Symphonic metamorphoses

Variations on vulnerability: orchestral musicians' employment in times of crisis

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Publication date
2022

17. Greener Pastures: coming of age in the orchestral workplace

Musicians don't retire, they just decompose."[1961]

"We are in a situation in which the older generation is enjoying all the securities while even the very best young musicians have to fight it out for scraps."[1962]

"Age discrimination cases are not slam dunks by any means."[1963]

This *movement* explores the age factor in the orchestral workplace both in terms of age-related employment issues faced by tenured orchestral players and parallel issues faced by freelance substitute players entering into the grey-ing zone.[1964] The argument can be mounted that aging in any profession is a given, a constant that has little to do with external crises. On the contrary, vulnerability related to aging in the orchestra and the angst of diminished performance ability is closely tied to both external and internal issues. Although age-based challenges at the workplace are not directly related to the 2007-2008 financial crisis or the pandemic crises considered here, research has shown that as the orchestral profession shows signs of increased precarity related directly to financial instability, traditional challenges such as age-related issues in performance have become amplified. This amplification takes several forms as the cases to follow illustrate. "If an orchestra replaces an older player with a younger musician, crassly put, there is a savings component as the older player unquestionably costs more according to contractual obligations that entail seniority pay and pension-related benefits."[1965] What might be perceived as a preposterous hypothesis with regard to 'replacement' contains more than a grain of truth in light of the jurisprudence that relates to orchestral musicians. In addition, aging in a highly competitive profession, in which the number of positions versus the number of professionals who seek these positions is disproportionately small leads to problematic employment dilemmas in which tenured musicians can be unduly pressured to leave their jobs.

This *movement* presents background on age-related issues in orchestras while giving voice to those who have endured age discrimination and 'combination' discrimination

[1961] Dave Lee, Chairman, Musicians' Union (U.K.).
[1962] Hugo Shirley. "Is Germany's Orchestra Paradise as good as it seems?" *The Strad* 4 April 2019,
[1963] Harvey Mars, Legal Counsel Musician's Local 802 American Federation of Musicians (AFM).
[1964] The pun on grey zone is intentional as a greying zone refers to the coming of old age while a grey zone according to the Oxford Dictionary is a "situation not easily defined."
[1965] Conversations with Allison Beck. She served as the first female director of the Federal Mediation Agency, appointed by President Obama in 2015.

at the orchestral workplace. These considerations strive to open a space to consider age-related issues including the right to play and pension payments from the perspective of musicians, employers, and courts. The United States is the main focal point for this *movement* considering the amount of age-related litigation and the fact that there is no mandatory retirement age in the U.S. As is customary throughout the research, reviews of relevant cases are supplemented by contributions and observations from insiders. Starting off with a general consideration of age-related physical and stress-related challenges, pensions and pension diminution in the post-crisis age will be discussed with special attention paid to industrial action at U.S. orchestras in which musicians opted to strike for the right to maintain pension entitlements. Next, attention will be given to obstacles that obstruct the path to successful litigation: for example, in the procedural challenges faced by U.S.-based litigants under the Equal Employment Opportunity Commission (EEOC) and 'unchecked' summary judgment.[1966] Throughout the *movement*, a spotlight will shine on case law that featured workers struggles to litigate age discrimination claims. Relevant U.S. jurisprudence in which orchestral musicians attempted to (re)claim their positions by relying on age discrimination legislation will be explored in an attempt to bring these cases to life for vulnerable musicians who face similar issues in other jurisdictions.

In a much-debated article published in *The Atlantic* in 2008, one of the magazine's editors, Megan McArdel, commented on the vicissitudes faced by young entrants into the workforce as the 'Baby Boomer' generation approaches retirement age.[1967] In a *movement* devoted to aging orchestral musicians whose concerns run the gamut from age discrimination with regard to 'forced' early retirement on the one hand to efforts to bargain for seniority pay and secure pensions as well as the right to continue playing on the other hand, a particular quote rings true:

> *"But it's also the perverse result of a social bargain we've made with our workers: you accept slightly lower wages than you're worth when you're young in exchange for steady increases as you age. The problem is, this makes older workers expensive compared with young people, and harder to reemploy if they lose their jobs. Wages are what economists call "sticky": they rarely adjust downward, except after long agony. The sticky wage theory hypothesizes that pay of employees tends to have a slow response to the changes in the performance of a company or of the economy. . . Specifically, wages are often said to be sticky-down, meaning that they can move up easily but move down only with difficulty."*[1968]

[1966] Reflecting Judge Jerome Frank's critique of summary judgment, the pro-trial by jury side of the ideological debate, see, Patricia M. Wald. "Summary Judgment at Sixty" 1998.
[1967] The Baby Boomer generation was born in the post-WWII period of increased prosperity in the developing world 1946-1964, see https://www.investopedia.com/terms/b/baby_boomer.asp
[1968] Megan McArdel. "No Country for Young Men," *The Atlantic*, January/February 2008.

The issue of aging in orchestras is, to dip into Ms. McArdel's terminology, particularly 'sticky' as it calls into question the worth of a musician decades after passing the double whammy of the competitive audition and demanding tenure stages that lead to permanent orchestral employment. Orchestral musicians in the Netherlands register astonishment when they learn that some of their U.S. counterparts have gone to court. To Dutch musicians, "litigating is in our view a bridge too far. Our society is not litigious like what we perceive of American society from reports of suing and receiving high monetary damages. Then again, as my orchestra heads into crisis, maybe if we think our case is important, we should go to court."[1969]

17.1 Age-related issues in the orchestral workplace

There are several issues concerning aging in the orchestral workplace that deserve further discussion. The psychological pressures of maintaining a career in which a musician performs under constant aural scrutiny is not, contrary to what non-musicians often posit, a mere matter of experience and routine. "Setting a standard, rehearsal after rehearsal and concert after concert takes a tremendous amount of mental and physical stamina which in many cases takes its toll on the individual musicians."[1970] To maintain that standard of excellence as age-related physical issues impact performance ability is a challenge that bears further research and on-the-job support.

While the connection between the aging musician's woes and the post-crisis orchestral musician's world might not appear to be direct at first blush, messages received from working musicians corroborate the fact that orchestral life has gotten even tougher since 2008. "Before the age of cynicism in the 2000s, we left the conservatory full of dreams and hopes for a musical future. Speaking for many of us who are between 50-65 now, we started off with diaries bursting with diverse gigs and tours with orchestras far and wide. Exhausting but exhilarating! Inevitably, the precarity of freelance orchestral life kicks in. Conductors seem to prefer the younger kids eager and fresh who enter the market and never complain about adverse work situations. And, if a conductor makes disparaging comments about an older player, younger players tend to look away in the hopes that it will never happen to them. To make matters worse, the crisis hit, and

[1969] Conversations with Maurits Wijzenbeek, RKO and RKF violist and orchestra committee member, prior to the considerations for litigation 2012.
[1970] Remarks made by Esther van Fenema, psychiatrist Leiden University Medical Center and violinist, author, *Het ontstemde brein, psychiater op de Muziekpoli (The Untuned Brain)* 2018.

orchestras started to 'disappear.' The older freelancer has been hard hit on all sides; we are vulnerable on many different fronts."[1971]

17.1.1 Age and the freelance musician

One factor that feeds into a somewhat toxic mix that has exacerbated freelance vulnerability in the post-crisis era relates to age. "You might wonder what the A-word [age] is doing in a discussion of our shrinking work lives as freelance musicians after the crisis. Well, while you might think that age is equitable to experience and extra value like in the good old days, times have changed because with less and less work around, younger players often jump in to offer their services at prices that undercut the market. Older players know their value and still believe in a fair system in which union minimums should be honored."[1972] Whereas recent graduates are wont to express the view that "seasoned old-times with connections get the best gigs in town"[1973] those very same seasoned players shed light on other aspects of the precarious freelance domain. Several additional issues challenge vulnerable freelancers in the volatile orchestral market: increasing competition, the financial demands of 'adult' life often associated with a breadwinner's role to support the family, the glut of excellent players in a shrinking market, and the willingness of young people to 'work for less' remuneration.

For a complete discussion of the nuances related to growing older in the orchestral environment, the German researchers Heiner Gembris and Andreas Heye writing for *Musicae Scientiae* provide ample perspectives for consideration.[1974] Their sensitivity to the nuances of how musicians juggle the challenges of what the researchers delicately refer to as the "largely inescapable declines in musical peak performance due to aging"[1975] run counter to "unchanging high expectations and increases in retirement age."[1976] The difference between the experience of the esteemed older professional orchestral musicians who enjoy stable careers under the protection of CBAs/CAOs and the experiences of aging freelancers is substantial. In the run-up to freelance CAO bargaining sessions in the Netherlands, an oft-articulated line of reasoning

[1971] New York-based veteran of 30 years of freelance work at over 25 orchestras who noted that her work-base shrink to 2-3 orchestras in 2016 from the earlier 20+.
[1972] Conversations with Rebekah Johnson, violinist, member New Jersey Symphony who has freelanced in the greater New York City area for decades.
[1973] Recent cello graduate Juilliard School of Music interviewed May 2016.
[1974] Heiner Gembris, et al. "Health Problems of Orchestral Musicians from a Life-Span Perspective: Results of a Large-Scale Study" in the impressively titled *Musicae Scientiae* January 2018.
[1975] Ibid., p. 385.
[1976] Ibid.,

centered on the conundrum as to how true equivalence between the standard CAO and the freelance CAO could be reached with regard to pay scales related to years of experience and age. "For true equality, the clauses in both agreements should be the same, however, more experienced, older freelancers fear that employers will not hire them if they must be paid more than less experienced, younger freelancers with fewer years of work under their belts."[1977]

17.1.2 When is old, too old?

Some of the many questions that come to fore when the older musician becomes the focus of discussion include: how can musicians best manage their orchestral careers to guarantee employment longevity? What are best practices taken from the experiences of orchestras in the Netherlands and the U.S.? Are there any gaps between the protections embodied in legislative texts and what actually happens to older musicians in orchestras? Is there a role for additional legal regulations beyond the generic anti-discrimination legislation in place to come to the aid of musicians in need? Are these issues that need to be legally regulated or worked out in collectively bargained CBAs? Should there be a boilerplate 'one size fits all' clause incorporated in orchestral contracts with regard to age-related departures or should orchestras consider individual players, as just that–individuals who face different challenges at different points in their careers? Discussions with musicians and HRM specialists in the Netherlands and the United States point to a mix of the aforementioned options although this 'mix' does not solve the issue of abuse of powers as exhibited in the PS cases and the *Wetherill* case discussed below. "The law should provide the basis for employee protection while the orchestra needs to craft a plan for musicians as their careers mature."[1978]

Questioned about decisions taken with the goal to 'reshape' the Rotterdam Philharmonic, where a considerable number of players faced demotion and even forced early retirement in the 1970s, Edo de Waart, its then Music Director, remarked: "music is a calling that necessitates inhuman amounts of discipline and self-criticism. What is fair is that which is fair to the music and keeping that in mind, all of us have to make sacrifices. In the name of quality and artistic commitment, the tough but honest reality

[1977] Conversations with PvFM active member, harpist Saskia Rekké.
[1978] Interview, Ella Broekstra HRM director Stichting Omroep Music (SOM) the umbrella organization responsible for the musical organizations within the Netherlands Broadcasting Organization March 13, 2016.

is that sometimes a player must step down."[1979] Artistic concerns outweighed employee protection; without protest on the part of an empowered orchestra committee as well the employee 'watchdog' at the Dutch workplace, the orchestra's works council, the maestro had more-or-less free rein to hire and fire in the name of quality.[1980]

17.1.3 Longevity in the orchestra: play as long as you can

The response to aging at the U.S. orchestral workplace can seem paradoxical to overseas colleagues. On the one hand, individual examples of musicians who are actively 'at the stand' deep into their late 70s abound as indicated in the examples below. In fact, many U.S. top-tier orchestras feature musicians 'of age,' with clarinetist Stanley Drucker holding the record of over 62 years (almost 40 years as principal) as a member of no less an orchestra as the New York Philharmonic.[1981] On the other hand, one of the leading bones of contention in collective bargaining during U.S. orchestral contract negotiations centers on who should bear the burden of rising pension costs. "Dead center to U.S. orchestral negotiations and often the trigger that spills over into collective action: our futures, our pensions and seniority pay scales."[1982]

While some U.S. orchestras welcome pensionable players to remain in the orchestra, there is no 'signed in stone' policy. Retirement in U.S. orchestras is according to many managers a variable to be dealt with on an individual basis. "The decision to stay or leave is often under the discretion of several key musicians, not the least the individual, his or her section leader and the music director."[1983] A peak down under into the pit at New York's prestigious Metropolitan Opera Orchestra (MET) shows viola section players respectfully performing alongside Marilyn Stroh who was the second woman contracted as a member of the orchestra back in 1960.[1984] A living legend, she is known to regale her younger colleagues with tales of life at the 'old' Metropolitan Opera building during long intermissions in the pit at New York's Lincoln Center. Speaking of Ms. Stroh, a brief consideration of individual choice and aging in the orchestra takes us to the United States where the illegality of mandatory retirement leads to an age-diversity on stage.

[1979] Conversations with Maestro Edo de Waart.
[1980] The purportedly powerful role of Dutch Works Councils (ORs) will be discussed more fully in the section dealing with the reorganization of the Dutch radio orchestras 20012-2013.
[1981] Daniel J. Wakin. "Ending a 60-Year Gig at the New York Philharmonic." *New York Times* June 4, 2009.
[1982] Conversations with Tino Gagliardi, President Local 802 AFM.
[1983] Jeff Woodruff Executive Director Harrisburg Symphony Orchestra.
[1984] Ms. Stroh's lively recollections of over five decades 'in the pit' are reproduced here. This is a priceless retelling replete with entertaining tidbits of workplace history and an ode to contemporary collective bargaining for better conditions. See, http://www.metorchestramusicians.org/blog/2014/4/27/violist-marilyn-stroh-in-my-own-words.

For some orchestral musicians, age does not appear to matter. "As they age, many orchestral musicians seem able to perform better than other professionals: a lifetime of concentrated practice and rehearsal-activity that combines hearing, hand-to-eye conditioning and ceaseless muscular use tends to keep most near top form at an age when others have to retire." [1985] Take the case of the aforementioned phenomenal Russian concertmaster, Valentin Zhuk, still performing strong, way in his seventies. Septuagenarian, and even octogenarian conductors and classical music soloists might be sought after as star performers at international concert halls; yet this status does not necessarily trickle down to affect positively the life of the aging orchestral musician. For some, the process is painful and humiliating. Complaints about a particular player who is perceived of as unable to perform at the high level demanded by the orchestra usually come first from other players who hear the problem and bring the issue to the attention of a section leader, the artistic committee and/or the music director. Major orchestras have procedures to confront the difficulty of slipping players, although they are often reluctant to use them.

One of the highpoints of the Concertgebouw Hall's visiting orchestra season 2016 was a long-awaited concert given by one of America's most exciting orchestras, the Los Angeles Philharmonic (LA Phil). The LA Phil's musicians and their superstar conductor, the youthful, dynamic Gustavo Dudamel brought a scintillating performance of Mahler's Third Symphony to the temple of Mahler performance.[1986] What struck audience members minutes before the dynamic conductor sprung on stage was the composition of one of the string groups. As the second violins entered stage right on the raised stage, a remarkable procession took place. A coterie of young players hovered around an elderly colleague. After he was escorted to his seat at the rear of the section, the remaining violinists settled in to give their attention to the concertmaster who tuned the orchestra.

Querying colleagues from the LA Phil, the response bordered on "why would you ask? The older colleague loves playing and has been a part of the orchestra for a long, long time and is a font of wisdom in the midst of young musicians. Don't forget U.S. orchestras have a great history of longevity: Michele Zukofsky just retired from playing clarinet after 54 years in our orchestra"[1987] The list of 'longest served' in U.S. orchestras

[1985] See, "Some Greying Orchestras Reward Experience" *Chicago Tribune* February 11, 1988.
[1986] The RCO is considered to have particular expertise in the performance of Mahler's monumental symphonic repertoire, a tradition going back to Willem Mengelberg's tenure as Music Director, 1895-1945.
[1987] Post-concert discussion with two members of the Los Angeles Philharmonic.

includes such legendary characters as the MET timpanist Richard Horowitz who performed in the New York pit from 1946 to 2012 until the age of 88. The longest tenured orchestral musician, the diminutive bass player Jane Little, collapsed on stage just before the final bars of "There's no Business-like Show Business;" she performed for 71 years as a member of the Atlanta Symphony and its precursor.[1988] For musicians who are physically capable to continue playing, "we want to be with our family, our fellow musicians and play the greatest music on earth for as long as we can hold our bows."[1989]

A study based on a relatively small sample, fourteen U.S. retired musicians representative of various sections within the orchestra, boasted its conclusion in the title: "The great symphony orchestra – A relatively good place to grow old."[1990] Author David Smith reflected: "older players were valued for their excellence and experience and were difficult to replace. Obsolescence was not a problem, and the gradual deterioration of playing with age was generally not incompatible with working to an advanced age."[1991] However, even a cursory analysis of his hypothesis and conclusions puzzle the reader. A small sample of fourteen could very well skew the results, and, the differences between the career paths and longevity-within-the-orchestra are markedly different between top-tier, well-financed organizations and those excellent orchestras that struggle for financial support.[1992] Finances aside, the individual struggles of U.S. musicians such as Louis Kampouris, whose litigation woes will be discussed subsequently, prove that not all aging professional orchestra players experience the 'orchestra as a warm bath of happy colleagues supporting the elder colleague through thick and thin.'[1993]

17.1.4 Longevity in European orchestras

Such orchestral longevity is unheard of on the European orchestral scene. For example, "the Vienna Philharmonic will hire no musician over 35 years of age and has a mandatory retirement age of 65; 30 years of service are required to receive a full pension."[1994] Dutch orchestras do not post such information but follow mandatory

[1988] Norman Lebrecht's *Slipped Disc* blog offers a list of long-lived orchestral members see, http://slippedisc.com/2011/09/new-longest-serving-orchestral-players-the-ultimate-list/
[1989] Interview with violinist Maurice Wolfson, a 40-year veteran of the Cleveland Orchestra.
[1990] David Smith. "The Great Symphony Orchestra - A Relatively Good Place to Grow Old" 1988 pp. 233–247.
[1991] Ibid, p. 233.
[1992] Observation based on a compilation of interviews with musicians at all ranges of the 'financial success' spectrum.
[1993] Paraphrasing the quote of a 55-year-old orchestral professional in the Cleveland Orchestra (2017).
[1994] Exceptions can be made for certain leading positions although these exceptions have not been acted upon as of 2017. See, James R. Oestrich. "Even Legends Adjust To Time and Trend, Even the Vienna Philharmonic" New York Times 28 February 1998.

retirement regimes. At a time when Europe's member states have legislated an increase in the age of retirement, typified by the Netherlands with its sliding scale upwards from 65 to 67, orchestras across the U.S. afford deference to elderly colleagues who often perform as long as they can. In passing, orchestral musicians in Russia and in the United Kingdom serve longer tenures compatible to their U.S. compatriots. As discussed earlier, in the orchestral landscape in northern Europe, musicians are contractually obliged to stop performing at a statutory retirement age.

17.1.5 The CSO fights for fair pensions and seniority pay scales

> *"If an organization starts fiddling around (pun intended) with the financial stability of its elder statesmen and women who have given decades of artistic service to the public, it shows a lack of commitment to a basic right, retirement with dignity."*[1995]

Leaving the freedom musicians might have to remain 'on the stand,' more important to the orchestral collective as a whole is the right to receive an adequate pension post retirement. In March 2019, the world-renowned Chicago Symphony Orchestra (CSO) went on strike, cancelling seven weeks of season concerts. Orchestras across the U.S. held their collective breaths: a leading orchestra taking on a board intent at curbing expenses especially with regard to pensions, resonated with the struggles of musicians in less fortunate positions than the top-tier Chicagoans.[1996] And, when music director Ricardo Muti broke the silence so often associated with an esteemed maestro to join the musicians on the picket line, his gesture became an iconic cultural news item. "Conductors usually do not take sides, they are careful and usually abide by the motto, 'I am a musician not a politician.'"[1997] A digression to highlight the CSO strike's central issue is germane as it breathes life into the issue of 'life after the orchestra' before the *movement* explores aging and age-discrimination in the sector.

One of the key issues to ignite the headline catching CSO strike centered on the CSO Board proposal to diminish pension benefits. This diminution is embedded within the larger issue of what Americans are fond of calling 'mission creep:'[1998] what is perceived by musicians inside the orchestra as a shift in the board's interpretation of

[1995] Conversations with Peter Benoliel, former Board Chair, the Philadelphia Orchestra Association, and former CEO Quaker Chemical Oil.
[1996] Thousands of comments on the Musicians of the Chicago Symphony Orchestra blogsite corroborate this statement, see http://www.chicagosymphonymusicians.com/
[1997] Conversations with Max Bonecutter, former bass trombonist Minnesota Orchestra; the Metropolitan Opera, and graduate of the University of Maine School of Law.
[1998] Since the early 1990s, the term can be interpreted as an expansion of the initial objectives of an organization.

its all-important role.[1999] A tangible example of 'creeping change' was the CSO Board's insistence on shifting the orchestral musicians' retirement plan from a guaranteed benefit plan to an 'individualized risk' model[2000] in which the musicians 'share' the risk, a shift that would create a sharp diminution of benefits that were central to the CSOs excellent benefits for the greater part of a century. "If the board is really there for the musicians, why would they insist on eviscerating the protections for older musicians who have served the orchestra for decades?"[2001] Although defined-benefit pensions are being phased out in the private sector, "unions have fought long and hard for defined-benefit pensions as customary for America's top orchestras."[2002] The CSO board's insistence on pension diminution showed evidence of that dreaded mission creep: musicians' needs were no longer a high priority. "Any pension problems are not of the Orchestra's making but reflect the Board of Trustees' decision to not fully fund the plan over the last years. We would also fault their decision to spend nearly two-thirds of revenues on the building and non-Orchestra employees and allocate little more than 1/3 of revenues to the Orchestra itself. After all, it is the music that people come for."[2003]

To the performing artists in the orchestra, seniority pay is another element in a larger package of orchestral health and pension benefits that has been slow to catch up with the realities of aging. A major sticking point in contract negotiations in U.S. orchestras since the mid- 1970s has revolved around the issue of pay scales in relation to seniority. Seniority scales in most U.S. orchestral CBAs add increments to base salaries with a cap on increases set between 25-30 years of service. On a comparative note, Dutch orchestral CAOs contain step-by-step incremental salary raises according to years of service with fifteen years of service calculated from the first day of service, as a general cap in terms of maximum salary.[2004]

17.1.6 Retirement and pension-related issues in Dutch orchestras

The statutory retirement age tied to eligibility for social security benefits (Algemene Ouderdomswet (AOW) in the Netherlands has increased from the previously

[1999] See *FAQs*, the role of the board.
[2000] For a thorough analysis of the defined benefit vs. the defined contribution plan, consult the informative Adaptistration website at: https://adaptistration.com/2004/08/18/pension-plans-and-negotiations-part-1/
[2001] Ibid.,
[2002] Conversations with Tino Gagliardi.
[2003] Posted on Facebook March 10, 2019, and in statements released on the CSO musicians' official website, note not the Orchestra website http://www.chicagosymphonymusicians.com/
[2004] Exceptions for 'unusually faithful service' after 15 years are made, rather exceptionally, see 10.4 and 10. 5 CAO Orkesten 2014-2017 (CBA Dutch Orchestras).

established 65 to 66 in 2018. The AOW pension age increases to 67 in 2021. [2005] While the legislation is not set in stone and prior rules linked the pension age to life expectancy, the latest news suggests that 67 and 3 months will be the final cap. Interviews with Dutch professionals show that the desire to stay in the orchestra past retirement age felt by many U.S. colleagues does not appear to exist in the Netherlands. To quote a prominent Dutch principal player, "we have a feeling of obligation to our colleagues: when it is time to go, it is time to go, and we make room for younger players."[2006]

Pension payments in post-employment years, a major bone of contention for workers in the U.S. both in and beyond the orchestra, are less of a controversial issue for orchestral employees in the Netherlands, as tenured musicians are covered by mandatory sector-wide pension funds. Dutch occupational pension schemes are direct benefit schemes, with stringent solvency requirements on the part of the pension funds. In the last decade, Dutch pension funds' levels of protection have been placed under increased scrutiny, and the threat of 'lowered' pension payments have hit the headlines yearly since the recession and stock market debacle that followed on the heels of the 2007-2008 financial crisis. Nonetheless, Dutch pensions are in much better shape than their U.S. counterparts. Simple answers to a question of great complexity that puzzles many an economist is that the Dutch system is based on a concept of 'inter-generality,' in which each generation is partially responsible to shoulder the burden of economic downturns as opposed to "the American practice of shielding the current generation of workers, retirees, and taxpayers while pushing costs and risks into the future, where they can metastasize unseen."[2007]

Another contrast to the U.S. system lies in the fact that in the Netherlands, employers' contributions to pensions are capped, which in times of market depreciation precludes the sort of frantic 'cash call ins' that have led many U.S. employers and many orchestral organizations to stop offering defined benefit pensions. Last, but certainly not least, the Nederlandsche Bank (DNB, Dutch Central Bank) retains a watchdog role to make sure that pension funds will be able to pay out the pensions promised.[2008] "American

[2005] Information gleaned from Dutch Tax Authority website 2021. Available at: https://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/belastingdienst/prive/werk_en_inkomen/pensioen_en_andere_uitkeringen/wanneer_bereikt_u_de_aow_leeftijd/

[2006] Interview with former RCO principal bassoon, Brian Pollard who retired at 65 after 40 years as a member of the orchestra. Post-retirement, Mr. Pollard played in the Hague Philharmonic (until 1997) and coached many unforgettable sessions for various youth orchestras.

[2007] Interview with Keith Ambachtsheer, Dutch economist, and pension specialist at the University of Toronto's Rotman International Center for Pension. Available at: https://www.nytimes.com/2014/10/12/business/no-smoke-no-mirrors-the-dutch-pension-plan.html

[2008] Funds are granted a three-year turnaround recovery period if they do not meet the requirements set by the Central Bank.

public pension funds have no such minimum requirement, and even if they did, there is no regulator to enforce it. Company pensions are bound by federal funding rules, but Congress has a tendency to soften them."[2009]

17.2 U.S. age discrimination litigation

This *movement* looks closely at several U.S.-based orchestral age discrimination lawsuits. Save for U.K.-based ensembles, European orchestras encourage superannuation at the mandatory retirement age. While litigation in the Netherlands is rare in the orchestral field and even rarer with regard to age discrimination, the number of lawsuits in the sector have increased after the 2012 subsidy cuts were announced.[2010] And, with the rise of HRM initiatives to provide solutions for workplace issues related to longevity in employment, new clauses dedicated to wellbeing have found their way into CBAs to give legal muscle to a healthy work life for performing artists. Back to the U.S. to find an answer to the question as to how pensions have come to be such a critical issue in orchestral bargaining.

> *"The arrival of Social Security—the first retirement checks for workers who had reached age 65 were delivered in 1940 helped make leaving the workplace an even more reasonable proposition."*[2011]

Occupational pensions introduced in ancient times as incentives to Roman soldiers were offered to American Revolution recruits in the 1770s: these precursors of modern pensions were offered to those who survived military service. In the late 1800s, corporate entities (*American Express* was the first in 1875) led the way to introduce payments upon retirement.[2012] The notion of mandatory retirement, spurred by union activists in both the U.K. and the U.S., took hold in the late 19th century, but was not backed up by coherent, cross-occupational national pension schemes until the 1940s.[2013] U.S. statistics show that in 1950, the average working male could look forward to seven years of pension, while women with traditionally longer life expectancies averaged at

[2009] See, Keith Ambachtsheer, *supra* at fn. 2007.
[2010] Aside from individual musicians who felt they were wronged after losing their jobs in the 2012-2013 orchestral cuts in the Netherlands discussed in *Requiem for an orchestra*, other cases discussed in other *movements* focused on the freelancers' rights.
[2011] Emily Yoffe. "Please Take the Gold Watch" commentary on Slate.com Available at: https://slate.com/human-interest/2011/04/mandatory-retirement-how-the-abolition-of-mandatory-retirement-continues-to-change-america-in-unexpected-ways.html
[2012] Peter N. Stearns. *Satisfaction not Guaranteed: Dilemmas in Modern Society*. 2007 p. 93. Ironically in 2009, American Express slashed pension plans following the financial crisis of 2007-2008.
[2013] Carol Haber and Brian Gratton. *Old Age and the Search for Security: An American Social History* 1994.

ten years.[2014] In the face of life expectancies peaking at 70 years, considerably lower than present day estimates, the prevailing theory of geriatric employees was to 'let them go' for so that the (former) employees would have a few years to enjoy without the 'drudgery' of daily work commitments: old age was synonymous with deterioration.

> *"Since the early twentieth century, the older worker has been increasingly viewed as the least efficient member of the work force. Industry's attitude toward the aged employee finds its counterpart in society's generally negative stereotyping of the elderly. The courts too have succumbed to the popular perspective on aging. The defect in the perspective is that it views aging as a degenerative process, elevating the physical advantages of youth over the experiential advantages of age."*[2015]

Approximately half of the U.S. workforce faced a non-negotiable deadline for leaving the workplace at the Social Security mandated age of 65 by the early 1970s. For some, the departure may have been welcome; for others, it felt like being prematurely put out to pasture. The very notion of mandatory retirement was questioned by both academics and politicians after a body of laws grouped under Title VII originally intended to stamp out racial discrimination were amended in order to encompass age, disability, and gender.[2016] By 1986, as part of a series of congressional actions to address age discrimination, it became illegal to force people out of jobs at any age. Under the influence of academics led by the Boston College Center of Retirement Research economist Joseph Quinn, who argued that 'forced retirement' at 65 sent many willing-and-able workers into a negative spiral, a "descent into the abyss of old age" delivered strong support for the message that mandatory retirement could be detrimental not only to the individual but to society at large.[2017]

17.2.1 U.S. federal anti-discrimination legislation: equal protection[2018]

Protected classes are a means to an end: federal law defines its protections against discrimination through Title VII's enumeration of protected classes.

To frame a discussion of select U.S. orchestral musician cases carefully, a brief description of U.S. legislation applicable to discrimination cases follows. In its first incarnation, the Civil Rights Act 1866, passed by Congress on the heels of a legislative

[2014] Teresa Ghilarducci. *When I'm 64: The plot against pensions and the plan to save them* 2008 p. 13.
[2015] John B. McHugh. "The Constitutional Challenge to Mandatory Retirement Statutes" 2012 p. 45.
[2016] Leading the charge against mandatory retirement, John Beard, director of the World Health Organization Department of Ageing.
[2017] For a complete list of Professor Quinn's substantial research on retirement, see: https://crr.bc.edu/about-us/people/affiliated-researchers/joseph-f-quinn/
2018 Age Discrimination in Employment Act of 1967 (ADEA) at 29 U.S.C. §§ 621–34 (2006).

override of President Andrew Jackson's veto, purported to prohibit discrimination "in civil rights or immunities . . . on account of race, color, or previous condition of servitude."[2019] A commentary on its failure to protect any of the enumerated classes goes beyond this research but deserves mention and a link to in-depth analysis.[2020]

The number of "protected classes" increased substantially under the Civil Rights Act of 1964 (the Act) in which Title VII Act prohibits discrimination in employment on the basis of race, color, national origin, sex, and religion.[2021] A number of bona fide exceptions to the seemingly broad coverage include the fact that the Act covers workers between the ages of 40-64. Further, federal government employees and employees in enterprises with less than 20 employees are excluded from the ambit of the Act. Numerous anti-discrimination protections are afforded by state legislation which will be discussed where relevant to a particular case under scrutiny. Independent contractors are not covered by the Act, as we soon shall learn from a closer inquiry into jurisprudence in the freelance sphere. An independent federal agency, the Equal Employment Opportunity Commission (EEOC) was established under the Act to administer the enforcement of Title VII and other civil rights acts that apply to workplace discrimination.

17.2.2 Equal Employment Opportunity Commission (EEOC) and the ADEA

The core of the EEOC's Mission statement is quite simple: "to prevent employment discrimination."[2022] To take action against an employer in a U.S. discrimination cases, an employee is required to file a charge with the EEOC within 180 days from the time the alleged discrimination took place. Most commonly, claims are filed under the Age and Discrimination in Employment Act of 1967 (ADEA).[2023] Following a fact-finding process, the EEOC decides whether the charge will withstand a high procedural bar and decide if the claim is trial worthy.[2024] The EEOC engages in a fact-finding process to determine if a charge shows 'merit' and 'probably direct cause' to stand trial. Yet, as the jurisprudence discussed in this *movement* confirms, the EEOC 'system' has not

[2019] 14 Stat. 27 (at 31)
[2020] See for example, George Rutherglen. *Civil Rights in the Shadow of Slavery: The Constitution, Common Law, and the Civil Rights Act of 1866* 2013.
[2021] Civil Rights Act of 1964, Pub.L. 88-352, 78 Stat. 241 (1964).
[2022] See, https://www.eeoc.gov/
[2023] The Age Discrimination in Employment Act of 1967 (ADEA at 29 U.S.C. §621 to §634.
[2024] Ibid.,

been set up to tackle a large case load; the vast majority of EEOC cases are found to be deficient, lacking in 'merit,' and do not meet the high bar set for 'probably and direct cause.' In other words, whereas a high percentage of claims receive an EEOC Notice of Right to Sue, a very low percentage move forward to litigation. An eye-opening article by Michael Selmi[2025] written at the beginning of the millennium records the same mitigating issues that 2016 federal records corroborate.[2026] According to these records, employees filed 97,443 charges, and the EEOC issued 81,129 Notices to Sue (83.3%) according to records in fiscal year 2016 (Oct. 1, 2015, through Sept. 30, 2016). Yet less than 10% (7,239 cases) proceeded to court. Of the complaints that did reach federal courts, 87% were anti-discrimination claims. Additional information concerning the high percentage of claims that were barred from federal courts due to summary judgment related issues will form the core of the case-based discussion further in this *movement*.

After receipt of the EEOC's Notice of Right to Sue, claimants can prepare for battle in court. The term 'battle' is chosen carefully as scholarly research and federal records corroborate that employment discrimination plaintiffs fight an upward battle to win their cases at any level, from pre-trial motion to appeals, especially with regard to burden of proof encumbrances that will be discussed in the following pages. Post EEOC, in terms of procedure, if an employee disagrees with the EEOC investigation, there is a 90-day window to file a lawsuit in federal court. "Navigating the system is challenging: the local (union) can provide help for a musician claimant but then again, the local has to have the legal resources and time to come to his assistance. I could imagine that these factors vary cross-country depending on the experience and 'manpower' the local has. Even more important to mention is that the expense in finding decent representation for most people mirrors the situation faced by orchestral musicians: little knowledge of the law, limited resources to fund 'their day in court,' and a thorny path to resolution."[2027]

Another possible hindrance with regard to EEOC discrimination litigation is the promotional aspect at play. The EEOC does not take on cases purely on merit; it seeks cases that will broaden its impact. "When the EEOC initiates litigation, it seeks public exposure of the suit and details the nature of the suit in press releases issued to the

[2025] Michael Selmi is the Samuel Tyler Research Professor of Law at The George Washington University Law School.
[2026] Michael Selmi. "Why are Employment Discrimination Cases So Hard to Win?" 2001 pp. 574-75.
[2027] Conversations with Morris Shanker, Professor of Law Case Western Reserve School of Law.

media."[2028] For example, the EEOC website boldly reaches out to potential class-action 'clients' with a text that reads like a tv ad: "Are You Affected by an EEOC Lawsuit or Settlement?" The EEOC currently has a number of on-going lawsuits and settlements of lawsuits. We are looking for people who may have been affected by the unlawful discrimination alleged in these suits."[2029] Musician discrimination cases certainly do not have the societal impact or 'reach' that is key to profile-raising success at the EEOC. From the aforementioned statistics on actual cases litigated, one would hope that the EEOC would practice more of what it preaches by extending its enforcement reach without paying undue heed to public relations.

In the ADEA, an expanded list of protected classes, including age, was added to social protections: "it shall be unlawful to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual because of such individual's age" [2030] Workers who file age discrimination claims under the ADEA are afforded legal protection from retaliation, including those who:

- oppose employment practices that may discriminate based on age
- testify or participate in an investigation, proceeding, or litigation brought under the ADEA[2031]

In order to bring forward a claim of intentional disparate treatment under the ADEA, a plaintiff has to show that discrimination was the predominate factor that caused the injurious employment decision, or, under the 1991 amendments to the Civil Rights Act, that discrimination was a "motivating factor." Citing the text of the Act directly: "[a]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.")[2032] The ADEA only applies to individuals age 40 and older, and the federal courts have interpreted it narrowly over time, generally requiring more than a year or two age difference between employees to support a finding of age discrimination.

Is it possible to argue that Congress tacitly approved of a mandatory retirement age and approved of discrimination against workers who might have wanted to continue to

[2028] Harvey Mars. "Musicians Fight Age Discrimination" *Allegro* April 2018.
[2029] See, www.eeoc.gov
[2030] *See,* The Age Discrimination in Employment Act of 1967 (ADEA).
[2031] See, U.S. EEOC Enforcement Guidance on Retaliation and Related Issues no. 915.004 August 25, 2016.
[2032] Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1071, 1075 (1991) (codified at 42 U.S.C. § 2000e-2(m)); The Age Discrimination in Employment Act of 1967 (ADEA; codified at 29 U.S.C. §621 to §634.

work past the age of 65? Or is a more sensitive reading of the ADEA taking its place in progressive civil rights legislation in order? A brief foray into background documents supports the argument that Congress envisioned protection for the most vulnerable group who would otherwise be unable to enjoy the benefits of social security. [2033] Age discrimination legislation at the state level proliferated since the passage of the two aforementioned acts in the 1960s: exceptions to the scope of coverage will be discussed in relation to the cases selected below. Jerome Hunt's state-by-state comprehensive analysis points to gaps in protection for certain groups and opens the door to further study.[2034]

The two aforementioned examples of U.S. rights-protection legislation were products of a great move forward with regard to legislating equal rights in direct reaction to the sweeping civil rights movement of the 1950s and 1960s. The "equal protection of the laws" promise in the 14th Amendment[2035] that led to sweeping change in terms of civil rights from the 1960s onwards subsequently rested on the courts for fulfillment. More than a half-century later, jurisprudence on employment discrimination has shown more discord than harmony with regard to the goal of alleviating workplace discrimination as cases discussed as the *movement* unfolds obviate. As articulated earlier in this *movement*, the U.S. Congress struck down the mandatory retirement age in 1978 and follow-up federal legislation in 1986 rendered mandatory retirement at the age of 70 illegal.[2036] Many orchestral managers were caught 'unawares' by the importance of this issue as a bargaining point for musicians as the *Henrickson* case illuminates.

17.3 *Frances Henrickson vs. Atlanta Arts Alliance*

In 1973, *Senza Sordino*, the official publication of the International Conference of Symphony and Opera Musicians (ICSOM), published a disconcerting report in its XIth volume. The report provided details about a civil suit in which violinist Frances Henrickson claimed both age and sex discrimination against the Atlanta Arts Alliance Inc., the corporate umbrella organization that operated the Atlanta Symphony Orchestra

[2033] For further consideration regarding the scope of the ADEA, see Bryan Woodruff. "Unprotected Until Forty: The Limited Scope of the Age Discrimination in Employment Act of 1967" 1998.
[2034] Jerome Hunt. "A State-by-State Examination of Nondiscrimination Laws and Policies" 2012.
[2035] Amendment XIV Section 1 in relevant part: **"**No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
[2036] Retirement age was abolished under the 1989 amendments to the ADEA.29 U.S.C. §§621-634.

(ASO).[2037] Ms. Henrickson joined the ASO in 1965 at a comparatively late age (mid 50s) after a rich musical life as performer and pedagogue. Her initial ASO placement was at the back of the first violin section, 'fifth desk' (the second to last desk in the section).

According to the *Senza Sordino* account, "her problems began with a series of actions on the part of the conductor, Robert Shaw, and the personnel manager, Martin Sauser." In February 1972, she was demoted from her fifth stand first violin seat to placement at the very back of the second violin section, sixth stand. As mentioned in the *FAQs*, although section members of the two violin sections receive the same financial remuneration under the terms of an orchestra's CBA, there is a significant difference in the two parts played by violinists. More importantly, the association of 'first' and 'second' tells all: first violinists are frequently considered to hold the alpha position within the orchestral string hierarchy. While modern-day violinists interviewed in major orchestras are proud to play in the second violin section recognizing the importance of every individual with a coveted orchestral contract, the old school players often cast aspersion on second violin positions, hence the allusion to inferiority, as in 'to play second fiddle.'[2038] First-second violin distinction was 'replayed' as an issue in the Amsterdam-based *Pintus* case that is the focus of discussion in *A long and winding road*.

In June 1972, Miss Henrickson called the personnel manager to report that she was sick. The ASO docked pay after she exceeded the 10-day sick leave maximum stipulated in the ASO CBA by two days. Subsequently, the ASO granted her an official leave of absence so that she could recover fully (at least, that was her reading of the leave). To her amazement, she received a letter of contractual termination from the ASO's outgoing manager during what she perceived of as her recuperation period. In relevant part:

> *"We, therefore, have decided that we will not be able to offer you a contract for the next season. In accordance with Article XX of the master agreement, which deals with physical incapacity, you will be granted severance pay in the amount of $500 at the conclusion of the season."*

Shocked by her unexpected job loss and the tone of the ASO communications, Miss Henrickson sought immediate reinstatement based. Procedurally, the ASO's actions

[2037] "Francis Henrickson: A Study in Calumny." *Senza Sordino* August 1973 pp. 1-3.
[2038] The same expression in Dutch, 'de tweede viool spelen' is used in exactly the same way as the English expression. The *Cambridge Dictionary* defines the expression 'to play second fiddle' as "to be less important or in a weaker position than someone else. See, https://dictionary.cambridge.org/dictionary/english/play-second-fiddle

were questionable, perhaps illegal lacking due process: Miss Henrickson had not been served notice, nor did she receive a mandatory hearing in the presence of union officials and at least one member of the orchestra committee. The ASO's local union (Atlanta Federation of Musicians local 148-462) advised Miss Henrickson to seek arbitration to resolve her grievances. She opted for litigation. Before filing suit for discrimination on the basis of age and gender, the purportedly wronged violinist met with the ASO's newly appointed manager, Mr. Ratka, who agreed to grant her a contractual extension until the end of the 1972-73 season in return for a letter of resignation effective at the end of the season. Miss Henrickson presented a 'bill of good health' from her attending physician and signed the extension-for-resignation offer, albeit 'unwillingly.' She continued to plead her case during the course of the new season, this time with Maestro Shaw who appeared to be sympathetic to her cause. Bowing to majority rule, the maestro requested the entire orchestra to vote in order to ascertain whether or not there was support for Miss Henrickson's reinstatement. "The orchestra by a vote of 53-5 showed support for Miss Henrickson upholding her view that she was 'illegally dismissed without consideration for her illness, and unduly persuaded to resignation in a coercive manner.'"[2039]

Nonetheless, Miss Henrickson received no reply from either management or the music director concerning the continuation of her employment. Interesting to note, there was no mention of Miss Henrickson's age in the claim report, a salient fact crucial for success in an age discrimination case. Archival research netted the following document that shows evidence of her debut as violin soloist, age 17, with the Boston Pops Orchestra in 1935, thus she would have been between the ages of 55-56 at the time of the dispute.[2040]

The U.S. Department of Labor, Wage and Hour Division[2041] took notice of Miss Henrickson's claims. The Division that serves as an enforcement agency for a long list of labor-related laws ranging from worker protection to wage laws mounted an investigation to ascertain if Miss Henrickson's allegations of discrimination were singular, an isolated case, or if her claim could point to general discriminatory actions forming a recognizable pattern at the ASO. Perhaps the fact that the Miss Henrickson opted to sue for both age discrimination and gender discrimination diminished the

[2039] See *Senza Sordino*, *supra* at fn. 2037.
[2040] The Boston Pops Archives contain a copy of Miss Henrickson's debut performance with the orchestra in 1935. Available at: https://archive.org/stream/bostonpopsorches1935bost/bostonpopsorches1935bost_djvu.txt
[2041] Responsible to enforce Federal wage laws, the U.S. Department of Labor, Wage and Hour Division was established in 1938 under the Fair Labor Standards Act (FLSA).

plausibility of her case: no evidence was presented to point to the latter accusation. Miss Henrickson had not proffered hard evidence of harassment as a core determinant leading to her demotion nor could she prove that her advanced age was the tipping point factor that pushed her employer to curtail her employment. Although the case generated media support in favor of Miss Henrickson,[2042] the ASO did not reconsider its adverse employment action. Conversely, Miss Henrickson was not reinstated to perform in the 1973-1974 season. Ultimately, her case was settled out of court: she agreed to accept one year's salary and full reimbursement for court costs and legal fees.

Hypothetically, had the dispute taken place two years later, the union could have played a more significant role as a result of the 1975 SCOTUS decision in *NLRB v. Weingarten*.[2043] The decision established an employee's right to union representation in a situation in which the employee is required to participate in an inquiry that could result in disciplinary (or more serious) actions on the part of the employer. Yet, although the ASO did not follow a defined inquiry protocol, even *Weingarten* might not have offered Miss Henrickson recourse. Is there another possible explanation for her dismissal?

Digging beneath the surface of the case, another parallel story emerges. When the Atlanta Symphony approached Robert Shaw as a frontrunner for its coveted music director position in 1967, Maestro Shaw had earned his stripes as choral director for Arturo Toscanini and had served as associate conductor to the exacting taskmaster, George Szell, at the Cleveland Orchestra for over a decade. By the time Robert Shaw arrived in Atlanta, he had not only a taste for greatness, but he had experienced the sound and fury of Szell, one of the most extraordinary conductors of this time. A man with a mission, Robert Shaw wrote prolifically on the subject of how to succeed in his quest to catapult the ASO into the ranks of top-tier U.S. orchestras. During the time frame when Miss Henrickson brought her charges of discrimination to the fore, the ASO was in the process of change in terms of artistic vision and professional capabilities.

Within just a few years, Maestro Shaw not only raised the orchestra's standards dramatically, but also the orchestral musicians received considerable employment perks including competitive salaries and a 30-week performance season. Such a

[2042] A microfiche survey of *Atlanta Journal-Constitution* articles reported on the case is available at: http://www.af.public.lib.ga.us/
[2043] *NLRB v. J. Weingarten, Inc.,* 420 U.S. 251 (1975).

solidification of benefits meant that the ASO could attract and retain high level players. According to the ASO's website, "[m]usicians' pay continued to increase, enhancing the Orchestra's ability to attract and retain notable players. The roster was increased by several key positions."[2044] Once a 'sleepy town' part-time regional orchestra, Robert Shaw 'grew' the ASO to its present stature as the premier orchestra in the southern United States and a top-tier U.S. orchestra. For a man with such an artistic vision, there was no choice but to 'retire or fire' the personnel who could not meet the challenges of excellence.[2045]

To 'attract and retain notable players' especially in the string sections, Maestro Shaw would have had to dismiss several long-serving members of the orchestra who simply could not perform to his standard. Decades later, the letters he wrote to them show that he was forthright and even, on occasion, remorseful, showing great sympathy to the musicians' personal dramas.[2046] Like, the Executive Director in the *Kampouris* case discussed subsequently, Maestro Shaw's first loyalty was to build the orchestra, to make it worthy of the music it performed. If Maestro Shaw crossed the boundaries of unfair treatment in Ms. Henrickson's situation, or if he was acting out of purely musical interests to raise the level of the organization is a question that crosses into a grey zone. Is the pursuit of a collective goal of excellence at the price of players who cannot meet the high bar expected unreasonable or illegal? Across the ocean in the Netherlands, Maestro Edo de Waart would have shown solidarity with Maestro Shaw: "we sink or swim as a result of our whole team, if there are too many weak players, the collective sinks."[2047] Ultimately, Miss Henrickson agreed to accept the financial settlement proffered by the ASO and Maestro Shaw succeeded in turning the orchestra into a world-class ensemble.

17.4 Principal players strike back at unlawful actions: the Phoenix Symphony cases

The next phase of this inquiry takes us to the Phoenix Symphony (PS) during a dark period in the orchestra's labor history in which eight full time symphony members

[2044] See, https://www.atlantasymphony.org/About/Robert-Shaw
[2045] With special thanks to the Special Collection librarians at the Irving S. Gilmore Music Library of Yale University who shared documents from the Robert Shaw Papers, available in part at: https://archives.yale.edu/repositories/6/resources/5898
[2046] The Robert Shaw papers are in the possession of the Yale Music Archives, special thanks to archivist Richard Boursy for prompt assistance.
[2047] Conversation with Edo de Waart.

filed age-discrimination complaints with the EEOC and several cases led to litigation at the National Labor Relations Board (NLRB). The sole full-scale orchestra in the state of Arizona, the PS had established an enviable reputation for innovative programming and performance since its inception in 1947. During the mid-1970s, the 'up and coming' conductor Eduardo Mata stood at its helm and, like his Atlanta-based contemporary Robert Shaw, was a strong proponent of orchestral professionalization. While Mr. Shaw's plans affected the careers of at least one older player as the *Henrickson* case illustrated, there are no records of any sort of egregious employment contraventions related during Maestro Mata's musical reign.

The Phoenix litigation focuses on a particularly noxious trio of legal and management matters: discriminatory practices, poor board/management-orchestral relations, and crucially, the impact of a young, ambitious music director whose agenda clashed with some of the best musicians and strongest personalities in the orchestra.[2048] Granted, a music director is entitled to establish and set forth his/her blueprint for his/her orchestra. However, as the Phoenix story and subsequently the *Wetherill* case in Indianapolis illustrate, personal vendetta at the expense of experienced players who do not 'fit' within a maestro's blueprint can lead to discriminatory practices.

The PS employment crisis began thirty years after the symphony's glorious Mata days when another young rising star, Michael Christie, was appointed music director. While the great conductors of the 19th and 20th century were more often than not 'mature' musicians who had learned their craft through years of instrumental study, the appointment of a flamboyant character with a penchant for piloting planes and the gift of gab, seemed to fit with a pattern established during the Mata years. Both men were young (Christie at 30 was four years younger than Mata upon appointment), and like his predecessor, generated a great deal of audience appeal. Unfortunately, the similarity ends there. Another side of Mr. Christie's personality came to the fore soon after he ascended the podium in Phoenix. His disdain toward a number of principal players, vociferous section leaders who had never hesitated to make their opinions heard on behalf of their colleagues, was palpable from the onset of his tenure. "Facial expressions at the onset, the frown, the sneer the obvious dislike that is how it started. ...by the time it ended there were dismissals, lawsuits and an orchestra with a broken

[2048] Excellent reporting on the PS cases available through the *Phoenix New Times* blog, https://www.phoenixnewtimes.com/topic/feathered-bastard-6498369

spirit."[2049] An orchestral veteran, cellist Delaine Salt who had been a member of the PS for 41 seasons, opted out of extending her PS contract, citing unbearable stress levels and an increasingly hostile work situation as primary reasons for departure.[2050]

Dismissals at the PS showed a distinct pattern in which highly proficient, well-respected players were replaced by inexperienced newcomers. Taking on the role of devil's advocate for a moment, readers are asked to put themselves into the position of a young conductor taking on the challenges of a music director's position. Would you (as conductor) prefer to stand in front of musicians who look up to you, or deal with musicians who might question your authority? Interviews with PS musicians point to a clash between the newly appointed music director's insecurity and the established musicians' knowhow and power. "Add a great deal of brashness to that mix, presumptuous behavior on the part of Christie and we were heading for disaster."[2051]

Richard Bock, principal cellist from 1984-2007, an internationally recognized cellist whose level of playing was irreproachable according to expert witnesses, was fired on January 14, 2008. His replacement, a good cellist by all accounts was young and far less experienced as an orchestral principal player. Principal violist Peter Rosato, a particularly outspoken individual whose musical prowess was undisputed was demoted and eventually fired that same year. Both of these players were not only celebrated within the local classical music circuit, but also both enjoyed considerable musical careers based on their excellent reputations and chamber music performances as well as music festival affiliations. These musicians were initially suspended, and eventually their contracts with the PS were terminated.

17.4.1 Colleagues react

The news of irregularities at the PS reached the ears of colleagues at the internationally renowned U.S. summer festival, the Grand Teton Music Festival (GTMF) in July 2008, where Mr. Rosato had performed. In an act of solidarity, outraged orchestral musicians from leading symphonies wrote and signed a letter-of-protest registering their outrage at the 'Phoenix' situation.[2052] In addition to eyewitness experience (the author was performing at the GTMF that summer), this *movement* benefits from

[2049] Interview section player not involved in the threat of dismissal, Phoenix Symphony, anonymity assured.
[2050] Information appeared in print, Stephen Lemons reporting for the *Phoenix New Times* March 23, 2009. Available at: https://www.phoenixnewtimes.com/news/michael-christie-and-the-ongoing-rumble-in-the-phoenix-symphony-6503427
[2051] Conversation with a former member of the Phoenix Symphony, anonymity assured.
[2052] See *Epilogue: Appendix 28* for a copy of the signed Grand Teton Music Festival musicians protest.

additional detail thanks to the exceptional generosity shown by Mr. Bock in providing useful background information and personal insights concerning his PS employment debacles. His remarks corroborated by interviews with Mr. Rosato and several PS former colleagues and the commentary that preceded the GTMF missive paint a dark picture as to how far management and music directors can collaborate to wreak havoc on a musical ensemble as the so-called arbiters of musical excellence. As the consolidated case that Messrs. Bock and Rosato brought before the NLRB revealed, the GTMF letter was considered to be a concerted activity for the purpose of mutual aid protected under the National Labor Relations Act (NLRA).[2053] Mr. Rosato was threatened by the PS that 'engaging in concerted activities' would jeopardize payments due to him.[2054]

According to some PS musicians (deep background information), Mr. Christie's targeted harassment was part of a 'dark vendetta' or 'grand plan' to mask his insecurities, eliminate criticism, and raise his approval rating with a management and board intent on keeping 'the orchestra out of any significant decision-making efforts from the artistic to the financial.' Many experienced players from the ranks and at the helm of various orchestral sections were highly skeptical of his talents, or bluntly put, lack thereof. To many of the PS's musicians, Mr. Christie had "pizzazz but not much musical backup to make our rehearsals bearable and concerts musically interesting. Nevertheless, our board and management loved him."[2055]

The reluctance of the board and the orchestral management to perceive that what might look good for the community is not good for the musicians is a crucial factor not only in the PS case but in subsequent orchestral employment-related disputes. "Board cluelessness is not necessarily based on bad faith or malicious intent, but a distressing lack of the insider knowledge, the background research needed to understand all the forces at work within the orchestra. This is compounded by the necessity for those who are entrusted with orchestral leadership to realize that what is good for the

[2053] Quoting from the NLRA website "Section 7 of the National Labor Relations Act (the Act) guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from any or all such activities. "Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the Act. See, https://www.nlrb.gov/rights-we-protect/whats-law/employers/interfering-employee-rights-section-7-8a1

[2054] *Phoenix Symphony Association d/b/a The Phoenix Symphony and Richard C. Bock, Peter Rosato and Local 585 American Federation of Musicians before the National Labor Relations Board Region 28* (Consolidated case) Case 28-CA-22325 at para. 5(c). Available at: https://www.nlrb.gov/case/28-CA-022325

[2055] Interview with Phoenix Symphony members who performed during the pre- and post-Christie era, anonymity assured.

musicians is good for the orchestra"[2056] Not a clash of the titans, but certainly a clash in which a music director attempted to go after principal players who not only held tenure but were perceived as 'influencers.' "If Christie could successfully get rid of these musicians and hold auditions to fill their seats and of course find more malleable, less-experienced players, he would win and get his way. Power game, that's what this was, all at a big price for those of us who were forced to remain on the sidelines."[2057] The power and authority of the music director discussed at length in the *FAQs* reinforced by the influence held by board and management, held the 'nonthreatened' orchestra members at bay, and served to augment the music director's command.

The chance to receive direct insights and testimony from musicians directly involved in employment discrimination cases provided a unique opportunity to delve into animus, causation, reasons, and false reasons that characterize these and other employment discrimination cases. The peculiarities of orchestral employment, exemplified by the hierarchy that puts musicians in a subordinate position to maestro-music directors is of particular relevance to this and other orchestral employment discrimination cases. "You can't imagine what it is like to be put in such a situation. Most of us consider ourselves not only to be a part of the orchestra, but to be the orchestra. To have that called into question puts us into total tailspin. For us to move forward and actually file charges is a really big step as it calls our very identities into question and even has some element of biting the hand that has fed you."[2058]

17.4.2 Discrimination charges in Phoenix

Mr. Bock filed several discrimination charges against the Phoenix Symphony Association (PSA), the governing body of the PS with the EEOC, claiming age discrimination and retaliation. According to reports inside the PS received by the author in confidence, a member of the orchestra's board of directors carped to members of the orchestra about the "eight musicians who had filed age discrimination claims and indicated that the filing of those claims was underhanded and out of order, that it must stop, and that punishment and termination of the musicians would be considered." Reacting to Mr. Bock's suit, Edwin Wolf, a member of the Board and one of the defendants in the case warned Mr. Bock that there would be repercussions if the case were to continue. Mr. Bock fought his suspension and dismissal and

[2056] Conversations with Marcia Peck, cellist and senior member of the negotiating committee, Minnesota Orchestra. Spokesperson for the orchestra during their 16-month lockout in 2013.
[2057] Interview with Phoenix Symphony section player, anonymity assured.
[2058] Conversations with Peter Rosato.

together with Peter Rosato filed a case at the National Labor Relations Board (NLRB) on January 22, 2009, to continue their struggle against retaliation on the part of the orchestra. [2059] Mr. Bock proceeded to sue for wrongful termination and Mr. Rosato sued for both wrongful termination and unpaid wages. Mr. Bock's suit centered on "unfair and inconsistent treatment in comparison to other employees" and eventual job termination "to be replaced by a much younger person." The Phoenix office of the NLRB issued a formal complaint charging the Phoenix Symphony's CEO, MD and Board with discrimination, unlawful termination and a hostile work environment engendered by the Symphony's leadership.[2060]

17.4.3 The PSA responds

The PSA responded that Mr. Bock's firing had nothing to do with any form of discrimination. In a legally questionable move, the CEO of the PS, Maryellen Gleason publicly stated that Mr. Bock was fired for breaching Arizona law. The CEO referenced Title 12 of the Arizona Revised Statute, A.R.S. 12-2238, a piece of legislation that concerns the mediation process, more specifically mediation process privilege. Amended in 1993, this piece of legislation applies to the entire mediation process not just statements made 'during mediation' as in the pre-1993 statute. According to the confidentially clause (B):

> *"Communications made, materials created for or used and acts occurring during a mediation are confidential and may not be discovered or admitted into evidence unless one of the following exceptions is met:*
> *1. All of the parties to the mediation agree to the disclosure.*
> *2. The communication, material or act is relevant to a claim or defense made by a party to the mediation against the mediator or the mediation program arising out of a breach of a legal obligation owed by the mediator to the party.*
> *3. The disclosure is required by statute."*

A.R.S. 12-2238 renders confidential 'all materials created, acts occurring, and communications made as a part of the mediation process.' Essentially, the procedural rule serves as a checklist as to how courts should consider the admissibility of information gleaned during mediation. The question arises as to how this statute could possibly lead to an accusation of 'breaking the law' in the *Bock* case? According to the powers-that-be at the Symphony, Mr. Bock breached the statute by sharing the Symphony's discriminatory practices with outsiders, including local journalists. In the logic or

[2059] See Consolidated case, *supra* at fn. 2054.
[2060] As quoted by Stephen Lemons. "Ongoing Angst at the Phoenix Symphony" *Musical America Worldwide* March 25, 2009.

rather illogic of the PSA, his information-sharing was tantamount to a criminal action. In a memo released to the orchestra, management stated that, "even if this issue is not covered in the master agreement, you can't break the law and work for the Phoenix Symphony. Ms. Gleason went on to give the example of someone who shoots someone not being able to keep their job even though shooting someone is not covered in the master agreement."[2061] The NLRB response pointed to a PSA reliance on an 'overbroad rule of confidentiality,' that in fact breaches the generous interpretation of protected activity under the NLRA.[2062]

17.4.4 More insights from within and above: whose story do you believe?

To quote Angelo Filigeni, a 42-year veteran of the orchestra: "the conductor is getting rid of these exceptional musicians for two reasons. . . [One, to] hire younger less experienced musicians so they don't question his authority and are not a threat to his musicianship, which is questionable at best. Two has to do with management and that is so they can hire younger musicians and pay them much less than the musicians they have succeeded in getting rid of."[2063] If younger players are hired to replace older players at the orchestra, does this reveal discrimination? Is it indicative of a move to save money taking into consideration the fact that younger rank-and-file players earn less than older colleagues? Is there an objective way to weigh the effects of what older players consider to be an 'insecure working environment' versus the chances afforded to younger players who replace their seniors? And who is listening? As an Arizona politico observed, "having just run for Congress, unsuccessfully, I knew no one was even talking about the Phoenix Symphony."[2064]

In May 2009, the PSA issued a press release proclaiming: "Phoenix Symphony Musicians and Symphony Board Reach Landmark Accord. We are announcing today a new level of cooperation between [sic] the Music Director, the staff, the Musicians, and the board of the Phoenix Symphony." Orchestra Board Chair C.A. Howlett declared in the press release, "at last, all is well!" Yet, in terms of employment, the agreement was disastrous; musicians were pressured into accepting a whopping 17% pay cut effective

[2061] An insider writing under the pen name **appalled music lover** on Wednesday June 11, 2009. Available at: https://adaptistration.com/2009/06/10/reeling-from-a-one-two..
[2062] See Consolidated case, *supra* at fn. 2054.
[2063] Angelo Filigeni quoted on Wednesday June 10, 2009. Available at: https://adaptistration.com/2009/06/10/reeling-from-a-one-two..
[2064] Quote by James Ward, President and CEO of the Phoenix Symphony. The former Republican Tea Party candidate was hired in January 2011 to mastermind a fiscal turnaround for the beleaguered orchestra. Available at: https://www.phoenixsymphony.org/article/arts-groups-struggle-to-stay-relevant

immediately. CEO Gleason cited the usual suspects in terms of orchestral finances exacerbated by the financial crisis 2007-2008: persistent financial fallout, a decrease in the number of donors, and a decline in long-term endowments. Yet, her story did not accord with speeches made by PSA executives who had raved concurrently to donors and as orchestral musicians about balanced budgets and sell-out concerts.[2065] A local blogger reported that the CEO wanted to reduce the size of the orchestra to around 50 players (from 79), and to perform only 28 non-consecutive weeks, as opposed to nine months. Rehearsals would be at nighttime and weekends. In short, the orchestra would revert back to its status prior to the 1960s, when it achieved a "major" rating from the American Symphony Orchestra League, a status hard-won and fully deserved, having played under such music directors as Theo Alcantara and Hermann Michael and guest conductors of similar caliber.

Certainly, cutbacks in arts organizations are nothing new, even in the best of financial times. The difference that lies beneath the surface in the Phoenix story is how these cutbacks were managed and 'sold' to the most important and vulnerable stakeholders: the musicians. With all those glowing reports, why was it necessary for the musicians to take a 17% pay cut, especially when their base pay ranked next to the very bottom of comparative salaries, weighing in at $35,000 per year? Moreover, what sort of twisted ethical compass leads a CEO to blame the cuts on lawsuits from musicians who were forced to leave their jobs for reasons that had little to do with their musicianship or leadership, the essentials of their job descriptions? Reports from the Phoenix News present a disturbing pattern of 'lies and whispers.' Although a PSA press release announced that the musicians accepted the notorious 17% pay cut that resulted from a decrease in donor contributions, "when Gleason and I talked in March (2009) she argued that the decisions to demote or dismiss veteran players such as Bock were contributing to the symphony's well-being, which she portrayed in relatively rosy terms."[2066]

An outsider to the music profession would assume that such actions on the part of a manager would lead to professional discredit as the "musicians were billed for management mistakes," however, quite the contrary is true.[2067] Promoting herself as a "leader in "high velocity turnarounds" in the performing arts, Ms. Gleason moved from Phoenix to take on the top position at the Milwaukee Symphony in 2010. Within

[2065] See Lemons, *supra* at fn. 2060.
[2066] Ibid.,
[2067] Appalled music lover paraphrased.

two years, the Milwaukee ensemble and its board took the dramatic decision to hire a musician to replace Ms. Gleason. Phoenix orchestral insiders speculated that just, perhaps, Ms. Gleason's alacrity to cut without heed had come home to roost.[2068]

17.4.5 An unsettling settlement

Just prior to the NLRB hearing, the PSA board capitulated and reached a settlement with Messrs. Bock and Rosato. The two musicians were required to withdraw all formal complaints and were presented with the option to return to the PS with full restitution of back pay or drop all claims against the PSA in exchange for a financial settlement. Referring to a poisoned atmosphere as a result of the way in which these serious claims were trivialized, the musicians elected to leave the orchestra. Both Mr. Bock and Mr. Rosato opted not to return to the PS, and both received a settlement from the orchestra that was not disclosed to the public. Mr. Bock revealed that the amount was "certainly well-deserved and substantial. I never asked for this despicable treatment, nor did I deserve it in any way. It's sad to say that part of the reason that musicians are compelled to sue the very orchestras they once called home is to prove to the greater music world out there that we can never ever accept such treatment. Such wrongs deserve remedies no matter how tough and long the fight is. Sadly, most musicians do not have the wherewithal to stand up against an unfair employer."[2069] Without providing details that are barred from the public domain, other musicians who alleged harassment at the PS never really recovered from the shock. Mr. Bock happily pursues his two vocational loves with great success: a sought-after cellist on the chamber music circuit, he 'plays when and where he wants to' and expanded upon his love of Italian food and culture at his Italian restaurant in Phoenix, a popular venue where culinary art is 'music to the palate.' [2070]

The PSA was required under the terms of the settlement to post a list of prohibited activities, "protected activities, those very activities that the wronged musicians had engaged in: filing age-discrimination cases at the EEOC and protecting themselves through such actions as the GTMF letter.[2071] "The question now making the rounds is whether the symphony was insured for such settlements, or whether the musicians'

[2068] Interviews with Phoenix Symphony musicians, anonymity assured.
[2069] Conversations with Richard Bock in 2018.
[2070] Richard Bock's restaurant, Giuseppes on 28th has received a swathe of awards since it opened in 1984. https://giuseppeson28th.com/
[2071] Corroborated by David Kelley, Deputy Assistant General Counsel at the NLRB, Deputy Regional Attorney NLRB at the time of the *Bock* and *Rosato* cases.

pay cuts were subsidizing them."[2072] Adding insult to injury, PS musicians received a memo from the CEO that asserted that their 17% salary cut was directly related to the settlements received by their (former) colleagues, the musicians forced out of the orchestra. "Try and imagine how we felt. Our music director instigated actions to dismiss some of our leaders, great players and colleagues. Our board and management not only signed off to that but after some colleagues sued for their rights, we were told this would cost us money. Betrayal, total betrayal. How could they think we would believe that the very principals we looked up to bear the responsibility for our loss of income. We were put in a terrible situation not only financially but personally. You might wonder how we survived? Those who could get another job did and thank goodness Christie left soon thereafter."[2073] Not only musician outrage but Cornele A. Overstreet, Regional Director for Region 28 of the National Labor Relations Board (NLRB), alleged that the PSA had breached the NLRA by overstepping the boundaries of fairness. Furthermore, the PSA did not meet its obligation under the orchestras collective bargaining agreement that held it responsible to pay its musicians the salaries that had been duly bargained for. To put the blame for salary cuts on the shoulders of the wronged musicians goes down in the annals of unforgivable deeds in the orchestral workplace.

Those experienced in the lore of U.S. orchestras remember that Maestro Christie's tenure with the PS coincided with his tenure as music director at New York's Brooklyn Philharmonic (2005-2010). Praised by music critics for his innovative programming choices, musicians and local union officials in New York paint a different picture of the flamboyant maestro. Taking cognizance of the maestro's dicey dealings with longtime members of the orchestra and his spate of conflicts with the orchestra committee, the following observation was published:

> *"Crippled by lack of money, the orchestra had cancelled its entire previous season. The painful question remains: did anyone notice? Once important group, especially for modern music, under the distinguished batons of Lukas Foss, Dennis Russell Davies, and Robert Spano, the orchestra saw its overall quality fall off drastically under music director Michael Christie. Christie developed stylish concert programs but put less care into rehearsing and developing the ensemble - the music director's primary responsibility."*[2074]

As of 2018, Mr. Christie's career declined from directing distinguished ensembles such

[2072] Dmitri Drobatschewsky. "About that 'Landmark Accord' in Phoenix," MusicalAmerica.com Available at: https://conductingmasterclass.wordpress.com/2009/06/14/more-bad-press-for-christie/
[2073] Interview with former viola section member, Phoenix Symphony Orchestra post-2009 debacle.
[2074] George Grella. "Alan Pierson: Making Brooklyn's Orchestra" *The Brooklyn Rail* September 9, 2011.

as the PS and the Brooklyn Philharmonic to serving as Music Director of the New West Symphony Orchestra, a regional orchestra in the Los Angeles metropolitan area. "Maybe, just maybe there is such thing as musical, if not poetic, justice."[2075]

17.5 Other factors that add 'injury' to age

An important consideration that feeds into a deliberation on exacerbated vulnerabilities in the orchestra relates to a heady mix of psychological and physical stresses and strains. Compounded by age, these psycho-physical factors "are massive at the best of times; for older musicians these are additionally traumatic."[2076] The expenditure of physical energy and chances for injury associated with playing orchestral instruments varies considerably between different groups of instruments. Brass and wind players can suffer from embouchure issues ranging from trembling lip to dystonia that becomes exacerbated with age. "Hand position, steadiness of the wind, the jaws, the lips, the oral cavity, the clarinet in the embouchure, the clarinet in the hands, and the axis of the palms of the hands themselves, the knuckles being as quiet as possible off of which the fingers operate. Those are some of the basic maladies that wind and brass players endure."[2077] String players' maladies run the gamut from repetitive strain injuries and muscle overuse disorders to inflammatory conditions exemplified by tendonitis.

Until the late 20th century, the cause of overuse injuries in musicians was largely undiagnosed and few accepted the fact that maladaptive playing patterns could lead to curable muscular strain or in the worst cases, irreparable neurological injury. Orchestral musicians' occupational-related injuries have since steadily gained academic recognition but are more likely than not to be well-kept secrets at the workplace. "Can you imagine letting your colleagues know that you fight every day just to play your instrument? If you let others know about pain whether mental or physical, they often cannot imagine it or worse they might let others know about it which could lead to a snowball effect of events. Shame, distress and confusion often

[2075] Former bass player Brooklyn Philharmonic echoing the sentiments of a Phoenix Symphony Orchestra string player, anonymity assured.
[2076] Conversations with Dr. Boni Rietveld, orthopedic surgeon and musician, Dr. Rietveld is internationally acclaimed for his work in the field of performing arts medicine. Founder Medisch Centrum voor Dansers en Musici (MCDM) The Hague.
[2077] See, interview with Robert Marcellus, legendary principal clarinet Cleveland Orchestra 1953-1973, available in reprint at: https://joffewoodwinds.com/articles/robert-marcellus-thoughts-on-performing-teaching and Steven Frucht. "Embouchure dystonia: a video guide to diagnosis and evaluation" 18 June 2016.

keeps a musician from telling even those closest to him that he is suffering."[2078] The aging musician, who suffers from a performance-related disorder, is apt to suffer in silence according to research undertaken in several jurisdictions.[2079] "Nothing seems to be more shameful than to admit that something is wrong with you when you play your instrument; this instantly undermines your position not only in your eyes, but in the eyes of your colleagues. For an orchestral musician, you start on a high point before the pressures of your 'career' can either make or break you."[2080]

Musculoskeletal and neurological disorders[2081] prevalent amongst orchestral musicians have spurred a great number of recent international studies, and publicity focused on 'musical sportsmen and women' have engendered attitude changes in the past two decades. Although a culture of pride and silence has characterized the unwillingness of musicians to go public with regard to pain, changes in recent years have been spurred by high-profile musicians who broke the silence. Traditionally, there has always been a sort of musicians 'omerta' – an unsettling vow of silence not to discuss aches and pains. Distinguished pedagogues often passed on the message to their pupils, to 'suffer in silence,' as the show must go on no matter what. The Dutch violin pedagogue, Coosje Wijzenbeek, instilled a performance ethic by teaching pre-teens, "never miss a lesson or certainly not a concert unless your fever reaches 40 degrees centigrade."[2082]

After the international renowned soloists, pianists Leon Fleischer and Gary Graffman,[2083] came out in the open to share the truth behind their suffering and performance impediments, both musical insiders and media outsiders began to face the facts with regard to a profession replete with occupational hazards. Yet, although a great deal of sympathy and media attention was garnered by the retelling of Messrs. Fleischer and Graffmans' struggles to overcome music-related injuries, the trickle-down effect for orchestral players was minimal. "The famous soloists were both pianists who were individual stars, quite unlike orchestral principals, or heavens forbid, sec-

[2078] Esther van Fenema, *supra* at fn. 1970.

[2079] https://musikermedizin.charite.de/en/research/musicians_diseases/ in Germany and Laura Kok's (Netherlands) dissertation https://www.orthopeden.org/downloads/553/proefschrift-laura-kok.pdf adds to the significant amount of material available in the U.S.

[2080] Interview, Dr. Boni Rietveld, https://www.haaglandenmc.nl/nieuws/boni-rietveld-promoveert-in-de-dans-en-muziekgeneeskunde

[2081] String players' maladies run the gamut from repetitive strain and muscle overuse disorders to inflammatory conditions. Focal dystonia, carpal tunnel, tennis elbow and tendonitis are common amongst string players.

[2082] Translated from Dutch, Ms. Wijzenbeek's generations of talent attest to variations on the quote.

[2083] Both Leon Fleischer and Gary Graffman were preeminent piano soloists who suffered from focal dystonia cutting short, distinguished careers in the late 20th century. Leon Fleisher made a much-publicized comeback after 18 years of 'one-handed' performances in 1982. See, Joseph McLellan "The Comeback of Leon Fleisher" *Washington Post* September 7, 1982.

tion players who are viewed from the outside as 'group players,' not individuals. If orchestral musicians make a mental leap to regard their performance craft like athletes favor their chosen sport, perhaps we could gain more publicity and professional focus on their needs when they are in distress and cannot perform."[2084]

Before delving further into how psychosocial pressures in playing can lead to orchestral drama, one notable and noble exception bears mention. Adolph (Bud) Herseth, who comes to the fore in the Fritz Reiner anecdote (retold in the *FAQs*) was the protagonist of brass lore and reined for 53 years as principal trumpet in the Chicago Symphony Orchestra. 'Bud's Mystique,' not only with regard to his musicianship but also the formidable standards of integrity, leadership, and his knack for teambuilding molded 'his' trumpet section, the famed Chicago brass, and set a precedent for excellence in brass sections the world over.[2085]

17.5.1 The orchestral hierarchy weighs in: the role of the conductor and alleged discriminatory practices

Musicians interviewed consistently made mention of what they laughingly refer to as "the largest elephant in the room, the conductor" and his/her influence with specific reference to aging musicians. Stories of abusive behavior on the part of celebrated conductors abound with similar tales told regardless of the prestige of the orchestra. Beyond Mr. Bock and Mr. Rosato's experiences in Phoenix, many interviewees retold tales of harassment on the work floor. A respected brass player recalls a particular painful series of Tannhäuser rehearsals[2086] in which a celebrated conductor humiliated the orchestra's bass trombone player, a distinguished musician approaching retirement. "It did not seem to matter to the illustrious maestro that our colleague who was soon to end his great career was belittled and bullied in front of his colleagues during consecutive rehearsals. He had to repeat the most difficult passages over and over again; it became a sort of maestro power trip as if the prize would have been to 'break the musician.' Although it should have been the brass section principals' job to make this behavior stop, nobody dared speak out against such a famous conductor."[2087] Yet, for all those amassed stories of woe, only a handful of players opted for any form of legal action. The orchestral

[2084] Esther van Fenema, *supra* at fn. 1970.
[2085] Adolph Herseth retired in 2001: the Chicago brass section is as legendary today as it was in Herseth's time.
[2086] A Wagner opera completed in 1845, Tannhäuser is infamous for difficult brass parts, especially for both first and bass trombones.
[2087] The story was retold publicly at a FIM conference on Musicians and Health Issues, Amsterdam, November 2018; allusions to the specific orchestra and the name of the famed conductor have been omitted.

musicians' level of empowerment to take action to stand up against harassment is surprisingly limited and often highly individualized. "Get real, my job, my livelihood, my life in this orchestra would be at stake if I stuck my neck out and sought recourse for what our music director inflicted upon me. We musicians take to the pub and commiserate with colleagues knowing that it is senseless to take another form of action."[2088]

17.5.2 HRM and orchestral management weigh in

As the cases under discussion and multiple interviews attest, for many orchestral musicians who have spent decades performing as a member of a symphonic collective, the final years 'on the stand' can be fraught with difficulty. A Dutch orchestral works council member and principal player reflected on the importance of HRM elements within the process of coming to grips with reasonable measures. "Without a water-tight system in place in which management puts fair HRM protocols in place and enforces them and without the funds to ensure that musicians are spared work capability tests such as re-auditions at advanced ages, we descend further into unfairness and frustration."[2089] In the mid-2000s, all of the orchestras in the jurisdictions studied underwent major changes in terms of HRM implementation. Adding another spin, a Dutch HRM manager noted that many of the changes wrought in the Netherlands were influenced not only by workplace necessity but also by 'revolutionary' changes in the sector stemming from U.S. initiatives. "We were finally forced to ask ourselves what is key, what is important for the longevity and mental/physical health of orchestral musicians? It was decided that we needed more HRM budget to encourage life learning, and the development of personal portfolios. We could not just let the musicians 'take care of themselves' as the orchestras grew older. The challenge back in 2009 was would management take HRM seriously or would the 'men at the top' still consider the field as a 'woman's job' in a soft sector."[2090]

17.6 Summary judgment: protective measure or stumbling block?

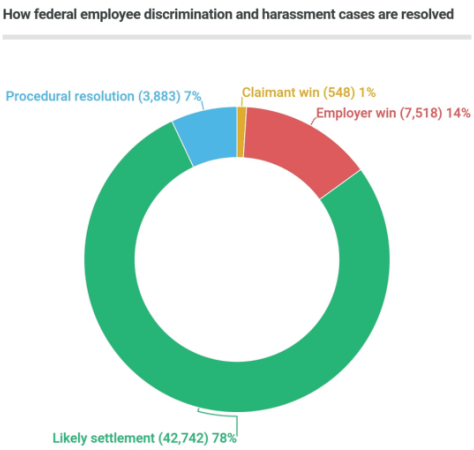
> *"Too often litigation has become more about resources and expenses than about reaching the merits and doing justice."*[2091]

[2088] Interview with principal player top-ten U.S. orchestra, anonymity assured.
[2089] Interview with a Dutch principal player and works council member, anonymity assured.
[2090] Interview, Ella Broekstra HRM, Stichting Omroep Music (SOM) the umbrella organization responsible for the musical organizations within the Dutch Broadcasting Organization March 13, 2016.
[2091] Profound observations from the bench provided by the Honorable Denny Chin, "Summary Judgment in Employment Discrimination Cases: A Judge's Perspective" 2013.

Freelance orchestral musicians in the Netherlands have shown an active interest in their U.S. counterparts' litigation aimed at rectifying perceived employment inequalities especially post-2007-2008 crisis as the number of orchestral musician cases have increased. Dutch-based musicians generally assumed that success in 'your day in court' would be easier in the litigious U.S. than in the Netherlands where, to quote Tiziana Pintus, "it seems as if you start out with a strike against you as a musician going to court, [as] it is just not done."[2092] To diffuse the notion of 'the litigation grass is greener on the U.S. side,' the paragraphs that follow examine one of the major stumbling blocks to success in employment discrimination cases. A predominant block, according to many scholars, is a particular procedural bar to litigation: summary judgment. Rule 56 in the U.S. Federal Rules of Civil Procedure lays down the basis for summary judgment, a short-cut legal process, in which the court adjudicates a case based on the facts presented without ordering a trial.[2093] Criticizing viewpoints touting the utility of summary judgment,[2094] legal scholars in the last decade hold some of the paradigms associated with the rule accountable for a veritable miscarriage of justice. "Employment discrimination law is held captive by an increasingly complicated web of frameworks, which facilitate a reflexive, formalistic view of discrimination."[2095]

According to analyses prepared by a leading U.S.-based legal research service provider, the chances of success for claimants who file federal job discrimination, harassment, and retaliation claims are limited. Few cases make it to court, and only 1% of those claims eventually succeed in court**.** According to statistics tracked between 2009-2016, 13% of employers prevailed on summary judgment. Employers prevailed in 7,518 cases (14%), while employees won a mere 584 times in trial (slightly over 1%). Of the 72,000 cases registered in federal courts, a mere 192 plaintiffs won any form of punitive damages. Approximately 7% (3,883 cases) failed on procedural grounds, where the employee's claims were dismissed.[2096] While the analytics present what could be perceived of as a disquieting trend in terms of an employee's chances to 'win' antidiscrimination claims, material evidence concerning the individual cases and their presentation of facts are not available for analysis. Suffice it to say, employees face an upward battle at both the trial and pre-trial phases of anti-discrimination claims.

[2092] Conversations with Tiziana Pintus.
[2093] Federal Rules of Civil Procedure 56. Available at: https://www.law.cornell.edu/rules/frcp/rule_56#rule_56
[2094] Randy Kozel & David Rosenberg. "Solving the Nuisance Value Settlement Problem: Mandatory Summary Judgment" 2004 and Edward Brunet. "The Efficiency of Summary Judgment" 2012.
[2095] Sandra F. Sperino. "Rethinking Discrimination Law"2011.
[2096] Data provided by *Lex Machina*, see: https://lexmachina.com/employment-litigation/



17.6.1 Summary judgment: which claims are sufficiently meritorious to be brought to trial?

Many scholars find that the procedural device of summary judgment is the main barrier to employees' success in anti-discrimination cases. As several of the orchestral musicians' cases scrutinized below stranded on this procedural call, a deeper inquiry into the procedure is warranted. Rule 56a Federal Rules of Procedure reads:

> **Motion for Summary Judgment or Partial Summary Judgment.** A party may move for summary judgment, identifying each claim or defense - or the part of each claim or defense - on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.[2097]

Summary judgment is predicated on the assumption that there is no dispute of material fact. A motion for summary judgment calls for the judge to decide a case summarily, thus, without delay and of course, without a jury trial. Is summary judgment a procedural shortcut that restricts litigants or a laudable docket-clearing tool?

Although summary judgment per se can be valued as a measure of procedural efficiency, a means to avoid long drawn-out suits that often result in costly trials, the record with regard to employment cases bears closer scrutiny. Historically speaking, employers

[2097] Fed. R. Civ. P. 56(a) as amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009; Apr. 28, 2010, eff. Dec. 1, 2010.)

favored summary judgment, not only for the aforementioned reasons, but because the quick trial approach mitigated the effects of negative publicity endemic to protracted, headline-grabbing trials. An article published in the *Harvard Law and Policy Review* supplied a legion of statistics to demonstrate that in the realm of employment law at the federal level, plaintiffs won merely 15% of all cases while in other types of cases, over 50% of the plaintiffs won at the federal level.[2098] Two years later, a thoroughly researched article entitled "Shortcuts in Employment Discrimination Law"[2099] presented additional compelling statistics on the steady rise in 'judicial hostility' toward plaintiffs in employment discrimination cases, arguably the 'least successful' class of plaintiffs in the constellation of plaintiff groups in the United States.[2100] Tellingly, the reversal rates for defendants on appeal are dramatically higher than plaintiffs, 41% vs. 9%.[2101] And, according to court watchers, judicial hostility toward Title VII cases continues to increase.[2102] Under Title VII, is unlawful "for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[2103] Legal researcher Kerri Lynn Stone holds that a plethora of 'shortcut doctrines' defined by the author as "a label of inference that proxies for reasoned analysis,"[2104] compel courts to tilt their deference towards defendants when adjudicating anti-discrimination cases. This and other scholarly articles corroborate the point that judicial hostility to the panoply of cases that fall under Title VII has increased exponentially in the 21st century. As stated earlier, several of the cases to be examined further on in the *movement* corroborate these views.

17.6.2 Historical background: the runup to the rule of summary judgment

A brief reflection on the history of summary judgment can be illuminating. The rule of summary judgment did not exist in common law until its introduction in England in the mid-1800s.[2105] Across the Atlantic decades later, the U.S. legal scholar, Charles E.

[2098] Kevin M. Clermont and Stewart J. Schwab. "Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?" 2009 pp. 103-111.
[2099] See Kerri Lynn Stone. "Shortcuts in Employment Discrimination Laws" 2011 pp. 111-171.
[2100] Ibid.,
[2101] Ibid.
[2102] Title VII of the Civil Rights Act of 1964 (subsequently amended) prohibits employment discrimination based on race, color, religion, sex, and national origin.
[2103] 42 U.S.C. § 2000e-2(a)(1).
[2104] See Kerri Lynn Stone, *supra* at fn. 2099.
[2105] For a complete background check on the introduction of summary judgment in England see, Clark & Samenow. "The Summary Judgment" 1929.

Clark, fought hard for the implementation of Rule 56 Federal Rules of Civil Procedure (1938), arguing in favor of its expediency and success rate at the state level.[2106] His views were contested in the literature and in the courts, notably by Judge Frank in what scholars refer to as 'the infamous Clark-Frank debate.'[2107] Judge Frank was a proponent of the fairness inherent in 'everyone's right to his day in court': the right of trial by jury.

As the advisory notes that prefigured Rule 56 elucidate, summary judgment was envisioned as a "method for promptly disposing of actions in which there is no genuine issue of material fact."[2108] Judicial idealists hoped that the Rule would increase efficiency at state and federal courts swamped by an overload of cases. A quick check on the background of summary judgment in its English embodiment shows that the U.S. incarnation of summary judgment bears scant similarity to the English procedure. Two principal differences deserve mention. Firstly, the English procedure was not available to defendants.[2109] Secondly, it was limited to cases in which a debtor could not dispute the existence of an agreement and could not pay his/her bills.

It is fair to pose the question, is summary judgment granted disproportionately or wrongly in employment discrimination cases? The aforementioned high rates of failure are not enough to make that call and answer the question. And, to make the question more difficult to answer, discrimination cases are, pardon the pun, rarely black vs. white. Factors such as the employer's 'state of mind, or 'intent' are difficult to evaluate. In the subtle legal arena that encompasses a wide description of what constitutes discrimination, "the smoking gun, evidence of discrimination," can be elusive.[2110] Before attempting to flesh out an answer to the question with particular regard to *Bock* and other orchestra-related cases, mention must be made of the positive aspects of summary judgment, as it would be unfair to place this form of judicial procedure in an exclusively negative reading. Summary judgment can be a valid tool to separate the wheat from the chaff in terms of long-winded, time-consuming cases that would fail due to claims-without-merit. In any legal system, and with special consideration for the litigious U.S. system with its high concentration of civil suits per capita,[2111] it can be advantageous to rely on procedures to separate the cases that should go to trial

[2106] For personal views on summary judgment, see, Charles E. Clark "The Federal Rules of Civil Procedure: 1938-1958"1958.
[2107] Patricia M. Wald, *supra* at fn. 1966.
[2108] Federal Rules of Civil Procedure 56, Advisory Committee Notes, 1937.
[2109] Charles E. Clark, *supra* at fn. 2106.
[2110] Richards v. New York City Bd. of Educat. 668 F. Supp. 259 S.D.N.Y. (1987).
[2111] Consider in this light, the illustrious British judge, Lord Denning's observation: "As a moth is drawn to the light, so is a litigant drawn to the United States." *Smith Kline & French Labs Ltd. v. Block*. [1983] 2 All E.R. 72, 72 (End. C.A. 1982).

from those that should not. Yet, discrimination cases are particularly susceptible to misinterpretation, as the bulk of evidence on the employer's side is often managed more efficiently than the evidence provided by the 'injured' employee.

17.6.3 Summary judgment leading cases

"A weapon to the arsenal designed to check the spread of litigation."[2112]

Discussions with U.S.-based attorneys highlight the difficulties faced by employees whose testimony is often based on personal experience/hearsay versus employees who can dredge up a paper trove of documents to back up their claims. Thoughtful reflections by judges are exemplified by Judge Patricia M. Wald's critique, "its flame lit by *Matsushita*, *Anderson* and *Celotex* in 1986,[2113] and fueled by overloaded dockets of the last two decades, summary judgment has spread swiftly through the underbrush of undesirable cases, taking down some healthy trees as it goes."[2114] Judge Wald refers back to the *Matsushita* trio that has garnered the distinction of 'most frequently cited cases' in U.S. state and federal courts; the three cases were crucial to solidify summary judgment as standard judicial practice. More integral to our discussion of how summary judgment impacts discrimination cases than the frequency of citation is the way in which the courts have foregone summary judgment, not only in headliner precedents but in orchestral musicians' cases central to this inquiry.

Tracing the jurisprudence that has burgeoned since the early days of summary judgment, an ideological discord exists between judges who seek to take a new procedural opportunity to resolve as many cases as possible in a quick and efficient manner, versus those who continue to be apprehensive that litigants would be denied their constitutional right for their 'day in court' if summary judgment became a means to an end with regard to pruning heavy caseloads. Certain areas of the law, including, but not limited to antitrust, civil rights cases, negligence, and patents were considered initially to be no-go areas for a motion of summary judgment.[2115] However, the increasing use of summary judgment in age and gender discrimination cases as well as civil rights cases in the last decades of the 20th century, raised a red flag even

[2112] Samuel Issacharoff and George Loewenstein. "Second Thoughts about Summary Judgment." October 1990 pp. 73-126.
[2113] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); Anderson *v. Liberty Lobby, Inc*., 477 U.S. 242 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).
[2114] Patricia M. Wald, *supra* at fn. 1966.
[2115] Charles Clark, *supra* at fn. 2106.

amongst jurists who advocated a "handle with care" approach to prevailing summary judgment discourse.[2116]

In discrimination cases, critics observed that summary judgment was originally conceived as the exception that became the rule.[2117] To paraphrase the court in *Meiri v. Dacon*, "[t]he salutary purpose of summary judgment - avoiding protracted, expensive and harassing trial - apply no less to discrimination cases than to other areas of litigation."[2118] Thus, according to judges and practitioners across the United States, an added layer of sensitivity is needed to balance employment discrimination cases.[2119] Outspoken opponents of the 'overuse' of the motion have focused their barbs on the constitutionality of summary judgment.[2120] The question is governed by the Seventh Amendment which provides that "[i]n Suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." The "common law" in the Seventh Amendment refers to the application of English common law principles in 1791, the year the amendment was adopted.

Summary judgment has been cited as a significant reason for the dramatic decline in the number of jury trials in civil cases in federal court documented by a plethora of scholars.[2121] While both scholars and practitioners actively question the use of summary judgment in discrimination cases, the central question – whether summary judgment is constitutional – has not been thoroughly researched, as it has been assumed that SCOTUS settled the Seventh Amendment interpretational issue in *Fidelity & Deposit Co. v. United States*.[2122] Critics have revealed that the *Fidelity* court did not examine the core issues of common law practice in the late 18th century in this early 20th century case, nor did *Fidelity* provide conclusive guidance concerning the constitutionality of summary judgment. "The Court did not quote or cite the Seventh Amendment, nor did the Court compare the rule at issue to procedures under the

[2116] Most notably, Judge Richard Posner's observation: "there is not a separate rule of civil procedure governing summary judgment in employment discrimination cases," however, courts should "be careful" before they grant summary judgment in such cases. See, *Wallace v. SMC Pneumatics, Inc.*,103 F.3d 1394, 1396 (7th Cir. 1997).
[2117] Ibid.,
[2118] *Meiri v. Dacon 759 F.2d* 989 (2d Cir. 1985).
[2119] One of the most thoughtful critical commentators, the Honorable Judge Brock Hornby offers frank criticism from the bench, see D. Brock Hornby. "Summary Judgment without illusion" 2010.
[2120] Suja A. Thomas. "Why Summary Judgment Is Unconstitutional" 2007.
[2121] Ruth Colker. "The Americans with Disabilities Act: A Windfall for Defendant" 1999; Kerri Lynn Stone. "Shortcuts in Employment Discrimination Laws" *supra* at fn. 2101.
[2122] *Fidelity & Deposit Co. of Maryland v. United States* 187 U.S. 315 (1902).

common law. Nevertheless, SCOTUS continued to cite *Fidelity* to support the critical proposition that summary judgment is constitutional with little regard for the fact that summary judgment in the 20th-21st centuries differs significantly from any one of the procedural devices that were available and/or acceptable at the time of adoption of the Constitution.[2123] Considering the disagreement and ongoing constitutionality debate, a true interpretation of *Fidelity* has yet to shed light on questions related to a proper reliance on summary judgment.

According to current opinion, summary judgment is a useful tool to mitigate the pressures of a federal docket overloaded by trials. The majority opinion in *Celotex Corp. v. Catrett*, a legacy of Chief Justice Rehnquist's era,[2124] touts support for the virtues of summary judgment as an essential, timesaving feature within the nexus of national procedural rules.

> *"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action. . .Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule prior to trial, that the claims and defenses have no factual basis."*[2125]

17.7 SCOTUS advocates tests

In an attempt to level the playing field between employer and employees, SCOTUS proposed a tripartite 'burden-shifting' test in *McDonnell Douglas Corp. v. Green*, a subsequent procedural landmark case.[2126] To prove *prima facie* discrimination,[2127] the plaintiff is required to show that he/she was 1) qualified for the job; 2) is a member of a bona fide protected class[2128] and 3) has undergone an adverse employment action. The successful plaintiff must provide evidence that he/she is belongs to the protected class and that while satisfactorily performing duties experienced unlawful discrimination under circumstances that support a legitimate inference of discrimination. Secondly,

[2123] Suja Thomas, *supra* at fn. 2120.
[2124] Judge William Rehnquist served as Chief Justice of the U.S. Supreme Court from 1986 until his death in 2005.
[2125] See *Celotex, supra* at fn. 2113 at 327.
[2126] *McDonnell Douglas*, *supra* at fn. 2113 at 801.
[2127] "*Prima facie*" in law "sufficient to establish fact." The employee who brings a Title VII discrimination case must show enough evidence to allow the judge to infer that discrimination took place to meet the *prima facie* standard.
[2128] Examples of a protected class recognized by the Court, inter alia., women, senior workers, and LGBT employees).

under the 'burden-shifting' test, the respondent employer must prove that either that the 'protected class' was unsuited for the occupation or that there was a legitimate, nondiscriminatory reason, for the adverse action taken.[2129] Thirdly, the burden shifts once again to the plaintiff who must provide evidence from which it can be inferred that the defendant's rationale for the adverse employment action is actually a pretext for discrimination. Simply put, the third stage element requires the employee to prove that the employer relied on a false reason to take action. SCOTUS held that if the employee can prove that a *prima facie* case of employment discrimination exists **and** if the employer cannot prove that the adverse action was justiciable, summary judgment could be circumvented. The burden-shifting test has caused a great deal of confusion concerning how the different aspects of the 'shift' could influence a judge to grant a motion of summary judgment.

Orchestral musicians in the United States strongly support a broad interpretation of the ADEA, as multiple interviews corroborate. In their view, the musicians in conclave with an artistic committee and the music director are best suited to decide on the appropriate age for an individual performer's retirement, as opposed to a management team. "To many of us, the single most important issue at the table is our pension rights. As young newly minted orchestral members, we give our all to make music with our colleagues and continue to do so often for decades. A decent departure, a well-earned pension is not an entitlement that should be ignored, as it is often in contemporary negotiations."[2130] Interviewees also expressed great concerns with regard to shrinking pensions and changes paralleling the concerns that led to the Chicago Symphony Orchestra (CSO) strike in 2019. "Keep in mind the fact that the vast majority of orchestral musicians fortunate enough to win an audition stay in that position, the demand for seniority comes from a feeling that those who have proven themselves should be rewarded."[2131] And as former Denver Symphony[2132] (the precursor of the present-day Colorado Symphony) cellist and former ICSOM chair Melanie Burrell noted, "seniority is a misnomer. . . the issue is not age, but service. We actually heard members of the orchestra's board make the threat, 'we're not going to pay you more

[2129] *McDonnell Douglas, supra* at fn. 2113 at 802.
[2130] Conversations with Marcia Peck.
[2131] Judy Nelson, violist New York Philharmonic Orchestra 1983-2019.
[2132] The Denver Symphony was established in 1934 and dissolved due to financial instability in 1989. The Colorado Symphony was established that same year and by all accounts is still going strong with such crowd pleasers as 'marijuana concerts' and rock extravaganzas.

because you're old.'"[2133]

The complex test advocated by the Court in *McDonnell Douglas* was met with resistance by other courts and drolly referred to as a 'yo-yo rule."[2134] Although originally conceived of as a three-prong test, the *McDonnell Douglas* paradigm has expanded into a complex series of tests that prompt review processes each step of the way. In discrimination cases in which the plaintiff mounts multiple claims, for example a promotion-withholding and a wrongful termination claim, the court is required to proceed with care through each of the *McDonnell Douglas* steps for each claim.

In an interesting variation on the equal treatment theme, in one of the many discriminatory claims mounted against employer American Express in *Borrero v. Am. Express Bank*, the female plaintiff claimed that her supervisor forbade her to attend a meeting the same day he gave permission to a male employee to be excused from work in order to attend a baseball game.[2135] The court denied the motion for summary judgment stating, "the 'ultimate issue' in any employment discrimination case is whether the plaintiff has met her burden of proving that the adverse action was motivated at least in part by an 'impermissible reason,' i.e. that there was discriminatory intent."[2136]

Perhaps a cautionary caveat handed down in 2016 by the First Circuit Court of Appeals deserves closer attention. In *Burns v. Johnson*, the court noted that even when an employer provides an exhaustive account of the facts, a jury could come to a different conclusion and find that based on a "convincing mosaic" of facts, the evidence provided was strongly "nuanced," thus biased in favor of the employer.[2137] In *Bulwer v. Mt. Auburn Hospital*,[2138] the highest court in the state of Massachusetts, the Supreme Judicial Court, went even further in its delineation on how to prove discrimination. Plaintiff, a foreign-born, black medical practitioner who worked as a resident at a Massachusetts hospital, claimed discrimination after his medical residency contract was terminated. Plaintiff submitted five separate categories of evidence to prove racial animus and meet the requirement of the third element within the tripartite burden shifting paradigm set forth in *McDonnell Douglas* (see above). Although he submitted evidence that included testimony from colleagues pointing to racial bias as well as

[2133] Ms. Burrell is quoted in: "Some Greying Orchestras Reward Experience" *Chicago Tribune* February 11, 1988.
[2134] *Bickerstaff v. Vassar Coll.*, 992 F.Supp.372, 372 (S.D.N.Y. 1998).
[2135] *Borrero v. Am. Express Bank*, 533 Supp. 2d 429, 436 (S.D.N.Y. 2008).
[2136] Ibid.,
[2137] *Burns v. Johnson*, 829, F. 3d (2016) 1, 9.
[2138] *Bulwer v. Mt. Auburn Hospital*, 473 Mass. 672, 680, 2016.

evidence that the defendant had not followed standard termination procedures, the court inferred that however weighty the evidence, it would have to assess the credibility of this evidence, an unacceptable measure.

Placing importance firmly in the hands of a jury rather than the court when presiding over a motion on summary judgment, the *Bulwer* court conveyed a resounding negative answer to the third and last question. "The question of whose interpretation is more believable,". . . is not for the court to decide. . . but is for the fact finder."[2139] And, in its appraisal as to how plaintiffs could 'survive' a motion of summary judgment, the *Bulwer* court opined: "the plaintiff need only present evidence from which a reasonable jury could infer that "the respondent's facially proper reasons given for its action against him were not the real reasons for that action."[2140] The court favored the use of a jury to determine the importance of questions with regard to a material fact, rather than a determination by a single judge. Reflecting on the limitations of summary judgment, the *Bulwer* court avowed: "Summary judgment remains a disfavored remedy. . . because the ultimate issue of discriminatory intent is a factual question. . . A defendant's motive is elusive and rarely is established by other than circumstantial evidence, therefore requir[ing] [a] jury to weigh the credibility of conflicting explanations of the adverse...decision."[2141]

17.7.1 What is pretext? Of pretext and burden shifts

The Oxford Dictionary of the English language defines the term succinctly as: "a reason given in justification of a course of action that is not the real reason." Examined under the lens of employment law, pretext refers to a false reason proffered in an adverse employment action; the reason is false in that it serves as a cover up for the employer's real motives. Proving pretext is of particular importance in litigation at the motion for summary judgment stage. The possibility to prove pretext is by mounting evidence that attacks the credibility of the employer's reasoning and points to discrimination that motivated the employer.

Unless a plaintiff has direct evidence of discrimination, courts analyze Title VII claims under the *McDonnell Douglas* burden-shifting paradigm with its strict requirement for the plaintiff to establish a *prima facie* case of discrimination. Once a *prima facie* case of discrimination is established, the burden shifts to the defendant to articulate a

[2139] Ibid, at 689.
[2140] *Wheelock College v. Massachusetts Comm'n Against Discrimination* 371 Mass. 130, 139 (1976).
[2141] Ibid., at 689.

legitimate, nondiscriminatory reason for its actions. And then, the burden shifts once more: the plaintiff may then mount evidence to show that the defendant's reasons were but a pretext for discrimination: the burden rests on the plaintiff to prove that the proffered reason was pretextual, or a cover-up, and not the real reason for the employment decision but a mask for the employer's true discriminatory intent. In an answer to the second question, the court has emphasized that the employer is required to show that there was a total absence of any genuine issue of material fact with regard to "every relevant issue." In summary judgment, the burden of persuasion rests on the "the moving party" to provide evidence that "even if (the employer) would not have that burden on that issue if the case were to go to trial."[2142]

Initially, the *McDonnell Douglas* paradigm provided a method to prove discriminatory intent and causation. The additional burdens of multiple tests however, made it too unwieldy in subsequent employment discrimination cases. In a move to advocate a simplified process with regard to the paradigm, several solutions were advocated including allowing an insinuation or 'inference' to serve as proof of discrimination.[2143]

To establish pretext and 'survive' summary judgment, the plaintiff can opt for several paths advanced through case law. As described by the *Fuentes v. Perskie* court, the plaintiff must advance "some evidence, direct or circumstantial, from which a fact finder could reasonably either: (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action"[2144] To establish pretext under the first method, the plaintiff "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable fact finder could rationally find them unworthy of credence."[2145]

Aside from the observation that it would be well-nigh impossible to differentiate between 'implausibilities, inconsistencies, and incoherencies,' the simple assertion that the employer's decision was mistaken is not sufficient, "since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the

[2142] Ibid, at 683.
[2143] *Lipchitz v. Raytheon Co*., 434 Mass. 493, 502 (2001) relevant quote: "it is not the only way … [A]n inference of discrimination with suffice."
[2144] Referred to in the literature as the *Fuentes* test named after the findings in *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir.1994).
[2145] Ibid, citing *Keller v. Orix Credit Alliance, Inc*., 130 F.3d 1101, 1108-09 (3d Cir.1997).

employer is wise, shrewd, prudent or competent."[2146] The plaintiff must move beyond an assertion of 'wrong' by mounting evidence to prove that the employer's reasoning "was so plainly wrong that it cannot have been the employer's real reason."[2147]

Within the purview of the second prong in the *Fuentes* test, pretext can be proven if the plaintiff can show that discrimination "more likely than not"[2148] motivated the defendant's actions. To bolster this view, the Third Circuit advanced the view that indirect evidence can be useful to a plaintiff to "show that the employer has previously discriminated against other persons within the plaintiff's protected class, or that the employer has treated more favorably similarly situated persons not within the protected class."[2149] To succeed in a retaliation claim, evidence must be provided to support the claim that the plaintiff was engaged in a protected activity that caused the employer to retaliate through an adverse employment action such as suspension or dismissal.

17.7.2 'But-for' clause causes distress

As discussed above, the ADEA prohibits discrimination for the specially protected workers starting at the age of 40. The bar for proving age discrimination is exceptionally high undoubtedly due to a complex and debatable SCOTUS decision based on the 'mixed motives' doctrine.[2150] There, the Court developed a long and circuitous road for a plaintiff claiming age discrimination:

> *"A plaintiff bringing an ADEA disparate-treatment claim must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision."*[2151]

The complexity of the "but-for" clause caused not only dismay from the four dissenting justices[2152] but from scholars who decried the uncertain standards that plague age discrimination cases at every phase of procedure from summary judgment to appeal, at a higher court. In place of bright lines, increasingly muddy waters. To close, the admonition of the dissenter Justice Stevens: "were the Court truly worried about difficulties faced by trial courts and juries . . . it would not reach today's decision,

[2146] Ibid.,
[2147] Ibid, citing *Keller* at 1109.
[2148] *Fuentes, supra* at fn. 2144 at 413.
[2149] Ibid, citing *Simpson v. Kay Jewelers, Inc.,* 142 F.3d 639, 645 (3d Cir.1998).
[2150] *Gross v. FBL Fin Servs., Inc.* 129 S.Ct. 2343 (2009).
[2151] Ibid.,
[2152] Justice Stevens, with whom Justice Souter, Justice Ginsburg and Justice Breyer join, dissenting.

which will further complicate every case in which a plaintiff raises both ADEA and Title VII claims."[2153]

17.7.3 Anti-retaliation provisions

Under Title VII, an employer cannot retaliate against an employee who has "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing."[2154] The U.S. district and federal courts opted for a strict temporal requirement: the retaliatory act must be a direct consequence of discrimination and the act must have taken place within less than three months to sustain a 'retaliation inference.'[2155] Taking heed of the lower courts' findings in two cases, SCOTUS stipulated that "temporal proximity must be very close" for a plaintiff to succeed.[2156]

Jurisprudence and scholarly opinions on summary judgment with relation to employment discrimination cases conclusively shows asymmetry in how plaintiffs vs. defendants fare. For plaintiffs, the first stage of the *McDonnell Douglas* burden-shifting paradigm is the very first challenging step in which evidence must be provided to prove a *prima facie* case: often there is a lack of 'smoking gun' evidence (clear-cut, direct) evidence, and the plaintiff ultimately bears the burden, in the absence of such evidence, to prove that discrimination was the defendant's motivation. The Eighth Circuit Court's admonition "summary judgment should be used sparingly in the context of employment discrimination and/or retaliation cases where direct evidence of intent is often difficult or impossible to obtain"[2157] should be heeded to impede improper foreclosure for plaintiffs in anti-discrimination cases facing summary judgment.

17.7.4 The specificity of age-discrimination cases in the U.S.

In *Charles Merrick v. Hilton Worldwide, Inc.*[2158] a sixty-year-old Director of Property Operations who had been employed by Hilton Hotels for over twenty years sued his employer for unlawful termination resulting from age discrimination under the California Fair Employment and Housing Act (FEHA).[2159] The Ninth Circuit court,

[2153] Ibid.,
[2154] 29 U.S.C. § §623(a), 631(a) 2006).
[2155] *Richmond v ONEOK, Inc.,* 120 F.3d 205,209 (10th Cir. 1997) three months are insufficient; *Hughes v. Derwinski*, 967 F.2d 1168, 1174 7th Cir. 1992) four months insufficient.
[2156] *Clark County School District v. Breeden* 532 U.S. 268, 273 (2001).
[2157] *Wallace v. DTG Operations, Inc.* 442 F.3d 1112, 1117 (8th Cir. 2006).
[2158] *Merrick v. Hilton Worldwide, Inc.*, 867 F. 3d at 1147-1150. U.S. App. (9th Cir. 2017).
[2159] Fair Employment and Housing Act (FEHA) Gov. Code, § 12900 et seq.)

regarded as plaintiff-friendly in anti-discrimination suits decided in favor of Hilton applying the *McDonnell Douglas* burden-shifting test. In a consideration of the impact of summary judgment in anti-discrimination cases leading up to a closer analysis of several orchestral musicians' cases, this decision provides an important model to predict future outcomes.

The hotel submitted that the reason for the employee's termination was a workforce reduction that Hilton Worldwide mandated as part of an international cutback. Along with instructions to eschew cutting positions with direct guest interaction responsibilities, Hilton Worldwide instructed the hotel to attempt to achieve the cutback by eliminating a minimum of employees. The hotel moved for summary judgment as Merrick was the sole employee whose contract was terminated and of course, the grounds for termination were economic and nondiscriminatory. The hotel's motion was granted; subsequently, Merrick appealed.

In *Merrick*, the plaintiff had met the initial burden of establishing a prima facie case of age discrimination requiring him to show he was: "(1) at least forty years old; (2) performing his job duties satisfactorily; (3) discharged; and (4) either replaced by substantially younger employees with equal or inferior qualifications or discharged under circumstances otherwise 'giving rise to an inference of discrimination." The burden then shifted to the hotel, which supplied evidence to show that several nondiscriminatory reasons set forth by Hilton Worldwide in its guidelines entitled Management Reduction in Workforce (RIF) Timeline led to the termination. Specifically, eliminating Merrick's salary assisted the hotel in its compliance with the workforce salary reduction requirement to minimize layoffs and further, the plaintiff's job description and actual tasks did not involve significant contact with guests as outlined in the RIF. Under the RIF, "reduction decisions should be weighted at the senior level" in order to meet the explicit goal to lower payroll expenses by 7%-10% through the elimination of a single position.

The court shifted the burden back to the plaintiff in line with the *McDonnell Douglas* paradigm to show a triable issue by proving that the hotel's reasons for termination were both pretextual and discriminatory. Moving toward its decision with regard to the stated economic justifications for the plaintiff's termination, the court specified: "there must be evidence supporting a rational inference that intentional discrimination, on grounds prohibited by the statute, was the true cause of the employer's actions."[2160]

[2160] Citing *Guz v. Bechtel National Inc.*, 24 Cal.4th at pp. 360-361.

Three main reasons led to the court's reliance on nuanced scrutiny and the conclusion that the plaintiff's claim was insufficient to prove that the defendant's motives were discriminatory. Firstly, the defendant suffered considerable lost profits engendered by recession and financial crisis that led to massive layoffs. Secondly, the plaintiff had survived previous reductions as a member of the protected over-40 age class. Thirdly, the defendant provided valid commercial reasons for selecting Merrick's position for elimination.

Critics of summary judgment in discrimination cases admit to its utility as a pretrial tool to separate serious from trivial cases. Their disapproval targets the judicial over-reliance on summary judgment. Historically, motions to dismiss were infrequent (in the 1970s) and were not perceived as overextending the boundaries of fairness until the early years of the new millennium. Judge Bennett's disappointment at the decision to affirm summary judgment in the *Kampouris* case (2000) sharpened in the years that followed. Bennett and other bench practitioners lament a hardening of the legal profession, a real cultural change in which 'Rambo-style' litigation is favored over solution-seeking adversaries: "from trial by jury into a "litigation" by summary judgment legal industry."[2161]

17.7.5 Twiqbal **motions**

An oft-criticized pair of SCOTUS decisions gave rise to what witty legal observers call 'mushrooming *Twiqbal* motions."[2162] In a pair of cases, SCOTUS granted district courts a wide margin to dismiss complaints that do not advance "plausible" claims. A cursory case review at the district and federal court levels shows that the precedents set by *Twombly* and *Iqbal*[2163] pushed forward a tendency for courts to equate the motion to dismiss with a motion of summary judgment.[2164] The dramatic increase in employment discrimination cases evidenced by statistics monitoring caseloads 2000-2010[2165] has exacerbated systemic overload and engendered increased antipathy

[2161] Hon. Mark W. Bennett U.S. District Court Judge, Northern District of Iowa. "Essay: From the 'No Spittin', No Cussin' and No Summary Judgment Days of Employment Discrimination Litigation to the "Defendant's Summary Judgment Affirmed Without Comment' Days" 2012 p. 690.
[2162] Referring to two leading SCOTUS cases: *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).
[2163] Ibid.,
[2164] To clarify further: summary judgment centers on the triable issues of material fact, while a motion to dismiss determines that there is no legal issue upon which relief can be granted.
[2165] EEOC charges increased 25% from 2000-2010 see, *Charge Statistics FY 1997 Through 2010 EEOC*, available at http://www.eeoc.gov/eeocstatistics/enforcement/charges.cfm

to employment discrimination cases.[2166] A shift from judging by way of trial to 'trial management' through summary judgment has shown that the Judge Bennett's worst fears have become even more anchored into the highly litigious U.S. system. To give credence and add substance to Bennett's concerns, we progress to the *Kampouris* case in which a long-standing member of a major orchestra attempted to 'win back' his right to play after sustained injuries.

17.8 David vs. Goliath: *Kampouris* and the St. Louis Symphony

The contours, or more appropriately, the ups and downs of the *Kampouris* case[2167] in which a long-standing member of the St. Louis Symphony sued his employers for discrimination on the basis of disability serves as a blueprint for subsequent cases in which musicians have litigated on various grounds of discrimination in U.S. orchestras.

Material presented earlier in this *movement* devoted to age-related issues shows evidence that older players way beyond the customary retirement age of 65 perform in orchestras across the United States while Dutch orchestras, like other European counterparts, expect members to retire at the nationally mandated pension age. It would seem that such a pattern of acceptance creates universal broadmindedness with regard to aging in orchestras. "To show respect for our older colleagues is engraved into our genetic makeup as members of the orchestra. It is not our place as musicians to make the call as to when a colleague has to step down unless of course his/her playing has suffered audibly enough to affect the section and of course the audience."[2168] However, as bitter litigation in the United States in St. Louis, Phoenix and most recently Indianapolis[2169] show, one orchestra's lenience or respect for aging colleagues does not translate to all orchestras. The cases selected for discussion are closely linked to the discussion on the federal court's predilection for granting summary judgment.

17.8.1 Kampouris facts in a nutshell

> *"By directing lower courts to inquire into evidentiary sufficiency at the summary judgment stage, the Supreme Court opened the door to pretrial adjudication on the merits, regardless of whether the district judge would be constitutionally empowered to sit as the ultimate trier of fact."*[2170]

[2166] Kenneth Conboy's Op-Ed in *New York Times* "Trouble in Foley Square" eloquently sets forth this argument December 27, 1993 at A 17.
[2167] *Kampouris v. Saint Louis Symphony Soc.*, 52 F. Supp. 2d. 1096 (1999).
[2168] Chairman, Cleveland Orchestra Committee (players), the Cleveland Orchestra in interview, 2016.
[2169] The three cases will be discussed in depth: *Kampouris*, *Bock and Wetherill*.
[2170] Samuel Issacharoff and George Loewenstein, *supra* at fn. 2112.

The facts of *Kampouris*[2171] cannot be presented without making the observation of the difficulties inherent in making the call as to when a musician should stop playing. Soloists who spend their performing lives in front of the orchestra face particular challenges. "Please realize, it is our life blood this music making, to take this away from us is like cutting out our hearts" observed the late great Ivry Gitlis after a live performance on the Dutch TV show *Podium Witteman* in 2017.[2172] Performance in the classical music world whether solo or orchestral calls for great mental and physical stamina that is not the within the traditional provenance of old age. New York-based orchestral musicians were particularly happy to 'back up' Isaac Stern towards the end of his illustrious career as the aging violinist insisted on numerous takes for each phrase of music as the technical challenges mounted during the recording session process. To 'Earn with Stern' was synonymous with the receipt of ample paychecks. Far from the glitter and glamor of the solo world, cases such as *Kampouris* and *Wetherill* bring the drama of aging-in-the-orchestra to the fore.

Violinist Louis Kampouris joined the St. Louis Symphony (SLS) in 1949 and performed faithfully in the violin section for 45 years. In 1989, he experienced mobility problems in both arms and sought professional advice from a neurologist. By December 1994, Mr. Kampouris was forced to take a leave of medical absence because of 'several neurological abnormalities' that impeded him from functioning at full capacity as a professional orchestral violinist. During his disability leave (long-term, from December 1994 to July 1997) Mr. Kampouris received benefits from his employer's (Saint Louis Symphony Society (SLSS)) insurance provider, as stipulated in the orchestra's collective bargaining agreement.

Eager to return to the orchestra, the group that provided him not only with financial remuneration but 'his life' in terms of music and camaraderie, he sought a variety of medical treatments to alleviate his symptoms. The list of medical practitioners he consulted is significant in terms of numbers and the wide-ranging nature of the remedies and opinions sought. Mr. Kampouris returned to work in the spring of 1997. He participated in all of the SLS's rehearsals and concerts from mid-May to early-August 1997. A medical professional, Dr. Gelberman who treated Mr. Kampouris in May, sent a note to Mr. Neville expressing his opinion that Mr. Kampouris was improving, and that in his professional opinion the patient would be able to make great strides forward within a few months. Mr. Kampouris' disability benefits were

[2171] *Kampouris*, supra at fn. 2167.
[2172] Ivry Gitlis (1922-2020) was one of the greatest contemporary violin virtuosi. For a link to the Witteman performance on October 30, 2017: https://www.youtube.com/watch?v=fCIh4hqYJAM

discontinued in June 1997. The SLSS insisted that an independent medical practitioner provide an opinion concerning Mr. Kampouris' ability to work full time in the orchestra. The doctor reported that Mr. Kampouris suffered from "[s]evere atrophy of [the] ulnar musculature in both hands."

Following the orchestra's summer recess in August, at the very start of the new season in September, the SLSS informed Mr. Kampouris that he was not ready to 'play the violin in the orchestra,' and therefore not ready to return to work. His salary was not paid out and he was barred from returning to his seat: Mr. Neville and Bruce Coppock, Executive Director of the SLS, made the decision jointly based on the firm conviction that Dr. Gelberman's medical opinion with regard to Mr. Kampouris' ability to perform was not reliable. As Mr. Coppock noted years later, "it could have been based on good will toward the patient who wanted to return to the orchestra at any cost."[2173] The SLSS was convinced that the independent specialist's appraisal of Mr. Kampouris' ailment was leading. Looking back on the situation from a vantage point of posterity, Mr. Coppock commented, "[t]hese decisions are the most challenging for a director. The outside world and in fact many of our musicians unfortunately thinks we are heartless automatons. They have a tendency to forget that it our responsibility to put the collective first, to do what is good for the symphony."[2174] The court concurred:

> *"There exists no evidence of any motivation other than skepticism that plaintiff's deteriorated physical condition permitted him to play to the Symphony's requirements of stamina and artistry, the circumstances do not suggest unlawful discrimination."*

17.8.2 The SLS work schedule

SLS orchestra committee members confirmed that the orchestra with the support of the union (Local 2-197) mandated that a musician who wants to return to the orchestra following a legitimized disability leave must demonstrate the ability to perform full-time within 24 months. The policy was applied to several other former members of the orchestra, who were unable to return to the orchestra within the 24-month time period. 'Mere physical ability to play' was not considered as a bona fide, 'full' return to the orchestra, as the musician was required to meet the significant obligations of the orchestra's work schedule of 7-8 services per week.

Two SLS musicians who also served on the orchestra committee corroborated evidence concerning a SLS policy in which a musician on disability leave must demonstrate

[2173] Conversations with Bruce Coppock.
[2174] Ibid.,

'fitness' to return to full-time status within 24 months, otherwise his/her position would be filled because he/she is no longer considered an active playing member of the orchestra. Under such a policy, the musician in question is not required to re-audition for his/her seat, as discussed in the lengthy consideration of auditions in the *intermezzo* devoted to the subject, a Herculean task for the injured and/or older player. To fulfill the requirement, the musician must be able to prove that he/she not only is physically able to play and moreover must be able to play at the requisite artistic level. Logically, the section principals, the orchestra's artistic committee and the music director, would be most suited to participate in decision-making with regard to such a crucial matter as the ability of a colleague to return to work.

A longstanding member of the SLS, hornist Kaid Friedel, sought arbitration to settle a dispute concerning disability benefits in 1991 during Mr. Kampouris' tenure in the orchestra. Of relevance, two clauses from the Kaid Friedel Arbitration Decision:

> 1. a disabled musician is treated like an active employee and remains covered by the Society's group medical and dental plans as long as he/she receives long term disability benefits.
> 2. a disabled musician's position can be filled permanently when the disabled musician is determined to be totally disabled from any occupation, and never to return to the Orchestra.

The SLS applied the '24-month rule' in which a player who was unable to perform his/her duties would relinquish the right to play in the orchestra and the position would be open for audition. There was no firm consensus if this rule was a decision made and/or supported by the union, Local 2-197. Several members of the SLS staff as well as orchestra members presented statements to the court that pointed to an interpretation that the policy was made in concert with the SLS, the orchestra committee and 'the understanding of the local' following the Kaid Friedel Arbitration in 1991.

Mr. Neville attested that the 24-month rule has been applied consistently for years and provided examples of three SLS musicians whose seats were filled through auditions after the orchestra's insurance company classified these particular players as disabled with regard to "any occupation." One of the musicians exemplified in this unhappy category, Cara Mia Antonello, a superlative violinist with whom the author worked years ago spent decades searching for the source of the excruciating performance-related pain that forced her to leave the SLS prematurely.

The difference between Ms. Antonello's situation and Mr. Kampouris' was that she was physically unable to play due to a neurological disorder that was improperly diagnosed for years. Mr. Kampouris was able to function, if only partially. As a point of comparison, Ms. Antonello's prior employer,[2175] the Hague Philharmonic may have been a better employer for injured musicians than U.S. orchestras exemplified by the SLS. In the 1990s, most Dutch orchestras offered 50% contracts for tutti (section) musician members. Although 50% pay in a Dutch orchestra could not compare to a 100% SLS salary, the opportunity to play for 50% of the time could been of great benefit to musicians in need of (partial) recovery from ailments such as Mr. Kampouris.

Mr. Kampouris maintained that the 24-month rule was in breach of the SLS's CBA as there was no proof that it was an actual 'bargained' part of the employment contract. The court dismissed this part of his claim, as it bore no relevance to a discrimination claim under the ADA. Shortly thereafter, Mr. Kampouris launched an appeal against the district court's decision to grant summary judgment.[2176] The Eighth Circuit court held that the employer's decision-making processes were nondiscriminatory and not based on age per se. Further, the court held that Mr. Kampouris had not provided evidence to support the claim that his employer had operated under pretext. Lastly, perhaps the most vital strike against Mr. Kampouris was that although he had 'partially' returned to perform in the orchestra, he did not prove that he was capable of returning to his job fulltime without significant modification in the terms of his employment.

17.8.3 Re-auditions and the missing maestro

In an attempt to gain reinstatement, Mr. Kampouris added age discrimination to his claims in court. Mr. Neville went on record in court to attest that the Music Director, was uniquely and solely qualified to comment on Mr. Kampouris' playing quality. Hans Vonk, the distinguished Dutch maestro was Music Director at the SLS, his tenure sadly cut short by Amyotrophic Lateral Sclerosis (ALS). "Vonk's limited presence during plaintiff's work in the spring and summer of 1997 and plaintiff's distance from Vonk in the orchestra pit did not permit Vonk to evaluate plaintiff's musical fitness to return. In order for the music director to make such an evaluation, a special arrangement subject to plaintiff's cooperation would have been required."[2177] In other words, the

[2175] Cara Mia Antonello held the position of principal second violin (50% position) with the Residentie Orkest (Hague Philharmonic) prior to winning the same position at the St. Louis Symphony in 1981.
[2176] *Kampouris v. St. Louis Symphony Society* Case no. 99-2704210 F.3d 845 (8th Cir. 2000).
[2177] Ibid.,

68-year-old violinist would have been required to audition for Maestro Vonk for a valid analysis of his fitness to perform. If Mr. Kampouris' colleagues, violinists in his immediate proximity, did not complain about his ability to play and the music director was not available for commentary, how could the SLSS stand by its decision to fire Mr. Kampouris?

17.8.4 A failed case?

Considering the observations gleaned in the pages devoted to summary judgment and its overused and routine application in employment discrimination cases at the federal court level, did *Kampouris* provide a textbook example of a failed case under the 1990 Americans with Disabilities Act (ADA) to provide redress for "unfair and unnecessary discrimination and prejudice" against persons with disabilities?[2178] Was this a classic example of a case in which the perceived discrimination claims bolstered Kampouris' "fundamental and sacred' right of trial by jury?"[2179] Or, was the court correct in opting for a summary judgment dismissal?

One of the three appeal judges and the sole dissenter, Judge Mark W. Bennett, vociferously disagreed with his fellow judges. Bennett's dissent brings forward the contention that there were real issues, 'genuine' issues of material fact that should have swayed the court to dismiss summary judgment in favor of trial by jury with a full consideration of all relevant facts. In Judge Bennett's opinion, the court erred not only in its holding but in its entire approach to the case:

> *"Indeed, that decision undoubtedly states the conclusion I would have reached on the record presented, had I been the trier of fact. However this case was not before the district court as the trier of fact. Rather, it was before the district court on a motion for summary judgment."*[2180]

Judge Bennett challenged the court's decision by disputing their holding on two grounds: pretext and the presentation of genuine issues of material fact. Furthermore, underlining the support for a judiciously cautious application of summary judgment, he concluded that Mr. Kampouris was short-changed by judicial intent on 'getting to the bottom' of the case by weighing evidence and seeking the truth of the matter. Judge Bennett relied on the importance of the aforementioned 1986 trio of landmark

[2178] See, the Americans with Disabilities Act of 1990 (ADA) 42 U.S.C. § 12101(a) (9).
[2179] Ibid.,
[2180] The full text of Judge Bennett's dissent is available at: http://media.ca8.uscourts.gov/opndir/00/04/992704P.pdf

summary judgment cases, (*Anderson v. Liberty Lobby, Inc.*, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp* and *Celotex Corp. v. Catrett*)[2181] in which SCOTUS emphasized that standards for summary judgment call for judges at the district court level to engage in monitoring and gatekeeping, not in "taking the law into their own hands."[2182] The nuances within *Kampouris* are found in the inferences, the insinuations, perceptions and/or misperceptions that colored the relationship between an aging employee and his employer.

Coming to grips with Judge Bennett's sharp criticism one is persuaded to pose the question: what were the issues of 'genuine fact' that passed into the mist in *Kampouris*? The crux of the matter centers on the question: "was the SLSS's 'legitimate, non-discriminatory reason' for denying Mr. Kampouris 'his' performance contract pretextual? Was it a cover up for the SLSS's true motives? According to Judge Bennett's line of thought, this reasoning trumps a grant of summary judgment as, "the record undoubtedly generates a genuine issue of material fact as to Mr. Kampouris's ability to play to the required standards."[2183]

Upon his return to the orchestra after extensive treatment, Mr. Kampouris performed during the SLS' spring and summer seasons. In court, his employer highlighted that these seasons were not as rigorous as the fall and winter seasons. There was also disagreement as to the quality of Kampouris' level of performance during this time period. Whether or not Mr. Kampouris was able to play to the required standard is a question of fact that calls for determination not dismissal. A disturbing pattern in *Kampouris* is that sworn depositions by members of the orchestra and its personnel manager were rife with conflicting observations that led to questionable conclusions. Beyond the cynicism shown by managers who echo the sentiment 'bring me four musicians and you will find 40 opinions'[2184] the court should have taken these discrepancies into consideration.

With regard to the adverse employment action, the SLSS move to fire Mr. Kampouris showed a 'changing tune,' a wavering set of inferences leading up to the action. The consistency vital to persuade the court that summary judgment is indeed viable and

[2181] See *supra*, at fn. 2113 for full citation of the trilogy.
[2182] See, for example, Eric K. Yamamoto et al., "Summary Judgment at the Crossroads: The Impact of the Celotex Trilogy" 1990 pp. 3-33.
[2183] See, Judge Bennett's dissent, *supra* at fn. 2180.
[2184] Observation brought to the fore by, Ben Janssen former director Muziekcentrum van de Omroep (MCO) Dutch Broadcasting Music Center.

desirable in the pursuit of justice was questionable on several fronts. Did Jeffery Neville, the director of orchestral personnel, believe that Mr. Kampouris was disabled within the ADEA's ramifications, that is not only disabled from violin performance in the orchestra but also disabled in the widest sense, unable to take on any form of employment? Or did he believe that Mr. Kampouris was totally disabled because of the insurance company's findings? Mr. Neville either suffered from amnesia or perhaps could not hold to one line of inference as he admitted to the court that there were reasons to 'change his mind' along the way. Firstly, Mr. Neville testified that he acted on the presumption that Mr. Kampouris was disabled totally. Later, Mr. Neville altered his testimony stating that he presumed that the insurance company's appraisal of Mr. Kampouris condition was the guiding factor to conclude that the violinist was indeed totally disabled. This 'waffling' on the part of Mr. Neville and, more importantly, the variations in his recorded deposition casts aspersions on the SLSS's reasons to take action and fire Mr. Kampouris. Was there disability discrimination at the very core of this action? As Judge Bennett articulated in his dissent: "it is the jury and not the district court judges who should turn their attentions to this lack of consistency to determine which facts are relevant."[2185] To emphasize and reiterate, the underpinning upon which summary judgment hinges is that the moving party must "show that there is no genuine issue" using all available documents under Rule 56(c).[2186]

Should the documentation supporting evidence in *Kampouris* have been left up to opinions stated in insurance company reports and/or the personnel director's perceptions? Or should the court have required the SLSS to present the views of Mr. Kampouris' fellow section players, his concertmaster, and the conductors with whom he performed? The SLSS was vitally interested in ridding itself of Mr. Kampouris and his problematic health issues without taking into consideration his mental condition, his willingness to play as much as possible, and his actual physical condition. The manner in which the SLSS presented its evidence was questionable enough to merit Kampouris' claim of pretext.

Where should the line be drawn between discrimination and the practical issues associated with keeping an orchestra running? According to a recently published

[2185] See, Judge Bennett's dissent, *supra* at fn. 2180.
[2186] Rule 56(c) (1) Supporting Factual Positions reads: "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials."

dissertation entitled, *Musculoskeletal Health in Musicians*,[2187] much attention is paid to the manifold and debilitating musculoskeletal problems that accrue from the functional demands of a profession with high physical demands. Performing research primarily on violinists (the author of the dissertation is a medical doctor and proficient violist) the author presents insights into the occupational hazards that accompany intensive practice and performance. What could have happened if the SLSS had had a system in place to deal with the physical issues that plagued Mr. Kampouris and several of his colleagues including the former principal second violinist, Cara-Mia Antonello (mentioned in Mr. Kampouris' litigation) whose physical ailments led to 'early retirement' from the SLS at the prime of her career?[2188]

A true wake-up call for orchestras is that relevant health-related appraisals, information, and advice for eventual treatment should be part of a human resources policy that is easily available for all members of the orchestra. The stigma that Mr. Kampouris suffered after decades of service casts a shadow on his former employer. Until the real issues concerning the painful side of performance and the wellbeing of employees is central within the orchestral organization, *Kampouris* will find repetition in similar claims.

17.9 Phoenix Symphony revisited: *John Wetherill vs. the Indianapolis Symphony Orchestra (ISO)*

In a modern-day parallel to the aforementioned Phoenix debacle, the Indianapolis Symphony Orchestra's (ISO) principal bassoonist John Wetherill was pitted in a losing battle against a new music director who sought to replace him. Mr. Wetherill had joined the ISO's bassoon section ISO in 1989 and won the principal bassoon audition eleven years thereafter. As a principal player (see *FAQs*) his contract authorized extra compensation (principal scale) and additional remuneration for seniority. His employment troubles began after the young (31-year-old) Polish maestro, Krzysztof Urbanski assumed the music director position in 2011. Mr. Urbanski, like many present-day music directors (see *FAQs*) who divide their time between several orchestra positions, spent approximately 11 weeks each season at the ISO.

According to evidence presented by Mr. Wetherill, Mr. Urbanski embarked on a new

[2187] Laura M. Kok. *Musculoskeletal Health in Musicians: Epidemiology & Biomedics* Leiden University Medical Center 2018 thesis defended 20 November 2018.
[2188] For more details, see Janet Horvath *Playing Less Hurt* "Cara Mia's Story" 2010.

ISO procedure that commenced with calling in older (over 40 years of age) musicians for private meetings. Initial solicitation was cordial; musicians were presented with handwritten notes. Mr. Wetherill was told that the meeting would be "two to three minutes tops, no big deal." Upon entering the music director's inner sanctum, he was surprised to see the ISO's general manager (GM) in attendance, purportedly "to take notes."[2189] As the initial meeting progressed, the music director queried Mr. Wetherill about how other musicians functioned. The interrogation that ensued was not only uncomfortable but breached the orchestra's CBA. Like other U.S. orchestral CBAs, the ISO CBA mandates advance notice concerning any individual meeting scheduled with a 'higher-up,' let alone a meeting with two superiors. In addition, the CBA mandates the presence of an orchestral colleague to serve as a witness if such a meeting is to take place. Mr. Wetherill and the 'other older musicians' were not afforded these rights. The situation worsened. Adding insult to injury, Mr. Wetherill was requested by the ISO's GM and Vice-President to "step down as Principal in order to nurture a younger player because this is the way it was done in Europe."[2190] No evidence of such a tradition was presented. Perhaps, the music director was hearkening back to the mid- 20th century, where this practice was reported in Eastern European and Italian opera orchestras. Under U.S. orchestral CBAs, such a practice was totally illegitimate and proscribed by audition protocol.[2191]

Suing the Indianapolis Symphony Society Inc. (ISS), the nonprofit organization that ran the symphony, Mr. Wetherill alleged that the music director was unrelentless in his harassment actions and provided detailed evidence of run-ins with the maestro. Humiliation reached a high point when the music director attempted to cast aspersions on Mr. Wetherill's ability to play bassoon solos by having him play a particularly difficult solo passage that called for the use of a special reed in front of an audience without any form of prior notification.[2192] Fortunately, Mr. Wetherill had the 'correct reed' within reach and was able to avoid public embarrassment.

An additional allegation that Mr. Wetherill delivered in the name of several colleagues was that other older musicians had undergone undue intimidation while still another

[2189] *John Wetherill v. Indiana Symphony Society, Inc.,* United States District Court Southern District of Indiana Indianapolis Division Case No: 1:17-cv-809 (further *Wetherill*). The complaint and demand for jury trial available at: https://www.courthousenews.com/wp-content/uploads/2017/03/IndianaSymphony.pdf
[2190] *Wetherill* at para. 13.
[2191] In the lore of the orchestral musician, the mentorship, passing the position on to a trusted student, is not unheard of as part of an ongoing tradition but unthinkable in the context of the modern CBA with regulated audition processes.
[2192] *Wetherill* at para. 30.

group of elder musicians had opted to leave the orchestra as a result of Maestro Urbanski's "move out and replace plan and action."[2193] In his complaint, the bassoonist emphasized that the ISSS was not only aware of the ongoing discriminatory behavior but that management fostered a work environment where harassment could continue unchecked.

Mr. Wetherill filed an initial age discrimination charge at the EEOC on October 29, 2015, after which intimidation and harassment escalated in tone and pardon the pun, in frequency. He requested compensation for emotional distress, mental anguish, lost wages and payment for attorney fees and court costs. To quash any intimation of inferior playing, the bassoonist submitted published reviews that singled out his exceptional playing during the height of Maestro Urbanski's provocations in 2015.[2194]

The *Wetherill* case is of particular interest for several reasons. Firstly, the musician in question had not only served many years in the orchestra to the satisfaction of fellow players and past music directors, but he was set to retire within two years. The question arises as to why there were no HRM modus in place to aid the transition from tenured employment to retirement. Secondly, if Mr. Wetherill could not function properly in a principal position, surely his close musical colleagues (principal wind players) and members of the orchestra's artistic committee could have been consulted to mediate. Lastly, in relation to his peers, a series of allegations critiqued the manner in which the music director sought to apply the collective bargaining-bound peer review process under which a musician may be terminated for artistic reasons. "Yes, the manner in which peer review is to take place is spelled out precisely, however what often happens behind the scenes in which musician-peers can be put under pressure to vote a certain way should not be a part of the process but inevitably takes place. It feels like job engineering in which the music director can get his/her way."[2195] Legal representatives for both parties filed a joint agreement of dismissal announcing the termination of federal age-discrimination proceedings and filed a joint agreement to dismiss the case on February 12, 2017. No discussion of compensation was disclosed, nor did Mr. Wetherill return to the orchestra he had served for decades.

17.10 A closing note, not age but plain-old discrimination?

[2193] *Wetherill* at para. 45
[2194] *Wetherill* at para. 46.
[2195] Interviews with artistic committee members at a top-tier U.S. orchestra, anonymity assured due to the sensitive nature of recent peer-group decisions.

In the 1930s when orchestral hirings and firings made for front-page news, *Time Magazine* reported public outcry concerning Maestro Leopold Stokowski's 'cleansing' actions at the Philadelphia Orchestra.

> *"Conductor Leopold Stokowski of the Philadelphia Orchestra was censured by many last week for ousting nine of his players. Four: Clarinetist Paul Alemann, Horn-player Otto Henneberg, Violinist Marius Thor, Oboist Edward Raho - had been with the orchestra from 18 to 26 years. Probable reason for their dismissal: too old, stale."*[2196]

A U.S. case involving allegations of unfair labor practices and discrimination under the NLRB in the late 1940s illustrates the difficulties in discerning discrimination when orchestral musicians face 'early' termination. A suitable lead-in to the *Kampouris* case, the *Karella* case took place in the setting of the famed Philadelphia Orchestra (Philadelphia Orchestra Association, as employer, POA) when its exacting music director, Eugene Ormandy, was consolidating his artistic control and continuing his predecessor Leopold Stokowski's ambitions for an ever-improving, self-critical ensemble.[2197]

Music Director Eugene Ormandy was a maestro of extraordinary capacity whose ability to 'create' a sound and mold an orchestra was the stuff of legends. What became known as 'the Philadelphia sound,' a reference to the unique palette of timbres that characterized the 'fabulous Philadelphians,' was realized through a combination of the maestro's concept of sound, the individual musicians' ability to produce that sound, and backed up by a strong musical culture of creativity mixed with discipline and a reverence for tradition. Present-day orchestral members look back to Maestro Ormandy's contributions in open admiration. "We still revel in the legacy of the past from the Stokowski[2198] sound to Ormandy's careful attention to phrase to perpetuate a flexible, breathing sound much like a great voice. This tradition was passed on to Philadelphia players for generations."[2199] Mr. Karella was a provisional employee of the POA holding a contract to perform as tubist for one season. In contrast to the recent cases mentioned above, his employment woes were partially attributable to the actions of the union Local 77 American Federation of Musicians and the POA's management as much as they were to the music director.

[2196] "Names make News." People Section *Time Magazine* March 3, 1930. Available at: http://content.time.com/time/magazine/article/0,9171,738763,00.html

[2197] Maestro Ormandy's 44-year tenure at the Philadelphia Orchestra began in 1936. Those were the days when music directors stayed with 'their' orchestras for decades!

[2198] A reference to Leopold Stokowski, Music Director of the Philadelphia Orchestra in its formative years, 1912-1935 considered responsible for developing the renowned 'Philadelphia sound.'

[2199] Conversations with POA violist, Judy Geist.

The *Karella* case stands in strong contrast to the unfair practice and discrimination charges that weave their way through the *Bock*/*Rosato* cases that played out more than half-a-century later.[2200] Differences can be discerned in terms of artistic context, procedural backdrop, and the admittedly erroneous behavior on the part of the POA and its management team. Orchestras employ one, and only one, tuba player to perform within their complement and, suffice it to say, the tubist is often not required to play during a substantial portion of the orchestral season. "Our place in the orchestra might be limited due to the choice of repertoire within a season. However, when we play, you certainly hear us: think of the great operatic scores by Wagner and Strauss tone poems not to speak of Prokofiev ballets–no life there without the tuba."[2201] After the POA's long-term tubist, a player approaching a respectable pension-age fell ill, the organization cast its net out to seek substitute players. Word in professional circles pointed to Clarence O. Karella a member of the Chicago-based Local 10. He was hired to play several concerts and subsequently hired as a probationary member of the POA for the duration of the 1948-49 season.

Within the closed shop system of U.S. unionized orchestras at the time, Mr. Karella would have had to prove that he was a member 'in good standing' of the appropriate union, the Philadelphia-based Local 77. The membership issue was of such a serious nature that "it is entirely clear that the Union was threatening to call its musicians on strike if Karella continued to perform."[2202] Arbitration proceedings with regard to whether or not Mr. Karella would be allowed to play ensued with a decision handed down on March 7, 1949. Quite salient to an understanding of the dispute and the strong preference for 'local talent' espoused by the union is the first part of the decision, which reads in relevant part:

> *"We recognize the rules of the Union which aim at giving preference of employment to local musicians where talent is equal. Clarence Karella, of Chicago, was hired for the 1948-49 season at a time when the management of the Orchestra concluded that there was not available a tuba player acceptable to the musical director. An audition should have been made. We are of the opinion that the employment of Karella should terminate on April 23, 1949, at which time a local man acceptable to the musical director will be available."*[2203]

An entire *movement* could be devoted to the outcome of the arbitral proceedings

[2200] Philadelphia Musical Society, Local 77, American Federation of Musicians Cases nos. 4-CA-219 and 4-CB-35 December 14, 1951.
[2201] Conversations with tubist Zachariah Spellman, San Francisco Opera Orchestra.
[2202] *Philadelphia Musical Society* at 556.
[2203] Ibid., at 557.

concerning the open admission of 'local first' preference and the POA's negligence with regard to a fair audition procedure. Relevant in the case at hand was a discrimination claim, in which Mr. Karella claimed that his employment termination rested on the union's refusal to grant him a membership transfer card in a timely fashion. From the employer's standpoint, the real reason for the employment termination, and hence the dispute, was based on the Maestro's assessment of the musician's ability to excel within the superstar orchestral ensemble. In the interest of keeping his position, Mr. Karella accused both the personnel manager (PM) and the POA of complicit actions to block his reinstatement. "The nature of the product involved in the concert activities of the Orchestra–near perfect orchestral music–and the relationship of its musical director in bringing such a product out of a group of employees require further consideration."[2204] Observations that follow are of salient interest to orchestra watchers in their assessments of the balancing act between artistic aspirations and fair employment practice. Maestro Ormandy, while complimentary about Mr. Karella's technical command of the instrument, was dismayed by the musician's lack of ability to blend with the brass section. Thus, a crucial component of artistic success in a musical collective was lacking.

The letter of termination penned by the PM on January 6, 1949 did not mention the maestro's findings, the true reason for nonrenewal. Instead, and awkwardly, it made mention of the fact the Mr. Karella although a card-carrying member of the Chicago local was not a member in good standing of the Philadelphia Local 77. According to testimony, the PM did not want to hurt Mr. Karella's feelings, thus adding to the confusion regarding proper membership in the correct union, in other words, the Philadelphia-based local.

The PM and the POA's manager attempted to assuage the union, however their attempts backfired. In their eagerness to resolve the situation, the POA produced a letter stating that, although Mr. Karella was not to blame for the union membership confusion, it was 'inadvisable' to extend the contract for an additional season as a result of the union 'mistake.' "The whole of the Union controversy has been unfortunate, and you are, of course are not to blame for the confusion that has resulted. Under the circumstances, however, our Board feels that it would be inadvisable to attempt an extension of your contract beyond the current season."[2205]

[2204] Ibid., at 558.
[2205] Ibid., at 555.

The union went so far as to threaten Mr. Karella when he made a move to 'rejoin' the orchestra, a move that could be characterized as an unfair labor practice 'affecting commerce within the Orchestra" under Section 2(6) and (7) NLRA. In addition, Mr. Karella's right to hold a transfer card, qualified under Section 8 NLRA, was breached. Although these findings might appear to mandate a robust remedy, the Board recommended a cease-and-desist order in which the Local was required to sign an Order stating that it would "not attempt to cause the POA. . .to terminate or otherwise discriminate against employees with regard to their hire or termination. . .or in any manner restrain or coerce employees of the POA."[2206] The PM mourned the fact that the union did not accept the blame for the improper transfer of union membership. And, adding salt to Mr. Karella's wounds, the NLRB found that neither the POA nor its PM could be reasonably accused of either restraint or coercion.

An orchestral musician who faces age discrimination, like the multitude of other employees attempting to prove unfair practices linked to ageism, faces such a high standard of proof in the U.S. judicial landscape that politicians of every stripe are banding together to ensure that legislation will actually offer protection to 'older workers.' Senator Chuck Grassley (Republican, Iowa) joined several other senators in a bipartisan reintroduction of the *Protecting Older Workers Against Discrimination Act* (POWADA) in 2019. Intended to bolster and revive ADEA safeguards, its primary purpose is to "clarify the intent of Congress to make sure people like Jack Gross don't face discrimination due to age. . . Older Americans contribute greatly to our society and economy. They deserve the same protections as every other."[2207]

Jack Gross, the 54-year-old claimant in *Gross v. FBL Financial Services,*[2208] was an Iowan who alleged that his employer FBL Financial Services, Inc. (FBL) demoted him from the position of "claims administration director' to the position of "claims project coordinator." FBL insisted that Mr. Gross was 'reassigned,' and not discriminated against or demoted due to his age, and that the reassignment of his initial position to a female colleague in her early forties was part of a reshuffling of company positions. Suing under the ADEA, Mr. Gross brought forth an age discrimination claim. At trial, Mr. Gross presented evidence that supported his claim that the demotion was partially due to age. The judge presented the jury with 'mixed-motive' instruction: a

[2206] Ibid, *Appendix* A Order, p. 561.
[2207] Chuck Grassley, U.S. Senator for the State of Iowa's website at: https://www.grassley.senate.gov/news/news-releases/grassley-senators-introduce-bipartisan-bill-protect-older-workers-discrimination
[2208] See *Gross, supra* at fn. 2150.

favorable verdict for Mr. Gross was inevitable if age was the moving, or "motivating" factor for demotion. The jury found in Mr. Gross' favor awarding him $46,945 in lost compensation. FBL appealed, and the Eighth Circuit Court of Appeals reversed the verdict, finding that the 'mixed-motive' instruction erroneous. In their view, Gross did not present direct evidence to link age discrimination to the employment action. FBL could have taken the same action, i.e., demotion, regardless of age discrimination.

On certiorari, SCOTUS was asked whether a plaintiff is required to present direct evidence of discrimination in order to obtain a mixed-motive instruction in a discrimination case brought under the ADEA. Brushing aside the central question, SCOTUS chose to analyze whether the burden of persuasion shifts to the employer in a mixed-motive discrimination claim. Taking a markedly black letter approach, SCOTUS made a distinction between Title VII and the ADEA. To recall, under the ADEA "[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, *because* of such individual's age." Thus, age had to be "the reason" for the adverse action; "but for" age the action would have never taken place.

The close-call 5-4 decision was considered to be an overwhelming victory for employers: even if a plaintiff introduced evidence to show that age was an important motivating factor in an ADEA age discrimination claim, the burden of persuasion would not shift to the employer to prove that it would have taken the action regardless of the plaintiff's age. In *Gross*, SCOTUS imposed a higher burden of proof on workers who specifically asserted age discrimination claims against their employers under the ADEA, as opposed to a lower burden of proof for claims asserting other forms of discrimination such as gender, racial, or religious discrimination in Title VII claims.

In a particular scathing criticism of the majority, the dissenters accused their colleagues of avoiding the issue central to the case and lamented the majority's penchant for engaging in "unnecessary lawmaking."[2209] Another cogent criticism lies in the area of mixed motive age discrimination cases that wallow in ambiguity. To bring back memories inspired by *Henrickson* and *Karella*, how should a lower court react to a case in which a plaintiff who is a member of a 'protected age group' is not performing up to par? It is now clear that the plaintiff carries the burden of persuasion and that the "but for" test applies to the evaluation of the defendant's conduct; the mixed motive context remains ambiguous. For example, if a plaintiff in the protected age group was

[2209] Ibid., dissent available at: https://supreme.justia.com/cases/federal/us/557/167/

underperforming, and a company terminated him or her because of the combination of age and sub-par performance (a mixed motive justification for the discharge), has the employee met the "but for" test? Age alone would not have resulted in discharge and the performance deficiencies alone would not have resulted in discharge. If the two are combined, has the "but for" test been satisfied?

The *Gross* decision begs the question as to if and when Congress will step in to correct the rigid ADEA standard imposed by SCOTUS. Tellingly, although the majority in *Gross* was certainly apprised of the Congressional modification to Title VII, no reference (at least on the part of the majority) was made with regard to the lopsided legal standard that allows for the ADEA to remain unchanged. Responding to Senator Grassley's 2019 plea for Congressional action, the Executive Vice-President of the American Association for the Advancement of Retired People (AARP), "the largest nonprofit nonpartisan organization dedicated to empowering Americans 50 and older,"[2210] asserted, "too many older workers have been victims of unfair age discrimination and are denied a fair shake in our justice system. The time for Congress to act is now."[2211] These words resonate with opinions expressed by the orchestral musicians who attempted to mount age discrimination cases but were often thwarted by 'the system' and its handmaidens: EEOC requirements and the judicial penchant for screening cases "to preclude judgment as a matter of law" that has all but closed the doors to surviving summary judgment. From the front lines of musician's age discrimination, the disproportionality between a musician's resources to litigate and the employer's resources should not be underestimated: many who would and should stand up for their rights, can't."[2212]

17.10.1 The road not taken: arbitration

A preponderance of U.S. discrimination cases, including the majority of the orchestral discrimination cases did not meet the 'trial-be-jury' bar and were dismissed by means of the maligned procedural figure, summary judgment leaving orchestral musicians vulnerable to a system that in many cases neglected their particular needs. Interviews with musicians in U.S. orchestras reveal that to their knowledge, there were claims that did not go to court, as many musician-claimants opted for alternative dispute settlement. In *Rowe*, the centerpiece in the *movement* on gender discrimination,

[2210] Consult the AARP website for additional information at: www.aarp.org
[2211] Nancy LeaMond, AARP Executive Vice President and Chief Advocacy & Engagement Officer, quote cited on Senator Grassley's website.
[2212] Conversations with Richard Bock.

alternative dispute resolution was preferred to litigation in court. For those who advocate arbitration and/or mediation with regard to discrimination cases at the workplace, perhaps the warning advanced by the Honorable Robert Payne bears repetition. "As more meritorious claims get slated for arbitration, the judiciary's perception of what is occurring in the workplace will become more skewed."[2213]

[2213] Speech delivered by Robert Payne at the Austin Owen Lecture series, reprinted as "Difficulties, Dangers & Challenges Facing the Judiciary Today" 1998.