. TOMEZSKO, CONTRACTUALLY SHORTENED STATUTES OF LIMITATIONS FOR EMPLOYEE CLAIMS, Westlaw (database updated Jan. 2024).

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of both parties, individual employees are free to agree to whatever terms they wish, even a shortened limitations period.[35]

When freedom of contract and public policy conflict, "the former necessarily must yield to the latter."[36] Though parties usually cannot contract to *extend* a maximum time limit established by a statute of limitations, various jurisdictions enforce contractual provisions *shortening* statutory limitation periods, provided that such provisions are reasonable given the circumstances.[37] The Supreme Court generally agrees, preserving the practice of shortening statutory time periods as a well-established option available under the freedom to contract.[38] However, the law imposes some limitations on the ability to shorten statutory periods for certain claims.[39] Enforceability of an agreement to shorten a time period may depend on the type of claim impacted.[40] Although treatment of contractually shortened statutes of limitations varies across jurisdictions in contradictory forms, courts generally uphold such clauses when (a) the "shortened time period is reasonable" and (b) "[t]he underlying statute lacks a controlling limitations period."[41]

35. FREEDMAN, *supra* note 27, at 2; Joel C. Tuoriniemi & Roger W. Reinsch, *Return to Camelot: A Statutory Model for a Judicial Examination of Employment Agreements with Shortened Period of Limitations*, 35 OHIO N.U. L. REV. 751, 787 (2009).

36. Calef v. West, 652 N.W.2d 496, 501 (Mich. Ct. App. 2002).

37. *See, e.g.*, Long v. Holland Am. Line Westours, Inc., 26 P.3d 430, 440 (Alaska 2001); Yakima Asphalt Paving Co. v. Wash. State Dep't of Transp., 726 P.2d 1021, 1023–24 (Wash. Ct. App. 1986); *see also* 15 ARTHUR CORBIN, CORBIN ON CONTRACTS § 83.8 (Murray rev. ed. 2020). A statute of limitations negotiated between two parties is not inherently against public policy because:

> Many states allow the parties to agree, prior to the accrual of a cause of action, to shorten the applicable statute of limitations. Such an agreement must provide for a reasonable time to sue. This is not contrary to public policy but rather promotes the public policy behind statutes of limitations of preventing stale claims. What is a reasonable time in this context is based on the particular circumstances of each case. At the very least, the claimant must have a sufficient opportunity to investigate and to file suit.

CORBIN, *supra* (footnotes omitted); *id.* (noting that courts generally do not allow a complete waiver or extension of the statute of limitations because the policy concerns for a complete waiver are different than those considered when the limitations period is merely shortened).

38. *See, e.g.*, Ord. of United Com. Travelers of Am. v. Wolfe, 331 U.S. 586, 608 (1947); Mo., Kan. & Tex. Ry. Co. v. Harriman, 227 U.S. 657, 672 (1913).

39. Heimeshoff v. Hartford Life & Accident Ins. Co., 571 U.S. 99, 107 (2013) (holding invalid an attempt to contractually shorten the timeframe to bring a claim specifically under a federal law regulating suit against common carriers (citing La. & W. R.R. Co. v. Gardiner, 273 U.S. 280, 284 (1927))).

40. BERNSTEIN & TOMEZSKO, *supra* note 34.

41. *Id.*

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C. The ADEA

The goal of the ADEA is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."[42] In short, the ADEA prohibits discrimination on the basis of age against employees and applicants age forty or older.[43] As the American workforce continues to age and age discrimination becomes more frequent—with contributing factors such as the rising technology gap—a clear understanding of the ADEA is essential for employees and employers alike.[44]

1. The ADEA's Self-Contained Period to File

The ADEA specifies that an employee must file a claim with the EEOC within 180 days from the time the alleged discriminatory conduct occurred.[45] In states where a "local fair employment practices agency is able to seek relief for age discrimination," the employee's filing period is deferred to either 300 days after the incident occurs or

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42. ADEA, 29 U.S.C. § 621(b).

43. LISA GUERIN & SACHI BARREIRO, THE ESSENTIAL GUIDE TO FEDERAL EMPLOYMENT LAWS 26 (5th ed. 2016); O'MEARA, *supra* note 5, at 3–4 (outlining the congressional findings that support the ADEA as the "inability of older persons to regain employment when they are displaced from jobs, the resulting long-term unemployment they experience, and the disadvantage they face because of the practice, common in 1967, of setting of arbitrary age limits regardless of potential for job performance").

44. ANDREW W. ROBERTS, STELLA U. OGUNWOLE, LAURA BLAKESLEE & MEGAN A. RABE, U.S. CENSUS BUREAU, THE POPULATION 65 YEARS AND OLDER IN THE UNITED STATES: 2016 (2018), https://www.census.gov/content/dam/Census/library/publications/2018/acs/ACS-38.pdf [https://perma.cc/TG95-7ZTG]; Chris Dolmetsch & Katharine Gemmell, *Age Discrimination Is Common, Winning Lawsuits Rare: QuickTake*, BLOOMBERG L. (Sept. 12, 2022, 10:13 AM), https://news.bloomberglaw.com/daily-labor-report/age-discrimination-is-common-winning-lawsuits-rare-quicktake [https://perma.cc/3XG6-GTRN] (presenting a 2018 study that found "56% of workers 50 or older were pushed out of longtime jobs before they chose to retire"); GUERIN & BARREIRO, *supra* note 43, at 27 ("In 2014, almost one quarter of all discrimination charges filed with the EEOC included an age discrimination claim. More than 20,000 age discrimination charges were filed each year from 2009 to 2014."); LINDEMANN & KADUE, *supra* note 29 (explaining that one reason for increased ADEA claims is the rise in technology). For example, on one hand, "[t]echnology has extended a worker's useful life." LINDEMANN & KADUE, *supra* note 29. On the other hand, technology has "disadvantaged many older workers in relation to their younger counterparts, many of whom have acquired computer skills as part of their standard education." *Id.*

45. 29 U.S.C. § 626(d)(1)(A).

thirty days after the employee receives notice of conclusion of the state proceedings, whichever is earlier.[46] These time periods have been extended by Congress several times since the ADEA's creation, and although they are not formal statutes of limitations, they function the same way.[47]

While the employee waits for the EEOC to conduct an ADEA investigation, the employee may initiate a private suit sixty days after filing the initial claim with the EEOC, regardless of whether the employee receives notice from the EEOC of their right to do so.[48] This differs from the filing process under Title VII, where claimants must wait to receive a notice of the right to sue (Right to Sue Notice) from the EEOC prior to commencing a private action.[49] However, the EEOC may, as a formality, issue a Right to Sue Notice even for ADEA claimants upon concluding its investigation.[50]

If an ADEA claimant waits to initiate private action until receiving a Right to Sue Notice, they must then file a lawsuit within ninety days after receiving the notice or the ADEA time limitation period will bar them from bringing the action.[51] The time limitations of both the

46. *Id.* § 626(d)(1)(B); LINDEMANN & KADUE, *supra* note 29, at 16.

47. LINDEMANN & KADUE, *supra* note 29, at 16. A brief history of changes to the ADEA statutory limitations period is as follows:

> Before 1991, the ADEA provided that employees had two years to sue from the date the discrimination occurred, or three years in cases of willful violations.
>
> Under the Age Discrimination Claims Assistance Act of 1988, and again in 1990, Congress extended the statute-of-limitations period for certain plaintiffs who lost their right to sue in court because of the EEOC's failure to process their charges prior to the expiration of the statute-of-limitations period.
>
> The Civil Rights Act of 1991 gave plaintiffs up to 90 days to commence a civil action after receiving notice from the EEOC that a claim has been dismissed or that EEOC proceeding have otherwise been terminated.

Id. (footnotes omitted); 4 N. PETER LAREAU, LABOR AND EMPLOYMENT LAW § 122.04(8) (Matthew Bender & Co. 2023).

48. 29 U.S.C. § 626(d)(1); COVINGTON & SEINER, *supra* note 25, at 264 (describing that the EEOC will issue a Right to Sue Notice within 180 days after determining "either that there is no probable cause to believe a violation has happened or that further attempts at conciliation are not feasible").

49. Title VII, 42 U.S.C. § 2000e-5(f)(1); EXHAUSTION OF ADMINISTRATIVE REMEDIES AND STATUTES OF LIMITATIONS UNDER EMPLOYMENT DISCRIMINATION LAWS, Westlaw (2023) [hereinafter EXHAUSTION OF ADMINISTRATIVE REMEDIES].

50. 29 U.S.C. § 626(e); *Filing a Lawsuit*, U.S. EQUAL EMP. OPPORTUNITY COMM'N [hereinafter *Filing a Lawsuit*], https://www.eeoc.gov/filing-lawsuit [https://perma.cc/7KAA-WV64].

51. 29 U.S.C. § 626(e); *Filing a Lawsuit*, *supra* note 50.

ADEA and Title VII encourage employers to cooperate with the investigation process; accordingly, employees claiming a violation of either statute must exhaust the available administrative remedies before privately suing an employer in federal court.[52]

2. ADEA Waivers and the OWBPA

Prior to 1990, employment agreements often contained provisions that altogether waived the right for employees to bring ADEA claims in certain situations, such as when employees voluntarily resign or retire.[53] Employers often negotiated a waiver of this type (sometimes a "release") when ending employment; the employee relinquished rights to bring ADEA claims after leaving the job in exchange for a benefit they otherwise would not receive, such as severance pay or a retirement bonus.[54] Courts diverged on the enforceability of such provisions, leading to the enactment of the Older Workers Benefit Protection Act (OWBPA), which establishes standards for deciding if ADEA waivers are valid.[55] Under the OWBPA, ADEA waivers are

52. EXHAUSTION OF ADMINISTRATIVE REMEDIES, *supra* note 49.

53. COVINGTON & SEINER, *supra* note 25, at 257; N. Jansen Calamita, *The Older Worker's Benefit Protection Act of 1990: The End of Ratification and Tender Back in ADEA Waiver Cases*, 73 B.U. L. REV. 639, 639–40 (1993) ("Neither the language of the ADEA nor its legislative history addressed release agreements until Congress amended the ADEA in 1990 by enacting the Older Worker's Benefit Protection Act (OWBPA). The OWBPA was the first legislation to address waivers of ADEA claims through release agreements." (footnote omitted)).

54. Calamita, *supra* note 53, at 639.

55. COVINGTON & SEINER, *supra* note 25, at 257. Despite technically being an amendment, most employment professionals refer to the OWBPA as an "act" because it not only changed then-existing language of the ADEA, but also added entirely new provisions. GUERIN & BARREIRO, *supra* note 43, at 306; Richard J. Lussier, *Title II of the Older Workers Benefit Protection Act: A License for Age Discrimination? The Problem Identified and Proposed Solutions*, 35 HARV. J. ON LEGIS. 189, 193–94 (1998) (discussing the Senate Committee's explicit statements that the policy behind the OWBPA is to prevent "unfair and abusive waiver practices," such as "(1) manipulation and coercion of older workers, and (2) waiver of ADEA rights by older workers without information necessary to assess whether their terminations were based on age").

valid if "knowing" and "voluntary."[56] Vague at best, these terms required additional fleshing out in order to be useful to the courts.[57]

Under the OWBPA, a waiver is knowing and voluntary if it: (1) is written in an agreement in a reasonably understandable way; (2) specifically refers to the ADEA; (3) does not waive claims that may arise after the waiver's date; (4) promises in exchange something of consideration to the employee; and (5) advises the employee to consult an attorney prior to signing.[58] Finally, the OWBPA offers that "[n]o waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission."[59] Even with these OWBPA requirements, the question of whether the Sixth Circuit correctly categorized the ADEA's limitation period as a substantive rather than procedural right still persists.[60]

II. ANALYSIS

Reviewing the Sixth Circuit's recent holding in *Thompson* requires an additional analysis of its decision in *Logan*. Understanding the argument in both cases provides perspective for articulating whether differing circuit and district courts should find *Thompson* persuasive.

A. Understanding Thompson *and* Logan

Thompson introduced the Sixth Circuit to an arthritic, fifty-two-year-old, African American employee who signed a

56. GUERIN & BARREIRO, *supra* note 43, at 316; O'MEARA, *supra* note 5 ("Although the ADEA contains no explicit authorization for a defense based upon an employee's waiver of rights, the courts have permitted a knowing and voluntary waiver of rights signed for adequate consideration to be a bar to suit.").

57. Shannon G. Mink, *If I Sign This Release, I Can Still Sue You Later, Right? The Current (and Future) Status of FMLA Waivers*, 37 CAP. U. L. REV. 137, 145–46 (2008) ("Ambiguities in ADEA waivers easily can run afoul of the requirement that ADEA waivers be 'knowing and voluntary.'" (quoting Jeffrey S. Klein et al., *Drafting Employment Agreements*, 745 PRACTISING L. INST., 175, 198 (2006))).

58. ADEA, 29 U.S.C. § 626(f)(1)(A)-(E).

59. *Id.* § 626(f)(4).

60. O'MEARA, *supra* note 5, at 221 (describing the ADEA statute of limitations as procedural).

"Handbook Acknowledgement" as part of her new hire paperwork.[61] This acknowledgement purported to waive the employee's right to sue if she did not bring the suit within six months of the date of the event giving rise to the claim.[62]

The employee filed a charge with the EEOC five days after being fired, claiming wrongful termination based on her age.[63] Although the employee could have brought a private age discrimination suit sixty days after filing the EEOC charge, she waited 398 days to allow the EEOC to complete its investigation.[64] Once the employee received a Right to Sue Notice, she waited another eighty-seven days, just three days shy of the ninety-day statutory limitations period, to bring private suit against her former employer.[65] The employer argued that the six-month limitation in the handbook acknowledgement prevented the employee from suing because 485 days passed from the date of her termination.[66]

During the *Thompson* trial proceedings, the Sixth Circuit issued its decision in *Logan*, a case that asked "whether Title VII's statute of limitations may be contractually shortened," and which proved highly influential in the outcome of *Thompson*, despite a difference in the underlying cause of action.[67] In *Logan*, an employee's acceptance of job application conditions held her to a six-month limitation on bringing any claim or lawsuit against her employer.[68] Two hundred

61. Thompson v. Fresh Prods., LLC, 985 F.3d 509, 514–15 (6th Cir. 2021).

62. *Id.* at 515. The provision also explicitly stated it would apply regardless of any statute of limitations to the contrary. *Id.*

63. *Id.* at 517–18.

64. *See id.* at 518; LAREAU, *supra* note 47, § 122.04(3).

65. *Thompson*, 985 F.3d at 518; ADEA, 29 U.S.C. § 626(e).

66. *Thompson*, 985 F.3d at 518–19.

67. *Id.* at 519. *Logan* presented only a question of employment discrimination under Title VII, whereas the plaintiff in *Thompson* alleged discrimination not only under Title VII but also the ADA and the ADEA. Logan v. MGM Grand Detroit Casino, 939 F.3d 824, 825 (6th Cir. 2019); *Thompson*, 985 F.3d at 518.

68. *Logan*, 939 F.3d at 825. The full clause in the application reads as follows:

> I agree that any claim or lawsuit arising out of my employment with, or my application for employment with, MGM Grand or any of its subsidiaries must be filed no more than six (6) months after the date of the employment action that is the subject of the claim or lawsuit.

sixteen days after voluntarily resigning due to alleged sex discrimination, the employee filed a claim with the EEOC.[69] The employee waited as required under Title VII for the EEOC to complete its investigation, received a Right to Sue Notice, and 440 days after resigning, sued her former employer in federal court.[70]

Although the district court deciding *Logan* held that the contractual limitation period had expired and barred the suit, the Sixth Circuit reversed.[71] The Sixth Circuit asserted that a contract could not supersede the Title VII statutory time to file because this federal law enforces a detailed pre-suit process that must be followed before litigation may begin, and "alteration of this process abrogates substantive rights and contravenes Congress's uniform nationwide legal regime for Title VII lawsuits."[72]

1. *The Title VII Pre-Suit Process*

The Sixth Circuit's conclusion in *Logan* regarding the pre-suit process emphasized the unique administrative enforcement scheme of Title VII.[73] After a claim is filed, the investigation period allows the EEOC an opportunity to facilitate settlement through "informal methods of conference, conciliation, and persuasion" before the

> While I understand that the statute of limitations for claims arising out of an employment action may be longer than six (6) months, I agree to be bound by the six (6) month period of limitations set forth herein, and I WAIVE ANY STATUTE OF LIMITATIONS TO THE CONTRARY.

Id. at 826.

69. *Id.* at 826. Like an ADEA claimant, a Title VII claimant must file with the EEOC either 180 days (or 300 days in deferral states) after the event giving rise to the claim. Title VII, 42 U.S.C. § 2000e-5(e).

70. *Logan*, 939 F.3d at 826. Unlike the employee in *Thompson* who freely brought suit for her ADEA claim sixty days after filing, the employee in *Logan* did not have the choice to sue before receiving a Right to Sue Notice from the EEOC for her Title VII claim. 29 U.S.C. § 626(d)(1); Title VII, 42 U.S.C. § 2000e-5(f)(1).

71. *Logan*, 939 F.3d at 826.

72. *Id.*

73. *Id.* at 827–31; *see also id.* at 828 ("Unlike other anti-discrimination laws, Title VII does not merely provide wronged employees with damages remedies.").

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claimant may file a lawsuit in federal court.[74] The court reasoned that allowing parties to shorten the statutory time that an employee has to bring private suit for Title VII claims risks also shortening the EEOC's investigation period, in direct opposition to congressional intent.[75] Finding this reasoning persuasive, the *Thompson* court extrapolated the administrative justification to protect the pre-suit processes of the ADEA and the ADA.[76]

If these employment laws are unique because they use informal conference methods to encourage correction of non-compliant action, then opposition to shortened time periods is logical.[77] Both the ADEA and Title VII state that the EEOC will attempt to effectuate employer compliance during the investigation period; cutting that investigation short would arbitrarily limit the chance of mitigating unnecessary litigation.[78] However, there is a notable difference in this rationale when considering the ADEA. Where claimants under Title VII *must* receive a Right to Sue Notice before they can file in federal court (generally allowing the EEOC 180 days to investigate), the ADEA only requires that the claimant wait to file a suit until sixty days after

74. 42 U.S.C. § 2000e-5(b). Although a Title VII claimant may request a Right to Sue Notice from the EEOC 180 days after filing a claim, the EEOC is not required to complete its investigation within a certain period of time. *Frequently Asked Questions*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/youth/frequently-asked-questions#Q7 [https://perma.cc/X92V-7FH6]. This unlimited investigation period demonstrates Congress's desire for the EEOC to complete a thorough review despite how long it may take and honors Congress's intent to make "[c]ooperation and voluntary compliance" the "preferred means" for ensuring "equality of employment opportunities." Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974).

75. *Logan*, 939 F.3d at 829 ("Any alterations to the statutory limitation period necessarily risk upsetting this delicate balance, removing the incentive of employers to cooperate with the EEOC, and encouraging litigation that gives short shrift to pre-suit investigation and potential resolution of disputes through the EEOC and analog state and local agencies.").

76. Thompson v. Fresh Prods., LLC, 985 F.3d 509, 520–21 (6th Cir. 2021) (stating the ADEA is "like Title VII in all the respects that the *Logan* court deemed significant"). It is true that the ADEA incorporates almost verbatim the text of Title VII regarding the EEOC's use of "informal methods" to resolve disputes. ADEA, 29 U.S.C. § 626(d)(2) ("[T]he Commission shall . . . promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.").

77. LEX K. LARSON & KIM H. HAGAN, 8 LARSON ON EMPLOYMENT DISCRIMINATION § 140.02 (2d ed., Matthew Bender & Co. 2023) (reinforcing that the purpose of the waiting time period is to encourage informal resolution, known as the conciliation process, through the EEOC).

78. 29 U.S.C. § 626(d)(2); 42 U.S.C. § 2000e-5(b).

https://readingroom.law.gsu.edu/gsulr/vol40/iss3/11

filing a complaint with the EEOC; under the ADEA, no Right to Sue Notice is required.[79]

2. *The Title VII Self-Contained Limitations Period*

Another crucial component of the *Logan* court's pre-suit process argument centered on treating Title VII's self-contained limitation period as a substantive rather than procedural right.[80] Recognizing that statutes of limitations traditionally are regarded as "procedural mechanisms," the *Logan* court relied on Supreme Court precedent from 1904 to assert that an exception may exist where a statute "creates a new liability, and in the same section or in the same act limits the time within which it can be enforced."[81] Because Title VII creates the right to sue for sex-based employment discrimination and contains a time limitation for bringing such claims, the Sixth Circuit found the limitation period to be a substantive right.[82] The *Thompson* court analogized this argument to the ADEA, finding that the limitations period within the ADEA is similarly substantive and cannot be prospectively waived.[83]

With longstanding precedent from the Supreme Court regarding the substantive force of statutes of limitations in this context, the question remains as to what reasoning other courts have employed in ruling to the contrary.[84] In 1995, the Eighth Circuit characterized the ADEA limitations period as procedural in two cases asserting that the "ADEA

79. *What You Can Expect After You File a Charge*, U.S. EQUAL EMP. OPPORTUNITY COMM'N [hereinafter *After You File a Charge*], https://www.eeoc.gov/what-you-can-expect-after-you-file-charge [https://perma.cc/STV9-V2ZL]; Grayson v. K Mart Corp., 79 F.3d 1086, 1100 (11th Cir. 1996) ("Unlike Title VII, the ADEA does not require that the plaintiff first receive a [R]ight to [S]ue [N]otice from the EEOC prior to commencing suit."); Julian v. City of Houston, 314 F.3d 721, 726 (5th Cir. 2002) ("Although [Section 626(e)] establishes a ninety-day limitations period for the ADEA complainant who actually receives notice from the EEOC, it does not require a complainant to receive such notice before filing suit.").

80. *Logan*, 939 F.3d at 829.

81. *Id.* (quoting Davis v. Mills, 194 U.S. 451, 454 (1904)).

82. *Id.*

83. Thompson v. Fresh Prods., LLC, 985 F.3d 509, 521 (6th Cir. 2021).

84. LARSON & HAGAN, *supra* note 77, § 141.02 (discussing how, in conflict with *Thompson*, some courts "have upheld contract provisions limiting the time period for bringing employment-related lawsuits, including ADEA actions").

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statute of limitations is 'intended to serve as a conventional limitation on the remedy, not upon the right to bring the action.'"[85] In the same year, the Second Circuit refused to treat the ADEA limitations period as a substantive right because the time limit provided solely a rule of procedure secondary to the primary right to bring suit.[86] Two years later, the Eleventh Circuit adopted this same thinking. The Eleventh Circuit did not find "any persuasive authority" for characterizing the limitations period as substantive, and more recently, the Northern District Court of Georgia offered that "it is *not* evident" that the Eleventh Circuit would agree with the Sixth Circuit's holding in *Thompson*.[87]

These decisions conceivably are the product of creative interpretation of Supreme Court precedent in an area where the line between substance and procedure is already blurred.[88] Lawyers, judges, and legal scholars alike have long struggled to clearly define the difference between these two categories of law.[89] This is partly attributable to the amorphous nature of the terms; "substance" and "procedure" have at times been used interchangeably and now, according to the Supreme Court, "precisely describe very little except a dichotomy."[90] In *Sun Oil Co. v. Wortman*, the Court further expounded that the words themselves "do not have a precise content,

85. Anderson v. Unisys Corp., 52 F.3d 764, 765 n.1 (8th Cir. 1995) (quoting Mumbower v. Callicott, 526 F.2d 1183, 1187 n.5 (8th Cir. 1975)); Garfield v. J.C. Nichols Real Est., 57 F.3d 662, 665 (8th Cir. 1995).

86. Vernon v. Cassadaga Valley Cent. Sch. Dist., 49 F.3d 886, 890 (2d Cir. 1995) ("The conduct to which the statute of limitations applies is not the primary conduct of the defendants, the alleged discrimination, but is instead the secondary conduct of the plaintiffs, the filing of their suit.").

87. Browning v. AT&T Paradyne, 120 F.3d 222, 225 (11th Cir. 1997); Smith v. Int'l Bus. Machs. Corp., No. 21-CV-03856-JPB, 2022 U.S. Dist. LEXIS 95934, at *15 n.8 (N.D. Ga. May 27, 2022).

88. *See* Boaz v. FedEx Customer Info. Servs., Inc., 725 F.3d 603, 606 (6th Cir. 2013) ("[T]he distinction between procedural and substantive rights is notoriously elusive.").

89. Albert Kocourek, *Substance and Procedure*, 10 FORDHAM L. REV. 157, 158–59 (1941) ("It is no easy task to state with precision the exact nature of the distinction between substantive law and the law of procedure . . . ." (quoting JOHN SALMOND, JURISPRUDENCE § 172 (9th ed. 1937))); *see also id.* at 160–61 (presenting various theoretical arguments of Jeremy Bentham ("'substance' and 'procedure' can be clearly and sharply separated"), John Salmond (the separation is clear in theory but dissolves upon practical application), Charles Chamberlayne (no distinction exists), and Walter Wheeler Cook (a difference may exist, but "many problems fall into a 'twilight' zone")).

90. Sun Oil Co. v. Wortman, 486 U.S. 717, 726 (1988).

even (indeed especially) as their usage has evolved."[91] Instead, case law supports that each word's meaning entirely depends on applied inflection and the context in which used.[92]

Within the specific context of time limitations, the distinction between procedure and substance is similarly blurred. On one hand, the Court discusses that limitations of time should be treated as directly interfering with a plaintiff's available remedy.[93] On the other hand, the Court acknowledges that the constitutional framers and society at large did not consider a statute of limitations as a substantive right, but rather as a procedural mechanism designed to ensure fairness to defendants.[94] The Sixth Circuit in *Logan* suggests that a statutory limitation period should fall "on the substantive side of the ledger" when the federal law creating the private right to sue sets forth the limitation period.[95]

There is substantial support for this position.[96] Most recently, the Supreme Court affirmatively reinforced the relatedness of Title VII and the ADEA and, although not specifically discussing shortening time limitations, stated that "a substantive waiver of federally protected civil rights will not be upheld."[97] Therefore, if the Court can classify the self-contained time limitation within the ADEA as part of the federal anti-discrimination right, then it may not use prospective

91. *Id.* at 726–27 (describing the unclear dichotomy drawn between "substance" and "procedure" and that what the words "mean in a particular context is largely determined by the purposes for which the dichotomy is drawn").

92. *Id.* at 726.

93. Davis v. Mills, 194 U.S. 451, 454 (1904) ("[C]ourts have been willing to treat limitations of time as standing like other limitations and cutting down the defendant's liability wherever [they are] sued.").

94. *Sun Oil Co.*, 486 U.S. at 726; Burnett v. N.Y. Cent. R.R. Co., 380 U.S. 424, 428 (1965).

95. Logan v. MGM Grand Detroit Casino, 939 F.3d 824, 831 (6th Cir. 2019).

96. *See, e.g.*, Barfield v. Fed. Express Corp., 351 F. Supp. 3d 1041, 1051–52 (S.D. Tex. 2019) (upholding a contractual limitations period for employee's ADEA claim because, although it procedurally shortened the available timeframe, the contract did not entirely prevent the employee from filing a substantive suit). *But see* Wineman v. Durkee Lakes Hunting & Fishing Club, Inc., 352 F. Supp. 2d 815, 823 (E.D. Mich. 2005) (refusing to enforce contractual a limitations period under FLSA); Mazurkiewicz v. Clayton Homes, Inc., 971 F. Supp. 2d 682, 689, 691 (S.D. Tex. 2013) (holding that contractual limitations periods are unenforceable against claims that require a Right to Sue Notice from the EEOC); *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1188 (1950) (discussing how "a statute which creates a cause of action . . . [and] includes its own limitation[s]" is generally considered "a substantive time limit").

97. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 273 (2009); *see also id.* at 276 (Stevens, J., dissenting) ("[T]he purposes and relevant provisions of Title VII and the ADEA are not meaningfully distinguishable . . . .").

waiver to sever the limitation from the statute's other substantive provisions.[98]

This question of classification is the fundamental issue presented in *Thompson*. To deduce a sufficient answer as to whether the ADEA statutory time period is substantive or procedural, an in-depth analysis must address whether shortening the time period to bring an ADEA claim through a contractual agreement infringes on the "statutory right to be free from workplace age discrimination."[99] Interestingly, the Sixth Circuit's *Thompson* opinion only briefly mentions this in a four-sentence gloss over the ADEA's waiver provision.[100] The court references the waiver language added to the ADEA through the OWBPA, noting that any valid waiver must be knowing and voluntary, and further offering that a waiver does not meet those criteria if it is prospective.[101] However, shortening the time limit to bring an ADEA claim, rather than prospectively waiving the entire right to do so, arguably does not dissolve the claimant's inherent right to be free from workplace discrimination. Instead, it requires the claimant to pursue claims subject to that right within a timely manner.

Should an employee and employer contractually agree to a limitations period one day shorter than as provided under the ADEA, there is little argument that the claimant's statutory right to sue is substantially diminished; the employee loses the ability to file a claim just one day sooner than provided by statute. Nevertheless, the Supreme Court provides that the OWBPA supersedes general principles of contract law, placing the federal statute's public policy above notions of individual autonomy and authority in private negotiations.[102] While addressing whether a complete release of ADEA claims met the specific OWBPA waiver requirements in *Oubre v. Entergy Operations, Inc.*, the Court explained that the statutory purpose of the knowing and voluntary standard "imposes affirmative

98. *Id.* at 265 (majority opinion).

99. *Id.*

100. Thompson v. Fresh Prods., LLC, 985 F.3d 509, 521 (6th Cir. 2021).

101. *Id.* ("A waiver may not be 'knowing and voluntary' if it includes wavier of 'rights or claims that may arise after the date the waiver is executed.'" (quoting ADEA, 29 U.S.C. § 626(f)(1)(C))).

102. Oubre v. Entergy Operations, Inc., 522 U.S. 422, 427 (1998).

duties of disclosure and waiting periods" and refused to entertain any variations on this principle.[103]

Despite the Court's strict interpretation of the OWBPA's statutory scheme in *Oubre*, lower courts have still upheld both a shortened ADEA time period and complete waivers of ADEA claims alike.[104] In *Barfield v. Federal Express Corp.*, the U.S. District Court for the Southern District of Texas decided over twenty years after *Oubre* to uphold a shortened limitations period in an employee's contract agreement.[105] The employee argued that the provision was "contrary to the weight of law and public policy" and was accordingly unenforceable.[106] This decision in *Barfield* came several months prior to *Logan*, allowing the *Logan* court an opportunity to consider the district court's persuasive—albeit, nonbinding—opinion.[107]

The district court arrived at its *Barfield* conclusion using the Supreme Court opinion in *Order of United Commercial Travelers of America v. Wolfe*; the district court interpreted that precedent as allowing reasonable shortened time limits for the ADEA.[108] The court

103. *Id.* ("The OWBPA governs the effect under federal law of waivers or releases on ADEA claims and incorporates no exceptions or qualifications. The text of the OWBPA forecloses the employer's defense, notwithstanding how general contract principles would apply to non-ADEA claims.").

104. *Id.* The Court sought to honor congressional intent in its application of the OWBPA:

> The OWBPA implements Congress' policy via a strict, unqualified statutory stricture on waivers, and we are bound to take Congress at its word. Congress imposed specific duties on employers who seek releases of certain claims created by statute. Congress delineated these duties with precision and without qualification: An employee "may not waive" an ADEA claim unless the employer complies with the statute. Courts cannot with ease presume ratification of that which Congress forbids.

Id. It is unclear whether any authority distinguishes between a clause that shortens the time to file an ADEA claim and a clause that entirely forfeits the right to bring an ADEA claim at any time. *See* discussion *infra* Part III.

105. Barfield v. Fed. Express Corp., 351 F. Supp. 3d 1041, 1044–45 (S.D. Tex. 2019). The relevant language of the employment agreement reads as follows:

> To the extent the law allows an employee to bring legal action against Federal Express Corporation, I agree to bring the complaint within the time prescribed by law or 6 months from the date of the event forming the basis of my lawsuit, whichever expires first. . . .
> . . . I have read this entire Agreement, which consists of 2 pages, and I thoroughly understand the content . . . .

Id.

106. *Id.* at 1049.

107. Logan v. MGM Grand Detroit Casino, 939 F.3d 824, 824 (6th Cir. 2019).

108. *Barfield*, 351 F. Supp. 3d at 1049; Ord. of United Com. Travelers of Am. v. Wolfe, 331 U.S. 586, 608 (1947).

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then characterized the six-month time limitation proposed in *Barfield* as reasonable because the employee still could have filed suit just sixty days after submitting a claim to the EEOC and failed to do so.[109] In *Barfield*, the court made a clear distinction between the administrative process of the ADEA and Title VII, refusing to interpret the former through the lens of the latter.[110]

The *Logan* court also acknowledged *Wolfe* in its opinion but distinguished the circumstances of *Wolfe* (waiver of state law claims) from those of *Logan* (waiver of federal law claims).[111] Cases such as *Barfield*, *Logan*, and *Thompson* demonstrate the inconsistent application of the ADEA when it comes to time limitation periods. Resolving this discrepancy may turn on using uniform statutory interpretation to more accurately honor Congress's purpose for enacting the ADEA and its waiver language.[112]

III. Proposal

Resolving the disparate treatment of ADEA time limitation clauses requires definitive action that may be taken in one of two ways.[113] The

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109. *Id.* at 1050–51. The court acknowledged the differences between the ADEA, Title VII, and Section 1981 limitation periods:

> Plaintiff's claim is brought under the ADEA, a federal statute with an exhaustion requirement that falls somewhere in between Section 1981, which contains no exhaustion requirement, and Title VII, under which a complainant may bring a claim in federal court only after receiving a right-to-sue notification from the EEOC . . . .
>
> . . . Considering the statutory language and the practical effects of the limited administrative process required before a complainant may bring suit, a contractual six-month limitations period is reasonable in the context of an ADEA claim.

Id.

110. *Id.* at 1051 n.44 (discussing that the "procedural scheme of Title VII claims . . . differs materially from the procedural requirements for an ADEA claim").

111. *Logan*, 939 F.3d at 834–35 (refusing to apply *Wolfe* to Title VII claims because the case addresses only whether state, rather than federal, antidiscrimination laws may be contractually shortened by reasonable agreement).

112. *See* Adam Bain & Ugo Colella, *Interpreting Federal Statutes of Limitations*, 37 CREIGHTON L. REV. 493, 523 (2004) ("Applying statutes of limitations to the facts of a particular case therefore becomes a quintessential exercise of statutory interpretation.").

113. Although the legislative and the judicial branches have demonstrated "a great deal of activity"

most effective method is for Congress to amend the ADEA's ambiguous waiver language to clarify whether a clause shortening the time to file is considered a prospective waiver. In the absence of legislative action, the judiciary should unify in interpreting the ADEA's statute of limitations as a non-waivable, substantive right.

A. ADEA Waivers Reconsidered

The OWBPA provided much needed guidance on whether an employee may agree to waive the right to bring a claim under the ADEA.[114] The Senate Committee predicted that employers would likely abuse ADEA waivers if no standards existed to guard the statutory protections afforded by the Act.[115] However, it is not clear that, in enacting the OWBPA, Congress considered or intended to address an agreement that shortens—rather than entirely removes—the statutory time to file suit.[116] The statute fails to explicitly define "waive" or "waiver," so employers, employees, and the EEOC must rely on other evidence to determine what type of clause falls into this category.[117] Allowing for discretion in making this determination undermines the OWBPA's purpose of preventing unfair and abusive waiver practices; what one employer or court considers to be a waiver may not align with other possible interpretations.[118] Discretion also

regarding efforts to clarify whether and when ADEA claims are valid, the lack of definitive action from either power continues to contribute to the confusion and differential treatment among courts. *See* Lisa M. Imbrogno, *Can You Have Your Cake and Eat It Too? Ratification of Releases of ADEA Claims*, 20 FORDHAM URB. L.J. 311, 317 (1993).

114. Judith Droz Keyes & Douglas J. Farmer, *Settlement of Age Discrimination Claims—The Meaning and Impact of the Older Workers Benefit Protection Act*, 12 LAB. L. 261, 261 (1996).

115. Lussier, *supra* note 55; *see also* Birnhack, *supra* note 26.

116. *See* Keyes & Farmer, *supra* note 114, at 268 (discussing generally the ambiguities and confusion around waivers of ADEA claims).

117. *See id.* (discussing lawyers' confusion in interpreting the ambiguous use of the word "waiver"); ADEA, 29 U.S.C. § 626(f); Imbrogno, *supra* note 113.

118. *See* Lussier, *supra* note 55. For example, an employer may successfully include a clause in a severance agreement that prevents the employee from bringing an ADEA claim at any time, as long as the clause complies with the statute's waiver requirements. Another employer may argue that a clause shortening the time to bring an ADEA claim is not a waiver at all because the employee does not completely abandon the right to bring a private action and, therefore, the clause need not meet the knowing and voluntary requirements.

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frustrates uniform application of federal anti-discrimination law, which should protect all employees in the same way.[119]

The knowing and voluntary standard of the OWBPA sets forth that a waiver will be valid if, among other requirements, it does not preemptively waive claims that arise after the execution of the waiver.[120] Most often, this arises in the context of termination agreements where an employee agrees not to bring any ADEA claims in exchange for severance compensation.[121] But, when an employee signs *pre*-employment paperwork that shortens the time to bring an ADEA claim, certainly the employee preemptively releases any age discrimination claims that may arise at any point thereafter.[122] If an employer effectively argues that this clause is not a waiver as described by the law, however, then the clause does not violate the statute.

Because the meaning is not clear from the plain words of the statute, a review of legislative history provides evidence of Congress's specific intent in enacting the OWBPA.[123] While reviewing the OWBPA, the Senate Committee affirmatively stated that the amendment's waiver requirements must be "strictly interpreted to protect those individuals covered by the Act."[124] Although specifically concerned with settlement agreements, the Committee also stated that it is "a basic principle of fairness" that employees should not even have the option to waive prospective claims.[125] In contrast, the Committee asserted that no "waiver agreement" may interfere with the public interest in preventing age discrimination in the workplace but that an employee is free to waive the right to recover in a private lawsuit.[126]

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119. Thompson v. Fresh Prods., LLC, 985 F.3d 509, 521 (6th Cir. 2021).

120. 29 U.S.C. § 626(f)(1)(C).

121. Calamita, *supra* note 53, at 639.

122. *See Thompson*, 985 F.3d at 521 (arguing that the ADEA's waiver provision supports the conclusion that the limitations period is a substantive right because prospective waivers cannot be knowing or voluntary).

123. William N. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT L. REV. 365, 369–70 (1990).

124. S. REP. NO. 101-263, at 22 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 1509, 1537. The report also mentions that the Committee included the knowing and voluntary requirements "with the intent of according basic due process protections to employees who are asked to execute waivers." *Id.*

125. *Id.* at 1538.

126. *Id.* at 1541.

These contradictory statements unfortunately provide no clarity, demonstrating exactly why courts are struggling to determine the validity and permissible scope of ADEA waivers. Although the Committee seemed to emphasize the importance of protecting the public interest in the ability to bring suit under the ADEA, it is not clear whether it specifically intended the language to also apply to ADEA private causes of action or to any type of clause other than a complete release of claims.[127] For this reason, the most effective resolution to the current confusion regarding this waiver language is for Congress to amend the OWBPA to clarify its legislative intent and the purpose of this statute.[128]

Considering the strong arguments in favor of protecting public and private interests alike, the proposed amendment should directly address: (1) whether a clause shortening the statutory timeframe to bring private suit for an ADEA claim is a valid waiver; (2) if so, whether the shortened timeframe is subject to any limitations; and (3) whether the shortened timeframe must comply with the knowing and voluntary requirements currently in place for other ADEA waivers.

B. Procedural or Substantive

Absent direct modification of the existing law, there remains the second hurdle of determining what effect the ADEA's statute of limitations has on a claimant's inherent right to bring suit. Even if an employer successfully argues that a clause shortening the statutory time frame does not violate the statute *per se*, the employer must still demonstrate that the statutory period to bring an ADEA claim is merely a procedural mechanism and not a substantive right.[129]

127. *See id.* at 1537, 1538, 1541.

128. *Cf.* NCNB Tex. Nat'l Bank v. Cowden, 895 F.2d 1488, 1500 (5th Cir. 1990) ("Indeed, a legislative body may amend statutory language 'to make what was intended all along even more unmistakably clear.'" (quoting United States v. Montgomery County, 761 F.2d 998, 1003 (4th Cir. 1985))).

129. Myers v. Alvey-Ferguson Co., 331 F.2d 223, 224 (6th Cir. 1964) ("If the statute creating a cause of action also fixes a limitation of time in which an action may be brought, the limitation is regarded as a part of the substantive law of the cause of action . . . .").

Although the Sixth Circuit in *Thompson* arguably reached the correct conclusion that an employee's time to file under the ADEA is a non-waivable, substantive right,[130] it employed the wrong justification to get there.

1. Clarification Using Statutory Amendment

The *Thompson* court emphasized that the statutory time period of the ADEA should not be shortened because it largely mirrors the language of Title VII, and the Sixth Circuit had previously held that the statutory time period of Title VII is a substantive right that cannot be waived.[131] Although it is true that the ADEA borrows both substantive and procedural terms from Title VII, comparing the functions of the statutory timeframes demonstrates substantial differences that cannot be overlooked.[132] Of primary significance are the ADEA's distinctive waiting periods and right to sue procedures. While Title VII requires a claimant to wait to receive a Right to Sue Notice before filing private action, a claimant under the ADEA need only wait sixty days after filing with the EEOC to bring a case in federal court.[133] Under the ADEA, the EEOC cannot prevent a claimant from filing after sixty days pass regardless of its determination regarding whether the employer likely violated the ADEA.[134] If Congress intended for the statutory time periods of the ADEA and Title VII to operate similarly as substantive rights, then it would not have drawn this distinction.

Consider Claimant A and Claimant B who both signed pre-employment agreements limiting their time to bring private suit for employment discrimination to four months. Both claimants experienced events giving rise to a Title VII and an ADEA claim,

130. Thompson v. Fresh Prods., LLC, 985 F.3d 509, 521 (6th Cir. 2021).

131. *Id.* at 519–21.

132. Lorillard, Div. of Loew's Theatres, Inc. v. Pons, 434 U.S. 575, 584 (1978). Title VII and the ADEA are not the same law, and there are reasons to avoid interpreting them the same way. *See* Go, *supra* note 11, at 1044–45 ("The differences between the ADEA and Title VII's policies, congressional purposes, and substantive statutory provisions outweigh the fact that both statutes use nearly identical language.").

133. Title VII, 42 U.S.C. § 2000e-5(f)(1); ADEA, 29 U.S.C. § 626(d)(1).

134. 29 U.S.C. § 626(d)(1); *After You File a Charge*, *supra* note 79.

respectively, and both must file an EEOC claim within 180 days of the event.[135] If Claimant A files their Title VII claim with the EEOC on day one, they must wait until the EEOC issues a Right to Sue Notice before bringing a private cause of action.[136] The EEOC currently reports that investigations require on average ten months to complete, but claimants can request a Right to Sue Notice after 180 days.[137] While Claimant A endures the mandatory waiting period, their four-month timeframe to bring private suit will likely expire before receiving a Right to Sue Notice and their private claim will forever be barred due to the conflict of the private contract agreement and the required administrative controls of Title VII. This implicates the substantive right of freedom from employment age discrimination by removing the employee's protection of legal redress.

Comparatively, if Claimant B files their ADEA claim with the EEOC on day one, Claimant B may bring suit in federal court sixty days later, regardless of whether the EEOC has finished its investigation or issued a Right to Sue Notice.[138] No conflict exists between the administrative requirements of the ADEA and the private agreement to shorten the time to bring suit in federal court. The statutory time to file merely functions as a procedural mechanism.

Nonetheless, it is just as easy to contemplate that an agreement with a timeframe less than sixty days would create a conflict. If Claimant B agreed to a thirty-day period to file, Claimant B's ability to bring private suit vanishes while they are required by the ADEA to wait at least sixty days before filing. Thus, I propose that a clause shortening the ADEA timeframe to bring a private cause of action is valid if longer than sixty days from the time a claim is filed with the EEOC. For this approach to work effectively, it is essential that the time limitation begins from the date the claim is filed rather than from the date giving rise to the claim. In doing so, a limitation only prevents the

135. 42 U.S.C. § 2000e-5(e)(1); 29 U.S.C. § 626(d)(1)(A). This hypothetical example assumes that the claimants do not reside within a deferral state that would alternatively allow 300 days to file claims with the EEOC. *See* 29 U.S.C. § 626(d)(1)(B).

136. *After You File a Charge*, *supra* note 79.

137. *Id.*

138. 29 U.S.C. § 626(d)(1).

claimant from waiting too long after filing with the EEOC to bring private suit and in no way infringes on the statutory waiting period allotted for the mandatory investigation process. If it finds the proposed method appropriate, Congress should abundantly emphasize the policy distinctions in allowing shortened filing time periods for the ADEA from not allowing such for Title VII.

2. *Clarification Using Judicial Unification*

In the absence of legislative action, the judiciary should clarify this issue and uniformly find that the ADEA time limitation is a non-waivable, substantive right. However, its finding should be specifically based on binding Supreme Court precedent regarding the protection of federal statutory time periods, rather than the ADEA's similarities to Title VII.[139] In *Davis v. Mills*, the Court affirmatively stated that a time period contained within a statute that also creates a cause of action is a substantive right and should be treated differently from laws of procedure.[140] The Supreme Court affirmed this finding again in *Oubre* through the lens of ADEA waivers.[141] The Sixth Circuit rightly explored this precedent in *Thompson*; it found that the ADEA creates a new liability (employment age discrimination) and includes a self-contained limitation period.[142] The Sixth Circuit also emphasized that changing this time limitation affects the right to sue under the ADEA and "risks undermining the statute's uniform application and frustrating efforts to foster employer cooperation."[143]

139. *See* Davis v. Mills, 194 U.S. 451, 454 (1904); *see also* Oubre v. Entergy Operations, Inc., 522 U.S. 422, 427 (1998); *supra* notes 93–103.

140. *Davis*, 194 U.S. at 454 (holding that "ordinary limitations of actions are treated as laws of procedure . . . affecting the remedy only and not the right" but that limitations of time "where a statute creates a new liability and in the same . . . act limits the time within which it can be enforced" inappropriately "cut[] down the defendant's liability wherever [they are] sued").

141. *Oubre*, 522 U.S. at 427. The Supreme Court did not hesitate in finding the OWBPA's policy (to implement Congress's "strict, unqualified statutory stricture on waivers") straightforward. *Id.* The Court also distinguished this statutory mechanism as separate from the protections of general principles of contract law. *Id.*

142. Thompson v. Fresh Prods., LLC, 985 F.3d 509, 520–21 (6th Cir. 2021).

143. *Id.*

Thus, the limitations period is "part of the substantive law of the cause of action created by the ADEA."[144] This logical analysis—rooted in binding Supreme Court precedent—is dispositive.[145] The Sixth Circuit erred in failing to recognize this as the singular reasoning for its holding in *Thompson*. When presented with the same issue of whether the ADEA statutory time period may be contractually shortened, district and circuit courts should look no further than the guidance provided in *Davis* and *Oubre* to answer the question in the negative; invalidating shortened time limits of ADEA claims aligns with binding Supreme Court precedent. In taking up a unified position with the correct justification, the judiciary would specify clear guidance and provide Congress with the opportunity to either affirm this interpretation by inactivity or to refute it by passing legislation to otherwise define its intent.

CONCLUSION

Without explicit clarification, district and circuit courts will continue to reach contradictory conclusions regarding whether the statutory time period for bringing ADEA claims may be shortened in private employment agreements. The ADEA's language does little to assist because it fails to define "waiver" and fails to explain whether the statutory time period is substantive or merely procedural. The Sixth Circuit became the first circuit court to take up this issue, and it reached the correct conclusion but used the wrong reasoning. Unless Congress acts to amend the ADEA or the judiciary employs a uniform interpretation based on Supreme Court precedent, the issue will continue to be misconstrued and misapplied. Accordingly, this ambiguity threatens to swallow the public and private interest in

144. *Id.*

145. 18 JAMES WM. MOORE, DANIEL R. COQUILLETTE, GREGORY P. JOSEPH, GEORGENE M. VAIRO & CHILTON DAVIS VARNER, MOORE'S FEDERAL PRACTICE - CIVIL § 134.02(2) (3d ed., Matthew Bender & Co. 2023) ("State and federal courts owe obedience to the decisions of the Supreme Court of the United States on questions of federal law, and a judgment of the Supreme Court provides the rule to be followed in all such courts.").

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preserving the right to bring ADEA claims as established by federal law.[146]

146. Eileen Silverstein, *From Statute to Contract: The Law of the Employment Relationship Reconsidered*, 18 HOFSTRA LAB. & EMP. L.J. 479, 482 (2001) (discussing that, in a move from "statute to contract," the effectiveness of employment federal regulation is "disappearing under the cloak of judicial decisions upholding contracts which . . . find individuals to have waived their and the public's statutory rights").

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