IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

BETTY BLAIR, MICHAEL CARDAMON, RICHARD COOK, ELMER KING, JOHN HOUGHTALING, BENJAMIN NICKS,	)	NO. 4:06-cv-00521-RAW
Plaintiffs,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT
vs.	)	
JOHN E. POTTER, Postmaster General UNITED STATES POSTAL SERVICE,	)	
Defendant.	)	

Plaintiffs Betty Blair, Michael Cardamon, Richard Cook, Elmer King, John Houghtaling, and Benjamin Nicks are present or former employees of the United States Postal Service ("USPS"). They all work[ed] as mail handlers in the truck terminal at the postal facility on Second Avenue in Des Moines, Iowa. All were over the age of 40. This lawsuit concerns plaintiffs' claims that for a period of time in 2002 and 2003 the supervisor on the preceding shift, Robert Burke, refused to request overtime workers from plaintiffs' shift to assist his work shift because he believed the plaintiffs were too old. They allege age discrimination.

Plaintiffs have exhausted their administrative remedies. They filed their Complaint on October 23, 2006 claiming "age discrimination in the workplace in the assignment of hours and wages" in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.* (Complaint at 4, ¶ 23). Plaintiffs seek compensatory and liquidated damages.

The Court has federal question and original jurisdiction. 28 U.S.C. §§ 1331, 1339, 1343(a)(4). At the final pretrial conference the parties agreed trial would be bifurcated, with liability being tried first and then, if necessary, damages to be tried at a later date. The case came on for bench trial before the undersigned on May 4 through May 5, 2009 pursuant to 28 U.S.C. § 636(c). Post-trial written arguments have been filed and the case is now fully submitted.

The Court has carefully considered the record evidence, the post-trial written arguments, and now finds and concludes as follows on the issues presented.

I.

FACTUAL BACKGROUND AND FINDINGS

USPS maintains a mail distribution facility located on Second Avenue in Des Moines, Iowa, formally called a Processing and Distribution Center ("P&DC"). The P&DC operates 24-hours a day with mail handlers assigned to three shifts known as "tours." Tour I works from 10:00 p.m. to 6:30 a.m., Tour II from 6:00 a.m. to 2:30 p.m., and Tour III from 2:00 p.m. to 10:30 p.m. The plaintiffs all worked full-time as mail handlers on Tour II. As noted, all were over 40 years of age. The mail handlers positions are covered by a collective bargaining agreement between the National Postal Mail Handlers Union and USPS. During the time in question, plaintiffs all worked in the truck terminal, one of several "pay locations" within the P&DC.

When jobs open on the tours, they were subject to bid on the basis of seniority. Tour II, the day shift, was particularly sought after. Consequently, the workers on Tour II tended to have more seniority and were older, but the average age difference between the tours was not dramatic. The P&DC had an older workforce overall; about 75% of the P&DC employees were over 40 years of age. (Ex. 24). The truck terminal employee lists in the record are incomplete in that they do not list all the employees (of the plaintiffs, only Nicks is listed as a Tour II employee), and a few of the birth dates are missing, but they provide a general picture of the age of the workers on each tour. The records indicate the proportion of mail handlers (with birth dates shown) 40 years of age or older was: 17 of 25 in Tour I; 24 of 26 in Tour II; and 28 of 35 in Tour III. (*See* Exs. 1, 2). They also show (adding the missing plaintiffs back in to Tour II) that in November 2002 the average age of the Tour I mail handlers was about 43.7, of the Tour II mail handlers 48.5, and of the Tour III mail handlers 47.1 (*Id.*)

As a distribution center P&DC functioned as a regional mail "hub." Mail was trucked in from other states and Iowa communities, sorted, and trucked out to other states and Iowa communities. It was the job of the mail handlers in the truck terminal to unload the incoming mail, sort the mail, and have the mail ready to be loaded on the trucks to be dispatched elsewhere. Mail handling was prioritized: "red tag" or next-day delivery

first, followed by other classes. Timing was important. To get to their destinations in time for delivery further on, the trucks to the other states needed to be loaded for dispatch by about 3:00 a.m., the trucks destined for other Iowa communities by about 4:30 a.m.

The daily workload fluctuated between the tours. It began to increase about mid-way through Tour III, continued strong until near the end of Tour I when the trucks were dispatched and then leveled off during Tour II until it began to climb again on Tour III. The volume of mail varied and overtime hours were regularly available.

There were three basic types of overtime opportunities associated with the tour schedule: overtime with workers coming in before their regular shift ("Begin Tour Overtime" or "BTOT"), overtime with employees staying to work after the end of their regular shift ("End Tour Overtime" or "ETOT"), and "Day Off Overtime" ("DOOT"). Overtime was voluntary. Employees could sign up on "Overtime Desired Lists" for any type of overtime each quarter. Each "pay location" within the P&DC maintained its own overtime lists. BTOT typically started four hours before normal shift time, about 2:00 a.m. in the case of Tour II workers. ETOT typically lasted four hours after normal shift time. Overtime was paid at a rate of time and a half.

The anticipated overtime needs of each shift and area were reported by each Tour Supervisor, Distribution Operations ("SDO") to the Manager, Distribution Operations ("MDO") for each tour. The SDO requested the number and type (BTOT, ETOT or DOOT) of overtime workers desired. The MDO made the final determination based on an assessment of the daily staffing situation and volume of mail. Once the number and type of overtime workers was determined, the Union called volunteers from the pay location lists "in order of seniority on a rotating basis." (Ex. 21 at 1-2). "[Q]ualified and available full-time employees" who placed their names on the overtime sheets were given priority in overtime assignments. (*Id.* at 2). Except in emergency or unforeseen circumstances, the SDO could not specify particular employees for overtime work.

Robert Burke was the SDO for Tour I. At the time of trial Mr. Burke was 44 years old. He would have been 37 or 38 in 2002 and 2003. Mr. Burke has worked for USPS fifteen years. Plaintiffs contend Mr. Burke ceased or reduced requests for Tour II BTOT workers to work in Tour I from about February 2002 to March 2003 as a result of which they were deprived of significant overtime pay. Plaintiffs say they regularly signed up for all types of overtime, including BTOT.

In late 2001 or early 2002 Mr. Burke began having problems with Tour III ETOT workers on his Tour I shift. As Mr.

Burke described it, the problems principally involved absences from the work floor and extended breaks which resulted in the Tour III ETOT workers being paid for overtime hours they did not actually work. When Mr. Burke's efforts through the Tour III SDO and union steward were unsuccessful in correcting the problem, he stopped requesting ETOT from Tour III workers for about two months. Mr. Burke's MDO approved the action. The Tour III workers were upset. After Union representatives came to him with assurances they would stay on the floor longer, Mr. Burke started requesting ETOT from them again.[1]

Mr. Burke testified he started having the same type of difficulties with some of the Tour II BTOT workers. Some would clock in but not show up in the work area until later. Mr. Burke testified he found Mr. Cardamon and Mr. King sleeping in their cars after the trucks went out at 4:30 a.m., Mr. Cardamon on about five occasions and Mr. King perhaps twice. Mr. Cardamon admitted it was

[1] Plaintiffs argue Mr. Burke's testimony about limiting ETOT for Tour III workers is contradicted by USPS records of the total hours of overtime worked by Tour III workers during the time period 11/3/01 to 2/2/02 when compared to the period 11/16/02 to 2/14/03 when, according to Mr. Burke, ETOT had been restored. According to plaintiffs' summary distilled from USPS overtime records, the total overtime hours worked in the first period (during which plaintiffs suppose the ETOT limitation was in effect) was only 8% less than the second. (*See* Exs. 26, 27). The problem with this is that the first period is not necessarily congruent with Mr. Burke's testimony and the many variables which affect overtime (need, number of volunteers, type of overtime requested and worked) make it very difficult to draw conclusions from total overtime hours for an entire tour.

likely he slept on the job. Mr. King admitted sleeping on a couple of occasions, but said they occurred later, in February 2003 and March 2004. He denied Mr. Burke ever had to awaken him. Mr. Burke testified he also found Mr. Nicks, who had a lawn care business, asleep on the docks on several occasions. Mr. Nicks also took overlong breaks and on occasion was absent from the work area requiring Mr. Burke to page him. Mr. Burke did not initiate formal discipline against any of the Tour II BTOT mail handlers with whom he had problems. He said he talked to them. Eventually, as he had done with Tour III, Mr. Burke, with the approval of his MDO, stopped requesting BTOT from Tour II workers.[2]

Apart from the brief period in which he did not request them, Mr. Burke consistently relied on ETOT from Tour III. As the Court understands his testimony, ETOT from Tour III was Mr. Burke's primary source of overtime labor. He testified the use of ETOT workers to assist his shift coincided with the busiest time in the post office. On an average day Mr. Burke would request 5 to 12 ETOT workers from Tour III, and often asked for everyone on the list.

[2] Mr. Burke admitted some of the incidents he described may have occurred after BTOT for Tour II workers was resumed in March 2003.

Mr. Burke continued to rely on Tour III ETOT workers after he stopped requesting BTOT from Tour II.[3]

When Mr. Burke made his decision not to request Tour II mail handlers for BTOT is the subject of some dispute in the record. Plaintiffs say they noticed a reduction in BTOT beginning in February 2002. Mr. Burke thinks he made the decision in November 2002. The Court believes it is most probable Mr. Burke began to reduce requests for Tour II BTOT workers before he made the decision not to request them at all. It is difficult to verify plaintiffs' claim that their BTOT was reduced beginning in February 2002 from the payroll data in the record because plaintiffs continued to work ETOT, in some cases DOOT, and were not completely precluded from BTOT.[4] The figures demonstrate a discernible decline in overall overtime only for Mr. Cook and Mr. Nicks. (*See* Exs. 4 -

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[3] It is, as noted previously, difficult to draw conclusions from total tour overtime figures, but the Court notes plaintiffs calculated that during the February 2002 to March 2003 time period the truck terminal Tour III mail handlers worked a total of about 22,000 hours of overtime whereas during the same period Tour II worked about 8,200 hours of overtime. (Ex. 27 at 1).

Plaintiffs assert that in addition to the Tour III ETOT workers, Mr. Burke filled Tour I overtime needs by using casual (temporary) workers to work overtime in violation of collective bargaining agreement rules. However, the total overtime hours worked by casual workers is comparatively insignificant. (*See* Ex. 27 at 2).

[4] As will be seen later there are indications that BTOT for Tour II workers was never completely eliminated. *See infra* at 11, 13 and n.11.

7).[5] The Court also has some question about the completeness of the records.

Nonetheless, the Court generally credits plaintiffs' testimony that they experienced a drop-off in BTOT from early in 2002. According to plaintiffs' summary from the USPS overtime records, Tour II workers worked approximately 38% less total overtime during the time period 11/16/02 to 2/14/03 when compared to approximately the same time period in 2001/02 when their BTOT was unrestricted. *(See* Exs. 26, 27). Plaintiffs' testimony about when they began to experience a reduction in BTOT is also consistent with the May 14, 2002 summary of a workplace "town hall"

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[5] Below is the Court's calculation from the overtime records in evidence of each plaintiff's approximate average monthly overtime before, during and after the roughly fourteen-month period during which plaintiffs say their opportunity for BTOT was reduced. (*See* Exs. 3-7). The first and third columns approximate the three-month periods before and after the reduction period. The middle column represents the monthly average during the reduction period. There is no data for Mr. Cardamon.

	11/03/01-02/01/02	2/02/02-03/28/03	03/29/03-06/27/03
Blair	64.7	46.6	43.7
Cook	101	59.4	73
Houghtaling	21.3	24.3	23.7
King	49.5	58.7	67.5
Nicks	101.9	76.5	119.9

meeting prepared by P&DC management. (Ex. 25).[6] The summary indicates one of the issues then raised with the supervisors concerned the lack of BTOT hours for Tour II workers: "Check Truck Terminal OT hours -- won't call in Tour-2 BT OT but they keep T-1 ET OT and T-3 BT & ET OT -- trucks should be full but are not." (*Id.*) Mr. Cook testified it was he who raised the Tour II BTOT issue at the town hall meeting.[7] It is likely the issue would have percolated for a while before Mr. Cook spoke up. For his part, while he testified as to time frames, it is apparent Mr. Burke really is not sure of the time period during which he did not request BTOT from Tour II workers.

Plaintiffs eventually came to believe the reason they were not receiving BTOT was because of their age. As the Court

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[6] A new P&DC manager, Mr. Wentzel, started the town hall meetings in early 2002 as a means for all pay locations to get together to discuss issues with supervisors. A summary was prepared after each meeting and made available to employees. Mr. Cook obtained the May 14, 2002 summary.

[7] Management's response to the issue in the "review status" column of the summary states: "We agree that trucks should be full and that working overtime after the dispatch is of little use." (Ex. 25). The response suggests that after the trucks to other Iowa communities left at about 4:30 a.m. there was no need for Tour II BTOT workers who typically would have worked from 2:00 a.m. to the start of their shift at 6:00 a.m. This may have been a factor in the decision to limit BTOT for Tour II workers, but the Court does not understand USPS to contend it was a determinative one.

The May 14, 2002 town hall meeting summary also reflects that a related overtime issue was raised: "ET OT every night on Tour III Outgoing - why?" (Ex. 25). The management response was "This has been true in the past due to staffing inefficiencies. However, this situation has improved of late." (*Id.*)

understands the progression of events, in mid-November 2002 Mr. Nicks contacted a USPS Equal Employment Opportunity (EEO) counselor complaining of age discrimination.[8] A "redress meeting" with management was scheduled to address the issue.

Mr. Cardamon wrote a note to himself with a date and time of December 3, 2002 at 4:40 a.m. about something he says Mr. Burke said to him that morning. At 4:40 a.m. Mr. Cardamon would have been working BTOT. Mr. Cardamon wrote Mr. Burke told him "that we were old & slow and that way [sic] he doesn't call us up for overtime." (Ex. 8). At trial Mr. Cardamon demonstrated a very poor recollection of events. He did not know what led up to his conversation with Mr. Burke and provided no testimony about the circumstances surrounding Mr. Burke's alleged comment.

On January 2, 2003 Mike Schwartz, a Tour III mail handler, wrote a memo captioned "The Old, Lazy and Slow" in which he described a conversation he had had with Mr. Burke. Mr. Schwartz had expressed disappointment that the postal service was going to "excess" a number of mail handlers from Tour II and place them in

[8] The sequence of events with respect to how and when the subject of age discrimination was raised internally is not very clear. In a motion to dismiss defendant said Mr. Nicks complained to the EEO counselor on November 15, 2002 and a formal complaint of age discrimination was made by him on January 15, 2003. (Def. Motion to Dismiss [8] at 2). The Court infers from the testimony of Mr. Burke, Mr. Brown and Mr. Cook that an informal complaint was made first, the redress meeting occurred, and when the redress meeting did not resolve the issue, a formal EEO administrative complaint was filed.

Tour I or Tour III, thereby reducing the number of Tour II workers.[9] He had hoped to bid into Tour II. According to Mr. Schwartz's memo, Mr. Burke responded by saying he "could not believe I wanted to go to days where all the mail handlers are lazy, slow and old. He was happy that excessing was finally happening." (Ex. 10). Mr. Burke continued that if the Tour II mail handlers had worked harder there would not have been the need for any to be excessed. (*Id.*) Mr. Schwartz wrote he disagreed with Mr. Burke's opinion of the Tour II mail handlers. (*Id.*) He signed his memo: "Mike Schwartz Old mail handler from Tour 3."[10]

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[9] The postal service periodically sends survey teams to postal facilities to assess the productivity of the facility. Mr. Burke testified a survey team visited the Des Moines P&DC at about the time of his conversation with Mr. Schwartz as a result of which a number of Tour II workers had been "excessed" or reassigned to other tours. Mr. Burke had nothing to do with the survey team's arrival or their recommendations. Plaintiffs do not contend the excessing is related to their age discrimination complaint.

[10] Mr. Schwartz was 51 years old at the time. (*See* Ex. 2). He testified initially that he did not believe there were any other occasions on which Mr. Burke referred to the Tour II workers as old, lazy and slow. When shown an affidavit he submitted during the EEO investigation he said the episode described in his January 2, 2003 memorandum was just one of several occasions, in fact many, on which Mr. Burke referred to the Tour II workers as old, lazy and slow. Mr. Burke may have referred to the Tour II workers as old, lazy and slow on more than one occasion, but the Court doubts the January 2003 conversation was just one among many others in a similar vein. What Mr. Burke said was remarkable enough for Mr. Schwartz to report it to Mr. Cook and then memorialize what was said. If Mr. Burke made the old, lazy and slow comment many times to Mr. Schwartz he would have made it to others, but with the possible exception of the single statement to Mr. Cardamon, there is no evidence of this.

Mr. Schwartz told Mr. Cook what Mr. Burke had said about the Tour II workers. Mr. Cook testified he asked Mr. Schwartz to write a statement. Not long afterward a formal administrative EEO complaint was filed. When Mr. Burke became aware of it, he approached Mr. Cook and asked "do you really believe that I would discriminate because of your age?" Mr. Cook responded he did not want to believe it, but thought it so.

Mr. Burke had other conversations with Tour II workers during the same general time period about the lack of BTOT and job performance in which he made no reference to the age of Tour II workers. Michael Brown is a long-time Tour II worker who in December 2002 was 58 years old. He was one of the original EEO complainants though he is not a plaintiff in this lawsuit. He too wrote a memo of a conversation he had with Mr. Burke. He indicates the conversation occurred on December 4, 2002 at 3:50 a.m., a time when Mr. Brown would have been working BTOT. Mr. Brown wrote that Mr. Burke stopped him, apologized for something he had said the day before and then continued: "I want to tell you the truth. The reason I haven't been bringing you guys in for OT is that there is a couple of people who don't work[.] I respect you and Betty [Blair] and if I could have just brought you guys in I would." (Ex. 9). Mr. Brown responded that Mr. Burke should not "cut the heads off everyone just to get at someone you don't like." (*Id.*) Their conversation concluded with Mr. Brown telling Mr. Burke "we'll talk

on the 10th and see if we can reach a settlement," evidently referring to the pending redress meeting. (*Id.*) Mr. Brown testified Mr. Burke did not mention age as a reason for the overtime decision and complained only that unnamed Tour II mail handlers did not work hard.[11]

At some point, probably late in 2002, Mr. Burke approached Ms. Blair and told her in substance that if she could get the Tour II workers to work harder he would "bring in more overtime." He said nothing to Ms. Blair about the age of the workers.

The time frame is unclear, but Mr. Burke complained to Mr. King about Tour II workers not returning from breaks on time. Mr. Burke said nothing to Mr. King about age. Later, after an unrelated argument between them, Mr. Burke told Mr. King that he wanted him (King) to work for him.

Mr. Burke admits to parts of the conversation with Mr. Schwartz. He says he told Mr. Schwartz he did not believe that he (Mr. Schwartz) wanted to work days (Tour II) because the pace was much slower. Mr. Burke described Mr. Schwartz as a good worker who liked to keep busy. Mr. Burke did not recall telling Mr. Schwartz that Tour II workers were "lazy" or "slow." He specifically denied telling Mr. Schwartz or anyone else that the Tour II workers were

[11] That Mr. Cardamon and Mr. Brown talked with Mr. Burke about the overtime situation in December 2002 while working BTOT is evidence that BTOT for Tour II workers never completely ceased.

"old." Mr. Burke testified he did not consider the problems he had had with the Tour II workers to be attributable to their age.

It is difficult to accept at face value Mr. Cardamon's written statement and testimony about what Mr. Burke told him. Mr. Cardamon did not recall much about the statement he attributes to Mr. Burke. That is not surprising in view of the six and one-half years between the statement and his testimony. Mr. Cardamon was not the only witness with recollection problems, but the fact remains there is only his very brief note. He did not in his note, and did not at trial, provide any information about the circumstances and context in which the statement was made which might assist the Court in assessing the credibility of his report. The Court is left to speculate how it came to be that alone among the Tour II workers Mr. Burke bluntly told Mr. Cardamon he and the others were not getting overtime because they were old and slow.

It is different with the conversation Mr. Schwartz says he had with Mr. Burke. Mr. Schwartz has a measure of credibility because he did not work in Tour II and was not affected by the lack of BTOT for Tour II workers. There is no evidence of conflict between Mr. Schwartz and Mr. Burke; in fact, Mr. Burke thought highly of Mr. Schwartz as a worker. Mr. Schwartz's written statement about what Mr. Burke told him sets out a plausible context in which the statement was made -- a discussion about Tour II mail handlers being excessed and its affect on Mr. Schwartz's

work plans. Mr. Schwartz described both sides of the conversation. It is the fact that a conversation about Tour II did occur between the two. Mr. Schwartz is definitely on the side of the mail handlers in this dispute, but the Court does not believe he fabricated what he wrote and had to say about his conversation with Mr. Burke.

Though to one employee, perhaps two, Mr. Burke made derogatory statements associating the age of Tour II mail handlers with their job performance, the consistent theme in all of the comments attributed to him about the Tour II workers is that he had a poor opinion of some of the workers' job performance and work habits. Regardless of the validity of his complaints, the Court finds Mr. Burke's opinions in this regard were genuinely held by him based on his experience with some of the Tour II BTOT workers.

The reference in Mr. Brown's December 4, 2002 memo to a meeting on "the 10th" to discuss settlement indicates the redress meeting was probably held on December 10, 2002. In attendance were Mr. Cook and Mr. Nicks for the Tour II mail handlers, P&DC lead MDO Jerry Short, Mr. Burke, EEO representative Debbie Dennis, and a mediator. No explanation was given for why Tour II workers were being deprived of the opportunity for BTOT. During the course of the meeting Mr. Short told Mr. Cook and Mr. Nicks that if they would drop their complaint Tour II workers would start receiving

BTOT again. Mr. Burke nodded his head in approval. The complaint was not resolved.

Ultimately Tour II workers began to receive BTOT again. Unlike with the commencement of the reduction in BTOT, when it resumed is relatively clear. Shortly after the redress meeting Mr. Burke was temporarily reassigned to Tour III for a period of about four months. His stand-in as Tour I supervisor resumed requesting BTOT from Tour II workers. This coincided with the arrival of a new "low cost tray sorter" at the facility which Ms. Blair, Mr. Cook, Mr. King and Mr. Nicks worked BTOT to help set up. When he returned to Tour I, Mr. Burke continued to use BTOT Tour II workers. The resumption of BTOT for Tour II workers probably occurred by March 2003 as testified to by some of the plaintiffs.

II.

LEGAL DISCUSSION AND ADDITIONAL FINDINGS

A.

The ADEA prohibits discrimination with respect to "compensation, terms, conditions, or privileges of employment because of [an] individual's age." 29 U.S.C. § 623(a)(1). The statute applies to USPS employees. *Id.* § 633a(a). To establish disparate treatment under the ADEA a plaintiff must prove (1) he or she is a member of the protected class, a person at least 40 years of age, *id.* § 631(a); (2) he or she was subjected to adverse employment action by the employer; and (3) the employer took the

action because of the plaintiff's age. *See* 8 L. Larson, *Employment Discrimination* Ch. 135, Proof of Disparate Treatment, § 135.01 at 135-3 (Matthew Bender 2d ed. 2009).

In the past there was some question about the causation standard under the ADEA and whether, and under what circumstances, the burden of persuasion shifted to an ADEA defendant. By analogy to the amendments to Title VII in the Civil Rights Act of 1991 and application of the mixed-motive analysis taken from the various opinions in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), some argued causation was established by proof that age was a motivating factor for the questioned employment decision, even though the decision may have been equally motivated by other factors. The 1991 Act amended Title VII (which does not concern age) to add 42 U.S.C. § 2000e-2(m). That subsection makes "motivating factor" the causation standard. Under it a Title VII violation is established "when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." The 1991 Act also added paragraph 2(B) to subsection (g) of 42 U.S.C. § 2000e-5. That provision shifts the burden of persuasion to a defendant once the plaintiff demonstrates under § 2000e-2(m) that an impermissible consideration was a motivating factor. To escape liability for damages and certain kinds of equitable relief the employer must prove it would have taken the

same action "in the absence of the impermissible motivating factor."

The Eighth Circuit had applied the mixed-motive analysis of *Price Waterhouse* to cases arising under the ADEA. Under *Price Waterhouse* as applied by the Eighth Circuit the burden of persuasion on the issue of causation shifted to the employer if the employee plaintiff produced "direct evidence" that an illegitimate factor played a substantial role in the employment decision. "Direct evidence is evidence showing a specific link between the alleged discriminatory animus and the challenged decision . . . ." *King v. United States*, 553 F.3d 1156, 1160 (8th Cir. 2009). Presented with direct evidence sufficient to demonstrate that age was a motivating factor the employer had to prove it was more likely than not it would have made the same decision absent consideration of the illegitimate factor. *See Gross v. FBL Financial Services, Inc.*, 526 F.3d 356, 359 (8th Cir. 2008), *rev'd* __ U.S. ____, 129 S. Ct. 2343 (2009)(citing *Erickson v. Farmland Indus. Inc.*, 271 F.3d 718, 724 (8th Cir. 2001)). In this case that would mean that if the statements attributed to Mr. Burke by Mr. Cardamon and Mr. Schwartz were taken as direct evidence that age was a motivating factor, USPS would have to demonstrate that it in the person of Mr. Burke would have nonetheless restricted BTOT for the Tour II workers.

Following the trial of this case the U.S. Supreme Court issued its opinion in *Gross*. The court agreed with the Eighth Circuit that the 1991 amendments to Title VII had no applicability to the ADEA because when Congress amended Title VII it did not make a similar amendment to the ADEA. ___ U.S. at ___, 129 S. Ct. at 2349. Unlike with Title VII, the ADEA's text does not provide that causation is established by proof age was a "motivating factor" for the challenged employment decision. Where the Supreme Court parted company with the Eighth Circuit was on the applicability of *Price Waterhouse* to ADEA cases. The court said the analysis in *Price Waterhouse* was inapposite because *Price Waterhouse* was a Title VII case and there is no basis in the text of the ADEA to extend it to age discrimination cases. *Id.*

The ADEA prohibits discrimination "because of" a covered individual's age. 29 U.S.C. § 623(a). The Supreme Court's ultimate holding in *Gross* was that the statutory language "because of" requires a "but-for" causation standard. Thus an ADEA plaintiff "must prove by a preponderance of the evidence (which may be direct or circumstantial), that age was the 'but-for' cause of the challenged employer decision." ___ U.S. at ___, 129 S. Ct. at 2351. The burden of persuasion never shifts to the employer.

While it is now clear that *Price Waterhouse* does not apply to ADEA claims, circuit precedent still holds that the

McDonnell Douglas[12] analytical framework applies to evaluate ADEA claims based on "indirect" or circumstantial evidence. *See Gross*, 526 F.3d at 359 (citing *Thomas v. First Nat. Bank of Wynne*, 111 F.3d 64, 66 (8th Cir. 1997)). The Eighth Circuit recently observed that the Supreme Court in *Gross* said again that it had not "definitively decided" whether the *McDonnell Douglas* analysis used in Title VII cases is appropriate for ADEA cases. *Baker v. Silver Oak Senior Living Management Co.*, 581 F.3d 684, 688 (8th Cir. 2009)(quoting *Gross*, ___ U.S. at ___, 129 S. Ct. at 2349 n.2). The present case is now before the Court on a fully developed trial record in which defendant presented legitimate age-neutral reasons for restricting Tour II employees from BTOT (the poor performance and work habits of some Tour II employees) and plaintiffs have presented rebuttal evidence (Mr. Burke's complaints were not factually accurate and the age-related statements to Mr. Cardamon and Mr. Schwartz). In these circumstances it is appropriate to pass to the ultimate question of age discrimination *vel non* rather than belabor the *McDonnell Douglas* framework. *Id.*

B.

Defendant disputes that the temporary deprivation of plaintiffs' opportunity to work BTOT was an actionable adverse employment action or that plaintiffs' age was the but-for cause of

[12] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

that action. There is no dispute that plaintiffs were members of the protected class.

Adverse Employment Action

> The adverse employment action must be one that produces a material employment disadvantage. Termination, cuts in pay or benefits, and changes that affect an employee's future career prospects are significant enough to meet the standard . . . . Minor changes in duties or working conditions that cause no materially significant disadvantage do not meet the standard of an adverse employment action. . . .

Kerns v. Capital Graphics, Inc., 178 F.3d 1011, 1016-17 (8th Cir. 1999); *see Buboltz v. Residential Advantages, Inc.*, 523 F.3d 864, 868 (8th Cir. 2008)("job reassignment involving no corresponding reduction in salary, benefits, or prestige is insufficient," citing cases); *Clegg v. Ark. Dept. of Correction*, 496 F.3d 922, 927 (8th Cir. 2007)(fact that plaintiff was not "welcomed back to work in the way she would have liked or immediately reoriented to her position" did not qualify as adverse action); *Fischer v. Andersen Corp.*, 483 F.3d 553, 557 (8th Cir. 2007)(placement of employee on performance plan did not qualify as adverse action); *Higgins v. Gonzales*, 481 F.3d 578, 584-88 (8th Cir. 2007)(multiple alleged actions, individually or cumulatively, did not constitute adverse employment action).

USPS relies on *Baucom v. Holiday Companies*, 428 F.3d 764 (8th Cir. 2005). Mr. Baucom alleged his hours were cut from over 40 per week to less than 40 with the result that absent overtime he

received a twenty percent cut in take-home pay. The Eighth Circuit held the alleged "slight decrease in hours" did not result in a material employment disadvantage. *Id.* at 767. The Eighth Circuit's holding was influenced by the fact that plaintiff's fluctuating schedule did not show a steady decrease in hours over the two-year period alleged nor did it demonstrate a "break point" between when he worked over 40 hours and began working less than 40 hours. *Id.* Except perhaps for Mr. Cook and Mr. Nicks, the payroll data in the record before the Court does not clearly show a net reduction in overtime hours and hence pay for the time period alleged. (*See* n.5 *supra*). On the other hand, while the time period is in dispute, it is evident that there was a break point after which Mr. Burke substantially reduced his requests for BTOT overtime from Tour II workers for reasons other than need. All of the plaintiffs had a history of requesting BTOT as well as other forms of overtime. It is probable some of the plaintiffs would have received significant additional amounts of overtime compensation had the decision to deny them the opportunity for BTOT not been made. *Baucom* makes the issue close, but the Court believes the difficulty here is with proof of damages rather than proof that an adverse employment action was taken. A decision by an employer to deny workers an opportunity for overtime which had previously been granted to them and of which they had previously taken full advantage amounts to a "tangible change in duties or working conditions" which constitutes

a "material employment disadvantage." *Id.* (quoting *Burchett v. Target Corp.*, 340 F.3d 510, 518 (8th Cir. 2003)). The ultimate issue in this case is but-for causation.

But-For Causation

It is appropriate to first address what "but-for" means. Defendant argues the but-for standard requires each plaintiff to prove that his or her age was "the unique, sole, one and only, and determinant reason" for the decision to reduce plaintiffs' BTOT hours. The Court does not agree "but for" means age must be the sole reason for the decision. The but-for standard in age discrimination cases is not new in this circuit as it is the standard many courts applied before *Gross* when there was no direct evidence of discrimination. Long ago in *Grebin v. Sioux Falls Ind. Sch. Dist.*, 779 F.2d 18 (8th Cir. 1985), an age discrimination case, the Eighth Circuit approved of an instruction defining "determining factor" for an employment decision in terms of but-for causation. *Id.* at 21 & n.1. Though there has been some back and forth in the circuit case law about whether age must be "a" or "the" determining factor, *see Hartley v. Dillard's, Inc.*, 310 F.3d 1054, 1060 (8th Cir. 2002), the law in this circuit has been consistent that "but for" means "determining factor," and vice versa. The Eighth Circuit model jury instructions for ADEA cases have for some time recommended that where there is no direct evidence of discrimination the court should require plaintiff to

prove age was a "determining factor" for the defendant employer's decision, explaining:

> "Age was a determining factor" only if the defendant would not have [taken the adverse employment action] but for the plaintiff's age; it does not require that age was the only reason for the decision made by the defendant.

8th Cir. Civil Jury Inst. § 5.11A (2008); *see id.* §§ 5.11, 5.91 (2001). The current model instruction, including the proviso that age does not have to be the only reason for a decision, traces its lineage directly to *Grebin*. These instructions remain good law after *Gross* except now they apply regardless of whether there is direct evidence of discrimination.

It follows the "but-for" cause does not mean the sole cause for an employer's decision. To require an age discrimination plaintiff to eliminate all other possible causes for a decision would pose an impossible burden in most instances. For age to be the but-for cause it must be the determining factor without which the adverse employment action would not have been taken.

Mr. Burke's statements to Mr. Cardamon and Mr. Schwartz about the age of the Tour II mail handlers are the only significant evidence of age discrimination in this record. The statement to Mr. Cardamon that Tour II workers were not receiving overtime because they were old and slow would be direct evidence of discrimination because it was specifically linked to the employment decision.

However, the probative value of the Cardamon statement is diminished by absence of context for the reasons given previously.

The Court has found Mr. Burke's description of the Tour II mail handlers as "lazy, slow and old" occurred substantially as reflected in Mr. Schwartz's memorandum and testimony. Remarks of this kind incorporate the kind of stereotypes about older workers the ADEA was intended to combat. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)(referring to the stereotypical and inaccurate belief that "productivity and competence decline with age" as the essence of age discrimination). What Mr. Burke said to Mr. Schwartz is therefore some evidence of a discriminatory attitude which may constitute direct evidence. *See King v. Hardesty*, 517 F.3d 1049, 1058 (8th Cir. 2008).

There is, however, other persuasive evidence against a finding that Mr. Burke harbored a discriminatory attitude toward older workers generally or was influenced by it in his decision not to request BTOT from the Tour II mail handlers. Mr. Burke had experienced problems with some of the Tour II mail handlers who worked BTOT. Some slept, some he had to look for. His comments to Mr. Brown, Mr. Blair, Mr. King and Mr. Schwartz all reflect that what it boiled down to was Mr. Burke thought some of the Tour II workers did not work hard enough. The Court has found previously that Mr. Burke genuinely believed this to be the case on the basis of his experience with some of the Tour II workers. Since he could

not select who he wanted, Mr. Burke's solution was to restrict BTOT for all. The fairness of, as Mr. Brown said, punishing all for the sins of some is not for this Court to decide. Mr. Burke's remark to Ms. Blair that if she could get the Tour II workers to work harder he would request more overtime from them indicates he hoped, as was the case with the ETOT Tour III workers previously, that assurances would be given by the Tour II workers that his expectations would be met.

Mr. Burke did not think ill of the job performance of all the Tour II mail handlers who had worked BTOT. His statements to Mr. Brown and Ms. Blair, at the time ages 58 and 49 respectively, show he had a good opinion of their work ethic and would have welcomed them to work BTOT. Despite the fact Mr. King slept on the job a couple of times, Mr. Burke told Mr. King he wanted King to work for him. This evidence is inconsistent with a general discriminatory attitude toward older workers which Mr. Burke's statement to Mr. Schwartz viewed alone might otherwise suggest, and it supports Mr. Burke's testimony that he acted in response to the perceived shortcomings of some of the Tour II mail handlers.

Finally, the workload varied, but the routine in the truck terminal was the same day after day. The trucks came in, the mail was sorted, the trucks went out. It was Mr. Burke's job to see that the work got done on his shift. Mr. Burke had consistently relied on ETOT from the Tour III workers and continued to do so after he stopped requesting BTOT from Tour II workers. On average

the mail handlers on Tour II were older but only marginally so compared with those on Tour III. In a seniority-based system it would also be the case that the older workers with more seniority on Tour III who signed up for overtime would be selected for ETOT first. The record does not reliably demonstrate the relative ages of the Tour II and Tour III workers who signed up to work overtime on Tour I, but the difference could not have been much. Regardless from which tour he selected, Mr. Burke was going to get similarly aged overtime workers, predominantly over age 40. Given the work requirements and the age of the available overtime work force, it does not seem plausible that Mr. Burke would refuse to request overtime from Tour II workers because of their age. It is more likely he was motivated by what he considered to be the poor job performance of some of the Tour II mail handlers who had worked BTOT on Tour I.

The Court concludes that plaintiffs have not established by the preponderance of the evidence that age was "the" [or "a"] determining factor for the decision in 2002 and 2003 to reduce BTOT for Tour II mail handlers. It follows age was not the "but-for" cause of the decision. *Gross*, ___ U.S. at ___, 129 S. Ct. at 2351.

III.

CONCLUSIONS OF LAW

1. Plaintiffs have not established that they were denied overtime compensation because of their age. Accordingly,

they have not established the liability of defendant for age discrimination under the Age Discrimination in Employment Act.

2. Judgment should be entered in favor of defendant and against plaintiffs dismissing the Complaint.

IV.

ORDER FOR JUDGMENT

The Clerk shall enter judgment dismissing the Complaint.

IT IS SO ORDERED.

Dated this 14th day of January, 2010.

ROSS A. WALTERS
UNITED STATES MAGISTRATE JUDGE