EEOC v. Johnson & Higgins, Inc.: Making the World Safe for Millionaires

Daniel P. O'Meara

In the recent case of EEOC v. Johnson and Higgins Inc., *both the U.S. District Court for the Southern District of New York and the Second Circuit concluded that Johnson and Higgins, Inc. unlawfully discriminated on the basis of age in enacting a mandatory retirement program for its Board of Directors and, thus, violated the Age Discrimination in Employment Act (ADEA). Mr. O'Meara suggests that both courts were misguided in reaching this conclusion. More specifically, he criticizes the appellate court's reasoning that allowed the Equal Employment Opportunity Commission (EEOC) to proceed with the case despite the absence of an aggrieved party.*

Finally, the essay criticizes the EEOC's decision to pursue this particular case. The author posits that the EEOC misallocated funds in seeking to protect wealthy corporate executives through an ADEA suit. He bases this conclusion on the fact that the employees at issue were not likely to need government-subsidized counsel to fight for protection from employment discrimination. Given the EEOC's limited resources and backlog of cases, Mr. O'Meara recommends that the best use of public resources in a similar case is to advise the allegedly aggrieved executives of their right to file a charge, and of the EEOC's willingness to challenge the policy in court, instead of initiating expensive litigation on behalf of such relatively wealthy individuals.

The judicial reasoning applied in *EEOC v. Johnson & Higgins, Inc.*[1] is open to some question. This essay argues that the district court and Second Circuit relied too heavily on case law under the Fair Labor Standards Act in deciding *Johnson & Higgins, Inc.* It also questions the decision of the Equal Employment Opportunity

Daniel P. O'Meara is a Member of Cozen and O'Connor, Philadelphia, Pennsylvania, and Managing Director, Wharton School Council on Employee Relations. Mr. O'Meara received his J.D. and M.B.A. from University of Pennsylvania in 1988. He is the author of *Protecting the Growing Number of Older Workers: The Age Discrimination in Employment Act* (University of Pennsylvania, 1989).

1. 887 F. Supp. 682 (S.D.N.Y. 1995), *aff'd*, 91 F.3d 1529 (2d Cir. 1996), *cert. denied*, 118 S. Ct. 47 (1997).

Commission (EEOC) to prosecute this case. Indeed, the EEOC's decision reflects a gross misdirection of public resources.

I. Johnson and Higgins's Corporate Structure and the Employment Practice at Issue

Until several years ago, Johnson and Higgins, Inc. (J & H) utilized a unique structure for its senior management that intertwined employment status as an officer, ownership of stock, and participation on the Board of Directors.[2] J & H was a privately held insurance brokerage and employee benefits consulting firm with its headquarters in New York City and offices throughout the world.[3] A Board of Directors, which at the start of the lawsuit contained thirty-five members, managed J & H.[4] There were no "outside directors" of J & H; all directors at the time of their election were officers and employees of J & H or its subsidiaries.[5] J & H directors retained their prior duties upon becoming directors and remained employees of J & H.[6]

Status as a director, however, marked a substantial promotion within the organization.[7] Directors attended Board meetings and served on various Board committees.[8] Equally as important, appointment to the Board enormously enhanced the new director's prestige and personal stature within the organization, as well as his ability to accomplish goals within the organization.[9]

Directors owned virtually all the stock of J & H and the corporation required all directors to maintain a specified level of stock ownership in order to retain their director seats.[10] Upon appointment to the Board, a new director could purchase the requisite stock for a nominal cost.[11] When a director left the Board for any reason, J & H required him to surrender his stock and then reallocated it to the other directors.[12] Departing directors continued to receive dividends on this

2. *See* 887 F. Supp. at 684; 91 F.3d at 1532.
3. *See* 887 F. Supp. at 683; 91 F.3d at 1531.
4. *See* 91 F.3d at 1531.
5. *See* 887 F. Supp. at 684; 91 F.3d at 1531.
6. *See* 91 F.3d at 1532.
7. *See* 887 F. Supp. at 684; 91 F.3d at 1532.
8. *See* 887 F. Supp. at 684.
9. *See id.*
10. *See* 887 F. Supp. at 683; 91 F.3d at 1532.
11. *See* 887 F. Supp. at 684.
12. *See id.* at 683; 91 F.3d at 1532.

stock for the first ten years after leaving the Board, during which time they served as consultants to the Board.[13]

At issue in the litigation of Johnson and Higgins, Inc. was a policy requiring all directors age sixty-two to resign from the Board, resign as officers, and resign from employment.[14] If the director was a Board member for fifteen or more years, J & H required him to resign at age sixty.[15] Retired directors could act only as consultants and receive dividends for ten years. J & H formalized and adopted this mandatory retirement practice in 1983.[16]

II. The EEOC's Investigation of J & H's Mandatory Retirement Policy

Although twenty-two directors have retired under this policy since 1983, none have filed charges with the EEOC challenging the practice.[17] The EEOC became aware of the policy when J & H forced a director younger than the mandatory retirement age to leave for assertedly non-age-related reasons.[18] He filed an EEOC charge against J & H, alleging that age was the true reason that J & H fired him.[19]

In May 1992, the EEOC began an investigation of the mandatory retirement policy applied to J & H directors.[20] The investigation concluded several months later when the EEOC issued a Notice of Determination stating it found reasonable cause to believe unlawful age discrimination had occurred.[21] After unsuccessful efforts to conciliate, the EEOC initiated a lawsuit against J & H in the U.S. District Court for the Southern District of New York.[22]

III. The District Court Decision

At the district court level, J & H posed several arguments in hopes of escaping liability under the ADEA. First, J & H contended

13. *See* 887 F. Supp. at 683; 91 F.3d at 1532.
14. *See* 91 F.3d at 1532.
15. *See id.*
16. *See id.*
17. *See* 887 F. Supp. at 684; 91 F.3d at 1533.
18. *See* 91 F.3d at 1533.
19. *See id.* (describing the manner in which the EEOC became aware of the policy); *see also* Sempier v. Johnson & Higgins, Inc., 45 F.3d 724 (3d Cir. 1995) (ADEA lawsuit brought by a former J & H Director).
20. *See* 91 F.3d at 1533.
21. *See id.*
22. *See* 887 F. Supp. at 682; 91 F.3d at 1533.

that its practice was based upon "reasonable factors other than age" (RFOA) and therefore permissible under the ADEA's RFOA defense.[23] More specifically, J & H asserted that the forced resignation from *employment* was based upon the resignation from the *Board of Directors* in that it would be awkward and unrealistic to move former directors into subordinate roles within the organization.[24] The court predictably rejected this argument, because the loss of director status was, in turn, based upon age, and therefore the factor relied upon was age.[25]

As its second argument, J & H contended that its directors were not really "employees" within the meaning of the ADEA in that they control and manage the business.[26] J & H argued that the directors are more accurately characterized as "partners," who are generally excluded from ADEA coverage.[27] The district court characterized this argument as having "some merit" and further stated that "[e]mployees who are also co-owners and directors of their corporation arguably are in a better position to take care of themselves than the average employee and consequently may not require the protections of the ADEA."[28]

The district court ultimately rejected this argument based upon a prior Second Circuit decision, *Hyland v. New Haven Radiology Associates*.[29] In *Hyland*, the Second Circuit heard an ADEA case by a radiologist who was one of five owners and directors of a professional corporation.[30] Although the corporate employer was "a partnership in all but name," it chose the corporate form of business organization.[31] The Second Circuit held that all employees of a corporate employer are covered under the ADEA, regardless of whether their positions are, in fact, similar to those of partners.[32] The trial court in *EEOC v. Johnson & Higgins, Inc.* felt constrained to follow *Hyland*, and therefore rejected J & H's argument that its directors were not "employees" within the meaning of the ADEA.[33]

23. 887 F. Supp. at 685-86.
24. *See id.* at 686.
25. *See id.*
26. *See id.* at 687.
27. *See id.*
28. *Id.*
29. *See id.* (citing Hyland v. New Haven Radiology Assoc., 794 F.2d 793 (2d Cir. 1986)).
30. *See id.*
31. *See id.* (citing *Hyland*, 794 F.2d at 794).
32. *See id.* at 687.
33. *See id.* at 687-88, 687 n.7.

Third, J & H argued that because no J & H director filed a charge with the EEOC, and because all the present and retired J & H directors were apparently pleased with this policy, no harm occurred.[34] Therefore, J & H reasoned that the EEOC had no power to bring the action.[35] J & H made similar arguments that the case did not present a justiciable case or controversy, and that the matter presented was not ripe for adjudication.[36]

The district court not only rejected all these arguments,[37] but began its analysis by noting that J & H discriminated based upon age against directors in their status as employees.[38] The court noted that the ADEA incorporates by reference the enforcement provisions of the Fair Labor Standards Act (FLSA) and cited cases stating that the EEOC may proceed without the consent of, and even against the wishes of, the assertedly injured individuals.[39] The court also cited a FLSA case for the proposition that the obligation to pay minimum wages and overtime cannot be modified or waived.[40]

The district court also rejected J & H's final argument that the EEOC had not engaged in sufficient conciliation prior to initiating the lawsuit.[41] The court recognized that the EEOC has a duty to attempt to end the discriminatory practice by conciliation, but it concluded that the EEOC had fulfilled this duty prior to filing.[42]

In short, the trial court concluded that J & H had discriminated based upon age through the use of its retirement policy.[43] In addition, it stated that J & H effectively sought to create an exception to the ADEA that Congress did not intend to include.[44] Congress established age sixty-five as the minimum retirement age for high-level executives, and the district court was not willing to lower the age Congress established.[45]

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34. *See id.* at 688.
35. *See id.* at 688-89.
36. *See id.* at 688 n.8.
37. *See id.* at 688-89.
38. *See id.* at 685.
39. *See id.* at 688.
40. *See id.* (citing Lerwill v. Inflight Motion Pictures, Inc., 582 F.2d 507, 513 (9th Cir. 1978)).
41. *See id.* at 689.
42. *See id.*
43. *See id.* at 685; EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1531 (2d Cir. 1996), *cert. denied*, 118 S. Ct. 47 (1997).
44. *See* 887 F. Supp. at 688.
45. *See id.*

In ultimately granting the EEOC's motion for partial summary judgment on liability and reserving judgment on the question of damages, the district court entered an injunction prohibiting J & H from enforcing its unlawful retirement policy and directed J & H to present the EEOC with a modified retirement policy for its employee-directors that complied with the ADEA.[46] The district court even proposed one possible modification of the policy that would bring the policy into conformity with the ADEA: a decoupling of director and employee status, thus allowing directors to remain as employees even after resigning as directors.[47]

IV. The Second Circuit Decision

A panel of the Court of Appeals for the Second Circuit affirmed the district court's decision.[48] In doing so, the appellate panel rejected J & H's arguments that: (1) the EEOC did not meet its duty to conciliate, and (2) the policy was based upon reasonable factors other than age.[49] In addition to these arguments, the Second Circuit panel addressed J & H's argument that the employee-directors should not be considered "employees" within the meaning of the ADEA because they are more akin to "partners."[50] Like the district court, the Second Circuit panel relied upon the *Hyland* decision to determine that corporate employees cannot be exempted from the ADEA as de facto partners.[51]

The Second Circuit addressed another issue not raised by J & H—whether the directors were employers, rather than employees, because they exercised such extensive control as directors.[52] The court concluded that the directors were "employees" within the meaning of the ADEA because they had, in fact, continued with traditional employment duties, were not employed by any other entity, and reported to someone higher in the hierarchy.[53]

46. The district court opinion did not state the relief, but merely stated at the conclusion of the opinion, "Submit Order." The discussion of the relief is taken from the court of appeals decision. *See* 91 F.3d at 1533-34.

47. *See id.*

48. *Id.*

49. *See id.* at 1535, 1540-42.

50. *See id.* at 1537-38.

51. *See id.*

52. *See id.* at 1538-40.

53. *See id.*

Finally, the Second Circuit addressed the argument that the EEOC had no standing to bring the lawsuit in the absence of an EEOC charge or an aggrieved individual.[54] The court characterized J & H's argument as twofold: (1) the directors expressly waived any ADEA claim they might have against J & H; and (2) the EEOC lacked authority to litigate in the absence of a charge or an aggrieved person.[55]

In support of its waiver argument, J & H submitted affidavits signed by its former directors opposing the EEOC's lawsuit.[56] The Second Circuit disposed of this argument by relying upon express ADEA language that no waiver agreement can affect the EEOC's rights and responsibilities to enforce the ADEA.[57] Regarding J & H's argument challenging the EEOC's authority to litigate the matter, the Second Circuit initially stated that "[t]his argument has some appeal inasmuch as it appears anomalous that the EEOC should be authorized to bring suit on behalf of individuals who do not believe themselves to be victims of discrimination and who seem to have no interest in pursuing a suit against their employer."[58] Nevertheless, the appellate court ultimately rejected the argument, relying upon several prior cases that allowed the EEOC to proceed in the absence of an aggrieved party.[59] Finally, the Second Circuit panel also noted that the EEOC had a legitimate concern in protecting the interests of future J & H directors.[60]

In a dissenting opinion, Judge Jacob[61] described J & H's senior management structure as a well-designed system structured to foster long-term growth and stability, rather than short-term objectives.[62] He was troubled by the EEOC's decision to allocate resources to attack this structure and noted that there "is no grievance, no victim, no loss, and no claim."[63] He agreed with the majority opinion that the EEOC had the right to pursue a claim in the absence of an aggrieved person and noted that fears of retaliation among employees support this result.[64]

54. *See id.* at 1535-37.
55. *See id.* at 1535.
56. *See id.*
57. *See id.* at 1535-36 (citing 29 U.S.C. § 626(f)(1) (1994)).
58. *Id.* at 1536-37.
59. *See id.* at 1535-37.
60. *See id.* at 1537.
61. *See id.* at 1543-47.
62. *See id.* at 1543.
63. *Id.*
64. *See id.*

Judge Jacob based his dissent on his belief that the J & H directors were employ*ers* as opposed to employ*ees*, and therefore not protected under the ADEA.[65] Judge Jacobs believed that, under the totality of the circumstances, material facts were in dispute and, as such, summary judgment on this issue was inappropriate.[66]

V. Commentary on the Courts' Decisions

EEOC v. Johnson & Higgins, Inc. is a case rich in ADEA analysis. It will be cited most frequently for the propositions that: (1) the EEOC can proceed in the absence of a charge or an aggrieved person, and (2) all corporate employees are covered under the federal employment discrimination laws, regardless of their status within the organization.

EEOC v. Johnson & Higgins, Inc. does not call into question the long-standing rule of law that positions on corporate boards of directors are beyond the reach of the ADEA and other employment discrimination laws. Nor does it call into question the rule of law that true partners within legal partnerships are not protected by the ADEA. J & H utilized a unique senior management structure intertwining directorship, stock ownership, and employee status.[67] Both the district court and the Second Circuit noted that if J & H did not require resignation from employment at the same time it required resignation from the Board and sale of J & H stock, the result would likely have been different.[68]

EEOC v. Johnson & Higgins, Inc. does not limit the right of employers to require senior executives to retire at age sixty-five under certain circumstances. When Congress amended the ADEA in 1978 to prohibit mandatory retirement, it added an exemption excluding from ADEA coverage certain qualifying bona fide executive and high corporate policy makers.[69] Had J & H required its directors to retire at

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65. *See id.* at 1543-47.

66. *See id.*

67. *See* EEOC v. Johnson & Higgins, Inc., 887 F. Supp. 682, 683-84 (S.D.N.Y. 1995).

68. *See id.* at 685 ("We might conclude differently if J & H's employee-Directors were merely forced under the policy to sell their stock and to resign from their position as Director.").

69. *See* 29 U.S.C. § 631(c) (1994) (permitting the compulsory retirement of anyone age 65 or older who had worked in the two preceding years in a bona fide executive or high policy-making position and meeting pension eligibility specifications).

age sixty-five, instead of age sixty or sixty-two, it would likely have prevailed over any legal challenge.[70]

The analyses of both the district court and of the majority of the Second Circuit are open to some question. The district court, for example, was misguided when it rejected J & H's argument that the directors waived their rights.[71] Both courts erred by incorrectly relying upon FLSA case law, because such reliance is grossly inappropriate and has long since been rejected by the courts and by Congress.[72] Although the Second Circuit superficially corrected the district court's error by looking to ADEA authority on waivers,[73] it ultimately concluded that the EEOC can bring suit in the absence of an aggrieved individual.[74] In doing so, it relied on cases that, in turn, looked to the Secretary of Labor's authority under the FLSA.[75]

Overreliance on FLSA case law and procedures in order to shape ADEA procedures is inappropriate. It is true that Congress incorporated certain FLSA procedural language into the ADEA, but this incorporation was intended to facilitate the enforcement efforts of the Wage and Hour Division of the Department of Labor, the agency that originally enforced the ADEA.[76] With the transfer of the enforcement function from the Wage and Hour Division to the EEOC, the purpose for that incorporation vanished, and, therefore, the courts should construe the ADEA accordingly.[77]

Moreover, very real differences exist between minimum wage and overtime law, as opposed to an employment discrimination law. It makes imminent sense to give a wage/hour enforcement agency the right to sue in the absence of aggrieved employees of the defendant employer. When an employer fails to pay a minimum wage or mandated overtime premium, it gains a competitive advantage over em-

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70. *See* 91 F.3d at 1533 n.2; 887 F. Supp. at 687 ("J & H could easily solve this problem without violating the ADEA by structuring its retirement plan for Directors so that it took effect at age 65 rather than age 60 or 62.").

71. *See* 887 F. Supp. at 686-87.

72. *See, e.g.*, 29 U.S.C. § 626(f) (regulation of waivers and releases under the ADEA, which was added in 1990); Runyan v. National Cash Register Corp., 787 F.2d 1039 (6th Cir. 1986) (en banc) (refusing to apply FLSA standards to ADEA release issues).

73. *See* 91 F.3d at 1535-37.

74. *See id.* at 1537.

75. *See id.*

76. See generally discussion in DANIEL P. O'MEARA, PROTECTING THE GROWING NUMBER OF OLDER WORKERS: THE AGE DISCRIMINATION IN EMPLOYMENT ACT 82-88 (1989).

77. *See id.*

ployers that comply with the FLSA, resulting in marketplace harm to those employers and their employees.

The same phenomenon does not necessarily exist under the ADEA. The legislative history of the ADEA discloses that Congress considered age discrimination to be an arbitrary and irrational practice depriving the economy of the services of valuable workers.[78] Indeed, it is hard to believe that J & H's competitors breathed a collective sigh of relief after its retirement policy was invalidated.

A final fallacy of the Second Circuit decision must be noted. In support of its conclusion that the EEOC should be allowed to proceed against the wishes of the current and past directors, the majority stated that its decision would benefit future directors.[79] In fact, the opposite was true. Candidates for director positions were the biggest beneficiaries of the early retirement policy in that it would vacate director positions. In reality, future directors were the primary victims of the Second Circuit's decision.

VI. Commentary on the EEOC's Involvement

Although the district court and Second Circuit decisions are questionable, they are not the most disturbing component of this case. The EEOC took that role when it decided to spend taxpayer dollars to litigate the case. To that effect, Judge Jacobs's dissent described the case as "a nonsensical waste of public and private resources."[80] Essential to this conclusion is the fact that any J & H director affected by the retirement policy had *the right to bring civil action* seeking make-whole relief, liquidated (double) damages, and attorney's fees.[81] It is hard to imagine a group of employees with readier access to private counsel than the directors of J & H.

It is also hard to imagine a group of employees less needy of government subsidization. J & H directors were estimated to make more than $1 million per year.[82] The EEOC's decision to expend taxpayer dollars to pursue the interests of a group of millionaires—against the apparent wishes of those millionaires—is even more dis-

78. *See* 29 U.S.C. § 621 (1994) ("Congressional statement of findings and purpose," focusing on prohibition of arbitrary discrimination).
79. *See* 91 F.3d at 1537.
80. *Id.* at 1543 (quoting the J & H brief).
81. *See* 29 U.S.C. § 626.
82. *See* EEOC v. Johnson & Higgins, Inc., 5 F. Supp. 2d 181, 185 (S.D.N.Y. 1998).

turbing in light of studies showing that the primary beneficiaries of the ADEA are white males in professional and managerial positions.[83]

If the EEOC was regarded as a smooth running administrative machine, its pursuit of the J & H case would be less disturbing. This, however, is not the case. As Judge Jacobs's dissent noted, the EEOC has a 100,000 case backlog and has been criticized regularly for delay in processing claims.[84] Practitioners dealing with the EEOC find that having phone calls returned is often the exception and not the rule. Indeed, the judiciary has criticized EEOC attorneys for ineffectiveness in their representation of aggrieved persons.[85]

Given the finite resources of the EEOC,[86] the pursuit of J & H presumably meant the neglect or abandonment of other cases. Unlike the directors of J & H, not all victims of age discrimination have plentiful damages, quick access to private counsel, and the money to pay an attorney's retainer. Many victims of discrimination look to the EEOC as the government agency that will vindicate their interests. Such vindication is not likely to occur with the EEOC's pursuit of claims like the J & H claim.

In defense of the EEOC, it is staffed by well-intentioned public servants working under a limited budget on an essential mission. Additionally, the agency is overwhelmed by a growing number of charges.[87] These realities and the importance of the EEOC's mission, however, do not explain the otherwise questionable use of public funds. Instead, the EEOC's decision to prosecute this case may be best explained by its general focus in case selection and by J & H's attitude during the investigation.

A review of the cases the EEOC historically has selected for litigation discloses an admirable emphasis on challenging facially discriminatory policies and practices.[88] In addition, when investigated, J

83. *See* Cathie A. Shattuck, ADEA Litigation Survey (1983), *reprinted in Recipients of ADEA Settlements Are Mostly Long-Term Male Employees*, 7 Daily Lab. Rep. (BNA) A-3 (Jan. 12, 1984); Michael Schuster & Christopher S. Miller, *An Empirical Assessment of the Age Discrimination in Employment Act*, 38 INDUS. & LAB. REV., Oct. 1984, at 64.

84. *See* 91 F.3d at 1543.

85. *See* EEOC v. MCI Int'l, 829 F. Supp. 1438, 1451-52 & 1481 n.30 (D.N.J. 1993).

86. *See* 91 F.3d at 1543 (Jacobs, J., dissenting) (citing congressional testimony by EEOC Chairman and prior judicial acknowledgments of understaffing and delay).

87. *See id.*

88. *See* Office of General Counsel Memorandum, ADEA Lawsuits Filed by the EEOC (available in the library of the EEOC Headquarters in Washington, D.C.).

& H was totally unapologetic.[89] In fact, J & H responded to one information request by stating that it did not regard the EEOC's letter as "an acceptable response from an agency of the United States to a corporate citizen whose almost one-hundred-year-old arrangements for the governance of its ownership and management affairs are being challenged by the agency."[90] If this passage is typical of J & H's approach as a whole, the EEOC's decision to litigate is more understandable.

Regardless, in spite of the facially discriminatory nature of the practice and J & H's response to the EEOC's investigation, the best use of public resources would have been to advise each and every director and former director of his right to file a charge, and of the EEOC's willingness to challenge the policy in court. Initiating litigation on behalf of a group of millionaires who opposed the litigation was, as Judge Jacobs noted, a "nonsensical waste of public and private resources."[91]

VII. EEOC Response

When contacted in regard to this essay, the EEOC offered a series of explanations for its decision to pursue this case.[92] First, an EEOC representative, Vince Blackwood, explained that J & H utilized a facially discriminatory policy in flagrant and open violation of the ADEA, a statute the EEOC is mandated to enforce.[93] Moreover, Blackwood stated, J & H was unapologetic about its practice during conciliation and was unwilling to modify it.[94] Blackwood also noted that, even if the current and former directors did not come forward to complain about the age-discriminatory policy, the EEOC's focus was on the lawfulness of the policy, not on the opinions of the incumbents.[95]

According to Blackwood, the EEOC also questioned the voluntariness of the waivers J & H secured during the course of the litigation and believes the subsequent repudiation of those waivers by many of

89. *See* 91 F.3d at 1533.

90. *Id.*

91. *Id.* at 1537 (quoting the J & H brief).

92. Telephone Interview with Vince Blackwood, Assistant General Counsel for the EEOC (Sept. 22, 1998).

93. *See id.*

94. *See id.*

95. *See id.*

the retired directors vindicates its decision to pursue the case.[96] Finally, Blackwood stated that the EEOC was concerned about the impact of the mandatory retirement policy on J & H employees other than directors.[97] The EEOC reasoned that continued application of the policy might reduce the motivation of older employees to aspire to senior management positions and may send a signal throughout the organization that J & H does not value employees in their sixties.[98]

VIII. Postscript

As if to accentuate the uniqueness of this case, in March 1997, J & H sold itself to Marsh McClennan, another international brokerage and consulting firm, for $1.8 billion.[99] Active directors each received between $36 million and $55 million.[100] The forty-five retired directors received a total of $297 million, or an average of $6.6 million each.[101]

In December 1997, nine retired J & H directors filed a lawsuit against J & H, Marsh McClennan, and the twenty-four J & H directors at the time of the sale, alleging that the former directors were shortchanged in the distribution of the $1.8 billion sale price.[102] The plaintiffs asserted that money was not their primary motivation, but rather that they wanted to correct a wrong.[103] They alleged that the then-active directors took 152 years of effort by a variety of people and in an act of shameless self-dealing, put the money resulting from such effort in their own pockets.[104] The retired directors alleged that the active directors, immediately prior to the sale, amended the J & H corporate bylaws to disenfranchise the retired directors of their ability to block a sale, thereby preventing the retired directors from receiving their fair share of the purchase price.[105]

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96. *See id.*
97. *See id.*
98. *See id.*
99. *See Melting in the Hands of M&M*, BEST'S REVIEW, PROP.-CASUALTY INS. EDITION, May 1, 1997, at 70, *available in* 1997 WL 9572717.
100. *See Retired J & H Directors File Suit Disputing Distribution Proceeds in Sale to M&M*, NAT'L UNDERWRITERS PROP. & CASUALTY-RISK & BENEFITS MGMT., Dec. 15, 1997, at 3, *available in* 1997 WL 9332573.
101. *See id.*
102. *See id.*
103. *See id.*
104. *See id.*
105. *See id.*

J & H also moved for summary judgment in district court as to thirteen former directors who signed waivers of rights after the initial district court decision on liability.[106] They received $1,000 each for the waivers, and the EEOC noted that it would be seeking $3-10 million for each of them at trial.[107] In addition, a number of the retired directors, subsequent to the sale of J & H, repudiated the waivers.[108] Judge Sand denied J & H's motion for summary judgment and directed the parties to be ready for trial on the issue of damages in October 1998.[109]

106. *See* 5 F. Supp. 2d 181 (S.D.N.Y. 1998).
107. *See id.* at 185.
108. *See id.* at 183; *see also id.* at 183 n.2 (referring to lawsuit brought by former directors).
109. *See id.* at 188.