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## Court rules university's retirement package offer did not violate ADEA

In *Ortony v. Northwestern University*, No. 12-3897 (7th Cir. Dec. 3, 2013), the 7th U.S. Circuit Court of Appeals held that Northwestern University did not violate the Age Discrimination in Employment Act (ADEA) when it offered a retirement package to a professor.

The plaintiff, Andrew Ortony, was a professor of psychology, computer science and education at Northwestern. In 2007, he asked his dean if he could take a one-year leave to visit another university. In response, the dean offered paid leave to Ortony for the 2008 calendar year and the 2011-12 academic year if Ortony would agree to teach at Northwestern from 2009 through the 2010-11 academic year and then retire at the close of the 2011-12 academic year.

In June 2007, the dean presented an agreement to Ortony in the form of a letter. According to the court, the "key paragraph" of the letter provided: "At your request, I will accept your resignation from the Northwestern University faculty effective with your retirement on Aug. 31, 2012. In recognition of your many years of service to the School of Education and Social Policy (SESP), I will recommend your appointment as an unsalaried professor emeritus effective immediately thereafter."

The agreement also addressed when Ortony would be on paid leave, when he would teach courses at Northwestern and when he had the option to resign before August 2012 and still retain the benefit of his paid leave. Ortony signed the agreement on June 25, 2007.

In 2011, Ortony was reminded that he was entering his final year on the tenured faculty, he would be on paid leave during the 2011-12 academic year and he would retire and assume emeritus status in August 2012. Ortony then informed Northwestern that he did not want to retire and had never agreed to do so.

On Nov. 29, 2011, Ortony filed a

charge at the Equal Employment Opportunity Commission (EEOC). After receiving a right to sue from the EEOC, Ortony filed a lawsuit in federal district court, alleging that Northwestern violated the ADEA when it offered him an early retirement package.

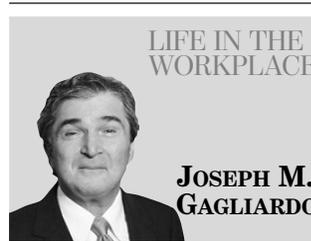
The district court granted judgment for Northwestern on the pleadings, holding that the agreement entered into by Ortony and Northwestern in 2007 foreclosed any claim by Ortony that he was fired on the basis of his age. On appeal, the 7th Circuit affirmed the district court's ruling.

The ADEA entitles employees age 40 and over to continue working so long as they perform their job duties satisfactorily. The court recognized, however, that the ADEA allows covered employees to "trade" their right to continue working "for something they value more, such as retirement packages."

According to the court, Northwestern did not terminate Ortony's employment. Rather, it "bought out his tenure by promising him five years' pay for three years' work, an offer that [Ortony] accepted in 2007 ..." That agreement was binding on Ortony.

Ortony contended that Northwestern discriminated against older faculty members by offering retirement packages to older professors. The court rejected Ortony's argument. Retirement packages do not violate the ADEA. To the contrary, the court stated, "[r]etirement packages, including buyouts of tenure, are a benefit of age because they are the sort of offer one would pay to receive, rather than pay to avoid. Older workers have an option (the opportunity to be paid for resigning) that younger workers lack — and the ADEA does not forbid offers that favor older workers over their younger colleagues."

The bottom line, according to the court, was that Ortony struck a bargain with Northwestern. He "received the benefits it promised, and must accept the detriments."



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After affirming the district court on the merits, the court then held that Ortony's ADEA claim should also have been dismissed because it was time-barred. Ortony had 300 days after the alleged discriminatory act to file his charge at the EEOC. Ortony signed the agreement in June 2007, but did not file his charge at the EEOC until Nov. 29, 2011.

Ortony claimed that the 300-day clock did not begin to run until February 2011, when he was reminded that, pursuant to the agreement, his classes would be reassigned in fall 2011 and he would be on paid leave during the 2011-12 academic year.

The court rejected Ortony's argument, stating that the time to file a charge under the ADEA does not begin with "reminders." Time runs from the alleged discriminatory act, not from the date

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the adverse effects of the discriminatory act begin. Therefore, in Ortony's case, the time to file his EEOC charge began to run when he learned definitively that he would be let go, i.e., the date he signed the agreement in June 2007.

Ortony contended that he construed the agreement to lay out a tentative plan under which he could leave Northwestern, if he chose to do so, five years later. However, Ortony's interpretation of the agreement was not controlling.

In rejecting Ortony's argument, the court relied on principles of contract law, stating that the interpretation of a contract "is an objective exercise; private beliefs and meanings do not matter." Courts consider how a reasonable person would interpret the contract language at issue.

The court held that no reasonable person could accept Ortony's interpretation of the agreement. The critical language, according to the court, provided that Ortony would resign effective Aug. 31, 2012.

The agreement gave Ortony an option to retire earlier than that date, but not an option to retire later. "[Ortony's] professed understanding of the contract would make it one-sided: Northwestern would give him full pay for two years during which he did no work, while he would not promise anything in return. People pay to acquire options; they do not get options (and two years' pay) handed to them for nothing."

In addition, the court noted that Ortony never communicated his understanding of the agreement to the dean, i.e., his belief that the agreement gave him the option to retire and required Northwestern to provide him with two years of paid leave. Based on the facts, Ortony could not rely on any parol evidence to contradict the express terms of the agreement.

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