ROBERT BROOKINS
LABOR ARBITRATOR ◆ PROFESSOR OF LAW ◆ J.D. ◆ PH. D.

September 16, 1999

Ms. Leslie Jenkins
Arbitrator Scheduler
Division of Human Resources
Office of Collective Bargaining
106 N. High Street, 7th Floor
Columbus, OH 43215-3009

Grievance # (15-00-980503-0061-04-01)
Grievance # (15-00-980503-0062-04-01)
Grievant, Trooper Bruce E. Cornett
Grievant, Trooper Mike D. Meyers
Union: OSTA
Employer: Ohio State Highway Patrol

Dear Ms. Jenkins:

Please find the enclosed the Arbitrator's opinion and award in the captioned matter. Thanks for the opportunity to serve you.

Sincerely,

Robert Brookins

Robert Brookins

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#1390

OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN
The Ohio Department of Public Safety, Aviation Section of State Highway Patrol
-AND-
Ohio State Troopers Association, Unit 1

For Aviation Division

Sergeant Randy A. Boggs
Sergeant Charles J. Linek
Angie Plummer, OCB
Lieutenant Colonel Sheldon W. Senek, Asst. Superintendent, Ohio State Highway Patrol
Staff Lieutenant Robert J. Young, Advocate, Ohio State Highway Patrol

For OSTA

Herschel M. Sigall, Esq., General Counsel
Darrell Thomas, Union Advocate
Trooper Bruce E. Cornett, Grievant
Trooper Mike D. Meyers, Grievant
Sergeant Edgar L. Clevenger, Retired
Sergeant Mark D. Groves, Witness

Grievance Nos.
15-00-980503-0061-04-01
15-00-980503-0062-04-01

Hearing held
June 15, 1999

Case Decided
September 16, 1999

Arbitrator: Robert Brookins, J.D., Ph.D.
Subject: Denial of Helicopter Pilot Training

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I. THE FACTS

This dispute involves the Ohio State Troopers Association and the Aviation Section of the Ohio Highway Patrol (the Employer or Aviation Section), a division of the Ohio Department of Public Safety. The Aviation Section has its own squad of pilots, uses both fixed and rotary-wing aircraft, and serves the public in several areas such as conducting man hunts, speed surveys, and searches for lost persons. Pilots in the Aviation Section are also troopers in the Ohio Highway Patrol. Staff Lieutenant Keith Haney commands the Aviation Section and reports to Lieutenant Colonel Sheldon Senek. The Superintendent of the Highway Patrol (the Superintendent) oversees the entire operation.

To become pilots in the Aviation Section, troopers must first obtain their basic pilot's licenses off-duty and at their own expense. Although the Aviation Section pays for any additional, necessary pilot training, some pilots purchase their own advanced certification such as commercial licenses.

The Aviation Section provides helicopter pilot training for its pilots as the need arises. Helicopter pilot training is a rather coveted, selective, four-five week program that costs the Aviation Section between $15,000 and $25,000 per trooper. Yet, some troopers perceive it as necessary for career advancement within the Aviation Section. In fact, the vast majority of troopers who become helicopter pilots are also subsequently promoted to the rank of sergeant. Nevertheless, to become sergeants in the Aviation Section, troopers (including helicopter pilots) must amass impressive service records and pass rigorous examinations. Undoubtedly, the cost of helicopter pilot training and its perceived role in career advancement heighten the program's selectivity and desirability respectively.

In 1998, the Aviation Section announced one opening in its helicopter pilot training program and five troopers applied. Three of those troopers—Michael D. Meyers, Bruce E. Cornett, and Phillip Bender—figure prominently in this dispute. After Trooper Bender was selected for the helicopter pilot training, Troopers Meyers and Cornett (the Grievants) filed grievances, claiming to be victims of age discrimination. Although the Grievants were qualified to receive helicopter pilot training, thirty-seven-year-old Trooper Bender was

adjudged the most qualified applicant in the pool. When they were rejected for helicopter pilot training, Troopers Meyers and Cornett were 43 and 44 years old respectively, licensed pilots, and productive members of the Aviation Section.

Essentially three factors have convinced some troopers that age is a barrier to acceptance into helicopter pilot training. First, Staff Lieutenant Haney made several statements which clearly fuel the conviction that age is a screen for helicopter pilot training. For example, Staff Lieutenant Haney said that the Aviation Section must get "more bang for the buck" by rejecting over-40-year-old troopers for helicopter pilot training. Also, in 1996, while discussing helicopter pilot training with Trooper Cornett (who was then 40 years old), Staff Lieutenant Haney predicted that Trooper Bruce Waters was too old for helicopter pilot training. Trooper Waters was 51 years old when the Aviation Section rejected him for helicopter pilot training.

Second, between 1994 and 1997, as commander of the Aviation Section, Staff Lieutenant Haney played the vital and highly visible role of initially screening all applicants for helicopter pilot training and recommending his choice of applicants to upper-level management.[1] From that group of applicants, the Superintendent ultimately selected troopers for the training.[2]

Third, since 1984, relatively few over-40-year-old troopers have been accepted for helicopter pilot training. In fact, from 1984 through 1998, the Aviation Section sent eight troopers to helicopter pilot training, only two of whom were over 40 years old—Troopers Edgar L. Clevenger and William R. Watkins.[3] More important, both of these troopers received their training under the command of Captain James Hedlesten, Staff

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[1] Joint Exhibit (taped interview with Staff Lieutenant Haney) at 5.

[2] *Id.*

[3] Union Exhibit No. 1. Trooper William Watkins was the last over-40-year-old trooper to receive helicopter pilot training. He was accepted into the program at the age of 43, when Captain Hedlesten commanded the Aviation Section.

Lieutenant Haney's predecessor.[4] During Staff Lieutenant Haney's administration, three over-40-year-old troopers—the Grievants and Trooper Bruce Waters—have applied for helicopter pilot training; none has been accepted. Finally, two troopers under 40 years of age were also rejected for helicopter pilot training under Staff Lieutenant Haney's watch.

A. The Grievants' Interviews

Nineteen ninety-eight was the first time the Aviation Section assigned Staff Lieutenant Haney's screening function to a committee, comprising Lieutenant Colonel Senek (Chairperson), Staff Lieutenant Haney, Sergeant Groves and Sergeant Boggs.[5] Both sergeants are also bargaining-unit members and helicopter pilots. The committee interviewed the Grievants on April 13, 1998. The committee subjected all applicants to the same questions in structured interviews for approximately 15 minutes, except that the Grievants received somewhat abbreviated interviews.[6]

Screening criteria for the interviews included a candidate's: (1) responses to interview questions; (2) tenure with the Highway Patrol and Aviation Section; (3) hours of flight experience; (4) type(s) of aircraft ratings; (4) health and wellness; and (5) ability to respond to emergency situations as determined in part by the distance the candidate lives from the Aviation Section's airport.[7]

Immediately after interviewing all applicants, the committee conferred and unanimously selected Trooper Bender as the most qualified applicant. The Superintendent accepted the committee's recommendation. In addition to excelling in all the above categories, Trooper Bender performed well in his interview and had obtained substantially more than the required number and types of flight certifications to be

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4 *Id.*

5 Employer's Brief at 2.

6 Employer Exhibit No. 1.

7 *Id.*

a pilot in the Aviation Section. Finally, the committee concluded that Trooper Bender took his job very seriously.[8] Lieutenant Colonel Senek testified that Trooper Bender was the most qualified applicant, given the selection criteria and Trooper Bender's superior performance in the interview. In contrast, the committee offered several reasons for rejecting the Grievants. The following table summarizes the committee's evaluation of these applicants.

Screening Committee's Assessments			
Trooper Assessed	Troopers' Personally Financed Professional Development	Committee's Unfavorable Observations	Committee's Favorable Observations
Trooper Bender	obtained commercial and multi-engine rating; obtaining flight instructor and airplane/power plant mechanic rating	none	prepared for interview; positive, enthusiastic, and confident; focused; off-duty availability
Trooper Cornett	none	unprepared for interview; carefree attitude and answers to interview questions reflect an insincere interest in helicopter pilot training	off-duty availability
Trooper Meyers	none	none listed	off-duty availability

II. The Issue

Did the Employer violate Article VII of the labor agreement by selecting Trooper Bender for helicopter training?

III. Relevant Contractual Provisions

Article 7—Non-discrimination

> Neither party will discriminate for or against any member of the bargaining unit on the basis of age . . . or for the purpose of evading the spirit of this Agreement; except for those positions which are necessarily exempted by *bona fide occupational qualifications* due to the uniqueness of the job, and in compliance with the *existing laws of the United States, the State*

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[8] *Id.* at 2.

of Ohio, or Executive Orders of the State of Ohio. . . .[9]

IV. Summaries of Parties' Major Arguments

A. Employer's Arguments

The Aviation Section selected Trooper Bender for helicopter pilot training because he was the best qualified among the applicants. Neither the committee nor the Aviation Section discriminated against Troopers Cornett or Meyers because of their ages.

B. Union's Arguments

The Aviation Section has an unwritten ageist policy of excluding 40-plus-year-old troopers from helicopter pilot training. In 1998, the Aviation Section relied on that policy to reject the Grievants from helicopter pilot training because of their ages. This discriminatory policy violates the Collective-Bargaining Agreement and the Age Discrimination in Employment Act (ADEA) which is wholly incorporated by reference into the parties' Collective-Bargaining Agreement.

V. Discussion

A. The Proper Standards In Federal ADEA Claim

The parties' Collective-Bargaining Agreement broadly incorporates both federal and state law that governs age discrimination in employment. Thus, Article 7 of the Collective-Bargaining Agreement prohibits either party from discriminating for or against any bargaining-unit member because of that member's age "in compliance with the existing laws of the *United States*, the *State of Ohio*, or Executive Orders of the *State of Ohio*."[10] This language obliges the Arbitrator to resolve this dispute in light of these referentially incorporated laws.

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[9] (emphasis added).

[10] (emphasis added).

The Age Discrimination in Employment Act (ADEA) provides:

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise *discriminate against any individual* with respect to his compensation, *terms, conditions, or privileges of employment, because of such individual's age*;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual's age. . . .[11]

With this language at the fore, the Arbitrator embarks on a two-step analysis to: (1) determine the scope of the foregoing language as set forth in decisions of the Sixth Circuit Court of Appeals (Sixth Circuit) within whose jurisdiction this dispute falls; and (2) apply that Sixth Circuit precedent to the facts of this dispute.

1. The Burden of Persuasion

Under both federal law, state law, and the law of the shop, the Union has the burden of proof (or persuasion) in this dispute. Federal and state law dictate that plaintiffs in ADEA litigation bear the burden of proof.[12] Similarly, in industrial jurisprudence, the grieving party bears the burden of proof in "issues" or "contract-interpretation" disputes like the instant one.[13] To carry its burden, the Union must ultimately adduce preponderant evidence,[14] in the arbitral record as a whole, that the Aviation Section rejected the Grievants'

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[11] 29 USCA § 623 (a) (emphasis added).

[12] *See, e.g.,* 91 F.3d 143, 1996 WL 400179, **5 (6th Cir.(Ohio)) (holding, "The plaintiff retains the ultimate burden of persuasion in an employment discrimination case"); Chappell v. GTE Products Corp., 803 F.2d 261, 265 (6th Cir. 1986) (holding, "Although the burden of production shifts, the burden of persuasion remains at all times with the plaintiff").

[13] *See, e.g.,* OWEN FAIRWEATHER, PRACTICE & PROCEDURE IN LABOR ARBITRATION 192 (3rd. ed 1991)(stating, "[T]he general rule followed by arbitrators, in nondisciplinary proceedings, is that the grieving party, typically the Union, bears the initial burden of presenting sufficient evidence to prove its contention") (citations omitted).

[14] Both the Sixth Circuit and labor arbitrators commonly apply this measure of persuasion or quantum of proof in employment discrimination cases. *See, e.g.,* Vermont Labor Relations Board, 1991 WL 693155 (Seaver, Arb.) ("The Employer having articulated non-discriminatory reasons for its actions, Grievant must prove by a preponderance of the evidence that the legitimate reasons offered by the Employer were not its true reasons, but were a pretext for age discrimination").

applications for helicopter pilot training *because of* their ages.[15] That is, the Union must demonstrate that the Grievants' ages were "determining" or but-for factors in this negative personnel decision.[16]

The Union may use either direct, circumstantial, or statistical evidence to establish the required but-for causal link.[17] According to the Sixth Circuit, the difference between circumstantial and direct evidence is that circumstantial evidence relies on inferences to establish a disputed fact (such as unlawful discrimination); direct evidence does not.[18] Restated, "Direct evidence of discrimination is evidence which, if believed, would prove the existence of a fact without any inferences or presumptions."[19] One circuit offered the following example of direct evidence: "a scrap of paper saying,' fire Rollins--she is too old.'"[20]

Given the Sixth Circuit's definition, this case lacks direct evidence, thereby obliging the Union to proffer several pieces of circumstantial evidence, the most substantial of which includes: (1) ageist statements

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[15] *See* note 8 *supra* and accompanying text.

[16] Phelps v. Yale Security, 986 F.2d 1020, 1023 (6th Cir. 1993) (stating, "A plaintiff who brings a claim under the Age Discrimination in Employment Act must prove that age was a *determining factor* in the adverse action that the employer took against him or her") (emphasis added).

[17] *See, e.g.,* Kline v. Tennessee Valley Authority, et. al., 128 F.3d 337, 348 (6th Cir. 1998) (stating, "As such, a plaintiff may establish discrimination either by introducing *direct evidence* of discrimination or by proving inferential and *circumstantial evidence* which would support an inference of discrimination") (emphasis added); McDonald v. Union Camp Corp., 898 F.2d 1155 (6th Cir. 1989) (stating, "Finally, a plaintiff may proceed by showing through *circumstantial, statistical or direct evidence* that he has been discriminated against"); Lynch v. Board of Directors of the Tennessee Valley Authority, 817 F.2d 380, 382 (6th Cir. 1987) (stating, "Direct evidence of intent is not required; the plaintiff can establish intent by proof of "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion illegal under the Act") (internal quotation marks omitted).

[18] *See, e.g.,* Manzer v. Diamond Shamrock Chemicals Co., 29 F.3d 1078, 1081 (6th Cir.1994) (holding direct evidence does not require a jury to infer the existence of a disputed a fact). *See also,* Greene v. St. Elizabeth Hospital Medical Center, 134 F.3d 371, 1998 WL 13410, (6th Cir.(Ohio)) (noting that, under the circumstances of that case, direct evidence would entail "evidence such as a statement by the decisionmaker that . . . [the plaintiff] was being demoted because of his age").

[19] Ginett v. Federal Express Corp., 166 F.3d 1213, 1998 WL 777998, **9 (6th Cir.(Tenn.)) (citing Lautner v. American Telephone and Telegraph Co., 1997 WL 26467, *3 (6th Cir. Jan.22, 1997).

[20] Castle v. Sangamo Weston, Inc. et al., 837 F.2d 1550, 1558 (11th Cir. 1988) (internal quotation marks omnitted).

by Staff Lieutenant Haney; and (2) evidence that Staff Lieutenant Haney's administration has never recommended an over-40-year-old trooper for helicopter pilot training.[21] Viewed individually or collectively, this evidence requires an inference to link the negative personnel decision to the Grievants' ages.

2. Prima Facie Discrimination and *McDonnell Douglas Corp. v. Green*

To establish a prima facie case of age discrimination with circumstantial evidence, the Union must satisfy a slightly modified version of the evidentiary requirements set forth in the landmark decision *McDonnell Douglas Corp. v. Green*.[22] Specifically, the Union must demonstrate that the Grievants: (1) are members of the protected class, i.e., between 40 and 60 years of age; (2) suffered an adverse employment action, (3) were qualified for the position in question, and (4) were rejected in favor of a substantially younger person who was not in the protected class of the ADEA.[23]

Although the Union's evidence clearly satisfies the first three criteria, it is doubtful that it satisfies the fourth criterion, under Sixth Circuit precedent. As to the first three criteria, the Grievants were over 40 years old when the Aviation Section denied them helicopter pilot training; they suffered an adverse employment action

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[21] *See, e.g.*, Kline v. Tennessee Valley Authority, et. al., 128 F.3d 337, 349 (6th Cir. 1998): Rarely can discriminatory intent be ascertained through direct evidence because rarely is such evidence available. This is the reason for the *McDonnell Douglas- Burdine* burden of proof mechanism, allowing a plaintiff to prove its case through circumstantial evidence. . . . [V]ictims of employment discrimination are permitted to establish their cases through inferential and circumstantial proof. . . . (citations omitted).

[22] *See, e.g.*, Hartsel v. Keys, 87 F.3d 795, 800 (6th Cir.1996), cert. denied, 65 U.S.L.W. 3267 (Jan. 6, 1997) (No. 96-486) for the proposition that the Sixth Circuit applies, "with appropriate modification, the McDonnell Douglas test as stated in St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993), to ADEA claims."

Parenthetically, one must avoid mechanically applying the McDonnell-Douglas evidentiary standards. *See, e.g.*, McDonald v. Union Camp Corp., 898 F.2d 1155, 1162 (6th Cir. 1989) (observing, "Instead of a mechanistic application of the McDonnell Douglas guidelines, a trial judge is to consider 'direct evidence of discrimination, and circumstantial evidence *other than* that which is used in the McDonnell Douglas criteria") (emphasis added).

[23] Bush v. Dictaphone Corp., 161 F.3d 363, 368 (6th Cir. 1998).

by not receiving that training; and they were qualified to receive it.[24]

However, the Sixth Circuit requires that a plaintiff in ADEA disputes must be replaced by (or rejected for) a "substantially younger" person. Under this standard, it is unclear whether Trooper Bender was substantially younger than either of the Grievants. In *Bush v. Dictaphone Corp.*,[25] the Sixth Circuit held that "[N]o reasonable jury could find . . . [the plaintiff's] 41-year-old replacement was 'substantially younger' than . . . [the plaintiff himself] (then 46 years old)."[26] Thus, a five-year difference between a plaintiff and his replacement or successor fails to satisfy the "substantially younger" standard. However, *Dictaphone* subsequently held that the "substantially younger standard" was satisfied where a plaintiff—46 years old—was 14 years senior to the successor—32 years old.[27] In the instant case, the age differential is seven years between Troopers Cornett and Bender and six years between Troopers Meyers and Bender.

Thus, the inquiry becomes whether either a six or seven-year differential satisfies the "substantially younger" standard. Because the Sixth Circuit has yet to offer an operational definition of "substantially younger," the Arbitrator is obliged to consider two other courses: (1) look for persuasive authority in other circuits to fill the gap in the Sixth Circuit: and/or: draw conclusions from Sixth-Circuit opinions that have addressed the "substantially younger" criterion.

Both courses are explored. A perusal of decisions from other circuits for clues to the conceptual or operational boundaries of "substantially younger, reveals *Pitasi v. Gartner Group, Inc.*,[28] where the Seventh

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[24] Indeed, the Aviation Section does not contend that the Grievants were not qualified for helicopter pilot training. Instead it maintains that Trooper Bender was more qualified than the Grievants.

[25] 161 F. 3d 363 (6th Cir. 1998).

[26] *Id.* at 368. *See also*, Wellman v. Wheeling and Lake Erie Railway Co., 1998 WL 25005, **4 (6th Cir.(Ohio))(verifying that a five-year age differential between the plaintiff and his replacement does not satisfy the "substantially younger" standard).

[27] *Id.*

[28] 154 F. 3d 709, 1999 WL 528477 (7th Cir.(Ill.)).

Circuit stated that an "inference of discrimination is appropriate only when the employer favors substantially younger persons, a term we have defined operationally as *ten years or more*."[29] More important, the Sixth-Circuit has not held that an age differential of less than ten years satisfies the "substantially younger" standard. Therefore, one can tentatively conclude that both the Sixth and Seventh Circuits would require plaintiffs to demonstrate at least a 10-year age differential between themselves and their successors. Under this standard, the Union's prima facie case of age discrimination fails because the fourth criterion is not met. However, in the interest of fully discussing pretext, the Arbitrator will assume arguendo that the Union establishes a prima facie case of unlawful, intentional age discrimination.

A prima facie case has several ramifications, which include: (1) satisfying the Union's burden of production; (2) raising a rebuttable presumption of unlawful age discrimination; and (3) shifting to the Aviation Section, the burden of articulating a legitimate, nondiscriminatory explanation for having passed over the Grievants.[30] Accordingly, the discussion now focuses on whether the Aviation Section satisfied that burden.

3. Articulation of a Legitimate Explanation

The burden that shifts to the Aviation Section is one of production and not of persuasion. Thus, the Aviation Section need not persuade the Arbitrator of the existence of a legitimate reason. The burden of persuasion for demonstrating the absence of a legitimate reason and the presence of unlawful discrimination resides at all times with the Union.[31] Consequently, the Employer needs only to introduce admissible evidence of a legitimate basis for its decision.[32]

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29 *Id.* at *7.

30 Chappell v. GTE Products Corp., 803 F.2d 261, 266 (6th Cir. 1986).

31 *Id.* at 266 (stating, "The defendant "need not persuade the [trier of fact] that it was actually motivated by the proffered reasons, but need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus. (Citations and internal quotations marks omitted).

32 *Id.*

The Aviation Section satisfies its burden of production. Specifically, the record shows that although the Grievants were qualified for helicopter pilot training, Trooper Bender was the most qualified applicant in the group which included the Grievants. In fact, the Aviation Section introduced evidence that exceeded its evidentiary duty.

Testimony, in this case, actually establishes a legitimate reason for having rejected the Grievants. First, Trooper Bender had acquired more training than any other applicant in the pool. He was, for example, the only applicant to have obtained commercial and multi-engine certifications at his own expense. Moreover, when the screening committee interviewed Trooper Bender, he was actually financing his own training for certification as a flight instructor and airplane/power plant mechanic. These advanced certifications are not required for admission into helicopter pilot training; nevertheless, they indicate a relatively high level of initiative and motivation, neither of which is irrelevant in assessing applicants for any position or program. Second, Trooper Bender had a very positive interview with the screening committee which found him to be focused, positive, enthusiastic, and confident. Third, Trooper Bender was as qualified as other applicants with respect to availability for emergency duty as a helicopter pilot. The Grievants and Trooper Bender demonstrated essentially equal availability for emergency calls during their off-duty hours.

By articulating (not to mention establishing) a legitimate explanation for its decision, the Aviation Section accomplishes two ends: (1) it rebuts the presumption of unlawful discrimination that would have been raised by the Union's prima facie case; and (2) shifts back to the Union, the burden of production which now merges with the Union's burden of persuasion to ultimately demonstrate that the Aviation Section intentionally discriminated against the Grievants because of their ages.[33]

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[33] Butler v. Ohio Power Co., 91 F.3d 143, 1996 WL 400179, **5 (6th Cir.(Ohio)) (holding, "If the defendant employer offers evidence of a legitimate non-discriminatory reason for a plaintiff's firing, plaintiff . . . must demonstrate that the proffered reason was not the true reason for the employment decision. This burden [of production] now merges with the ultimate burden of persuading the court that [he] has been the victim of intentional discrimination").

4. Establishing Pretext

To prevail in this dispute, the Union must now discredit the Aviation Section's legitimate reason by adducing preponderant evidence in the record as a whole that the Aviation Section's legitimate explanation is pretextual. The Union may establish pretext either directly by demonstrating that a discriminatory reason more likely caused the Aviation Section to reject the Grievants or indirectly by showing that the Aviation Section's explanation is unworthy of belief.[34] Finally, when proving pretext, the Union must adduce "evidence other than that used to satisfy . . . [its] prima facie burden."[35]

a. Direct Evidence of Pretext

As a general proposition, the Union may challenge the Employer's legitimate explanation through either of two evidentiary avenues. It may directly attack the explanation by showing it to be unworthy of belief because it lacks a factual basis and, therefore, is nonexistent.[36] Or, if the legitimate reason exists, the Union must discredit it by demonstrating that the reason was insufficient to have motivated the Grievants' rejections.[37] Here the Union might show, for example, that similarly situated, unprotected, employees received helicopter pilot training.[38]

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[34] Kline v. Tennessee Valley Authority, et. al., 128 F.3d 337, 342 (6th Cir. 1998). Pruitt v. First American National Bank, 1999 WL 552578 *4 (6th Cir.(Tenn.)).

[35] Tichenor v. Secretary of The Army, 181 F.3d 104, 1999 WL 357813, *2 (6th Cir.(Ky.)).

[36] Manzer v. Diamond Shamrock Chemicals Co., 29 F.3d 1078, 1084 (6th Cir. 1994).

[37] *Id.*

[38] *Id. See* Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir.1992) (holding, "It is fundamental that to make a comparison of a discrimination plaintiff's treatment to that of non-minority employees, the plaintiff must show that the "comparables" are *similarly-situated in all respects*")(emphasis added). *But see* Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 351 (6th Cir. 1998) (explaining that "similarly situated" does not mean exact in all respects. Instead, it means that plaintiffs must show that: [A]ll of the *relevant aspects* of . . . [their] employment situation[s] were *nearly identical* to those of . . . [a comparable unprotected employee]. . . . The plaintiff need not demonstrate an *exact correlation* with the employee receiving more favorable treatment in order for the two to be considered similarly-situated. . . .") (emphasis added) (internal quotation marks omitted).

Ercegovich also explained that one "should make an independent determination as to the relevancy of a particular aspect of the plaintiff's employment status and that of the non-protected employee." *Id.* Furthermore, the court reasoned:

> A prima facie standard that requires the plaintiff to demonstrate that he or she was similarly-situated in every aspect to an employee outside the protected class

Also, the Union may indirectly attack the credibility of a legitimate explanation by showing it to be more likely than not pretextual.[39] This standard requires sufficient circumstantial evidence to support an inference that an unlawful reason—the Grievants' ages—more likely than not motivated the decision to reject the Grievants for helicopter pilot training.[40] Regardless of the evidentiary route chosen, the Union must persuade the Arbitrator that but for their ages, at least one of the Grievants would have been selected for helicopter pilot training.[41]

b. The Union's Pretextual Evidence—Airborne Ageism

Although the Union introduced preponderant evidence that more likely than not ageism was "in the air," given the Employer's testimony, evidence in the record does not support a logical inference that the Grievants' ages caused their rejections. The Union's pretextual evidence comprises several pieces of testimonial evidence which are evaluated below. Specifically, the Union produced three witnesses who credibly testified that Staff Lieutenant Haney made ageist statements approximately one year before the Grievants were rejected. Sergeant Edgar L. Clevenger testified that, before retiring from the highway patrol, he chaired several supervisory meetings where he heard Staff Lieutenant Haney say that Trooper Waters was too old to receive helicopter pilot training. Also, Trooper Cornett testified that he heard Staff Lieutenant Haney use the phrase "more bang for the buck" and that Staff Lieutenant Haney told him that neither Troopers Waters nor Meyers would get helicopter pilot training because they were too old.[42] Trooper Meyers retired early, and, at 51 years

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receiving more favorable treatment removes from the protective reach of the anti-discrimination laws employees occupying "unique" positions, save in those rare cases where the plaintiff produces direct evidence of discrimination. *Id.* at 353

39 Manzer *supra* note 24 at 1084.

40 *Id.*

41 Levy v. Mercantile Stores Co. Inc., 168 F.3d 490, 1998 WL 808215, **3 (6th Cir.(Ohio)) (holding "Ultimately, however, the plaintiff must prove that age was a determining factor in the employer's decision in order to establish liability") (internal quotation marks omitted) (citing Chappell v. GTE Products Corp., 803 F.2d 261, 265 (6th Cir. 1986)).

42 Because Trooper Cornett is a Grievant in this dispute, his testimony standing alone might raise concerns about credibility. However, in this case, his testimony is supported by that of three other troopers who have

of age, Trooper Waters was rejected for helicopter pilot training. Similarly, Sergeant Groves testified that, during staff meetings and luncheon conversations, he heard Staff Lieutenant Haney say that Troopers Waters and Stanton would not get helicopter pilot training because they were too old and that the Aviation Section needed "more bang for the buck." Finally, Sergeant Boggs testified that it was common knowledge among troopers in the Aviation Section that supervision was looking for "more bang for the buck," a pervasive view in supervision and management. This testimony establishes that Staff Lieutenant Haney once had an ageist attitude.

Furthermore, Sergeant Boggs stated that this ageist cloud hung over the screening committee when it rejected the Grievants. Although this testimony does not establish that Staff Lieutenant Haney's ageist attitude persisted throughout the committee's deliberations, it does show that the Aviation Section was still infected with ageism. Ultimately, then the Arbitrator is persuaded that atmospheric ageism plagued the Aviation Section.

c. Documentary Evidence of Prior Age-Related Discrepancies

In a commendable effort to enhance the inferential strength of its evidence and thereby link the Grievants' ages to the contested decision, the Union also presents documentary evidence, suggesting that, under Staff Lieutenant Haney's watch, ageism tainted previous decisions to send troopers to helicopter pilot training.[43] In other words, by offering evidence of past age discrimination, the Union seeks to establish a basis for inferring that ageism tainted the presently contested decision to reject the Grievants. In this case, however, the Union's pretextual evidence must overcome the Aviation Section's evidence which established rather than merely articulated that Trooper Benson was more qualified than the Grievants.

First, the Union shows that two over-40-year-old applicants—Clevenger and Watkins—were given helicopter pilot training under Hedlesten's[44] watch, but Staff Lieutenant Haney's administration denied helicopter pilot

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no apparent reason to perjure themselves. In 1996, when Trooper Cornett was over 40, Staff Lieutenant Haney approached him about getting into helicopter pilot training. Trooper Cornett admitted that Trooper Bender could possibly have interviewed better than him.

[43] Union Exhibit 1.

[44] Hedlesten was Staff Lieutenant Haney's predecessor in the Aviation Section.

training to each of the three troopers who applied—Waters, 47; Cornett, 44; and Meyers, 43.[45] This historical evidence together with the foregoing testimonies certainly suggest that ageism was once a factor in decisions about helicopter pilot training in the Aviation Section and that airborne ageism persists there.

Next, the Union observes that 1998 was the first time the Aviation Section used a screening committee to assess applicants for helicopter pilot training. In light of this evidence, the Union argues that the change in screening personnel is too much of a coincidence and that the screening committee was intended to (and actually did) conceal the implementation of an unspoken ageist policy to weed out over-40-year-old applicants for helicopter pilot training.

Viewed as a whole, these two pieces of evidence offer some, albeit insufficient, support for an inference that links the Grievants's ages to their rejections. The following factors combine to establish airborne ageism as well as considerable suspicion: (1) no over-40-year-old troopers were sent to helicopter pilot training under Staff Lieutenant Haney's watch; (2) the timing of the decision to empanel a screening committee; and (3) Staff Lieutenant Haney's statements.

Still, four reasons tip the scale against the Union in this case. First, suspicion is not proof, and, in light of the testimony of Sergeants Boggs and Groves, the Union's evidence simply lacks the requisite inferential strength. Some discussion of this testimony is indicated. First, Sergeant Groves, Sergeant Boggs, and Lieutenant Colonel Senek credibly testified that age played absolutely no part in their selection of Trooper Bender for helicopter pilot training. The testimonies of Sergeants Groves and Boggs carry special weight and, to some extent, bolster Lieutenant Colonel Senek's testimony. For example, it was their testimonies that helped to establish that airborne ageism generally permeated the Aviation Section and was still present when the

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[45] The Aviation Section points out that the Union Exhibit No. 1 omitted the fact that two under-40-year-old troopers—Steel and Harkey (spelling?)—were also denied helicopter pilot training during Staff Lieutenant Haney's administration. It argues that this factual commission discredits Union Exhibit No. 1. Moreover, according to the Aviation Section, such an oversight betrays a thinly-veiled attempt to skew the evidence. However, the inclusion or commission of the fact in question does not necessarily affect the credibility of Union Exhibit No. 1. Rejection of both younger and older employees hardly excludes ageism as a factor in rejecting the older employees. Indeed, one presumes that most employers would avoid the inherent inculpatory risk of discriminating solely against older employees.

selection committee decided that picked Trooper Bender as the superior applicant. Moreover, both sergeants are bargaining-unit members and were the Union's witnesses.

The witnesses pose a substantial problem for the Union. Their bargaining-unit membership and their earlier testimonies about the presence of ageism lend extra credibility to their subsequent testimonies that, although present, the airborne ageism did not affect their votes. Neither of these witnesses has an apparent reason to cover up any role that ageism might have played in the committee's decision to reject the Grievants. Consequently, their testimonies seriously undermine the Union's evidence that ageism caused the rejections in question.

The second reason that militates against the Union is the existence of an alternative and perhaps equally persuasive explanation for the committee's sudden appearance. The Aviation Section might very well have empaneled the committee to filter out ageist contaminants and thereby avoid fueling perceptions and beliefs that age bias taints the selection process. The reasonableness and potential viability of this competing explanation at least weakens the inference that the committee merely cloaked age discrimination.

Third, there is a temporal issue regarding Staff Lieutenant Haney's ageist statements and the likelihood that they influenced the committee's vote. The record suggests that Staff Lieutenant Haney made the ageist remarks more than a year before the committee rejected the Grievants. In the Sixth Circuit, a temporal gap of one year between ageist utterances and an adverse personnel decision either eliminates (or at least substantially attenuates) any causal link between the utterances and the subsequent adverse personnel decision .[46] In this case, however, one must juxtapose the probable effects of the temporal gap against Sergeant Boggs' testimony that airborne ageism was still present when the committee passed over the Grievants. But that testimony does not show that Staff Lieutenant Haney still harbored ageist views. Instead, it shows that the

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[46] *See, e.g.*, Kahl v. Mueller Co., 173 F.3d 855, 1999 WL 196556, **4 (6th Cir.(Mich.)) (stating, "[R]emarks made in 1995 and 1996 were "temporally and topically" too remote to create an inference of discrimination where the plaintiff was fired in June 28, 1996"); Wohler v. Toledo Stamping & Mfg. Co., 125 F.3d 856, 1997 WL 603422, **2 - **4 (6th Cir.(Ohio)) (holding, "[A] comment made even a year before discharge is too far removed in time to be indicative of discriminatory intent behind the termination decision").

residue of such an attitude lingered in the air. Nothing in the record suggests that Staff Lieutenant Haney expressed ageist sentiment shortly before, during, or after the committee convened, interviewed the Grievants, and selected Trooper Benson. Nor does the record suggest that Staff Lieutenant Haney somehow, directly or indirectly, influenced the votes of other members. In fact, the relative impressiveness of Trooper Bender's qualifications would tend to give even an ageist member of the committee a "legitimate" hook on which to hang his negative vote.[47] Finally, even if ageism caused Staff Lieutenant Haney to reject the Grievants, his was but one of a unanimous vote to reject the Grievants.

B. Age Discrimination Under Ohio's Statute

In its brief, the Union correctly points out that the parties' contract also referentially incorporates Ohio's age discrimination statute, which closely tracks the language of the ADEA, providing in relevant part:

> It shall be an unlawful discriminatory practice: (A) For any employer, because of the race, color, religion, sex, national origin, handicap, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise *to discriminate against that person* with respect to hire, tenure, *terms, conditions, or privileges of employment*, or any matter directly or indirectly related to employment.[48]

Given the semantic overlap between the ADEA and Ohio's age discrimination statute, analyzing this case under the latter produces the same result as analyzing it under the former. The Ohio Supreme Court and

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[47] Viewed from this perspective, this dispute seems to assume a mixed-motive rather than a pretextual slant. However, the Sixth Circuit requires direct evidence of discrimination to entertain the mixed-motive theory of claim. See, e.g., Triplett Grille, Inc. v. City of Akron 40 F.3d 129, 63 USLW 2313, 1994 Fed. App. 0386P Nov 14, 1994 (NO. 93-3418) stating:

> Despite the inarguable fact that only four justices in Price Waterhouse [v. Hopkins, 490 U.S. 228, (1989)] would have imposed a 'direct evidence' requirement for 'mixed-motives' cases, most circuits have engrafted this requirement into case law."), cert. denied, --- U.S. ----, 113 S. Ct. 82, 121 L. Ed.2d 46 (1992). While "there is some awkwardness in attributing precedential value to an opinion of one Supreme Court justice to which no other justice adhered, it is the usual practice when that is the determinative opinion").

See also Gagne v. Northwestern National Insurance Company, 881 F.2d 309, 313-315 (6th Cir. 1989) stating:

> To the contrary, the Price Waterhouse Court specifically admonished that the new standard would apply only in the limited circumstances where the employee had produced direct evidence that the adverse employment decision at issue was the result of "mixed motives" on the part of the employer and that, although the employer acted in part because of legitimate nondiscriminatory justifications, an impermissible discriminatory animus was a substantial motivation for its action.

[48] Section 4112.02 (1999).

the Sixth Circuit have held that the evidentiary paradigm in *McDonnell Douglas Corp. v. Green*[49] applies under both the ADEA and Ohio's age discrimination statute.[50] In *Mauzy v. Kelly Services, Inc.*,[51] for instance, the Ohio Supreme Court noted that it had "adopted the analytic framework established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* . . . . for use in Title VII cases and held:

> "In order to establish a prima facie case of age discrimination . . . in an employment discharge action, plaintiff-employee must demonstrate (1) that he was a member of the statutorily-protected class, (2) that he was discharged, (3) that he was qualified for the position, and (4) that he was replaced by, or that his discharge permitted the retention of, a person not belonging to the protected class.[52]

Similarly, the Sixth Circuit has repeatedly stated that because the "[a]nalysis of a discrimination claim is similar under Ohio and federal law, we treat . . . federal and state age discrimination claims together."[53]

VI. The Award

For all of the foregoing reasons, the Arbitrator concludes that although atmospheric age bias existed in the Aviation Section, the record falls slightly short of showing that more likely than not age discrimination tainted the decision to reject the Grievants for helicopter pilot training. Restated, a preponderance of the

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[49] Byrnes v. LCI Communication Holdings Co. Supreme Court of Ohio (May 22, 1996), Ohio St.3d 125, *128, 672 N.E.2d 145, **148 (holding, "Discriminatory intent may be established indirectly by the four-part analysis . . . adopted from the standards established in *McDonnell Douglas Corp. v. Green* (1973)

[T]the plaintiff-employee demonstrate "(1) that he was a member of the statutorily- protected class, (2) that he was discharged, (3) that he was qualified for the position, and (4) that he was replaced by, or that his discharge permitted the retention of, a person not belonging to the protected class").

[50] *See* Kennedy v. Owosso Group & Gluco, Inc., 134 F.3d 371, 1998 WL 30801, *6 (6th Cir.(Ohio)) (stating "[E]lements and burden of proof in a state age discrimination claim are *the same as* those in a federal case") (emphasis added).

[51] 75 Ohio St.3d 578, 664 N.E.2d 1272 (Ohio Supreme Court June 12, 1996).

[52] *Mauzy* went on to state that the "Defendant-employer may then overcome the presumption inherent in the prima facie case by propounding a legitimate, nondiscriminatory reason for plaintiff's discharge. Finally, plaintiff must be allowed to show that the rationale set forth by defendant was only a pretext for unlawful discrimination"). *Id.*

[53] Pertz v. Edward J. Debartolo Corp., 1999 WL644339 (6th Cir. (Ohio)) (Citing Mack v. B.F. Goodrich Co., 699 N.E.2d 97, 98 (Ohio App.1997).

evidence does not demonstrate that but for the Grievants' ages, one or both would have been selected for helicopter pilot training. As a result, the grievance is hereby **DENIED**.

Notary Certificate

State of Indiana)

)SS:

County of Marion

Before me the undersigned, Notary Public for Hendricks County, State of Indiana, personally appeared Robert Brookins, and acknowledged the execution of this instrument this 20th day of September, 1999

Signature of Notary Public: Susan K. Agnew

Printed Name of Notary Public: SUSAN K. AGNEW

Notary Public, State of Indiana
County of Hendricks
My Commission Expires 11/13/2006

My commission expires: _____

County of Residency: _____

Robert Brookins

Robert Brookins

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