

4-11-2018

Public Entities Become a Model Against Age Discrimination: Expanding the Definition of "Employer" in *Guido v. Mount Lemmon Fire District*

Kathryn Weston

Boston College Law School, kathryn.weston@bc.edu

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/bclr>

 Part of the [Civil Rights and Discrimination Commons](#), and the [Labor and Employment Law Commons](#)

Recommended Citation

Kathryn Weston, *Public Entities Become a Model Against Age Discrimination: Expanding the Definition of "Employer" in Guido v. Mount Lemmon Fire District*, 59 B.C.L. Rev. E. Supp. 279 (2018), <http://lawdigitalcommons.bc.edu/bclr/vol59/iss9/16>

This Comments is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

PUBLIC ENTITIES BECOME A MODEL AGAINST AGE DISCRIMINATION: EXPANDING THE DEFINITION OF “EMPLOYER” IN *GUIDO v. MOUNT LEMMON FIRE DISTRICT*

Abstract: In *Guido v. Mount Lemmon Fire District*, the Ninth Circuit split with four other circuits in its understanding of the definition of employer under the Age Discrimination in Employment Act (“ADEA”). For decades, the other circuits found that the ADEA’s definition of employer excluded both private and public entities that did not meet the statute’s numerosity requirement of twenty or more employees. The Ninth Circuit broke with this interpretation and found that the ADEA’s numerosity requirement was applicable only to private entities. This ruling established that employing fewer than twenty people does not exempt a public entity employer from the ADEA’s ban on age discrimination – a decision that expands the ADEA’s protection a whole new class of employees. The Ninth Circuit’s decision took an ambiguous statute and forced clarity from its text, in contrast to the prior circuits’ rulings that found the statute ambiguous on its face and forced clarity from the legislative history. Ultimately, it is Congress’s role to refine this statute, so employers and employees can be clear on their duties and rights with respect to age discrimination in the employment setting.

INTRODUCTION

Two firefighters, John Guido and Dennis Rankin, worked for nine years for the Mount Lemmon Fire District (“Fire District”), a political subdivision of the state of Arizona.¹ Over the years, they rose from low-level emergency medical technicians to firefighter Captains.² In 2009, the Fire District terminated the employment of both men.³ At the ages of forty-six and fifty-four,

¹ *Guido v. Mount Lemmon Fire Dist.*, 859 F.3d 1168, 1169 (9th Cir. 2017), *cert. granted*, 2018 WL 1037578 (U.S. Feb. 26, 2018) (No. 17-587). The Age Discrimination in Employment Act (ADEA) does not define “political subdivision.” 29 U.S.C. § 630 (2012). In the labor context, however, the term “political subdivision” is generally understood to refer to entities “that are either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate.” *NLRB v. Nat. Gas Util. Dist. of Hawkins Cty.*, 402 U.S. 600, 604–05 (1971). The Fire District’s status as a political subdivision was not challenged in *Guido*. 859 F.3d at 1168.

² Brief of the EEOC as Amicus Curiae in Support of Plaintiffs-Appellants and Reversal at 2, *Guido*, 859 F.3d 1168 (No. 15-15030) [hereinafter EEOC Amicus Curiae Brief].

³ *Guido*, 859 F.3d at 1169.

they had to re-enter the job market.⁴ Plaintiffs Guido and Rankin ultimately filed a lawsuit, *Guido v. Mount Lemmon Fire District*, under the Age Discrimination in Employment Act (“ADEA”), asserting that the Fire District had based its decision solely on age.⁵

Age bias is not a new issue, however, and protections against it were enacted decades ago.⁶ Employment discrimination law seeks to minimize employment decisions that disadvantage members of particular social groups without adequate justification.⁷ Sex, age, race, religion and disability status are all major protected classes.⁸ In 1967, Congress enacted the Age Discrimination in Employment Act to address discrimination against older employees – a previously unprotected class under the first major employment discrimination law, Title VII.⁹ The ADEA is the single most important legal mechanism for employees to seek reparation for employment-related age discrimination.¹⁰ Constitutional provisions, state discrimination laws and common law also provide protection from age discrimination and are often used to fill gaps in the ADEA’s reach.¹¹

This comment will address the ADEA, the 1974 amendment made to the statute in an attempt to expand coverage to public entities, and the circuit split

⁴ *Id.* When older people attempt to reenter the age biased job market, they spend comparatively longer than younger people looking for work and receive fewer invitations to interview than younger people. BRUCE EVAN BLAINE, UNDERSTANDING THE PSYCHOLOGY OF DIVERSITY 183 (2d ed. 2012).

⁵ *Guido*, 859 F.3d at 1169.

⁶ Jeremy J. Glenn & Katelan E. Little, *A Study of the Age Discrimination in Employment Act of 1967*, GP SOLO, Nov.–Dec. 2004, at 41, 41. In 1967, Congress enacted the ADEA in response to findings of pervasive age bias in the American workplace. *Id.* One of the most common age biases is that older people do not make good employees because productivity and competence decline with old age. HOWARD C. EGLIT, AGE DISCRIMINATION § 1:4 (2d ed. 2017); see *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (stating that the very essence of age discrimination can be seen in cases where an older person is fired simply because an employer believes old age affects their job capabilities). Studies have found that these kinds of stereotypes lead to older employees’ exclusion from trainings, diminishing of skills, and ultimately premature exits from the workforce. Libby Brooke & Philip Taylor, *Older Workers and Employment: Managing Age Relations*, 25 AGEING & SOC’Y 415, 426 (2005).

⁷ SAMUEL ESTREICHER & MICHAEL C. HARPER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION LAW I (4th ed. 2012).

⁸ 42 U.S.C. §§ 2000e, 12101 (2012); ESTREICHER & HARPER, *supra* note 7.

⁹ 29 U.S.C. §§ 621–634 (2012); Glenn & Little, *supra* note 6, at 41.

¹⁰ EGLIT, *supra* note 6, § 10:1.

¹¹ *Id.* Constitutionally based age discrimination claims have rarely been successful, often failing on the governmental actor issue. *Id.* § 10:2. A vast majority of states have also adopted age discrimination laws, mirroring the ADEA, to provide another statutory cause of action under which employees can seek redress. *Id.* § 11:69. Although the statutory protection afforded by the ADEA and state discrimination laws is generally broad enough to cover most cases of employment-related age discrimination, there are some limits to its reach. *Id.* § 10:30. In this case, common law causes of action, particularly breach of contract and tortious interference, are used to fill the gap. *Id.* § 10:30; see *Bernstein v. Aetna Life & Cas.*, 843 F.2d 359, 366–67 (9th Cir. 1988) (reversing summary judgment of an employee’s breach of contract and tortious interference claims that were brought in addition to statutory claims under the ADEA and Title VII).

created by the Ninth Circuit Court of Appeals in *Guido v. Mount Lemmon Fire District*.¹² Section I introduces the ADEA, presents the clarity issue that was created by the 1974 amendment to the ADEA, and discusses how multiple circuit courts of appeal have resolved the clarity issue.¹³ Section II discusses the circuit split that was created in 2017 by the Ninth Circuit's ruling in *Guido v. Mount Lemmon Fire District*.¹⁴ Finally, Section III will analyze the Ninth Circuit's decision and address how it forced clarity from a statute that had been rightfully considered ambiguous for decades.¹⁵ This comment ultimately concludes that both the text of the statute and its legislative history are ambiguous, and the only appropriate way to resolve this ambiguity is through Congress.¹⁶

I. THE AGE DISCRIMINATION IN EMPLOYMENT ACT, THE 1974 AMENDMENT, AND THE GREAT DEBATE OVER THE NUMEROSITY REQUIREMENT

This Part introduces the Age Discrimination in Employment Act, its 1974 Amendment extending coverage to public entities and the debate that has ensued regarding whether the amendment restricted coverage of public entities to only those with a threshold number of employees.¹⁷ Section A presents the creation of the ADEA, starting with the influence of Title VII in 1964.¹⁸ Section B discusses the 1974 Amendment to the ADEA's definition of "employer," which extended the ADEA's coverage to public entities but did not clarify if the numerosity requirement applied to this new group.¹⁹ Section C presents the four prior circuit court of appeals cases that found the ADEA's definition of "employer" to be ambiguous and relied on legislative history to show that the statute's intent was to apply the numerosity requirement to public entities.²⁰ Finally, Section D introduces the factual and procedural history of the case at issue, *Guido v. Mount Lemmon Fire District*.²¹

A. *The Creation of the ADEA*

Protection against age discrimination has its roots in Title VII of the Civil Rights Act of 1964.²² Title VII was intended to prevent discrimination on the

¹² See *infra* notes 17–132, and accompanying text.

¹³ See *infra* notes 17–77, and accompanying text.

¹⁴ See *infra* notes 78–109, and accompanying text.

¹⁵ See *infra* notes 110–132, and accompanying text.

¹⁶ See *infra* notes 110–132, and accompanying text.

¹⁷ See *infra* notes 17–77, and accompanying text.

¹⁸ See *infra* notes 22–34, and accompanying text.

¹⁹ See *infra* notes 35–43, and accompanying text.

²⁰ See *infra* notes 44–64, and accompanying text.

²¹ See *infra* notes 65–77, and accompanying text.

²² Glenn & Little, *supra* note 6, at 4; see *Lorillard v. Pons*, 434 U.S. 575, 584 & n.12 (1978) (de-

basis of race, color, religion, sex, or national origin.²³ While drafting and debating Title VII, Congress considered incorporating age discrimination into the legislation, but ultimately chose not to include age as a protected class.²⁴ Congress, however, continued to investigate and debate age discrimination for three years following Title VII's passage.²⁵ This process brought to light statistical evidence of employment-related age discrimination, which indicated that older Americans were excluded and forced out of the workforce at disproportionate rates.²⁶ Beyond illuminating statistics on the difficulties faced by older workers, the congressional investigation into age discrimination in employment also exposed the burden the state laws had on businesses.²⁷ National businesses, such as airline companies, were subject to conflicting state age discrimination laws that complicated the hiring, firing, and benefits of employees.²⁸

termining that Title VII and the ADEA are fundamentally similar in their aims and substantive prohibitions, and recognizing mirroring language in the two statutes).

²³ Glenn & Little, *supra* note 6, at 42.

²⁴ *Id.*

²⁵ *Id.* In passing the Civil Rights Act of 1964, Congress issued a directive to the Secretary of Labor requiring the Secretary to complete a study of factors of age discrimination in employment and the consequences of this discrimination on the economy and individuals. Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 241, 265–66 (1964). Within a year, Secretary Wirtz presented his report, *The Older American Worker*, to Congress. WILLIAM WILLARD WIRTZ, *THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT*, REPORT OF THE SECRETARY OF LABOR TO CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964 (June 1965). Amongst other findings, the report determined that age discrimination is based on stereotypical assumptions of the abilities of older people, which are unsupported by objective facts. Thomas H. Butler & Beth A. Berret, *A Generation Lost: The Reality of Age Discrimination in Today's Hiring Practices*, 9 J. MGMT. & MARKETING RES. 1, 4 (2011). It also found that age discrimination in employment significantly harmed American society because it deprived the economy of labor from capable workers, increased costs of government benefits, and caused economic and psychological detriment to older workers who were denied their productive and satisfying occupations solely due to age. *Id.*

²⁶ Glenn & Little, *supra* note 6, at 42. Congress heard alarming statistics, such as workers over the age of forty-five were barred from one-quarter of all private-sector job openings, those over the age of fifty-five were barred from half of all private-sector job openings, and workers over the age of sixty-five were barred from almost all private sector job openings. *Id.* In addition, Employment Service offices reported that the average duration of unemployment for males age forty-five to sixty-four was over twenty weeks while the average for all males was under fifteen weeks. *Age Discrimination in Employment: Hearing on S. 830 and S. 788 Before the Subcomm. on Labor of the S. Comm. on Labor and Public Welfare*, 90th Cong. 34 (1967) [hereinafter *Age Discrimination Hearing*].

²⁷ *Age Discrimination Hearing*, *supra* note 26, at 219–20. Employers were unsure which state laws covered which employees. *Id.* at 219; see Glenn & Little, *supra* note 6, at 43 (discussing the confusion for businesses with operations in multiple states and businesses whose employees traveled between states). There was uncertainty regarding whether a state's discrimination laws were applicable to an employee based on where she was hired, where she resided, where she worked or where she was fired. *Age Discrimination Hearing*, *supra* note 26, at 219. Multistate businesses questioned if it was acceptable to treat employees in identical positions differently across different states. *Id.*

²⁸ See *Age Discrimination Hearing*, *supra* note 26, at 219–20 (advocating for uniform national treatment of age discrimination laws, similar to the Railway Labor Act); Glenn & Little, *supra* note 6, at 43 (“[T]he patchwork of state laws, through its lack of uniformity, created confusion for businesses.”). The Secretary of Labor described some state laws as being “virtually inoperative” and amount-

Congress responded to the glaring evidence of the adverse effects of age discrimination on both businesses and individuals by passing the Age Discrimination in Employment Act of 1967.²⁹ The ADEA instituted protections from age discrimination that Congress had previously excluded under Title VII.³⁰ The ADEA prohibits employment discrimination against job applicants and employees on the basis of age, protecting those people ages forty and over.³¹ This prohibition, however, is only applied to a limited set of employers that fall within the ADEA's definition of "employer," a definition that is narrower than the layman's meaning of the word.³² The statute's definition of employer includes a threshold minimum number of employees.³³ This is known as a numerosity requirement, and it is commonly used in anti-discrimination statutes to protect small businesses from burdensome regulation and the destructive expense of litigation.³⁴

B. The 1974 Amendment to the ADEA's Definition of "Employer" and Its Clarity Issue

In its original 1967 form, the ADEA prohibited age discrimination by private-sector companies that employed twenty-five or more employees for twenty or more weeks of the year.³⁵ In 1974, Congress amended the ADEA's definition of employer to lower the numerosity requirement from twenty-five or more to twenty or more employees.³⁶ The 1974 Amendment also extended the

ing to "little more than declarations of policy." *Id.* at 91.

²⁹ 29 U.S.C. § 621(a) (2012).

³⁰ *See id.* § 621(a)(2)–(4) (recognizing that the growing focus on productivity and technological skill disadvantaged older workers).

³¹ *Id.* § 621(b).

³² *Id.* § 630. Title VII and the Americans with Disabilities Act ("ADA") also restrict the definition of employer. *See* 42 U.S.C. §§ 2000e(b) (exempting employers with less than fifteen employees from Title VII's definition of employer), 12111(5) (exempting employers with less than fifteen employees from the ADA's definition of employer).

³³ 29 U.S.C. § 630

³⁴ *Id.* Legislative history demonstrates that the numerosity requirements in Title VII and the ADEA were included by Congress to protect small businesses from overregulation and the expense of litigation. *Thurber v. Jack Reilly's Inc.*, 717 F.2d 633, 634 (1st Cir. 1983); Brent T. Carney, *Part-Time Employees Divide the Circuits: An Interpretation of "Employer" Under Title VII and the ADEA*, 31 NEW ENG. L. REV. 167, 170 (1996); *see* 110 CONG. REC. 13,092 (1964) (statement of Sen. Cotton) ("[I]t would lead the Federal Government with all of its power . . . into the way of dealing with a small businessman who can ill afford to protect himself . . .").

³⁵ Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 11, 81 Stat. 602, 605 (1967). In 1973, the Senate Special Committee on Aging presented a report, entitled *Improving the Age Discrimination Law*, which found a significant deficiency in the ADEA's coverage. *See* STAFF OF SPECIAL COMM. ON AGING, IMPROVING THE AGE DISCRIMINATION LAW, S. DOC. NO. 21-493, at iii, 11, 14 (1973) [hereinafter REPORT ON IMPROVING THE ADEA]] (stating only about fifty percent of all workers between ages forty and sixty-four were protected by the ADEA).

³⁶ Fair Labor Standards Act Amendments of 1974, Pub. L. No. 93-259, § 28, 88 Stat. 55, 74 (1974); *see Guido*, 859 F.3d at 1170. The Committee reported that thirteen million people age forty to

ADEA protections to employees of state and local public entities.³⁷ These changes enabled the ADEA to provide age discrimination protections to more employees by encompassing more employers under the ADEA's definition of "employer."³⁸

The 1974 Amendment to the ADEA raised a new question of clarity.³⁹ The amended definition of employer consists of two separate sentences.⁴⁰ The first sentence applies to private employers and includes the exclusionary factors, such as the numerosity requirement.⁴¹ The second sentence begins, "The term [employer] also means . . ." and adds state and local public entities to the definition.⁴² This alteration of the definition of employer created a question of whether the numerosity requirement in the first sentence applied to the public entities addressed in the new second sentence.⁴³

sixty-four were working for entities with fewer than twenty-five employees, and thus were not covered by the ADEA. REPORT ON IMPROVING THE ADEA, *supra* note 35, at 14. In 1972, Title VII was similarly amended to reduce its numerosity requirement from twenty-five employees to fifteen employees. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103, 103 (1972).

³⁷ Fair Labor Standards Act Amendments of 1974, § 28, 88 Stat. at 74; *Guido*, 859 F.3d at 1170. The Report found that governmental entities employed 5.5 million people between ages forty and sixty-four. REPORT ON IMPROVING THE ADEA, *supra* note 35, at 14. The 1972 Amendment of Title VII similarly extended coverage to public entities, extending coverage under Title VII to ten million more employees. Equal Employment Opportunity Act of 1972, § 2, 86 Stat. at 103; *Milestones of the History of the U.S. Equal Employment Opportunity Commission: 1972*, E.E.O.C. (Mar. 3, 2018), <https://www.eeoc.gov/eeoc/history/35th/milestones/1972.html> [<https://perma.cc/D9YQ-CQMM>].

³⁸ REPORT ON IMPROVING THE ADEA, *supra* note 35, at 18 (stating that an amendment to the ADEA reducing the numerosity requirement to twenty or more employees instead of twenty-five would result in the protection of 1.3 million additional older workers, as well as make the ADEA more consistent with the broader scopes of other labor laws).

³⁹ 29 U.S.C. § 630 (2012); *see Guido*, 859 F.3d at 1172 n.6 (recognizing a dispute as to whether the numerosity requirement in the first sentence of the definition of employer extends to the second sentence); *Kelly v. Wauconda Park Dist.*, 801 F.2d 269, 270–71 (7th Cir. 1986) (finding ambiguity in application of the numerosity requirement due to the two-sentence construction of the definition of employer under the 1974 Amendment to the ADEA).

⁴⁰ 29 U.S.C. § 630(b).

⁴¹ *Id.* (limiting coverage to private entities that are "engaged in an industry affecting commerce" and have "twenty or more employees for each working day in each of twenty or more calendar weeks").

⁴² *Id.*

⁴³ *Guido*, 859 F.3d at 1170; *Kelly*, 801 F.2d at 270. Courts interpreting Title VII do not have to confront a similar ambiguity regarding the definition of "employer." 42 U.S.C. § 2000e(a)–(b); *Guido*, 859 F.3d at 1172 (noting that the construction of Title VII's definition of employer is comparatively clearer). In amending Title VII, Congress changed the definition of "person" to include government entities and political subdivisions. 42 U.S.C. § 2000e(a); *Guido*, 859 F.3d at 1172 & n.6. This definition of person is then used to define the term employer. 42 U.S.C. § 2000e(b); *Guido*, 859 F.3d at 1172 & n.6. This structure makes it clear that the fifteen employee numerosity requirement in Title VII applies to both public and private entities. 42 U.S.C. § 2000e(a)–(b); *Guido*, 859 F.3d at 1172 & n.7; *Kelly*, 801 F.2d at 272.

*C. Decades of Case Law Addressing the Ambiguity of the
ADEA's Definition of Employer*

Prior to *Guido*, four circuit courts of appeal have considered the question of whether the numerosity requirement applies to state and local public entities.⁴⁴ The Court of Appeals for the Sixth, Seventh, Eighth and Tenth Circuits all reached the same conclusion, finding that the statutory language defining “employer” was ambiguous.⁴⁵ They then looked to the legislative history of the Amendment and reached the conclusion that the numerosity requirement extended to public entities.⁴⁶

1. The Seventh Circuit Applies the Numerosity Requirement to Public Entities in *Kelly v. Wauconda Park District*

In 1986, the Seventh Circuit Court of Appeals was the first to consider this question in *Kelly v. Wauconda Park District*.⁴⁷ The court first looked to the plain language of the statute.⁴⁸ It determined that both parties presented reasonable interpretations of the numerosity requirement as written in the ADEA’s definition of employer.⁴⁹ The employee argued that by including public entities in a separate sentence, Congress unambiguously signaled a different category of employers.⁵⁰ This new category was without the numerosity requirement, so public entities of any size had to comply with the ADEA.⁵¹ In contrast, the

⁴⁴ *Guido*, 859 F.3d at 1172; *Cink v. Grant Cty.*, 635 F. App’x 470, 474 n.5 (10th Cir. 2015) (finding the ADEA protected an employee who worked as a jailer and a dispatcher for a county sheriff’s office); *Palmer v. Ark. Council on Econ. Educ.*, 154 F.3d 892, 896 (8th Cir. 1998) (finding that a state-funded nonprofit education corporation fell under the ADEA’s definition of employer); *E.E.O.C. v. Monclova Twp.*, 920 F.2d 360, 363 (6th Cir. 1990) (finding that a local township was an employer under the ADEA); *Kelly*, 801 F.2d at 270 (applying the ADEA’s coverage to protect a maintenance worker for a local park district from age discrimination).

⁴⁵ *Cink*, 635 F. App’x at 474 n.5; *Palmer*, 154 F.3d at 896; *Monclova*, 920 F.2d at 363; *Kelly*, 801 F.2d at 271 (finding that ambiguity stems from the fact that the sentence addressing public entities does not refer to the numerosity requirement). A statute is ambiguous if it has more than one reasonable interpretation and Congress has not explicitly spoken to the issue. *Alaska Wilderness League v. E.P.A.*, 727 F.3d 934, 938 (9th Cir. 2013); see *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (“The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”).

⁴⁶ *Cink*, 635 F. App’x at 474 n.5; *Palmer*, 154 F.3d at 896; *Monclova*, 920 F.2d at 363; *Kelly*, 801 F.2d at 270 (finding that the legislative history shows Congress intended to subject public and private entities to the same anti-discrimination rules).

⁴⁷ See *Kelly*, 801 F.2d at 270 (addressing a maintenance worker’s claim that his employer, a local park district with no more than three employees, based its decision to fire him on age).

⁴⁸ *Id.* at 272. Under the rules of statutory interpretation, when the plain language of a statute is clear, the court does not look beyond those words to interpret the statute. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201 (1976).

⁴⁹ *Kelly*, 801 F.2d at 271.

⁵⁰ *Id.*

⁵¹ *Id.*

employer argued that the 1974 Amendment merely clarified that public entities were to be added to the definition of employer under the same qualifications already employed by the definition.⁵² Because the conflicting interpretations were both reasonable, the court determined the statute was ambiguous on whether the numerosity requirement extended to public entities.⁵³

Ambiguity of statutory language compels the court to turn to the legislative history of the statute in order to determine the statute's meaning from congressional intent.⁵⁴ In determining intent, the Seventh Circuit gave consideration to the parallel nature of Title VII and its 1972 Amendment, which extended the definition of employer to cover state and local government entities.⁵⁵ This 1972 amendment to Title VII included language explicitly extending the numerosity requirement to state and local government entities.⁵⁶ In contrast, although the 1974 ADEA amendment was proposed at the same time Congress did not include similarly explicit language in the ADEA.⁵⁷ The legislative histories of both the ADEA and Title VII amendments suggested the amendments were made with some intent to put public and private employers on similar footing.⁵⁸ Because both statutes had similar objectives, substantive prohibi-

⁵² *Id.*

⁵³ 29 U.S.C. § 630(b) (2012); *Kelly*, 801 F.2d at 271; see also *Alaska Wilderness League*, 727 F.3d at 938 (“A statute is ambiguous if it is susceptible to more than one reasonable interpretation.”).

⁵⁴ *Kelly*, 801 F.2d at 271; see *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004) (finding the court should look to legislative intent where a statute is ambiguous).

⁵⁵ *Kelly*, 801 F.2d at 271. Because of the parallel nature of Title VII and the ADEA, Courts often rely on Title VII to interpret the ADEA. *Id.* Legislative history suggests that Congress intended the two anti-discrimination statutes to be interpreted in a similar manner. *Id.* During the Title VII hearings, Senator Lloyd Bentsen of Texas, a sponsor of the 1974 ADEA Amendment, stated, “I believe that the principles underlying these provisions in the EEOC bill (extending Title VII to public employers) are directly applicable to the Age Discrimination in Employment Act.” 118 CONG. REC. 15,895 (1972) (statement of Sen. Bentsen); Colleen Gale Treml, *Zombro v. Baltimore City Police Department: Pushing Plaintiffs down the ADEA Path in Age Discrimination Suits*, 68 N.C. L. REV. 995, 1002 & n.66–67 (1990); see *E.E.O.C. v. Elrod*, 674 F.2d 601, 607 (7th Cir. 1982) (stating that Title VII closely parallels the ADEA and thus, its history is helpful to interpret the ADEA).

⁵⁶ 42 U.S.C. § 2000e(a)–(b); see *supra* note 43 (discussing how Congress amended Title VII using language that could only be interpreted to apply the numerosity requirement to both public and private entities). Title VII first defines a “person” as: “one or more individuals, governments, governmental agencies, political subdivisions, . . . corporations, . . .” 42 U.S.C. § 2000e(a). It then narrows the definition of “employer” using this unlimited group of public and private “persons” to only those “engaged in an industry affecting commerce who has *fifteen or more employees* for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . .” 42 U.S.C. 2000e(b) (emphasis added).

⁵⁷ *Kelly*, 801 F.2d at 271. Senator Bentsen first proposed an amendment to the ADEA in 1972, while Congress was working on amendments to Title VII. *Elrod*, 674 F.2d at 604; REPORT ON IMPROVING THE ADEA, *supra* note 35, at iii n.1. He proposed it again after the Title VII amendments were passed, arguing that the ADEA amendment had similar principles and should get the same support. *Elrod*, 674 F.2d at 604–05.

⁵⁸ *Kelly*, 801 F.2d at 271–72 (quoting 120 CONG. REC. 8,768 (1974)). Senator Bentsen, a sponsor of the ADEA amendment, stated, “[T]he passage of this measure insures that Government employees will be subject to the same protections against arbitrary employment [discrimination] based on age as

tions, and legislative histories, the *Kelly* court determined that although the ADEA's definition of employer was ambiguous, the legislative history showed that Congress intended to extend the numerosity requirement to public entities.⁵⁹ As a result, it affirmed dismissal of the case in favor of the employer because the employer the requisite number of employees to be considered an employer under the ADEA.⁶⁰

2. Three Other Circuits Apply the Findings of the *Kelly* Court

In the decades following *Kelly*, other courts were also faced with the issue of whether the ADEA's numerosity requirement extended to public entities.⁶¹ The Sixth, Eighth and Tenth Circuits all addressed the question, and a consensus was reached.⁶² These courts agreed with the *Kelly* court that ADEA's definition of employer is ambiguous and used to a legislative intent analysis.⁶³ As of June 2017, all circuit courts that had considered the issue were unanimous in holding that the numerosity requirement applies to both private and public employers because Congress intended to apply identical restrictions to public and private entities, and protect all small organizations from the burden of age discrimination litigation.⁶⁴

D. Guido v. Mount Lemmon Fire District: *The Ninth Circuit Considers the Definition of "Employer" Under the ADEA*

John Guido and Dennis Rankin ("Firefighters" or "Plaintiffs") were both hired in 2000 by the Mount Lemmon Fire District ("Fire District" or "Defendant"), a local governmental subdivision of the State of Arizona.⁶⁵ Both men

are employees in the private sector." *Id.*

⁵⁹ *See id.* at 272 (finding that when two statutes are significantly parallel in their objectives, histories and goals, they should be interpreted to have the same meaning).

⁶⁰ *Id.* at 273.

⁶¹ *Cink*, 635 F. App'x at 474 n.5; *Palmer*, 154 F.3d at 896; *Monclova*, 920 F.2d at 363; *Kelly*, 801 F.2d at 270.

⁶² *Guido*, 859 F.3d at 1172; *see Cink*, 635 F. App'x 470, 474 n.5; *Palmer*, 154 F.3d at 896; *Monclova*, 920 F.2d at 362–63; *Kelly*, 801 F.2d at 270.

⁶³ *Cink*, 635 F. App'x at 474 n.5; *Palmer*, 154 F.3d at 896; *Monclova*, 920 F.2d at 362–63. Most recently, in 2015, the Tenth Circuit Court of Appeals heard the *Cink* case, in which the numerosity requirement was not a deciding issue. 635 F. App'x at 474 n.5. The court deferred to the findings of the other circuit courts on legislative history, addressing the numerosity requirement's application to public entities in only one footnote. *Id.*

⁶⁴ *Cink*, 635 F. App'x at 474 n.5; *Palmer*, 154 F.3d at 896; *Monclova*, 920 F.2d at 363; *Kelly*, 801 F.2d at 270.

⁶⁵ *Guido*, 859 F.3d at 1169. The Fire District has fewer than twenty full-time employees. Transcript of Oral Argument at 3, *Guido*, 859 F.3d 1168 (No. 15-15030). The plaintiffs argued, however, that volunteer firefighters and seasonal reserve firefighters count toward the numerosity requirement under the ADEA. *Id.* The district court concluded that volunteers should not be included as employees. *Id.* This issue became moot once the Ninth Circuit Court of Appeals determined that the numer-

served as full-time firefighter captains for the Fire District.⁶⁶ On June 15, 2009, the Fire District terminated the employment of Guido and Rankin due to layoffs.⁶⁷ At that time, they were the oldest full-time employees.⁶⁸ Guido was forty-six years of age.⁶⁹ Rankin was fifty-four years of age.⁷⁰

The firefighters filed complaints alleging age discrimination against the Fire District with the Equal Employment Opportunity Commission (“EEOC”).⁷¹ The EEOC issued separate favorable determinations for each, finding reasonable cause to believe the Fire District violated the ADEA.⁷² Guido and Rankin proceeded to file this lawsuit, *Guido v. Mount Lemmon Fire District*, for age discrimination under the ADEA in April 2013.⁷³

The United States District Court for the District of Arizona granted summary judgment for the Fire District, finding that the Fire District did not qualify as an employer under the ADEA because the department did not meet the numerosity requirement.⁷⁴ Thus, the Fire District’s employees, including Guido and Rankin, were not protected from age discrimination.⁷⁵ The District Court’s analysis was similar to that of the Sixth, Seventh, Eighth and Tenth Circuits, in that it began by determining that the statutory language was ambiguous and then looked to the perceived congressional intent of the 1974 Amendment.⁷⁶ After the district court ruled in favor of the Fire District, the Plaintiffs filed a timely appeal and the Ninth Circuit Court of Appeals granted review.⁷⁷

osity requirement did not apply to public entities. *Guido*, 859 F.3d at 1175.

⁶⁶ *Guido*, 859 F.3d at 1169; EEOC Amicus Curiae Brief, *supra* note 2, at 2.

⁶⁷ *Guido*, 859 F.3d at 1169; EEOC Amicus Curiae Brief, *supra* note 2, at 2.

⁶⁸ *Guido*, 859 F.3d at 1169.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 1169–70. The EEOC is the agency Congress has tasked with “interpreting, administering, and enforcing” federal laws regarding employment discrimination, including the ADEA. EEOC Amicus Curiae Brief, *supra* note 2, at 1; *see* 29 U.S.C. § 626(b) (2012).

⁷² *Guido*, 859 F.3d at 1170. These determinations are not binding on either party. *What You Can Expect After You File a Charge*, EQUAL EMP. OPPORTUNITY COMM’N, (Mar. 3, 2018) <https://www.eeoc.gov/employees/process.cfm> [<https://perma.cc/SDP9-MPAE>] [hereinafter *EEOC Process*]. In matters of age discrimination, the plaintiff does not need a Right-to-Sue Notice from the EEOC. *Id.* However, plaintiffs often file with the EEOC first because it can lead to early settlement when the EEOC initiates an investigation or facilitates mediation. *Id.*; *see* 29 U.S.C. § 626(b) (stating that the EEOC should attempt to eliminate the discriminatory practice by seeking the employer’s voluntary compliance). If the EEOC reaches a determination that there is reasonable cause to believe the employer violated an anti-discrimination law, the EEOC will seek a settlement by the employer. *EEOC Process, supra*. If no settlement is reached, the EEOC will either elect to pursue litigation itself or give the complaining party a Right-to-Sue Notice. *Id.*

⁷³ *Guido*, 859 F.3d at 1170.

⁷⁴ *Id.*

⁷⁵ *Id.*; EEOC Amicus Curiae Brief, *supra* note 2, at 3.

⁷⁶ EEOC Amicus Curiae Brief, *supra* note 2, at 3.

⁷⁷ *Id.* at 1 (stating that the issue of whether the numerosity requirement in Section 630(b) applied to public entities was a legal question of first impression in this circuit).

II. THE *GUIDO* COURT'S INTERPRETATION OF ADEA'S DEFINITION OF EMPLOYER DIVERGES FROM THE CONSENSUS OF ITS SISTER CIRCUITS

On June 19, 2017, the Ninth Circuit Court of Appeals issued its decision in *Guido v. Mount Lemmon Fire District*.⁷⁸ For the first time since the 1974 ADEA Amendment, a circuit court of appeals found that the language of Section 630(b) was not ambiguous and found that the ADEA definition of employer included public entities with less than twenty employees as employers.⁷⁹ This Part discusses how the Ninth Circuit reached that conclusion.⁸⁰ Section A presents the Ninth Circuit's argument for why the ADEA's definition of "employer" is not ambiguous its coverage of public entities, no matter the number of employees they have.⁸¹ Section B presents the Ninth Circuit's critique of the prior circuits' use of an unclear legislative history.⁸²

A. The Ninth Circuit Interprets the Definition of Employer Under Section 630(b) of the ADEA as Unambiguous

In reaching its decision, the court first sought to determine the plain meaning of Section 630(b).⁸³ It found that the section was unambiguous in that it did not extend any numerosity requirement exemption to public entities.⁸⁴ The courts generally do not depart from a statute's express language when it is unambiguous so as to avoid making policy decisions from the bench.⁸⁵

⁷⁸ *Guido v. Mount Lemmon Fire Dist.*, 859 F.3d 1168, 1169 (9th Cir. 2017), *cert. granted*, 2018 WL 1037578 (U.S. Feb. 26, 2018) (No. 17-587).

⁷⁹ *Id.* at 1175; *Cink v. Grant Cty.*, 635 F. App'x 470, 474 n.5 (10th Cir. 2015); *Palmer v. Ark. Council on Econ. Educ.*, 154 F.3d 892, 896 (8th Cir. 1998); *E.E.O.C. v. Monclova Twp.*, 920 F.2d 360, 363 (6th Cir. 1990); *Kelly v. Wauconda Park Dist.*, 801 F.2d 269, 270 (7th Cir. 1986).

⁸⁰ See *infra* notes 83–109, and accompanying text.

⁸¹ See *infra* notes 83–97, and accompanying text.

⁸² See *infra* notes 98–109, and accompanying text.

⁸³ *Guido*, 859 F.3d at 1171. To determine the plain meaning of a text, courts use tools such as dictionary definitions, rules of grammar, and maxims of linguistic construction. H. Drewry Gores, Sutton v. United Air Lines, Inc.: *Textualism, Intentionalism, the Chevron Doctrine and Judicial Policy-Making*, 27 N. KY. L. REV. 853, 872 (2000).

⁸⁴ *Guido*, 859 F.3d at 1174 ("We need not read minds to read text."). There are only two instances that the courts recognize they should look beyond the text of a statute: ambiguity and absurdity. *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004); see *Int'l Tel. & Tel. Corp. v. Gen. Tel. & Elecs. Corp.*, 518 F.2d 913, 917–18 (9th Cir. 1975) ("[T]his court may look beyond the express language of a statute in order to give force to Congressional intent: where the statutory language is ambiguous; and where a literal interpretation would thwart the purpose of the over-all statutory scheme or lead to an absurd result.").

⁸⁵ *Guido*, 859 F.3d at 1174; see *Palmer v. Massachusetts*, 308 U.S. 79, 83 (1939) ("... [c]alling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself."); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 395 (2012) (arguing that when judges say they are determining the legislative intent, they are really just themselves legislating where the situation has not been provided for by the statute).

The Ninth Circuit held that Section 630 creates distinct categories of entities that qualify as employers under the ADEA.⁸⁶ The court found that each category of employer has its own clarifying language, so the numerosity requirement in the first sentence is not associated with the public entities category addressed in the second sentence.⁸⁷ The Ninth Circuit's textual analysis zeroed in on "also," as it appears at the beginning of the second sentence ("The term *also* means . . .")⁸⁸ The court focused on the dictionary definition of the word, finding that it means "in addition; besides" and "likewise; too."⁸⁹ The court stated that in the context of definitions, the sentence structure used in Section 630(b) (X means A. X *also* means B.) is an indication that an additional, entirely separate definition, is available.⁹⁰ The Ninth Circuit determined that Section 630(b) is not ambiguous and does not include a numerosity requirement for public entities.⁹¹ It found "also" as a clear linguistic mechanism indicating two separate categories for "employer," and that the public entity category does not incorporate a numerosity requirement.⁹²

The employer in *Kelly* asserted that the construction of Section 630(b)

⁸⁶ 29 U.S.C. § 630(b) (2012); *Guido*, 859 F.3d at 1171. Section 630(a) reads: "The term 'person' means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons." 29 U.S.C. § 630(a). Section 630(b) reads:

The term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: Provided, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term *also* means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

Id. § 630(b) (emphasis added).

⁸⁷ 29 U.S.C. § 630; *Guido*, 859 F.3d at 1171. One category was encompassed by the first sentence of Section 630(b), and included those persons "engaged in an industry affecting commerce who has twenty or more employees for each working day." 29 U.S.C. § 630(b); *Guido*, 859 F.3d at 1171. A second category of employer was established in the second sentence, addressing state-affiliated entities as a separate category, with its own separate clarifying language in the second sentence of Section 630(b). 29 U.S.C. § 630(b); *Guido*, 859 F.3d at 1171.

⁸⁸ *Guido*, 859 F.3d at 1171.

⁸⁹ *Id.*; see *Also*, WEBSTER'S EIGHTH NEW COLLEGIATE DICTIONARY (8th ed. 1973) [hereinafter *Also*, WEBSTER'S DICTIONARY]. The plaintiffs, as well as the EEOC in its amicus curiae brief, asserted that the English language provided the statute's drafters many ways make it clear that the numerosity requirement extended to public entities, but none of the possible linguistic tools were used. *Guido*, 859 F.3d at 1172 & n.6; EEOC Amicus Curiae Brief, *supra* note 2, at 5–6.

⁹⁰ 29 U.S.C. § 630(b); *Guido*, 859 F.3d at 1171. The Ninth Circuit Court of Appeals provided an example that helps to explain its interpretation. *Guido*, 859 F.3d at 1171 & nn 4–5. "The password can be an even number. The password can also be an odd number greater than one hundred." *Id.* These are two separate definitions of a possible password. *Id.* The clarifying language, "greater than one hundred," applies to only one of the definitions even if the sentences are reversed. *Id.*

⁹¹ 29 U.S.C. § 630(b); *Guido*, 859 F.3d at 1174.

⁹² 29 U.S.C. § 630(b); *Guido*, 859 F.3d at 1174.

could also be reasonably interpreted as an addendum to the definition of employer under the same clarifying language, rather than a separate definition for a separate category.⁹³ The Ninth Circuit, however, criticized the *Kelly v. Wauconda Park District* opinion for its conclusory finding that this alternative interpretation of Section 630(b) was reasonable.⁹⁴ The court found that none of the prior rulings from the Sixth, Seventh, Eighth or Tenth Circuits had elaborated on the reasonableness of the alternative interpretation.⁹⁵ It was just declared to be reasonable.⁹⁶ Because the Ninth Circuit found only one reasonable interpretation of the text of Section 630(b), it declared the definition of employer to be unambiguous.⁹⁷

B. The Ninth Circuit Denies That the Legislative Intent Behind the 1974 Amendment Was to Create Equal Footing for Public and Private Entities

In addition to finding the text unambiguous, the Ninth Circuit proceeded to go one step further.⁹⁸ It then challenged the Kelly court's finding that the statutes should be interpreted to have the same meaning and effect.⁹⁹ Noting the differing language in the statutes, the Ninth Circuit held that if Congress had intended the 1974 ADEA amendment to have the same effect as the 1972 Title VII amendment, Congress would have used the same language.¹⁰⁰ The Ninth Circuit interpreted Congress's decision not to do so as evidence that Congress had not intended the ADEA to impose a numerosity requirement.¹⁰¹

⁹³ *Kelly*, 801 F.2d at 270–71 (introducing the employer's alternative interpretation as "reasonable" without any further analysis on its reasonableness).

⁹⁴ *Guido*, 859 F.3d at 1173.

⁹⁵ *Id.* at 1173 & n.9. The *Cink* court analyzed the entire issue of alternative interpretations in two sentences in the footnote of its opinion, adopting the prior circuits findings without further analysis. *Cink*, 635 F. App'x at 474 n.5. The *Palmer* court only needed one sentence of analysis on the issue, adopting the *Kelly* analysis of the reasonableness of the alternative interpretation in a conclusory manner. *Palmer*, 154 F.3d at 896 (citing *Kelly*, 801 F.2d at 270–71). The court in *Monclova Township* also relied on the *Kelly* court's determination without adding any further discussion as to why both interpretations were reasonable. *Monclova*, 920 F.2d at 363.

⁹⁶ *Guido*, 859 F.3d at 1173; *Cink*, 635 F. App'x at 474 n.5; *Palmer*, 154 F.3d at 896; *Monclova*, 920 F.2d at 362–63; *Kelly*, 801 F.2d at 270–71.

⁹⁷ *Guido*, 859 F.3d at 1174.

⁹⁸ *See id.* (recognizing that the court did not need to address legislative intent because the statute was unambiguous, but challenging the prior courts' findings on legislative intent of the 1974 ADEA Amendment anyway).

⁹⁹ *Id.*

¹⁰⁰ *Kelly*, 801 F.2d at 272. Both amendments sought to extend coverage to public entities and reduce the numerosity requirement. *Treml*, *supra* note 55, at 999 & n.45. Despite the identical structure of Section 2000e (Title VII) and Section 630 (ADEA) and the fact that they were proposed around the same time, the amendments did not use the same method for extending coverage. *Id.* at 1002; *see supra* note 43 (discussing how Title VII's 1972 Amendment clearly extended the numerosity requirement to public entities).

¹⁰¹ *Guido*, 859 F.3d at 1174; *see Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 351–58 (2013) (stating that Congress's choice of words and structural choices are presumed to be deliberate);

Furthermore, the *Guido* court also rejected the *Kelly* court's finding of a clear intent in the congressional record.¹⁰² The court noted that the record was sparse and never discussed extending the numerosity requirement to public employers.¹⁰³ The court criticized the *Kelly* opinion for relying on vague statements from the legislative history that only expressed dissatisfaction with the discrepancies between public and private sector protections, but did not directly discuss extending the numerosity requirement.¹⁰⁴ The Ninth Circuit also suggested reasonable explanations for why Congress would omit the numerosity requirement for public entities.¹⁰⁵

Ultimately, the Ninth Circuit reiterated its choice to follow the widely-accepted rule that it is not the role of the court to determine the best policy outcome.¹⁰⁶ The Ninth Circuit reversed and remanded the district court's decision, refusing to follow the precedent established in the other circuits.¹⁰⁷ The Ninth Circuit concluded that the numerosity requirement did not apply to state-affiliated entities, and based this conclusion solely on the plain meaning of the 1974 ADEA Amendment.¹⁰⁸ This determination allowed the plaintiffs' case to avoid summary judgment and move forward to determine whether the fire-

Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177 n.3 (2009) (finding that although Congress amended Title VII to include mixed-motive adverse employment actions, it did not make the same amendment to the ADEA, thus distinguishing the ADEA from Title VII).

¹⁰² *Guido*, 859 F.3d at 1174.

¹⁰³ *Id.*; *Kelly*, 801 F.2d at 271–72; see *E.E.O.C. v. Elrod*, 674 F.2d 601, 605 (7th Cir. 1982) (stating there is “scant” legislative history for the 1974 ADEA amendment).

¹⁰⁴ *Guido*, 859 F.3d at 1175; REPORT ON IMPROVING THE ADEA, *supra* note 35, at 14, 17–18 (“[I]t is difficult to see why one set of rules should apply to private industry and varying standards to government.”). The Senate report on improving the ADEA refers to the numerosity requirement as a “small business exemption,” a term generally used to refer only to private employers with few employees. REPORT ON IMPROVING THE ADEA, *supra* note 35, at 14. Additionally, the report always addresses the two amendments in separate paragraphs, and they were even originally proposed as separate amendments. *Id.* at 14, 17–18. It is clearly stated, however, that the primary goal of these amendments was to extend protection from age discrimination in employment to as many older workers as possible. *Id.* at 17.

¹⁰⁵ *Guido*, 859 F.3d at 1175 n.10. One reason the Ninth Circuit raises is that state-affiliated entities have a greater ability to bear the burden of lawsuits than small private-sector employers. *Id.*; see also *Kelly*, 801 F.2d at 272 n.3 (noting that the EEOC had asserted in its amicus brief that the numerosity requirement was intended to protect neighborhood small businesses with small incomes from government regulations that would threaten their existence); REPORT ON IMPROVING THE ADEA, *supra* note 35, at 14 (referring to statutory numerosity requirements as “small business exemptions”). Another explanation for this interpretation of congressional intent is that Congress may have wanted the government to be an example of non-discrimination for private-sector employers. *Guido*, 859 F.3d at 1175 n.10.

¹⁰⁶ *Guido*, 859 F.3d at 1175; *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034 (2014) (stating that the court has no license to disregard statutory language simply based on the opinion that Congress intended something different).

¹⁰⁷ *Guido*, 859 F.3d at 1175.

¹⁰⁸ *Id.*

fighters were in fact victims of age discrimination when their employment was terminated.¹⁰⁹

III. THE NINTH CIRCUIT ADDS A NEW INTERPRETATION

This Part challenges the Ninth Circuit's primary finding in *Guido v. Mount Lemmon Fire District*, but agrees with its criticism of the prior circuits that used a scant and unclear legislative history to solve the statute's ambiguity.¹¹⁰ Section A asserts that the Ninth Circuit incorrectly found Section 630(b) to be unambiguous.¹¹¹ Section B, however, supports the Ninth Circuit's determination that the legislative history of the 1974 Amendment to the ADEA is unclear.¹¹²

A. The ADEA's Definition of Employer Is Ambiguous

The Ninth Circuit finds plain meaning and clarity where there is none in Section 630(b).¹¹³ In determining the plain meaning of the ADEA's definition of employer, the court relied on dictionary definitions and conventions of the English language asserted with no clear evidence of certainty in these definitions or purported conventions.¹¹⁴ Dictionaries merely use words to explain words, leading to the appearance of a clear and plain meaning even in cases where uncertainty exists.¹¹⁵ Particularly for words like "also," which the Ninth Circuit gives great weight, the dictionary does not do much to clarify what it means when it is in use.¹¹⁶

Furthermore, the Ninth Circuit concludes that the other possible interpretation of Section 630(b) is unreasonable without providing any support for that conclusion.¹¹⁷ It seems perfectly reasonable that the second sentence of Section

¹⁰⁹ *Id.*

¹¹⁰ See *infra* notes 113–132, and accompanying text.

¹¹¹ See *infra* notes 113–120, and accompanying text.

¹¹² See *infra* notes 121–132, and accompanying text.

¹¹³ 29 U.S.C. § 630(b) (2012); *Guido v. Mount Lemmon Fire Dist.*, 859 F.3d 1168, 1169 (9th Cir. 2017), *cert. granted*, 2018 WL 1037578 (U.S. Feb. 26, 2018) (No. 17-587).

¹¹⁴ *Guido*, 859 F.3d at 1171; see A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J. L. & PUB. POL'Y 71, 72 (1994) (criticizing citation to dictionaries because it conveys only the appearance of certainty in meaning). Because "also" was undefined by the statute, it is ascribed its ordinary meaning. See *Crawford v. Metro. Gov't of Nashville & Davison Cty.*, 555 U.S. 271, 276 (2009) (looking to the dictionary definition of the term "oppose" when interpreting Title VII's anti-retaliation provision because it was not defined in the statute).

¹¹⁵ Randolph, *supra* note 114, at 72 ("Lexicographers define words with words. Words in the definition are defined by more words, as are those words Using a dictionary definition simply pushes the problem back.")

¹¹⁶ *Guido*, 859 F.3d at 1171; Also, WEBSTER'S DICTIONARY, *supra* note 89 ("1. In addition; besides. 2. Likewise; too."); see Randolph, *supra* note 114, at 73–74 ("I think [dictionaries] are . . . like 'word zoos.' One can observe an animal's features in the zoo, but one still cannot be sure how the animal will behave in its native surroundings. The same is true of words in a text.")

¹¹⁷ *Guido*, 859 F.3d at 1171, 1173 ("But, declaring that multiple reasonable interpretations exist

630(b) could be interpreted as an addendum to the definition of employer under the same clarifying language, rather than a separate definition for a separate category.¹¹⁸ There are numerous linguistic mechanisms that could have been used to make it clear whether the second sentence addressed public entities as a distinct category of employer or merely intended public entities to be added to the prior definition in as an addendum.¹¹⁹ Congress did not use any of these methods, and the Ninth Circuit should have recognized the ambiguity this created.¹²⁰

B. The Ninth Circuit Appropriately Finds That Congress's Intent Behind the 1974 ADEA Amendment to the Definition of Employer Is Unclear

The Supreme Court has stated that where specific provisions of the ADEA are identical to Title VII, the interpretations of Title VII apply equally to the ADEA.¹²¹ Yet in the present case, the language is not identical despite having the same overarching goals of extending coverage to government entities and lowering the numerosity requirement.¹²² The *Kelly v. Wauconda Park District* court makes a valid argument that there is no evidence that Congress intended the 1974 ADEA Amendment to have a different effect than the 1972 amendment to Title VII.¹²³ It is entirely possible, however, that a different intent was demonstrated by the use of different language.¹²⁴ The definition of employer in the ADEA and Title VII were identical before they were amended, so if the same result was intended both statutes could have had identical amendments.¹²⁵ Although there is a viable argument that Congress may have

does not make it so.”)

¹¹⁸ *Kelly v. Wauconda Park Dist.*, 801 F.2d 269, 270–71 (7th Cir. 1986).

¹¹⁹ *Guido*, 859 F.3d at 1172; *supra* note 43 (discussing how Title VII was amended to clearly extend the numerosity requirement to public entities). Congress could have used the same language as the 1972 Amendment of Title VII. *Guido*, 859 F.3d at 1172. Congress also could have added the numerosity requirement in the second sentence to make its intent obvious. *Id.*

¹²⁰ See SCALIA & GARNER, *supra* note 85, at 395 (recognizing that it is evident that in most cases of ambiguity legislators had “no real intention, one way or another, on the point in question” because if they had an intent, they would have made it clear in the text).

¹²¹ Meghan C. Cooper, *Reading Between the Lines: The Supreme Court's Textual Analysis of the ADEA in Gross v. FBL Financial Services, Inc.*, 45 NEW ENG. L. REV. 753, 760 (2011); see *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (stating that interpretations of Title VII “apply with equal force in the context of age discrimination” when the provision of the ADEA is identical to Title VII because the language of the ADEA was derived from Title VII).

¹²² 29 U.S.C. § 630(a)–(b) (2012); see 42 U.S.C. § 2000e(a)–(b).

¹²³ *Kelly*, 801 F.2d at 272. The *Kelly* court concluded that just because the language was not identical did not mean that Congress intended a different meaning for the ADEA amendment than it carried out with the Title VII amendment. *Id.*; see *Lorillard v. Pons*, 434 U.S. 575, 584 (1978) (stating that the ADEA’s prohibitions were derived in *haec verba* from Title VII); *E.E.O.C. v. Elrod*, 674 F.2d 601, 608 (7th Cir. 1982) (determining that Title VII is particularly helpful for interpreting the ADEA because it is the legislation that most closely parallels the ADEA).

¹²⁴ *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177 n.3 (2009); see 29 U.S.C. § 630(a)–(b); 42 U.S.C. § 2000e(a)–(b).

¹²⁵ *Guido*, 859 F.3d at 1174. The Supreme Court, however, has also recognized situations in

amended both Title VII and the ADEA with the intent to extend the numerosity requirement to public entities, there is an equally viable argument that Congress intended a different result, and thus used different language.¹²⁶

Furthermore, the Ninth Circuit accurately critiques the prior circuit courts that found a clear intent in the limited congressional record.¹²⁷ The reports and hearings that the *Kelly* court relied on never addressed the precise issue in question – whether the numerosity requirement should apply to public entities as well.¹²⁸ Furthermore, the report addressed the numerosity requirement and extending coverage to public entities in separate paragraphs, presenting the effects each change would have on its own and never discussing them in combination.¹²⁹ The *Kelly* opinion’s only other evidence of legislative intent are two floor statements from the Amendment’s sponsoring senator.¹³⁰ As legislation is written by multiple authors and subjected to a process negotiation and compromise, one individual’s statements should not be held to represent the congressional intent behind the statute.¹³¹ Just as the Ninth Circuit forced clarity from the text of Section 630(b), the *Kelly* court forced clarity from a scant and ambiguous legislative history.¹³²

CONCLUSION

This most recent ruling by the Ninth Circuit is a dramatic departure from its sister circuits’ interpretation of the ADEA’s definition of “employer” as

which a difference between the language of the ADEA and Title VII demonstrates that Congress intended a different meaning. *Gross*, 557 U.S. at 177 n.3. In *Gross v. FBL Financial Services, Inc.*, the Supreme Court heard a case, in which an employee claimed he had been demoted because of his age (fifty-four years old). *Id.* at 170. A key issue in the case was Title VII’s approach to adverse employment actions based on mixed-motive (permissible and impermissible considerations) and its applicability to an ADEA claim. *Id.* at 171, 173. The court ultimately found great importance in the fact that Congress had amended Title VII to authorize an employee to recover for mixed-motive adverse employment actions, but never similarly amended the ADEA. *Id.* at 174 (“Unlike Title VII, the ADEA’s text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor Congress neglected to add such a provision to the ADEA when it amended Title VII . . . even though it contemporaneously amended the ADEA in several ways . . .”).

¹²⁶ *Gross*, 557 U.S. at 173; Cooper, *supra* note 121, at 767.

¹²⁷ *Guido*, 859 F.3d at 1174–75; see *Elrod*, 674 F.2d at 605 (stating there is “scant” legislative history for the 1974 ADEA amendment).

¹²⁸ *Guido*, 859 F.3d at 1174; *Kelly*, 801 F.2d at 271–72.

¹²⁹ *Guido*, 859 F.3d at 1175; REPORT ON IMPROVING THE ADEA, *supra* note 35, at 14, 17.

¹³⁰ *Kelly*, 801 F.2d at 271–72.

¹³¹ JEREMY WALDRON, LAW AND DISAGREEMENT 125 (1999) (explaining that legislation is “the product of a multi-member assembly, comprising a large number of persons of quite radically differing aims, interests, and backgrounds”). A final statute is the result of political compromise between hundreds of legislators representing the wishes of millions of constituents. Elliot M. Davis, Note, *The Newer Textualism: Justice Alito’s Statutory Interpretation*, 30 HARV. J. L. & PUB. POL’Y 983, 988 (2007); see SCALIA & GARNER, *supra* note 85, at 391 (discussing how negotiation and compromise leaves a final document written by multiple authors “purposely vague.”).

¹³² *Guido*, 859 F.3d at 1175; *Kelly*, 801 F.2d at 271–72.

amended in 1974. In reading the definition of “employer” under the ADEA to apply to state and local entities without any numerosity requirement, the Ninth Circuit distinguished Section 630(b) not only from its previous interpretations but also from other discrimination laws, which generally carve out an exemption for small entities who may be crippled by the threat of discrimination litigation. To reach this conclusion, the Ninth Circuit found clarity in ambiguous statutory language. The *Guido* court’s policy justifications may be sound: its ruling expands the ADEA’s protections to millions of people working for small state and local public entities who were previously exempt from the ADEA. Nevertheless, the ruling may only give temporary relief. Parties cannot rely on *Guido*’s legal conclusion as it misrepresents clarity in an ambiguous statute and out of line with the long history of other circuit decisions. Due to the ambiguity of the statute, the scarce legislative history on the issue and the discrepancy with the Title VII amendment, it seems most appropriate for this issue to be returned to Congress to determine whether the numerosity requirement should be extended to public entities.

KATHRYN WESTON

Preferred Cite: Kathryn Weston, Comment, *Public Entities Become a Model Against Age Discrimination: Expanding the Definition of “Employer” in Guido v. Mount Lemmon Fire District*, 59 B.C. L. REV. E. SUPP. 279 (2018), <http://lawdigitalcommons.bc.edu/bclr/vol59/iss6/279>.