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# AGE BIAS IN THE AMERICAN WORKPLACE – AN OVERVIEW<sup>\*</sup>

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## I. INTRODUCTION – AGE AND AGEISM

The use of age as a basis for allocating economic, social, and political benefits, for imposing responsibilities, and for granting rights and privileges is a pervasive facet of American society. Age is utilized overtly in government laws and policies to identify who must attend school, who may vote, who can be hired to serve as firefighters and police officers, who is entitled to government-funded medical care, who may be excused from jury service, and so much more, as well.<sup>1</sup> Informally, age serves as a covert, but powerful, trigger for how we react to, and interact with, both those younger and those older than us; as a factor – sometimes obvious, sometimes subliminal – in arousing or discouraging sexual attraction; as a determinant as to what is appropriate in terms of how one dresses and how one presents oneself to others; and, again, much more.<sup>2</sup>

Of course, many uses of age are innocuous, and so they warrant neither praise nor condemnation. Some uses, however, are at the least problematic. And a few are outright offensive. Overall, the appropriate characterization for the use of age in a given circumstance often is one arrived at quite subjectively. For example, numerous government programs in the United States – most prominently Medicare – provide benefits primarily to older

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<sup>\*</sup> This paper constitutes a much expanded version of a paper that was published in 51 *Retraite et Societe*, an issue entitled *La discrimination fondee sur l'age dans l'emploi* (2008). The article, written by this author and published in French, is entitled *L'age dans le monde du travail aux etats-unis*. The author expresses his gratitude to the publishers of *Retraite et Societe* for their permission to use that article as a basis, in very much-modified form, for this article in the *Journal of International Aging Law & Policy*.

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<sup>1</sup> See generally Howard Eglit, *ELDERS ON TRIAL – AGE AND AGEISM IN THE AMERICAN LEGAL SYSTEM* 6 - 8 (2004) [hereinafter *ELDERS ON TRIAL*].

<sup>2</sup> *Id.*

individuals. From the perspective of the elderly these programs are a boon, but for needy younger individuals who have not yet attained the requisite eligibility age, such programs legitimately may be viewed as unfairly discriminatory: these people are disqualified solely on the basis of the immutable characteristic of age. Another, albeit more mundane, example of the ambiguity associated with appropriately characterizing age-based distinctions is provided by the widespread state laws barring youngsters under a certain age – typically 16 – from securing licenses to drive automobiles. From the standpoint of the adult populace, the exclusion of drivers 15 and under from the roads is a sensible safety precaution; from the perspective of 14-year-olds these licensure laws no doubt can be perceived as unfair age-based deprivations. Or take the example of the bikini-clad 50-year-old beachgoer. From her perspective, her garb is comfortable, seductive and, anyhow, she ‘doesn’t give a darn.’ To the 20-somethings snickering in the background, this ‘old bat’s’ revealing attire (or lack thereof) is ludicrously unappealing.

Focusing on the particular arena of concern here, i.e., the workplace, here, too, policies and practices geared to age can evoke conflicting characterizations. On the one hand, for example, it can be argued that age-based mandatory retirement undeservedly imposes hardship on blameless older men and women without regard to their individual abilities to perform. Alternatively, the practice can be defended on a number of reasonable grounds. It creates room for younger employees to move up in the ranks;<sup>3</sup> it enables employers to avoid the painful task of individually judging older employees and then telling those found lacking that they are deficient;<sup>4</sup> and it facilitates the removal of highly paid senior staff, thereby affording fiscal relief for financially stressed employers.<sup>5</sup>

In any event, no matter how one characterizes particular age classifications, the common use and ready acceptance of age distinctions separate age from other personal characteristics that typically do engender consistent strenuous condemnation. I am

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<sup>3</sup> This rationale was used in *Vance v. Bradley*, 440 U.S. 93 (1979), discussed *infra* at note 160 and accompanying text.

<sup>4</sup> A similar rationale was utilized in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), discussed *infra* at notes 163 - 164 and accompanying text.

<sup>5</sup> See notes 132 - 142 and accompanying text *infra*.

speaking here of race, ethnicity, religion, and in many instances gender – characteristics that constitute the necessary preconditions for racism, xenophobia, religious conflict, and sexism. These extreme prejudices are understood in contemporary American society as possessing no saving justifications (with the rare exception, perhaps, of some gender-based distinctions).<sup>6</sup> Rather, they are rightly deplored as evils born of irrationality and twisted values. In contrast, the use of age as a basis for private and public decisions, government and corporate policies, and federal, state, and local laws is an enterprise evoking much more ambivalence.

Why is this so? There are several answers. For one, age-based decision making typically is not an expression of the intense animosity that accompanies racism and its malignant compatriots,<sup>7</sup> and so decisions based on age are deemed more tolerable. Moreover, the use of age as a determinant to include some and exclude others, such as in the case of Medicare, often can be reasonably justified (as admittedly can be the uses of gender, perhaps) because of age's empirical verifiability, a quality which quashes ambiguity and thereby minimizes the potential for abuses that might otherwise occur if program eligibility and benefits were determined by the exercise of bureaucratic discretion. And finally, in some instances there is some empirical support for age-based attitudes and practices – even in the case of negative stereotypes and attitudes regarding old age and old people.<sup>8</sup>

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<sup>6</sup> Arguably, there are some instances when the biological differences between men and women might appropriately be taken into account in the workplace. That, at least, is the premise supporting the availability to employers of the bona fide occupational qualification (BFOQ) defense set forth in §703(e), 42 U.S.C. §2000e-2(e), of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e - 2000e-17. As to discussion of the parallel BFOQ defense in the age context, see notes 56 - 61 and accompanying text *infra*.

<sup>7</sup> See United States Secretary of Labor, THE OLDER AMERICAN WORKER – AGE DISCRIMINATION IN EMPLOYMENT, REPORT TO CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964 (1965) [hereinafter SECRETARY OF LABOR REPORT], discussed *infra* at notes 41, 55, and 100 and accompanying text.

<sup>8</sup> See Section III *infra*. The task of defining *old age* is quite complex. Some gerontologists distinguish between the *young-old* (those 55 - 75), the *old* (those 76 - 85), and the *old-old* (those 86 and older). See Bernice L. Neugarten and Gunhild Hagestad, *Age and the Life Course*, in HANDBOOK OF AGING AND THE SOCIAL SCIENCES 35, 46 (Robert H. Binstock and Ethel Shanas, ed. 1976). "The World

Ambiguity notwithstanding, there is only so far that one can (or should) legitimately go in unquestioningly accepting the ubiquity of age distinctions. This is because reliance on age as a basis for the allocation of benefits and detriments, as well as for other ends, can inflict harm – most commonly, harm suffered by blameless men and women unfairly and erroneously deemed too old and thereby subjected to the bias commonly known as *ageism*.<sup>9</sup> Unfortunately, however, deploring this reliance on the age factor as a decision-making and allocative device deployed against the ‘too-old’ is easier said than is achieving the cessation of that reliance. This “ism” is ingrained in American society, as it is in just about every developed society’s customs and laws.<sup>10</sup> Note, for example, the fact that the

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Health Organization classifies persons . . . between 60 and 75 as elderly [, those] between 76 and 90 . . . as old, and those over 90 . . . as very old.” Alexander P. Spence, *BIOLOGY OF HUMAN AGING* 8 (1989). Adding to the ambiguity of the situation is the question of context: one may be *old* or *too-old* in one setting, but not so in another. On the American scene, for example, a professional baseball player is old at 40; a college attendee in her 30’s is described as an “older” student; a 7-year-old is considered too old for kindergarten.

<sup>9</sup> Generally, age bias is thought of as afflicting only the elderly. This understanding is in good measure due to the explication of ageism most famously iterated by Dr. Robert Butler. See *WHY SURVIVE? BEING OLD IN AMERICA* 6 - 7 (1975). However, while Dr. Butler focused on discrimination suffered by the old, age bias actually can occur at any point in an individual victim’s life, as discussed earlier in the example involving disaffected teen-agers desiring to be licensed to drive cars, or in the case of a 36-year-old fully fit applicant for a job as a police officer who confronts the common requirement imposed by municipalities throughout the United States that new hires for law enforcement positions not be older than 35 or thereabouts. See, e.g., *Feldman v. Nassau County*, 434 F.3d 177 (2d Cir. 2006); *Equal Employment Opportunity Comm’n v. Missouri State Highway Patrol*, 555 F. Supp. 97 (W.D. Mo. 1982), *aff’d in part & rev’d in part*, 748 F.2d 447 (8th Cir. 1984). Thus, there is an important distinction to be made between *ageism* and *old-ageism*, the latter applying only with regard to bias directed against those at the farther end of the age spectrum.

<sup>10</sup> If respect and proper treatment of the elderly were the normal, innate pattern of human behavior, presumably there would have been less of a need for the Fifth Commandment, which commands us to honor our fathers and our mothers. (Of course, fathers and mothers start out young, and only eventually become old. Also, in the days of the Old Testament the longevity of most people – save for Abraham, Sarah, and a select group of other patriarchs, matriarchs, and prophets, was abbreviated in comparison to today. But this latter observation simply supports the further observation that someone at the age of 45 would have been deemed elderly

English lexicon contains an array of negative epithets that are thoughtlessly used in everyday discourse to negatively label and/or describe older men and women: “*old bag, old bat, battle ax, biddy, cantankerous, codger, coot, crank, crotchety, curmudgeon, dirty old man, [doddering,] dotard, dotty, eccentric, foggy, old fool, forgetful, fossil, gaffer, geezer, hag, old fart, ornery, senile, witch, and wizened*” are just a few.<sup>11</sup> In striking contrast, there are virtually no pejorative words in the English language to describe the young or, even more emphatically so, the middle-aged!

Of course, evidence of dislike for the elderly is far more extensive than just a list of unpleasant words:

Epithets aside, it is readily apparent that in magazines, on television, in the movies, in consumer advertising, and in dialogues both public and private, the American populace is relentlessly instructed to aspire to those qualities typically associated with youthfulness: smooth skin, silky hair, sleekly muscled bodies, athleticism, sexual prowess, mental acuity. Physical attractiveness is in fact a virtually impossible characteristic for the elderly to be seen as possessing.

For the most part, the popular visual and print media dwell almost exclusively on the doings of the non-old: their romances, their avocations, their homes, their opinions, and so on. The sports events that entrance millions of spectators each week further convey the message—incidentally but nonetheless powerfully—that almost all our hero athletes share at least one trait: they are not old . . . .

Not surprisingly, older faces are rare in movies, magazines, and television (save for public affairs programs). Elders who are depicted in the popular entertainment media typically are presented either as victims or as being quirky, resistant to change, mentally slow, physically frail, sexually neutered,

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in a society where most people did not live beyond age 50 or so).

<sup>11</sup> ELDERS ON TRIAL, *supra* n. 1, at 11.

forgetful, and/or cantankerous. In brief, old people almost invariably are portrayed as being at best pathetic and at worst distasteful or even loathsome. . . .<sup>12</sup>

Certainly, the foregoing exposition constitutes a grim, but unfortunately too accurate, collection of the negative images attached to the state of being old. But it is not only the elderly (an admittedly ill-defined group)<sup>13</sup> who can experience deprivation for being too old. In the workplace not only men and women in their 60s and 70s may confront animus for being too old, but even those in their 40s and 50s may do so as well.<sup>14</sup> In fact, in good measure it was because of findings regarding the difficulty particularly confronted by terminated workers in their 40s in securing new positions that in 1967 the United States Congress passed, and President Lyndon B. Johnson signed into law, the Age Discrimination in Employment Act (ADEA),<sup>15</sup> which extends protection to those who are age 40 and older.

## II. THE DEMOGRAPHIC DATA

A necessary backdrop to assessing the significance of age bias in the workplace are the data regarding the by-now exhaustively discussed baby boomers: the almost 76 million men and women born between 1946 and 1964 in the United States.<sup>16</sup> Each year, starting in

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<sup>12</sup> *Id.* at 10 - 11 (footnotes omitted).

<sup>13</sup> *Supra* n. 8.

<sup>14</sup> Indeed, a review of all the reported federal court decisions issued in one year – 1996 – addressing claims under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621 - 633a, revealed that the large majority of plaintiffs were men and women in their 50s. See Howard Eglit, *The Age Discrimination in Employment Act at Thirty: Where It's Been, Where It is Today, Where It's Going*, 31 U. of Rich. L. Rev. 579, 599 - 606 (1997) [hereinafter *The Age Discrimination in Employment Act at Thirty*]. And, while rare, even a 30-year-old may be seen as too old when she applies for an entry-level position typically filled by newly-minted college graduates; and a 36-year-old may run up against the common city and state laws barring the hiring of prospective firefighters and police officers who are older than 35 or thereabouts. See note 9 *supra*.

<sup>15</sup> 29 U.S.C. §§621 - 633a (2000).

<sup>16</sup> In each of these years between 3.4 million and 4.3 million babies were born

2006, several million of these individuals turned, or will turn, age 60. By 2016 the first wave of surviving boomers will be celebrating their 70<sup>th</sup> birthdays.<sup>17</sup> “By 2030, there will be about 71.5 million older persons, almost twice their number in 2005. People 65+ represented 12.4% of the population in the year 2005 but are expected to grow to be 20% of the population by 2030.”<sup>18</sup>

What about the demographic data regarding the workplace in particular? While during the twentieth century there was a steady decline in the numbers of American men and women who in their 60's remained working outside the home, the recent data reveal movement in the opposite direction.<sup>19</sup> And it seems likely that this trend will continue, with a growing percentage of older individuals – particularly those in their 60's – remaining or seeking to remain in the employed workforce. Indeed, data collected by the United States Bureau of Labor Statistics support the prediction that the number of

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in the United States (obviously with variations from year to year) – a total of 75.8 million. Baby Boomer Headquarters, *The Boomer Stats*, [www.BBHQ.com](http://www.BBHQ.com) (Dec. 17, 2008). Of course, not all of these individuals survived to adulthood, let alone middle or later age, nor will all those who are now alive survive to age 65 or 75 or the ages in between and beyond. (All anyone of course can be 100% confident about is that no matter their best efforts, every boomer eventually will die).

<sup>17</sup> *Supra* n. 16 (these data do not include naturalized Americans who attain age 65 and beyond but who were born in other countries).

<sup>18</sup> Administration on Aging, U.S. Department of Health and Human Services, A PROFILE OF OLDER AMERICANS: 2007 (2008) [hereinafter PROFILE OF OLDER AMERICANS], at 3.

<sup>19</sup> *Id.* at 12:

In 2006, 5.5 million (15.4%) [of] Americans age 65 and over were in the labor force (working or actively seeking work), including 3.1 million men (20.3%) and 2.4 million women (11.7%). They constituted 3.6% of the U.S. labor force. About 2.9% were unemployed. Labor force participation of men 65+ decreased steadily from 2 of 3 in 1900 to 15.8% in 1985, and has stayed at 16% - 18% since then. The participation rate for women 65+ rose slightly from 1 of 12 in 1900 to 10.8% in 1956, fell to 7.3% in 1985, and has been around 8% - 10% starting in 1988. However, during the past decade, labor force participation has been gradually rising to the 2006 levels. This increase is especially noticeable among the population aged 65 - 69.



older workers as a percentage of the total American workforce is already increasing markedly and will continue to do so:

[T]he total labor force is projected to increase by 8.5 percent during the period 2006 - 2016, but when analyzed by age categories, very different trends emerge. The number of workers in the youngest group, age 16 - 24, is projected to decline during the period while the number of workers age 25 - 54 will rise only slightly. In sharp contrast, workers age 55 - 64 are expected to climb by 36.5 percent. But the most dramatic growth is projected for the two oldest groups. The number of workers between the ages of 65 and 74 and those aged 75 and up are predicted to soar by more than 80 percent. By 2016, workers age 65 and over are expected to account for 6.1 percent of the total labor force, up sharply from their 2006 share of 3.6 percent. . . .<sup>20</sup>

And the Bureau goes on to comment as follows: “With the baby-boom generation about to start joining the ranks of those 65 and over, the graying of the American workforce is only just beginning.”<sup>21</sup> Moreover, the nature of the employment of older workers also is changing, with a decrease in part-time participation and an increase in full-time work.<sup>22</sup>

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<sup>20</sup> See U.S. Bureau of Labor Statistics, *OLDER WORKERS*, [www.bls.gov/spotlight](http://www.bls.gov/spotlight) (July 2008), at 9.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 3:

Since the mid-1990s there has been a dramatic shift in the part-time versus full-time status of the older workforce. . . . Between 1995 and 2007, the number of older workers on full-time work schedules nearly doubled while the number working part-time rose just 19 percent. As a result, full-timers now account for a majority among older workers: 56 percent in 2007, up from 44 percent in 1995.

There are a number of factors that are supporting and/or encouraging older men and women to continue working outside the home. For one, by virtue of statutory mandate, the normal age for retiring with full Social Security benefits has been slowly rising from age 65 – the age enshrined in the Social Security Act in 1935<sup>23</sup> – to age 67, the marker it will reach in 2022. Moreover, the Social Security Act was amended in 2000 to remove the earnings retirement test, i.e., the penalty imposed on people who both collected Social Security benefits starting at normal retirement age (as opposed to earlier retirement at age 62, 63, or 64) and continued to work.<sup>24</sup> The old version of the law provided that for every two dollars earned by an individual who elected to receive Social Security benefits while continuing to work, he would lose one dollar of Social Security benefit. But now there is no such penalty and so older men and women who attain the normal retirement age and at that point want to both apply for benefits and to continue working no longer are discouraged from doing so by this benefit reduction.<sup>25</sup> Most importantly, rising concerns about economic security no doubt are encouraging – even forcing – some older men and women who might have thought they would be better off financially by the time they reached the traditional retirement age of 65 to have second thoughts about giving up income-producing jobs.<sup>26</sup> This situation is painfully detailed in a review of a recent book concerning retirement:

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<sup>23</sup> As to how this age became enshrined with little thought, see ELDERS ON TRIAL, *supra* n. 1, at 174.

<sup>24</sup> See Social Security Online, *Exempt Amounts Under the Earnings Test*, [www.socialsecurity.gov](http://www.socialsecurity.gov) (Dec. 19, 2008), for the current deductions regarding people who retire prior to the normal retirement age.

<sup>25</sup> See generally Hugo Benitez-Silva and Frank Heiland, *The Social Security Earnings Test and Work Incentives*, 26 J. of Policy Analysis and Mgt. 527 (2007). The normal retirement age (NRA) is dependent on when an applicant was born. For those people born between 1943 and 1954 it is age 66; for those born between 1955 and 1959 the age increases in two-month increments. Thus, a man born in 1955 has an NRA of 66 and 2 months; a woman born in 1956 has an NRA of 66 and 4 months; and so on. For those born in 1960 and later, the NRA is 67. Social Security Online, *Retirement Planner*, [www.ssa.gov/retire2/retirechart.htm](http://www.ssa.gov/retire2/retirechart.htm) (Jan. 8, 2009).

<sup>26</sup> See PUBLIC POLICY IN AN OLDER AMERICA – A CENTURY FOUNDATION GUIDE TO THE ISSUES 24 (2006) (footnote omitted) [hereinafter PUBLIC POLICY IN OLDER AMERICA]:

Citing a plethora of actuarial studies, . . . [the authors] estimate that people who retire at age 65 today can expect Social Security to provide the equivalent of only 39 percent of their incomes after deductions for basic Medicare contributions. Those who plan to retire in 2030 can expect net benefits, similarly calculated, of only 30 percent of their incomes.

Current and future retirees would be ill-advised to rely on private-sector income supplements. In 1989, the authors report, 66 percent of American employers provided postretirement health care benefit programs. By 2006, that number had fallen to just 35 percent.

Worse, the rate at which Americans save for their nest eggs is abysmal. According to a Federal Reserve study in 2004, the “simulated,” or theoretically possible, savings in I.R.A.s and 401(k) plans owned by people ages 55 to 64 was \$314,000. The actual average savings, however, was just \$60,000.<sup>27</sup>

And this was all before the economic collapse of the American economy, and the associated devastation visited on 401(k) plans, in the latter part of 2008! What was for some older men and women an issue of preference – ‘do I want to continue working or not?’ – has

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The age at which individuals decide to retire will affect significantly what their incomes will be. . . .

One bright spot is that small delays in retirement age can mitigate shortfalls in retirement savings by a surprising amount. Given current life expectancy, each year retirement is delayed past age 62 reduces the household’s need for retirement savings by about 5 percent, and each extra year of work increases Social Security benefits by several percentage points. [(I] Unfortunately, however, the very households that often have the lowest personal savings – notably blue-collar workers whose jobs require physical labor and the disabled – are least likely to delay retirement.)

<sup>27</sup> Harry Hurt III, *Who Wants to Retire Later? (Don’t Laugh)*, New York Times, Business Sec., p. 5 (July 20, 2008), reviewing Alicia H. Munnell and Steve A. Sass, *WORKING LONGER* (2008).

become for some, maybe many, a matter of necessity: 'I have to keep working.'<sup>28</sup>

Another factor here is the health of old people. As a group, older men and women are healthier today than their counterparts 100 and even 50 years ago, and their ills likewise are more treatable and controllable than were the health problems of their predecessors.<sup>29</sup> Thus, more older men and women – particularly those who make up the *young-old*<sup>30</sup> – are able today to remain active, in contrast to their more physically debilitated predecessors.<sup>31</sup> For example, "[w]hite men age 60 to 64 . . . are two and a half times less likely to suffer from a chronic illness than they were just over a century ago."<sup>32</sup>

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<sup>28</sup> See Steven Greenhouse, *Working Longer As Jobs Contract*, New York Times, Special Section – Retirement, pp. 1, 8 (Oct. 23, 2008).

<sup>29</sup> See Alicia H. Munnell and Steven A. Sass, WORKING LONGER 20 - 34 (2008) [hereinafter WORKING LONGER].

<sup>30</sup> *Supra* n. 8 regarding this terminology.

<sup>31</sup> As compared to those 75 and older, individuals between the ages of 65 and 74 report considerably fewer limitations regarding the ability to perform activities of daily living. See PROFILE OF OLDER AMERICANS, *supra* note 18, at 14. This is not to say, however, that the younger group was free of disabilities (although such disabilities would include such matters as impaired vision, which is easily correctable with eyeglasses, and other types of impairments that can be ameliorated with medications and/or devices such as canes):

Some type of disability (sensory disability, physical disability, or mental disability), was reported by 52% of older persons in 2002. Some of these disabilities may be relatively minor but others cause people to require assistance to meet important personal needs. Almost 37% of older persons reported a severe disability and 16% reported that they needed some type of assistance as a result. Reported disability increases with age.

In . . . [one] study which focused on the ability to perform specific activities of daily living (ADLs), over 28% of community-resident Medicare beneficiaries over age 65 in 2005 had difficulty in performing one or more ADLs and an additional 12.9% reported difficulties with instrumental activities of daily living. . . .

*Id.*

<sup>32</sup> PUBLIC POLICY IN AN OLDER AMERICA, *supra* n. 26, at 25 (footnote omitted).

Another demographic factor relevant to the continuing participation in the American workforce of older individuals is their increasing longevity. People who survive to 65 have more future years left than was the case 100 years ago, or even 50: “About 19 percent of men and 33 percent of women who survive to age 65 will live to age 90 or older and have to support themselves for almost 30 years.”<sup>33</sup> Other presentations of such data make the same point.<sup>34</sup>

The changing nature of work in America also may have some role in older men and women remaining, or seeking to remain, in the workforce. Many of the physically demanding manufacturing jobs performed by millions of workers in the early and middle decades of the twentieth century are gone; they have been supplanted by less strenuous occupations, jobs that can readily be performed by older individuals who in the past might not have been able to handle (or were perceived as not being able to do so) more physically strenuous tasks.<sup>35</sup>

Finally, the large percentage of women working outside the home today likely has some statistical consequences for an aging workforce. Unlike most men, women commonly leave the workplace for considerable periods of time to perform family responsibilities. When they enter or return to the paid workplace they are behind men of comparable ages in terms of accumulating pension benefits and salary,<sup>36</sup> and so they need to play catch-up (assuming they want to

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<sup>33</sup> WORKING LONGER, *supra* n. 29, at 142.

<sup>34</sup> See Eric T. Sondergeld and Matthew Greenwald, *Public Misperceptions About Retirement Security* 15 (LIMRA International, Inc., the Society of Actuaries, and Matthew Greenwald & Associates 2005): “[T]here is an 82 percent chance that one member of a 65-year-old couple will survive to or beyond the male’s life expectancy of age 81 and a 71 percent chance of outliving the female’s life expectancy of age 84.”

<sup>35</sup> “Less than 8 percent of workers currently have physically demanding jobs, down from over 20 percent in 1950.” WORKING LONGER, *supra* n. 29, at 94.

<sup>36</sup> [N]early 30 percent of elderly non-married women, who represent a majority of households at older ages, are classified as poor or near poor. Some of these women were non-married and poor as they entered retirement; others were married and suffered a large drop in income when their spouse died. Thus women would be better off if they had stronger Social Security earnings records and their own employer pension benefits.

wind up matching the financial positions of their male counterparts). Accordingly, we may see women – as contrasted to men – more commonly working into their later years.<sup>37</sup> (On the other hand, there are reasons for concluding that this may not be the case: “Given their weaker attachment to the labor force, smaller financial incentives, tendency to coordinate retirement with their typically older husbands, the challenge for women to stay in the labor force is greater than that facing men.”)<sup>38</sup>

### III. AGE BIAS IN THE AMERICAN WORKPLACE

#### A. *The Age Discrimination in Employment Act of 1967 – Genesis and Overview*

In the early 1960s a groundswell of political support started to develop in the United States for addressing what had not hitherto been perceived as a national problem – discrimination in the American workplace directed against older workers. No doubt, this growing concern was spurred in considerable measure by a general heightening sensitivity to equality issues sparked by the efforts of ardent civil rights advocates fighting the racism afflicting millions of blacks, particularly in the Southern states. The legislative culmination of the civil rights struggle to combat racism occurred in part with the enactment at the federal level of the Civil Rights Act of 1964,<sup>39</sup> Title VII of which bans discrimination on the bases of race, color, national origin, religion, and sex in workplaces having 15 or more employees

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*Id.* at 62.

<sup>37</sup> Without offering any reasons for the increases, the Administration on Aging has noted the following with regard to the participation of older women in the work force:

Between 1984 and 2004 the labor force participation rates for women aged 55-61 increased from 47% to 62% and for women aged 62 - 64 the rates have increased from 29% to 39% over the same period. During these years, the percentage of men aged 55 - 61 [and 62 - 64] in the labor force remained relatively stable (77% to 74%, respectively).

PROFILE OF OLDER AMERICANS, *supra* n. 18, at 15.

<sup>38</sup> WORKING LONGER, *supra* n. 29, at 88.

<sup>39</sup> 42 U.S.C. § 2000a *et seq* (2000).

for 20 or more weeks of the calendar year in which the discrimination occurred, or in the calendar year preceding that year.<sup>40</sup>

During the Congressional debates on the 1964 Act an effort was made to add age to the list of prohibited practices. While this strategy failed, the Congress did direct the Secretary of the United States Department of Labor to undertake a study to determine the extent of age bias in the workplace and to recommend such action as might be necessary. In his 1965 report the Secretary identified such bias in the workplace as a reality and identified as its victims workers in their 40's, as well as those of greater age. He asserted that the matter of age bias was a significant problem particularly insofar as hiring practices were concerned; and he recommended federal action.<sup>41</sup> Two years later Congress responded by passing, as noted earlier, the Age Discrimination in Employment Act of 1967 (ADEA),<sup>42</sup> a complex enactment made even more so by amendments added over the years since the Act's adoption.<sup>43</sup>

The statute applies to middle-sized and large employers within the United States; to foreign companies doing business within the borders of the United States that are not otherwise immunized by treaties;<sup>44</sup> to American companies operating extraterritorially, insofar as their American employees are concerned;<sup>45</sup> and to American-controlled foreign enterprises operating outside the borders of the United States, albeit only with regard to American citizens.<sup>46</sup> It prohibits (subject to some key exceptions, some of which are discussed below) virtually all forms of workplace-related age-based decisions and actions. It also bars discriminatory advertising,<sup>47</sup> as well as retaliation both against individuals who seek to vindicate their

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<sup>40</sup> 29 U.S.C. §§ 2000e - 2000e-17 (2000).

<sup>41</sup> SECRETARY OF LABOR REPORT, *supra* n. 7.

<sup>42</sup> 29 U.S.C. §§ 621 - 633a (2000). *See generally* Howard Eglit, 1 - 3 AGE DISCRIMINATION (2d ed. 1995, and annual supplements, 1996 - 2008) [hereinafter AGE DISCRIMINATION].

<sup>43</sup> *See generally* AGE DISCRIMINATION, *supra* n. 42.

<sup>44</sup> *See generally* Laird M. Street, *Application of U.S. Fair Employment Laws to Transnational Employers in the United States and Abroad*, 19 N.Y.U. J. Intl. L. & Pol. 357, 374 (1987).

<sup>45</sup> 29 U.S.C. § 630(f) (2000).

<sup>46</sup> 29 U.S.C. § 623(h) (2000).

<sup>47</sup> 29 U.S.C. § 623(e) (2000).

own rights under the statute as well as those who help others to vindicate *their* rights.<sup>48</sup>

The key prohibitory language of the statute provides as follows:

It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age. . . .<sup>49</sup>

This language obviously is sweeping in its scope. But like any law the ADEA was, and in its amended form continues to be, a product of political compromise. And so what Congress gave with one hand, so to speak – that is, seemingly comprehensive protection to older workers – it undercut to some degree by other provisions of the statute limiting the enactment's reach.

Notably, the statute's scope is restricted to employers that have or had 20 or more employees for 20 or more weeks of the calendar year in which the alleged discrimination occurred or in the preceding calendar year.<sup>50</sup> The result of this formulation is that hundreds of thousands of small employers, and thus their employees, are not covered by the statute (and this scenario is replicated at the state level, since most analogous state anti-discrimination laws<sup>51</sup>

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<sup>48</sup> 29 U.S.C. § 623(d) (2000).

<sup>49</sup> 29 U.S.C. § 623(a) (2000).

<sup>50</sup> 29 U.S.C. § 630(b) (2000).

<sup>51</sup> Every state has adopted a fair employment practices statute; age is commonly included among the prohibited bases for employer decision making. See notes 172 - 175 and *accompanying text infra*.



likewise exclude small employers from their coverage).<sup>52</sup> One explanation for this ‘free pass’, so to speak, for smaller employers seems to be that the drafters of the statute felt that small businesses would have difficulty in affording the financial costs they would confront if they from time to time were forced to defend against accusations by aggrieved individuals claiming to be victims of alleged unlawful age discrimination. In addition, there apparently was a prevailing notion that because in small business settings the workers, as well as the owners, likely would be working in close proximity, there ought to be some room for employers to be able to avert on-the-job friction by excluding undesired individuals – in this instance, older men and women – from these workplaces, no matter that the exclusion was for a less than laudable reason, i.e., bias based on age.

Even as to those employers that *are* covered by the ADEA, there are a number of provisions that allow actions and decisions based on age, after all, and so the ostensible rigor of the prohibitory language is compromised. For one, only individuals age 40 and over are protected by the statute, and so discriminatory actions such as the age-based refusal to hire a 39-year-old<sup>53</sup> or the age-based demotion of a 37-year-old are legally permissible under the federal Act.<sup>54</sup> This denial of coverage for those under age 40 resulted from the drafters’ understanding – in part guided by the earlier-noted report of the United States Secretary of Labor – that younger women and men in the workforce did not typically confront age bias and so were not in need of statutory protection.<sup>55</sup>

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<sup>52</sup> As of 2004 the number of people employed in small businesses with one to 19 employees totaled approximately 22,000,000. United States Census Bureau, *Statistics about Business Size (including Small Businesses)*, <http://www.census.gov/epcd/www/smallbus.html> (Dec. 10, 2008).

<sup>53</sup> *Supra* n. 9.

<sup>54</sup> There are a few anomalous ADEA rulings in which plaintiffs under the age of 40 at the time of the alleged discrimination managed to finesse their way into protection under the statute. *See, e.g., Anderson v. Phillips Petroleum Co.*, 722 F. Supp. 668 (D. Kan. 1989); *Allen v. American Home Products, Inc.*, 644 F. Supp. 1553 (N.D. Ind. 1986); *see generally* 1 AGE DISCRIMINATION, *supra* n. 42, at § 3.02.

<sup>55</sup> SECRETARY OF LABOR REPORT, *supra* n. 7.

In addition, it is not a violation of the Act to use an age criterion “where age is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of its business.”<sup>56</sup> Thus, for example, if a private bus company that provides transportation services to schools has a policy barring the hiring of anyone over the age of 55 as a bus driver, it will not be liable under the ADEA if sued by a rejected 60-year-old if it can prove that (1) the normal operation of its bus service is to safely transport children and that (2) the state of being under age 56 is reasonably necessary to that function because older people are susceptible to sudden cardiovascular incidents, i.e., strokes and heart attacks, or that (3) it is impractical to individually test job applicants to determine who will and will not suffer a sudden cardio-vascular incident.<sup>57</sup> This BFOQ defense is generally narrowly construed both by the ADEA enforcement agency<sup>58</sup> and by the courts.<sup>59</sup> For example, cost savings, or profit enhancement, is not a legitimate BFOQ.<sup>60</sup> In other words, an employer cannot successfully argue that the normal operation of its business is to survive and therefore it should be able to pursue an age-gearred policy by, let us say, cutting the salaries just of employees ages 55 and over, who generally will be the more highly paid workers in the company, while leaving untouched the salaries of those under age 55. In contrast, safety arguments – such as that hypothesized vis-a-vis school bus drivers – are accorded particular deference by judges, who generally do not want to second-guess employers, lest it later transpire that the older job applicant who was placed into her job by court order, or the older terminated employee who was reinstated by judicial decree, subsequently causes a serious accident to occur.<sup>61</sup> Another exception, discussed more fully below,<sup>62</sup> allows differing treatment of people “where the differentiation is based on reasonable

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<sup>56</sup> 29 U.S.C. § 623(f)(1) (2000).

<sup>57</sup> See generally 1 AGE DISCRIMINATION, *supra* n. 42, at §§ 5:2 - 5:14.

<sup>58</sup> See 29 C.F.R. § 1625.6 (2008).

<sup>59</sup> See, e.g., *Western Airlines, Inc. v. Criswell*, 472 U.S. 400, 412 (1985).

<sup>60</sup> “The courts – with but one exception – have asserted that economic factors cannot be the basis for a BFOQ.” 1 AGE DISCRIMINATION § 5:10, *supra* n. 42, at 5-47 (footnote omitted).

<sup>61</sup> See generally 1 AGE DISCRIMINATION, *supra* n. 42, at § 5:11.

<sup>62</sup> See notes 133 - 142 and accompanying text *infra*.

factors other than age.”<sup>63</sup> Additional provisions legitimize other actions and decisions that might otherwise violate the statute’s prohibitions. For example, a differential in treatment regarding employees’ benefits will be legal if it is made in observance of the terms of a “bona fide employee benefit plan . . . where for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker. . . .”<sup>64</sup> This provision reflects the empirically supported fact, more fully fleshed out below,<sup>65</sup> that certain benefits afforded employees – most prominently, employer-paid health insurance and life insurance – cost more for older workers than they do for younger ones.

Given these limitations on the prohibitory language of the ADEA (and there are others unique to this particular anti-discrimination statute)<sup>66</sup> it is correct to conclude that the ADEA is more tolerant of age-based decision making and actions by employers than is the Act’s analogue,<sup>67</sup> i.e., Title VII of the Civil Rights Act of 1964, accepting of decisions employers might attempt to make based on race, color, national origin, religion, and sex. This gap between the two statutes of course is consistent with the generally accepted (although not necessarily correct) assessment that age-based decision making merits a reduced level of condemnation because it is not the product of the intense dislike that motivates white bigots’ dealings with blacks, or that prompts people of one national origin to discriminate against people of differing origins than their own, or that stirs one sect of religionists to oppress those of another sect who subscribe to a different version of God than their own. The ADEA’s compromised rigor also reflects the generally accepted notion – albeit

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<sup>63</sup> 29 U.S.C. § 623(f)(1) (2000); see generally Howard Eglit, *The Age Discrimination in Employment Act’s Forgotten Affirmative Defense: The Reasonable Factors Other Than Age Exception*, 66 B.U. L. Rev. 155 (1986).

<sup>64</sup> 29 U.S.C. § 623(f)(2)(B) (2000).

<sup>65</sup> See *infra* Section III.C.2.a.

<sup>66</sup> See 1 AGE DISCRIMINATION, *supra* n. 42, at Ch. 5.

<sup>67</sup> It is clearly well-established that because the basic prohibitory language of the two statutes is virtually identical (save that one addresses age and the other addresses other characteristics, i.e., race, etc.), decisions rendered as to the one statute often afford persuasive guidance for interpreting the other statute. See, e.g., *Oscar Mayer & Co., Inc. v. Evans*, 441 U.S. 750, 755 - 758 (1978).

a flawed one when put forth in its most vigorous iterations, as discussed below – that older people are unable to perform as well as their younger counterparts in the workforce,<sup>68</sup> and so full-scale protection is not warranted. This acceptance of the view of older men and women as being somewhat impaired contrasts with the underlying premise of Title VII, which is that race, national origin, and skin color have absolutely no relationship to the ability to perform or contribute to society generally, and that religion<sup>69</sup> and gender<sup>70</sup> only very rarely do.

Flowing from the dictates of the particular statutory language of the ADEA are thousands of judicial rulings regarding claims arising under the statute. Many of these are technical and/or procedural in nature, responding to particular statutory verbiage.<sup>71</sup> Most of the major substantive issues have been addressed – either by amendments made to the ADEA or by case law – and thereby have been more or less resolved, sometimes in a manner favorable to employers and sometimes to the victims. Thus, while the United States Supreme Court has not directly so held, it is generally accepted that the standard Title VII paradigm for establishing intentional discrimination on the basis of circumstantial evidence – a paradigm

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<sup>68</sup> See *infra* Section III.C.1.

<sup>69</sup> An employee's religious beliefs may preclude him from working at certain times. For example, an observant Saturday sabbatarian will be unable to work from sundown Friday until sundown Saturday, and so this employee is less able to perform the job – at least in exactly the same way – than are her colleagues. Title VII requires the employer to reasonably accommodate the employee's religious need, provided such accommodation does not cause undue hardship for the employer. 29 U.S.C. § 2000e(j) (2000). If such hardship will occur, the employer may choose not to accommodate the employee's needs. Thus, if an employer must have the particular position filled on Saturdays, and the Saturday sabbatarian employee is the only person who can perform the job at issue, the employer will not be guilty of violating the statute by terminating the employee for his refusal to report for work. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

<sup>70</sup> Some jobs may only be performed by a person of a particular sex. For example, a movie producer casting the role of Cleopatra may refuse to hire males for the role. The producer can defend against a claim of discrimination by proving up a BFOQ defense (discussed *supra* in the context of age, see notes 56 - 61 and accompanying text), based in this instance on the need for authenticity on the part of the person playing the role of the Egyptian queen.

<sup>71</sup> See generally 1 - 2 AGE DISCRIMINATION, *supra* n. 42.

set forth in *McDonnell Douglas Corp. v. Green*<sup>72</sup> in 1973, and that comes into play in the great, great majority of both Title VII and age

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<sup>72</sup> 411 U.S. 792 (1973). In *McDonnell Douglas* the Court enunciated what has been reiterated thousands of times by lower courts as the formula for employment discrimination plaintiffs and defendants in Title VII and ADEA non-class actions cases involving only circumstantial evidence:

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of . . . discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

*Id.* at 802. The Court admonished that its model for the prima facie case was a flexible one: "The facts necessarily will vary . . . and the specification . . . of the prima facie proof required from . . . [a plaintiff] is not necessarily applicable in every respect to differing factual situations." *Id.*

Applying the McDonnell Douglas standard to the ADEA [in a non-denial-of-hire case], to prevail on an age discrimination claim, the plaintiff must show that: (1) she was at least forty years of age; (2) her job performance met the employer's legitimate expectations; (3) the employer subjected her to an adverse employment action; and (4) the employer had a continuing need for the services that the plaintiff rendered.

2 AGE DISCRIMINATION, *supra* n. 42, at 7-28. This formulation is not a rigidly fixed one. See *id.* at § 7:4. The establishment of a prima facie case creates a presumption of discriminatory intent. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). It then becomes the defendant's task to rebut this presumption. This simply amounts to the defendant bearing a burden of producing (as opposed to the more rigorous burden of proving) a legitimate nondiscriminatory reason for the complained-of decision or action. *Id.* at 255. If the defendant satisfies this very easy burden, the presumption of discrimination drops from the case. *Id.* To prevail, the plaintiff then must prove that the defendant's reason is a pretext for discrimination, which she may do "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* at 256. See generally 2 AGE DISCRIMINATION, *supra*, at § 7.4.

cases – is applicable in ADEA cases.<sup>73</sup> Discriminatory impact analysis, i.e., analysis that comes into play when an ostensibly age-neutral policy has a significantly adverse impact upon older people, has relatively recently been established by the Supreme Court in *Smith v. City of Jackson*<sup>74</sup> as being applicable to the ADEA, although its particular formulation in the ADEA context is so pallid that this analysis is of very little benefit to age discrimination claimants.<sup>75</sup> Preferences accorded to older people, while denied to younger workers, do not offend the statute.<sup>76</sup> Jury trials are, and always have been, available under the Act.<sup>77</sup> By reason of the Act's applicability only to employers with 20 or more employees, individual wrongdoers – such as bigoted supervisors who actually make the discriminatory decisions at issue – cannot themselves be held liable.<sup>78</sup> Relief from the statutes of limitations embodied in the Act for filing charges of discrimination with the federal enforcement agency, the Equal Employment Opportunity Commission (EEOC), and for filing lawsuits will be allowed by the courts only for persuasive equitable reasons.<sup>79</sup> The primary purpose of relief under the statute is to make the wronged plaintiff whole, i.e., to put her in the position she would have been in had the wrong never occurred.<sup>80</sup> Punitive damages (i.e., damages to punish the wrongdoer to an extent beyond just making the wronged plaintiff whole)<sup>81</sup> and compensatory damages (i.e., damages

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<sup>73</sup> “[E]very U.S. Circuit Court has embraced the prima facie case formulation devised in McDonnell Douglas as being applicable to ADEA-based claims.” 2 AGE DISCRIMINATION § 7:3, *supra* n. 42, at 7-22 (footnote omitted).

<sup>74</sup> 544 U.S. 225 (2005).

<sup>75</sup> *Infra* nn. 139 - 142 and accompanying text.

<sup>76</sup> *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004); *see generally* 1 AGE DISCRIMINATION, *supra* n. 42, at § 4.14.

<sup>77</sup> 29 U.S.C. § 626(c)(2) (2000).

<sup>78</sup> *See, e.g., Medina v. Ramsey Steel Co., Inc.*, 238 F.3d 674 (5th Cir. 2001); *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50, 52 n.2 (7th Cir. 1995); *Smith v. Lomax*, 45 F.3d 402, 403n. 4 (11th Cir. 1995); *see generally* 1 AGE DISCRIMINATION, *supra* n. 42, at § 3:27.

<sup>79</sup> *See generally* 1 AGE DISCRIMINATION, *supra* n. 42, at § 6:31.

<sup>80</sup> *See, e.g., Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1212 (7th Cir. 1989); *Hansard v. Pepsi-Cola Metropolitan Bottling Co., Inc.*, 865 F.2d 1461, 1469 (5th Cir. 1989); *Rodriguez v. Taylor*, 569 F.2d 1231, 1238 (3rd Cir. 1977); *see generally* 2 AGE DISCRIMINATION, *supra* n. 42, at § 8.1.

<sup>81</sup> *See, e.g., Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143 (2nd Cir.

for pain and suffering)<sup>82</sup> are not recoverable under the ADEA. Finally, just as hostile environment sexual harassment violates Title VII,<sup>83</sup> so does hostile environment age harassment violate the ADEA.<sup>84</sup>

More generally, the case law reveals that age discrimination is a very difficult phenomenon to prove. Most plaintiffs who get to court lose.<sup>85</sup> Certainly some of these adjudicated claims by aggrieved job applicants, employees, and former employees simply are meritless. But reason suggests that both plaintiffs and their attorneys (particularly attorneys who handle cases on a contingent fee basis) are not going to invest much time and considerable amounts of money in pursuing claims that are hands-down baseless. Still, plaintiffs rarely prevail. Granted, employment cases classically involve two disputed versions of 'truth,' with the judge or occasional jury<sup>86</sup> being called upon to sift through conflicting evidence about events and decisions that they themselves of course did not witness

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1984); *Kolb v. Goldring, Inc.*, 694 F.2d 869, 872 (1st Cir. 1982); *Murphy v. American Motors Sales Corp.*, 570 F.2d 1226 (5th Cir. 1978); see generally 2 AGE DISCRIMINATION, *supra* n. 42, at § 8:42. But see note 183 *infra* regarding liquidated damages.

<sup>82</sup> See, e.g., *Pfeiffer v. Essex Wire Co.*, 682 F.2d 684 (7th Cir. 1982); *Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806 (8th Cir. 1982); *Naton v. Bank of California*, 649 F.2d 691 (9th Cir. 1981); see generally 2 AGE DISCRIMINATION, *supra* n. 42, at §§ 8:39 - 8:41.

<sup>83</sup> See *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

<sup>84</sup> See, e.g., *Young v. Will County Dept. of Public Aid*, 882 F.2d 290 (7th Cir. 1989); *Spence v. Maryland Cas. Co.*, 803 F. Supp. 649 (W.D.N.Y. 1992), *aff'd*, 995 F.2d 1147 (2d Cir. 1993).

<sup>85</sup> See *The Age Discrimination in Employment Act at Thirty*, *supra* n. 14; see also *infra* n. 97. The data regarding wins and losses are not very instructive because no doubt many valid claims of discrimination are settled by means of confidential agreements, and so they never wind up in court and thus never generate reported opinions that commentators can review and include in statistical data bases. See William J. Howard, *Arbitrating Claims of Employment Discrimination*, 50 Dis. Res. J. 40, at 43 - 44 (Oct. - Dec. 1995).

<sup>86</sup> There are some data that support the general notion subscribed to by the management bar that juries in ADEA cases (as opposed to those in other types of discrimination cases not involving older claimants) are particularly sympathetic to plaintiffs. See *The Age Discrimination in Employment Act at Thirty*, *supra* n. 14, at 655 - 656.

firsthand.<sup>87</sup> But this of course is nothing unique – in every case, no matter its nature, the judge and/or jury will not have firsthand knowledge of the events that culminated in a lawsuit. So the explanation must lie elsewhere. Whatever that explanation may be, certainly the statistics show that in the employment arena plaintiffs who wind up in court – both those invoking the ADEA and those seeking redress under Title VII – fare poorly.<sup>88</sup>

Whether because of the fact that the data show that the large majority of age discrimination grievants who actually litigate their claims lose, or because age bias is particularly resistant to legal attack, age discrimination in the workplace persists. Before addressing the data confirming this, and before examining some of the underlying beliefs and factors that are operative in sustaining age bias, a more positive note must be sounded. Despite the weaknesses of the ADEA, it nonetheless is on balance a legal lever that no doubt has had some salutary deterrent force. Logic as well as a sense of the legal lay of the land, so to speak, support the conclusion that age discrimination in the workplace – at least its blatant manifestations – indeed has diminished over the past several decades following enactment of the federal age discrimination statute and the enactment,

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<sup>87</sup> Actually, a major portion of ADEA cases are decided at the summary judgment stage; very few go to trial. See *The Age Discrimination in Employment Act at Thirty*, *supra* n. 14, at 637 - 639; see generally Lee Reeves, *Pragmatism Over Politics: Recent Trends in Lower Court Employment Discrimination Jurisprudence*, 73 Mo. L. Rev. 481, 551 - 555 (2008). Indeed, the heavy reliance on disposition by means of summary judgment in employment discrimination cases generally has been decried by several commentators. See, e.g., Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 23 B.C. L. Rev. 2034 (1993); Michael J. Zimmer, *Slicing and Dicing of Individual Disparate Treatment Law*, 61 La. L. Rev. 577 (2001); Michael Selmi, *Why are Employment Discrimination Cases So Hard to Win?*, 61 La. L. Rev. 555, 561 - 569 (2001). In that minority of cases in which plaintiffs survive the defendants' motions for summary judgment, typically the defendants will then be powerfully motivated to settle – so the general understanding is, at least – because of defendants' fear of juries being particularly sympathetic to ADEA plaintiffs. *Supra* n. 86.

<sup>88</sup> See Kevin Clermont, Theodore Eisenberg, and Stewart J. Schwab, *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 Employee Rights & Empl. Policy J. 547 (2003); Howard Eglit, *The Age Discrimination in Employment Act at Thirty*, *supra* n. 14, at 645 - 664; see also note 97 *infra*.



as well, of its state statutory analogues.<sup>89</sup> Some empirical data also support this conclusion.<sup>90</sup>

### B. *The Continuing Prevalence of Age Discrimination in the Workplace*

It is a commonplace to identify the United States as being blessed (or cursed) with a populace having a strong bent for resolving disputes by going to court. In fact, this perception of American society as being particularly litigious is itself a matter of dispute.<sup>91</sup> In any event, while the ADEA authorizes the Equal Employment

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<sup>89</sup> As to state anti-discrimination laws, see notes 172 – 175 *infra* and accompanying text.

<sup>90</sup> See David Neumark and Wendy A. Stock, *Age Discrimination Laws and Labor Market Efficiency*, 107 J. of Political Econ. 1081 (1999). As later described by Professor Neumark, the study discussed in this 1999 publication supported, on the one hand, the pallid conclusion that “federal and state age discrimination laws boost employment rates of the entire group of protected workers, but only slightly.” David Neumark, *The Age Discrimination in Employment Act: A Retrospective and Prospective Assessment* 14 (2008) (paper on file with author of the instant article). But, as Professor Neumark further reported, “the employment rates of protected workers aged 60 and over were increased substantially (by about 6 percentage points).” *Id.* Accord Scott J. Adams, *Age Discrimination Legislation and the Employment of Older Workers*, 11 Lab. Econ. 219 (2004).

But see Joanna N. Lahey, *How Do Age Discrimination Laws Affect Older Workers?*, Center for Retirement Research, Boston College (Oct. 2006). Ms. Lahey maintains that the ADEA may provide some benefit to older men who want to remain in their jobs and are able to rely on the Act to stave off undesired terminations. But in her view the statute has harmed older job applicants because it has made employers reluctant to hire such individuals, apparently (although she does not really explore this matter) for fear that such newly hired employees would be difficult to discharge if they did not work out as hoped. See also Richard A. Posner, *AGING AND OLD AGE* 329 (1995). The persuasiveness of Lahey’s data has been disputed, even while her critic did not reject the logical conclusion that the ADEA may have negative consequences for older individuals seeking to be hired. See David Neumark, *supra*, at 16.

<sup>91</sup> Compare Patrick M. Garry, *A NATION OF ADVERSARIES: HOW THE LITIGATION EXPLOSION IS RESHAPING AMERICA* (1997) (supporting litigiousness stereotype); Walter K. Olson, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991) (*id.*) with Marc Galanter, *The Day After the Litigation Explosion*, 46 Md. L. Rev. 3 (1986) (disputing stereotype).

Opportunity Commission (EEOC) both to bring its own lawsuits and to sue on behalf of individuals who file charges of discrimination with the agency,<sup>92</sup> the great majority of cases that are litigated are brought by individual grievants on their own initiative seeking legal redress from allegedly biased employers.<sup>93</sup> Of course, the hope has been – and it no doubt has been realized in some measure – that employers voluntarily will clean up their acts, so to speak, and thereby through their own actions remove operative age bias from their companies and factories.

Clearly, however, the American workplace is not yet discrimination-free. This arguably is evidenced, for one, by the thousands of age discrimination charges of discrimination annually filed with the federal agency charged with administering the ADEA – the EEOC.<sup>94</sup> These filings are statutorily required as a predicate to grievants ultimately seek judicial relief.<sup>95</sup> In theory the EEOC charge should spur the allegedly discriminatory employer to cease its wrongdoing and to provide relief, be it reinstatement or better working conditions or whatever, for the complainant, without her having to actually proceed on to the expensive and time-consuming task of suing in court. And in some instances such action on the part of the employer no doubt occurs. However, in many instances the EEOC filings turn out to be largely matters of ritual; they rarely result

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<sup>92</sup> 29 U.S.C. § 626(b) (2000); see generally 1 AGE DISCRIMINATION, *supra* n. 42, at §§ 6:60 - 6:64.

<sup>93</sup> The EEOC over the years has filed very few lawsuits. The statistics regarding ADEA law suit filings by the EEOC from FY 2000 on are as follows: FY2000 - 33; FY2001 - 42; FY2002 - 39; FY2003 - 27; FY2004 - 46; FY2005 - 44; FY2006 - 50; and FY2007 - 32. U.S. Equal Employment Opportunity Comm'n, *EEOC Litigation Statistics FY1997 through FY2007*, <http://www.eeoc.gov/stats/litigation/html> (Dec. 15, 2008). (The federal fiscal year runs from October 31 through the following September 30).

<sup>94</sup> See *The Age Discrimination in Employment Act at Thirty*, *supra* n. 14, at 669 n. 230. Over the past eight federal fiscal years (October 31 through the following September 30), ADEA filings with the EEOC have been as follows: FY 2001 - 17,405; FY 2002 - 19,921; FY 2003 - 19,124; FY 2004 - 17,837; FY 2005 - 16,585; FY 2006 - 16,548; FY 2007 - 19,103; and FY 2008 - 24,582. U.S. Equal Employment Opportunity Comm'n, *Charge Statistics FY 1997 Through FY 2007*, <http://eeoc.gov/stats/charges.html>. (Apr. 14, 2009).

<sup>95</sup> 29 U.S.C. § 633(b) (2000); see generally 1 AGE DISCRIMINATION, *supra* n. 42, at §§ 6:23 - 6:25.

in charging parties obtaining any kind of redress, either at the agency level or in court. Granted, many of these administrative charges lack legal merit, being filed by aggrieved employees and job applicants who erroneously believe themselves to be the victims of age discrimination or (to be cynical, but somewhat realistic) by individuals who know they do not have valid claims, but nonetheless hope to extract some sort of nuisance settlements from their allegedly discriminatory employers.<sup>96</sup> Moreover, even under the most generous characterization, these charges amount to no more than unproven allegations. Thus, they can at most be viewed only as *possible* indicators of wrongdoing. On the other hand – and this countervailing point merits particular emphasis, no doubt there are many people who indeed have valid claims but who do not file administrative charges with the EEOC, either because they are ignorant of their legal rights and/or because they do not have the courage or job security needed to risk challenging their employers and/or because they do not have the financial resources necessary to pursue their claims through to litigation and so they do not bother with the required predicate to suing, i.e., the charge of discrimination filed with, and processed by, the EEOC.

In sum, then, the numbers of charges annually filed with the EEOC – while noteworthy – do not really give an accurate picture as to the extent of ageism in the workplace. They may provide the observer with bases both for overstating the incidence of age bias as well as understating it.

A second piece of empirical data that perhaps more persuasively supports the conclusion that age bias continues to infest some American workplaces are the numerous cases decided every year by American courts. While it is true that in the majority of these

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<sup>96</sup> The EEOC very rarely makes a determination that there is reasonable cause to believe a violation has occurred. The statistics for FY2000 and on are as follows: FY2000 - 8.2%; FY2001 - 8.2%; FY2002 - 4.3%; FY2003 - 3.2%; FY2004 - 3.3%; FY2005 - 4.1%; FY2006 - 4.3%; FY2007 - 3.9%; and FY2008 - 3.2%. U.S. Equal Employment Opportunity Comm'n, *Age Discrimination in Employment Act . . . FY 1997 - FY 2008*, <http://www.eeoc.gov/stats/adea.html> (Apr. 14, 2009). One perhaps might question whether these meager numbers accurately reflect the actual merits of the charges filed or whether they in some measure, at least, reflect inadequate EEOC investigations and/or the hostility of a given Administration to ADEA claimants.

cases the complainants, i.e., the people claiming to be the victims of violations of the ADEA lose, there are some plaintiffs each year who do prevail.<sup>97</sup> More importantly, no doubt there are grievants with

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<sup>97</sup> See generally *The Age Discrimination in Employment Act at Thirty*, note 14 *supra*, at 645 - 662; see also Richard A. Posner, OLD AGE AND AGING 331 (1995).

Specific data regarding the success or lack thereof of ADEA complainants who wind up actually litigating is not readily available, apart from the reviews of specific years addressed in the foregoing two sources, nor are the data available as to why the success rate is, to the extent one has data, apparently so low.

Other compilations of statistical data that exist are not helpful because they do not separate out ADEA cases from other employment discrimination rulings arising under other related statutes, most prominently Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e - 2000e-17, the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*, discussed *infra* at notes 192 - 196 and accompanying text. During the 17-year period running from 1990 through 2006, "civil rights" suits filed in federal courts by private complainants (including ADEA plaintiffs) claiming to be victims of discrimination in employment, housing, welfare, voting, and other contexts increased from 18,922 in 1990 to a high of 43,278 in 1997; by 2006 the total had fallen from the 1997 high down to 30,405. U.S. Dept. Of Justice, Bureau of Justices Statistics, *Civil Rights Complaints in U.S. District Courts, 1990 - 2006* at 1, 4 (Aug. 2008). During this 17-year period, civil rights cases involving employment discrimination (of which the ADEA complaints made up an unidentified portion) constituted about half of the filings. *Id.* at 2. Of the total group of civil rights cases (of which only a portion, as noted above, were employment cases), the percent of cases that produced a judgment, as opposed to those that were settled or dismissed, ranged from a high of 33.8% in 1990 to a low of 25.3% in 2003, back up to 28% in 2006. *Id.* at 5, Table 4. While the data do provide some breakdown as to the bases for dismissals, the data only distinguish between dismissals because of settlement, voluntary dismissals, cases dismissed for lack of jurisdiction and for want of prosecution, and a category designated as "Other." *Id.* Thus, there is no way of gleaning any insight from these data as to the judges' perceptions of the merits of the claims. Of the total of civil rights cases not dismissed, a small percentage went to trial – a maximum of 7.6% in 1990, ranging down to a low of 2.9% in 2004, and slightly up to 3% in 2006. *Id.* Of the 15,950 employment cases disposed of in 2006, 3.2% were concluded by a trial. *Id.* at 6, Table 5. (In the employment discrimination cases that went to trial, the percentage involving a jury increased from 40% in 1990 to 86% in 2006. *Id.*) Of that small percentage of civil rights cases that were terminated by trial, plaintiffs (and that means not just plaintiffs under the ADEA), won about one-third of the time. *Id.*

In sum, these numbers really provide very little enlightenment as to ADEA cases, in particular. The same unfortunately is true of other sources. See e.g., Kevin M. Clermont, Theodore Eisenberg, and Stewart J. Schwab, *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7

meritorious claims who secure settlements before they ever actually litigate their claims or in some instances before they even file administrative complaints with the EEOC, although their numbers are unknowable to outside observers because confidentiality clauses are standard aspects of such settlements.<sup>98</sup>

Anecdotal evidence also supports the continuing prevalence of age bias in the workplace, as do – more importantly – formal (albeit somewhat dated) studies of workplace events:

[A] study published in 1993 by the Fair Employment Council of Greater Washington, Inc., relied upon a testing methodology whereby pairs of resumes – one for a hypothetical fifty-seven-year old and the other for a hypothetical thirty-two-year-old – were mailed to a random sample of 775 large firm and employment agencies nationwide. Even though the fictional job applicants' resumes set forth equal qualifications, the favorable response rate for older job seekers was 25.6% less than it was for the younger individuals in those instances where the companies actually had job vacancies. In similar vein, it was . . . reported in a [1996] popular journal, *Money Magazine*, that “[n]early five out of 10 executive search firms say that age is a ‘significant and negative factor’ to companies looking at job candidates ages 40 to 50, according to a 1996 survey by Exec-U-Net, a networking group for executives.”<sup>99</sup>

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Employee Rights and Employ. Policy J. 547 (2003); Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 Geo. L. J. 1567, 1588 (1989) (reporting a 22.2% success rate by plaintiffs in employment discrimination cases).

<sup>98</sup> See William J. Howard, *Arbitrating Claims of Employment Discrimination*, *supra* n. 85, at 43 - 44.

<sup>99</sup> *The Age Discrimination in Employment Act at Thirty*, *supra* n. 14, at 670; see also American Assn. of Retired Persons, BUSINESS AND OLDER WORKERS 20 (1989); The Commonwealth Fund, THE UNTAPPED RESOURCE, THE FINAL REPORT OF THE AMERICANS OVER 55 AT WORK PROGRAM 50 (1993); Marc Bendick, Jr., Charles W. Jackson, and J. Horacio Romero, *Employment Discrimination Against*

C. *The Forces Animating Age Bias in the Workplace, and the ADEA Responses*

What accounts for age bias in the workplace? The orthodox wisdom disclaims the hatred, malevolence, and evil-mindedness that so often accompany the archetypal biases – racism, xenophobia, and religious fanaticism. Rather, more benign forces generate rejection of older men and women (even those in their 40's) as being “too old.” Indeed, this was pointed out in the earlier-noted 1965 report of the United States Secretary of Labor:

[W]e find no significant evidence of . . . the kind of dislike or intolerance that sometimes exists in the case of race, color, religion, or national origin, and which is based on considerations entirely unrelated to ability to perform a job.

We do find substantial evidence of . . . discrimination based on unsupported general assumptions about the effect of age on ability . . . in hiring practices that take the form of specific age limits applied to older workers as a group.

We find that . . . [with regard to] decisions made about aging and the ability to perform in individual cases, there may or may not be arbitrary discrimination on the basis of age, depending on the individual circumstances.<sup>100</sup>

In sum, age-based decisions made by, and actions perpetrated by, employers supposedly are not the consequence of evil motivation,<sup>101</sup>

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*Older Workers: An Experimental Study of Hiring Practices*, 8(4) J. of Aging & Social Policy 25 (1996); B. Rosen and T.H. Jerdee, *THE PERSISTENCE OF AGE AND SEX STEREOTYPES IN THE 1990S: THE INFLUENCE OF AGE AND GENDER IN MANAGEMENT DECISION MAKING* (1995); Phillip Taylor and Alan Walker, *The ageing workforce: Employers' attitudes towards older people*, 4 Work, Empl. & Socy. 569 (1994).

<sup>100</sup> SECRETARY OF LABOR REPORT, *supra* n. 7, at 5.

<sup>101</sup> While active age-based hatred no doubt is rarely implicated in interactions between older and younger individuals, whether in the workplace or in other

but rather are grounded – at least in good measure – on assumptions about the compromised abilities of older workers to perform. The bases for these assumptions require analysis.

### 1. *Older Workers' Ability to Perform*

Certainly a particularly common basis for negative decisions vis-a-vis older workers is the perception that these older individuals cannot adequately perform the jobs at issue. While there indeed are some correlations between older age and diminished job performance, the data must be assessed with caution. For one, despite general information about older workers as a group, the facts are that the individuals who make up that group vary both as to how each of them ages and how each adapts to aging. Thus, any generalization about *all* 65-year-olds is highly dubious as applied to any particular 65-year-old.

Second, the data – even as applied to older workers as a group – are mixed:

[D]epending upon whom one looks to, the data may be characterized as either unpersuasive or at the least ambiguous. Expressing the former view are two analysts who, having conducted a meta-analysis of the literature, concluded that there is very little by way of a meaningful relationship between age and job performance:

The relationship between age and job performance has long been of interest to

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settings, the relationships between younger and older people are not necessarily always harmonious. Typically, however, some other animating force or issue other than age itself will be involved. For example, parents and adult children may argue bitterly and often, and they may even be totally estranged, but the operative forces here will not turn on age, but rather on family interactions. Or as discussed in the text, older workers may suffer at the hands of discriminatory employer decisions because of employer misperceptions about the ability of older men and women to perform the job. Still and all, there are going to be *some* instances when there simply is outright dislike of old people. As to the generative forces for such unadorned dislike, *see* ELDERS ON TRIAL, *supra* n. 1, at 23 - 55.

psychologists and industrial gerontologists . . . More recent studies either empirically evaluated the relationship using very large samples of data . . . or employed meta-analysis to integrate empirically the findings of many smaller studies. . . .

Collectively, these studies, which include more than 60,000 subjects, reveal an exceedingly weak relationship between age and performance. While this observation may be counter-intuitive, the large numbers of individuals on which the studies are based and the consistency of the results across reviews allow one to place substantial confidence in it.<sup>102</sup>

Third, while there undeniably are health-related changes that correlate with advancing age, it is not clear that these age-related health factors adversely affect job performance.<sup>103</sup> In fact, a number of studies have shown a non-significant relationship.<sup>104</sup> Some studies actually show improved worker performance on the part of certain older employees, i.e., clerical workers and salespersons, both in terms of accuracy and steadiness of work output.<sup>105</sup> "Human resource managers typically give older workers high marks for their work ethic, collegiality, loyalty, and reliability in a crisis. . . ."<sup>106</sup> Older workers are also thought to bring another asset to the workplace –

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<sup>102</sup> *The Age Discrimination in Employment Act at Thirty*, *supra* n. 14, at 678 - 679, quoting Harvey L. Sterns and Michael A. McDaniel, *Job Performance and the Older Worker*, in *OLDER WORKERS: HOW DO THEY MEASURE UP? AN OVERVIEW OF AGE DIFFERENCES IN EMPLOYEE COSTS AND PERFORMANCES* 27, 29 (Sara E. Rix, ed. 1994).

<sup>103</sup> As to the possibility of seeking redress under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 (2000) *et seq.*, see notes 192 - 196 and accompanying text *infra*.

<sup>104</sup> Monroe Berkowitz, *Functioning Ability and Job Performance as Workers Age*, in *THE OLDER WORKER* 87, 105 - 106 (Michael E. Borus, Herbert S. Parnes, and Steven H. Sandell, eds. 1988) [hereinafter *THE OLDER WORKER*].

<sup>105</sup> *Id.*

<sup>106</sup> *WORKING LONGER*, *supra* n. 29, at 94 - 95.



their experience. But while this is no doubt true to some degree, “[t]he economic value of experience . . . tends to erode over time.”<sup>107</sup> Moreover, there are studies revealing a correlation between declining performance and advancing age for individuals in some occupations: printers, male production workers, factory workers, mail sorters, and air traffic controllers.<sup>108</sup>

Fourth, absenteeism is less of a problem for older workers than it is for younger ones. But the flipside of the evaluative coin is that this better performance of oldsters is offset by the fact that when absences occur for health-related reasons, older workers are off the job for longer periods of time than are younger ones.<sup>109</sup> But again, there is ambiguity. “Older workers are less ‘healthy’ than younger persons irrespective of how health is measured (e.g., by self-evaluations, by extent of disability, by functional limitations).”<sup>110</sup> Fifth, and in a somewhat related vein, while the frequency rate for accidents is lower for older workers than for younger ones, the data show a strong positive correlation between increased age and the greater severity of on-the-job accidents.<sup>111</sup> But the same commentators add, if “the question is whether the job performance of middle-aged and older workers suffers from these age-related health factors, the evidence is considerably less clear.”<sup>112</sup>

Of great significance, also, in understanding the phenomenon of ageism in the workplace are the matters of worker motivation and intellectual capacity. The general stereotypes that hold sway are that increasing age is particularly accompanied by intellectual decline, as well as by diminished enthusiasm and creativity. However, the empirical data to a considerable degree dispute these stereotypes – and that is particularly so with regard to the matter of intellectual decline. “The key finding in terms of intelligence is that age-related declines are minimal for many intellectual functions.”<sup>113</sup> Moreover,

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<sup>107</sup> *Id.* at 98.

<sup>108</sup> THE OLDER WORKER, *supra* n. 104, at 105 - 106.

<sup>109</sup> *Id.* at 106 - 107.

<sup>110</sup> Herbert S. Parnes and Steven H. Sandell, *Introduction and Overview*, in THE OLDER WORKER, *supra* n. 104, at 11.

<sup>111</sup> *Id.* at 107 - 108.

<sup>112</sup> *Id.*

<sup>113</sup> Dorothy Fleisher and Barbara H. Kaplan, *Characteristics of Older Workers: Implications for Restructuring Work*, in WORK AND RETIREMENT:

“[w]hat is important to keep in mind is that, in the absence of illness, age-related declines in memory [, which understandably are often relevant to job performance,] may indeed be slight and have minimal affect on performance.”<sup>114</sup> Learning ability, which often is related to successful work performance, is commonly thought to be a particular Achilles heel for older people. Again, the actual empirical data undermine in good measure the validity of the stereotypical view.<sup>115</sup>

Still, when all is said and done, the data – while undercutting the stereotype of decline – do not entirely debunk it.<sup>116</sup> Moreover, and also on this less positive note, there does seem to be some correlation between age and motivation: older workers are less motivated to perform well than are younger ones, although the causes for this are unclear, as is the answer to the question whether this phenomenon is inevitable or only situational.<sup>117</sup> In addition, and still on a less positive note, the authors of one study conclude that older workers exhibit diminished work effort and less than satisfactory relationships with co-workers and supervisors, the reason being that they believe themselves to have been thwarted in their ambitions for personal achievement and promotions to higher positions.<sup>118</sup>

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POLICY ISSUES 140, 151 (Pauline K. Ragan, ed. 1980).

<sup>114</sup> *Id.* at 152.

<sup>115</sup> *Id.* at 152 - 153; *see also* WORKING LONGER, *supra* n. 29, at 96.

<sup>116</sup> *See, e.g.*, WORKING LONGER, *supra* n. 29, at 95 - 96.

<sup>117</sup> Dorothy Fleisher and Barbara H. Kaplan, *Characteristics of Older Workers: Implications for Restructuring Work*, note 111 *supra* at 153 - 155. Some explanations can be ventured. The older worker is aware that he has relatively few years remaining before he retires and thus he has less incentive to shine, since given his short remaining tenure his chances for merit-based promotion are limited, as well as are likely opportunities for lateral moves to equivalent or better jobs with other employers. In addition, the older worker is less likely than his younger counterpart to be caught up in the notion that his identity and worth are dependent upon the luster of his employer's reputation, and so he has less drive to excel than does the younger employee, who believes that his own star will rise as the reputation of the organization with which he is associated improves. Third, the older worker is more confident and self-assured than the inexperienced employee, and so he is less likely to be driven to seek the prestige that comes with elevated positions, which in turn come with working harder and for longer hours.

<sup>118</sup> Timothy A. Judge, *et al.*, *Employee Age as a Moderator of the Relationship between Ambition and Work Role Affect*, Working Paper 20, Center for Advanced Human Resource Studies, Cornell Univ. (1994).

In sum, negative stereotypes regarding decline and lack of initiative no doubt are powerful impetuses for the adverse treatment accorded to some older men and women who are in, or are seeking to re-enter, the employed work force. And while these stereotypes – like most – are flawed, they still – like most stereotypes – are based on some degree of truth. Given some data establishing some declines in functional ability and advancing age, plus data regarding the longer, albeit rarer, absences from the job experienced by older workers, plus data showing the greater severity of on-the-job accidents suffered by older workers, plus data regarding diminished motivation, there is some warrant for the conclusion that “[t]here would seem to be some basis, of a statistical nature, for discrimination. . . .”<sup>119</sup> And yet, the data are not so compelling as to justify wholesale exclusion or even uniform denigration of all older men and women as being unsuited for the workplace. Indeed, it has been opined by two astute students of workplace issues that “on the whole, employers are reasonably comfortable with the productivity compensation trade-off for employees aged 55 and over.”<sup>120</sup> In other words, these employers feel that they are getting their money’s worth from their older employees.<sup>121</sup> The key, it would seem, for those employers who are attentive to improving the lot of older workers – whether because these employers are innately beneficent or are driven by legal concerns, i.e., liability imposed for violations of anti-discrimination laws, or both – is to work with the assets older workers bring to the workplace and to adopt policies and practices that mitigate the impact of the deficits.

A cautionary note *is* due here, however: implicit in the foregoing admonition about looking to the assets older workers bring to the workplace, and explicit in the statutes and case law that have developed in the United States, is the entirely appropriate proposition that employers are in no way required to hire, retain, or promote people who are not able to do the job at issue. In other words,

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<sup>119</sup> THE OLDER WORKER, *supra* n. 104, at 110.

<sup>120</sup> WORKING LONGER, *supra* n. 29, at 105.

<sup>121</sup> But the same analysts caution that the fact “[t]hat employers are comfortable with their older employees and are less likely to displace them does not mean they are keen on retaining employees past their traditional retirement age.” *Id.*

rejection of age bias does not require acceptance of inadequacy or incompetence. The difficulty, of course, arises when in the context of a dispute between a grievant and an employer, one must determine whether it was either the individual's alleged lack of ability or the employer's alleged age animus that most accurately explains the employer's decision. It is the tension between these two typical polar rationales, and the difficulty that outside, after-the-fact observers – i.e., government enforcement agency personnel, lawyers, judges, and jurors – have in second-guessing employment decisions, that make for the voluminous body of judicial rulings addressing the ADEA.

## 2. *Older Workers and Employer Costs*

### a. *Benefits*

A major factor that accounts for employer antipathy (or at least discomfort) regarding older workers is the matter of cost. Unlike Western European countries, the United States does not provide governmentally-funded health programs for the general population; rather, it is customary for health insurance to be a job benefit, paid for in whole or, more commonly, in part by the employer. Because health care costs have been expanding enormously year after year in the United States,<sup>122</sup> and because health

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<sup>122</sup> National health spending grew in 2007 at the lowest rate in nine years, but mainly because prescription drug spending increased at the slowest pace since 1963, the government reported Monday.

But other types of health spending rose at a brisk pace, pushing the total to \$2.2 trillion, or 16.2 percent of the gross domestic product, a record. Spending averaged \$7,241 for each person. Total health spending rose 6.1 percent, compared with a 6.7 percent increase in 2006. . . .

Spending on hospital care rose 7.3 percent in 2007, to \$696.5 billion. . . .

Spending for doctors' services rose 5.9 percent in 2007, to \$393.8 billion. . . .

Out-of-pocket spending on health care increased 5.3 percent in 2007, to \$268.6 billion. . . .

insurance costs accordingly have become an increasingly large expense for employers, it is understandable that employers may find older employees to be increasingly less attractive in purely financial terms.<sup>123</sup> It has been asserted (without a breakdown as between men and women), that “[t]he 2003 cost of insuring workers in their early 60s was \$7,600, which was \$3,500 more than the cost of insuring workers twenty years younger.”<sup>124</sup>

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York Times, p. A17 (Jan. 6, 2009).

<sup>123</sup> See American Assn. of Retired Persons, *BUSINESS AND OLDER WORKERS* 16 - 17 (1989). Actually, in another study commissioned by the same organization, now known simply by the acronym AARP, the issue of health insurance costs was found to be of low-level concern at best:

[A]lthough many managers mentioned the cost of health care as being a major component of employment costs, few had strong opinions on whether these costs were significantly higher for older workers. Several noted that the additional costs for insuring an older worker would be partially offset by the fact that an older employee may not have dependents on his or her policy. Notably, some managers, especially those in larger companies, explained that they were relatively unconcerned about these costs, because the costs would not be incurred by their division or department, but would rather be absorbed into the company’s general overhead. Thus, age-related differences in health care costs were seen as a companywide issue, as opposed to a concern specific to an individual manager’s operating group.

Managers’ relative lack of opinion on and indifference to the issue of higher health care costs for older workers stands in contrast to the findings of other large surveys . . . which found that human resource managers believed that older workers had significantly higher health care costs and that rising health care costs were a major human resource concern. Other studies . . . have concluded that, in general, health care costs increase with age for working men and women, although [in one study the researchers] have shown in one corporate setting that self-selection by healthy older people to remain in the work force and the potential lack of dependents may offset age-related differences in health care costs otherwise expected.

VALUING OLDER WORKERS – A STUDY OF COSTS AND PRODUCTIVITY 10 (n.d.) (citations and footnote omitted).

<sup>124</sup> WORKING LONGER, *supra* n. 29, at 103.

More specifically, the data establish that the health insurance costs associated with older male workers are considerably higher than those generated by younger male workers, reflecting the fact that older males utilize health care more extensively than do their younger counterparts:

[In a 1993 report it was estimated] that in 1994 the average employer cost of insured males between the ages of 55 and 64 [would] be \$3,960 [,] compared to \$1,500 for workers 25 to 34. As a percentage of earnings, the health cost for the older male workers . . . [was expected to] be 14.5 percent, while employer expenditures for the younger male workers . . . [were] expected to be only 6.1 percent of salary.<sup>125</sup>

The data regarding women are more ambiguous. One model, when applied, showed a steady correlation between increasing age and increasing health insurance costs for women, as well as men.<sup>126</sup> But some experts have estimated that the cost of insuring women workers ages 55 to 64 are, or should be, less than for those ages 35 to 54.<sup>127</sup>

While not providing a solution for the higher overall insurance costs an employer may confront in paying for a group policy, particularly when a considerable percentage of its work force is older, the ADEA does ameliorate to some degree the consequence of the age/insurance cost correlation by means of an *equal cost/equal benefit* principle embodied in the Act.<sup>128</sup> By virtue of this provision, an employer will be insulated from liability for engaging in discrimination as long as it spends the same amount on health insurance coverage for each of its employees, even if that expenditure purchases less coverage for an older employee as contrasted with a younger one.<sup>129</sup>

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<sup>125</sup> Robert L. Clark, *Employment Costs and the Older Worker*, in *OLDER WORKERS: HOW DO THEY MEASURE UP? AN OVERVIEW OF AGE DIFFERENCES IN EMPLOYEE COSTS AND PERFORMANCES* 1, 17 (Sara E. Rix ed., 1994).

<sup>126</sup> *Id.* at 16.

<sup>127</sup> *Id.* at 17.

<sup>128</sup> 29 U.S.C. § 623(f)(2)(B)(I) (2000).

<sup>129</sup> Insofar as health insurance costs for retirees are concerned, the fact is that employers are not legally required to provide any such benefit. The Equal

Pension costs arising out of defined benefit plans also may put older workers at a competitive disadvantage, although decreasingly so. Under these plans the employer promises to pay its workers a specific amount in retirement benefits, which typically are computed according to formulae based on some combination of the retiree's length of service and his final salary, or the average of his last three

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Employment Opportunity Commission (EEOC) initially proposed a regulation in 2003 which would allow employers that did provide such coverage to terminate it without running afoul of the ADEA once an employee became eligible for Medicare coverage or a State-sponsored retiree health benefits program. The need for this regulation flowed from a couple of factors. First, health insurance coverage was, and is expensive. Second, many people retire prior to age 65, when Medicare eligibility arises, and a number of employers commonly provide as a benefit for such retirees bridge coverage, that is, the employer pays (in whole or part) for the former employee's health insurance until the retiree becomes eligible for Medicare. However, the ADEA creates a problem, as the EEOC explained:

[As a result of a 2001 federal district court decision, *Erie County Retirees Ass'n v County of Erie*, 140 F. Supp.2d 466 (W.D. Pa. 2001),] . . . an employer who voluntarily provides its pre-age 65 retirees with a bridge to Medicare (with the intent to terminate all employer-sponsored retiree coverage at that time) can do so without ADEA implications only if the benefits provided by the bridge coverage are either the same as or less generous than those provided by Medicare. Stated otherwise, in every instance where employer-provided bridge coverage exceeds Medicare coverage, the employer would be prevented by the ADEA from ending its coverage when retirees become eligible for Medicare [since this would constitute a negative action based on age from the perspective of the Medicare-eligible retirees, whose benefit coverage would decrease]. The Commission is concerned that many employers will respond to this outcome, given the dramatic cost increases for retiree health benefits, not by incurring additional costs for retiree benefits that supplement Medicare, but rather by reducing or eliminating health coverage for retirees who are not yet eligible for Medicare.

Equal Employment Opportunity Comm'n, *Age Discrimination in Employment Act; Retiree Health Benefits, Notice of proposed rulemaking*, 68 Fed. Reg. 41, 542, 41, 546 (July 14, 2003).

The proposed regulation was challenged by AARP; it ultimately was upheld as being within the authority of the EEOC to issue in *American Association of Retired Persons v. Equal Employment Opportunity Comm'n*, 489 F.3d 558 (3rd Cir. 2007), *cert. denied*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 1733 (2008).

or so years of salary prior to retirement. Under defined contribution plans, which today are far more common, the employer promises to contribute a specified periodic amount to the employee's pension plan, but it makes no promise as to what the final payout will be. Since, as discussed in the next subsection, older workers in many workplaces will receive higher salaries than their younger, more recently hired counterparts do, the amount of fixed pension benefits in the case of defined benefit plans for which the employer will be responsible can be reduced if senior workers are removed before their salaries inflate significantly. However, these plans are understandably becoming increasingly rare,<sup>130</sup> given their potential and actual negative financial ramifications for employers, and therefore are of lesser significance in this discussion. As for defined contribution plans, the equal cost/equal benefit principle discussed above applies here, so that the employer does not face liability as a result of differing pension pay-outs, so long as the employer contributes the same amount for both younger and older employees' pensions. Thus, the pension issue should not create any incentive for terminating, or refusing to hire, older workers in defined benefit plan workplaces. Otherwise, the ADEA addresses pension issues in a number of ways,<sup>131</sup> but again, pension costs do not provide a legitimate basis for concluding that the pension costs for older workers exceed those attributable younger workers.

### *b. Salary Costs*

Salary can be a particularly important factor in inclining employers to look with disfavor on older employees. Salary typically increases with time on the job. As a general matter a given 60-year-old worker – at least one who is not a new hire – will have been

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<sup>130</sup> See David Neumark, *The Age Discrimination in Employment Act: A Retrospective and Prospective Assessment* 20 (2008) (paper on file with the author), citing Leora Friedberg and Anthony Webb, *Retirement and the Evolution of Pension Structure*, NBER [National Bureau of Economic Research] Working Paper No. 9999 (2003); Leslie E. Papke, *Quantifying the Substitution of 401(k) Plans for Defined Benefit Plans: Evidence from Ongoing Employers*, National Tax Association 89<sup>th</sup> Annual Conference on Taxation 136 (1997); see also U.S. Bureau of Labor Statistics, *OLDER WORKERS* 8, [www.bls.gov/spotlight](http://www.bls.gov/spotlight) (July, 2008).

<sup>131</sup> See 1 AGE DISCRIMINATION, *supra* n. 42, at §§ 5:38 - 5:43.



employed with a given employer for a longer period of time than will have been her 30-year-old colleague. It therefore follows that in a workplace where wages are not strictly keyed solely to the job performed, no matter who is performing it, this 60-year-old will be earning more than her younger counterpart, even if the two are performing the same functions in the workplace.<sup>132</sup> It thus makes basic economic sense for employers to discard older, highly paid senior employees – particularly when their work product can be matched with no loss of quality or quantity by the less senior (and therefore likely younger) replacements.

The statutory language and the case law have joined together to make discharge based on salary by the cost-focused employer looking to reduce overhead perfectly legal – at least so long as it really is salary, and not age, which motivates the employer. More specifically, the ADEA allows an employer to act on the basis of “reasonable factors other than age,”<sup>133</sup> and so despite the typical positive correlation between older age and higher salary, a dismissal justified in the name of saving money by getting rid of more costly employees – a reasonable factor other than age – will not transgress the statute’s prohibition of age discrimination, even if most or all of the higher paid people who are discharged also happen to be the older people in the employer’s work force.

At one time, the foregoing conclusion was not so inevitable; some courts were willing to utilize an ‘age proxy’ analysis, whereby they would find a violation of the statute if a factor closely correlated with age (such as high salary) was utilized by an employer as a substitute, or proxy, for age itself. However, the viability of this mode of analysis was laid to rest by the United States Supreme Court in 1993 in *Hazen Paper Co. v. Biggins*.<sup>134</sup> This case involved a 62-year-old man who was discharged just weeks before his pension would have vested (that is, he would have had a legally protected guarantee of receiving that pension upon retirement) pursuant to the terms of the company plan, which provided for vesting upon the

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<sup>132</sup> See Rachel Floersheim Boaz, *The 1983 Amendments to the Social Security Act: Will They Delay Retirement? A Summary of the Evidence*, 27 *Gerontologist* 151, 154 (1987).

<sup>133</sup> 29 U.S.C. § 623(f)(1) (2000).

<sup>134</sup> 507 U.S. 604 (1993).

completion of ten years of employment with the company. Since seniority – that is, ten years on the job – correlated with age (after all, a 25-year-old would not have accumulated ten years of employment with the company), there was – according to the lower courts – a legally significant correlation between age and pension vesting, and so the company’s firing of Biggins to avoid the vesting of the pension was tantamount to discrimination on the basis of age. The Supreme Court disagreed and in overturning the lower courts’ rulings for Biggins pretty much demolished age-proxy analysis:

Disparate [i.e., discriminatory] treatment [analysis] . . . captures the essence of what Congress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with age. . . .

When the employer’s decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is. . . . On average, an older employee has had more years in the work force than a younger employee, and thus may well have accumulated more years of service [– a factor which is typically correlated with pension eligibility –] with a particular employer. Yet an employee’s age is analytically distinct from his years of service. An employee who is younger than 40, and therefore outside the class of workers as defined by the ADEA . . . may have worked for a particular employer his entire career, while an older worker may have been newly hired. Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily “age-based.”<sup>135</sup>

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<sup>135</sup> *Id.* at 610 - 611.

Applying these insights, the Court concluded that Biggins was not the victim of age discrimination because “[t]he prohibited stereotype (‘Older employees are likely to be \_\_\_\_’) would not have figured in this decision, and the attendant stigma would not ensue. The decision would not be the result of an inaccurate and denigrating generalization about age.”<sup>136</sup>

The Supreme Court’s 2005 holding in *Smith v. City of Jackson*<sup>137</sup> that disparate impact (which is generally termed in European Union countries indirect discrimination) analysis applies in the ADEA context does not offer any support for a departure from the *Hazen Paper* distinction between age bias, on the one hand, and salary-based decision making on the other. Inasmuch as impact analysis has been a very controversial part of American discrimination law and because in theory it has (or had) the potential for being of significant benefit for victims of age bias, some further explanation is due. This entails first looking to the ADEA’s sister statute, Title VII of the Civil Rights Act of 1964.<sup>138</sup>

More than three decades ago the United States Supreme Court established that an employer can be found liable for having violated Title VII if it uses an ostensibly neutral policy or test that has a significantly adverse impact upon members of one of Title VII’s protected classes, i.e., persons defined in terms of race, color, national origin, religion, or sex. Thus, for example, if an employer utilizes a weight-lifting test as a criterion for deciding who to hire, and significantly more women than men fail the test, the employer may be held liable (if it fails to prove that the test is job-related and serves business necessity).<sup>139</sup> The fact that the employer was not at all motivated by discriminatory intent in establishing this weight-lifting requirement is irrelevant. In its seminal 1971 impact decision, *Griggs v. Duke Power Co.*,<sup>140</sup> the Court explained the rationale undergirding employer liability in a disparate impact situation:

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<sup>136</sup> *Id.* at 612.

<sup>137</sup> 544 U.S. 225 (2005).

<sup>138</sup> It is well established that Title VII precedents are of persuasive analogical guidance for ADEA courts. *See supra* n. 67.

<sup>139</sup> 42 U.S.C. § 2000e-2(k)(1)(A)(I) (2000).

<sup>140</sup> 401 U.S. 424 (1971).

The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to “freeze” the status quo of prior discriminatory employment practices.

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. . . The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.<sup>141</sup>

Now, turning to the age context, suppose that an employer has a policy of firing any employee once she attains sufficient tenure – let us say 25 years – to be eligible for a salary of \$100,000. Suppose, further, that this policy has a significant negative impact on older workers, since typically only older workers will have the requisite years on the job to have reached the \$100,000 salary level. While classic disparate impact analysis seemingly could lead to the conclusion that our hypothetical employer has utilized a legally impermissible policy because of its adverse impact on older employees, the *Smith* Court fashioned a reconstruction of impact analysis severely limiting the utility for plaintiffs of such analysis under the ADEA.<sup>142</sup> Pursuant to this analysis, the discharge of an

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<sup>141</sup> *Id.* at 429 - 431.

<sup>142</sup> The *Smith* Court held that the standards set forth in a 1989 Title VII ruling, *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), applied to disparate impact claims litigated under the ADEA. *Wards Cove*, a pro-employer ruling, was in part repudiated by the Congress fairly soon after its issuance by means of the Civil Right Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (Nov. 21, 1991), which amended Title VII. That legislation did not, however, amend the ADEA and so a key question after the 1991 enactment was whether the pro-employee changes

older employee because of her elevated salary will qualify as a reasonable factor other than age and so her disparate impact argument will fail.

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made to Title VII could be read by courts into the ADEA by means of judicial construction. See Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog That Didn't Bark*, 39 Wayne L. Rev. 1093 (1993). Ultimately, the *Smith* Court ruled in the negative.

It was the *Wards Cove* formulation that in significant measure was held by the *Smith* Court to be applicable in the ADEA context. Thus, an ADEA defendant needed only to satisfy a burden of production, rather than proof, in responding to the plaintiff's prima facie claim. In contrast, under Title VII, as amended, the defendant bears the much heavier burden of *proving* an affirmative defense once the plaintiff establishes a prima facie disparate impact claim.

Further weakening the utility of disparate impact analysis for age discrimination plaintiffs, the *Smith* Court in one key respect spurned even the pro-employee *Wards Cove* formulation and devised an especially easy burden of production for ADEA defendants. Under *Wards Cove* "the dispositive issue . . . [was] whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer . . . ." 490 U.S. at 659. "[T]here . . . [was] no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster." *Id.* But the *Smith* Court, looking to the unique ADEA provision, 29 U.S.C. § 623(f)(1), that allows employers to rely upon reasonable factors other than age – a provision absent from Title VII – ruled that an employer needed only to produce evidence that its challenged policy or practice was reasonable. This is a standard clearly easier to satisfy than establishing that the challenged practice "in a significant way" serves the employer's legitimate goals. The *Smith* Court wrote as follows: "It is . . . in cases involving disparate-impact claims that the RFOA provision plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was 'reasonable.'" 544 U.S. at 239. In striking contrast to this very mild burden of production imposed upon an ADEA defendant in a disparate impact case (and a burden even easier, as noted, than that imposed by the pro-employee formulation in *Wards Cove*), under the amended Title VII a defendant must *prove* that its "challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i). This disparity regarding burdens subsequently was negated by the Court's ruling in *Meacham v. Knolls Atomic Power Laboratory*, 554 U.S. \_\_\_, 128 S. Ct. 2395 (2008), in which the Court held that it is the defendant that invokes the RFOA provision which bears a burden of proof, after all. However, this burden – while of course more onerous than a burden of production – still does not entail proving business necessity, as is required under Title VII, but only requires proof that there was a reasonable factor other than age (such as salary) for the employer's complained-of decision or action.

D. *Constitutional Analysis Regarding Age in the Workplace*

By far the great majority of federal court rulings addressing age discrimination in employment involve interpretations and applications of the ADEA, which applies to employers both in the private and public sectors. But grievants who work for state and local governmental employers also can look to the Equal Protection Clause set forth in the United States Constitution's Fourteenth Amendment,<sup>143</sup> a clause that is inapplicable to private employers. (A comparable guarantee has been read by the Supreme Court<sup>144</sup> into the Due Process Clause of the Fifth Amendment,<sup>145</sup> which applies only to the federal government.) A review of the equal protection case law is useful because it provides insights into the thinking that has animated the United States Supreme Court as to the proper, or at least acceptable, role of age in the workplace (in the absence of legislatively enacted limits on the use of the age factor).<sup>146</sup> As this analysis will disclose, the Equal Protection Clause actually affords less protection to governmental employees than they can secure under the ADEA.<sup>147</sup>

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<sup>143</sup> U.S. Const., amend. XIV, § 1.

<sup>144</sup> *Bolling v. Sharpe*, 347 U.S. 497 (1954).

<sup>145</sup> U.S. Const., amend V.

<sup>146</sup> See generally Howard Eglit, *Of Age and the Constitution*, 57 Chi-Kent L. Rev. 859 (1981) [hereinafter *Of Age and the Constitution*].

<sup>147</sup> The individual rights guarantees of the United States Constitution set floors, rather than ceilings. Thus, a state or local governmental body may choose to extend greater protection to individuals than does the Constitution. Conversely, they may not mandate less protection for individuals than the United States Constitution affords them. However, the issue becomes somewhat more complicated insofar as Congress is concerned. In the context of rejecting the proposition that the ADEA was an appropriate exercise of Congress's authority under § 5 of the Fourteenth Amendment to enact legislation implementing the due process and equal protection guarantees of the amendment set forth in § 1 of the amendment, the Court pointedly noted, in deciding *Kimel v. Florida Board of Regents*, 528 U.S. 62, 86 (2000), that "[t]he Act, through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard . . ." (The ADEA has been upheld as a valid exercise of Congress' power under the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3. *EEOC v. Wyoming*, 460 U.S. 226, 243 (1983)). The consequence of *Kimel* is that the ADEA cannot be deemed to constitute an

The Equal Protection Clause provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” Added to the Constitution in 1868, the initial and primary focus of the amendment was the protection of the newly-freed slaves,<sup>148</sup> who found that the freedom secured for them by the North’s victory in the Civil War quickly was being compromised after the war’s end by a host of hostile statutes and practices adopted and imposed in the vanquished southern states. For 100 years the Equal Protection Clause was invoked almost exclusively in the context of challenges to discrimination imposed because of race or national origin, the latter characteristic being seen as persuasively analogous to race.<sup>149</sup> Starting in the 1960’s and continuing even today to a limited extent, the provision’s reach has been broadened beyond race issues by a sometime rights-oriented Supreme Court. But while expansion of the clause has been achieved in the last 30 years or so, most notably with regard to legal condemnation of gender discrimination,<sup>150</sup> the efforts to invoke the provision as a protector for those victimized by age discrimination has failed.

There are four key decisions, three of which involved people deemed too old to be allowed to remain in their jobs. (With regard to minors, the courts typically have viewed them as not being entitled to

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abrogation of States’ sovereign immunity, an abrogation that only could be established if the statute were a valid exercise of § 5 authority.

<sup>148</sup> See, e.g., *Butchers’ Benevolent Assn. of New Orleans v. Crescent City Livestock Landing and Slaughter-House Co.* (Slaughterhouse Cases), 83 U.S. 36 (1872).

<sup>149</sup> See *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>150</sup> Until the 1976 ruling in *Craig v. Boren*, 429 U.S. 190 (1976), a minimum rationality test was used to assess the constitutionality under the Equal Protection Clause of gender classifications, see *Goesaert v. Cleary*, 335 U.S. 464 (1948), although a signal that a possible doctrinal change was imminent was provided by the Court’s striking down of such a classification in *Reed v. Reed*, 404 U.S. 71 (1971). In *Craig* the Court held that in order for a gender classification embodied in a statute or policy to survive, the defender of that statute or policy bore the burden of proving that the interest being served was an important one and that the means used to achieve that interest, i.e., the statute or policy at issue, had to be substantially related to that interest. Subsequently, the Court has added some apparent heft to this test: the defendant, so the Court has stated in some cases, must put forth an “exceedingly persuasive justification” for that important interest. *United States v. Virginia*, 518 U.S. 515, 534 (1996) (no citation by Court for the quote).

the full array of constitutional protections afforded adults, based on “the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.”<sup>151</sup> *Massachusetts Board of Retirement v. Murgia*<sup>152</sup> is particularly significant because it first set forth the analytical parameters to which the succeeding decisions have adhered.

*Murgia* involved a state police officer who was forced upon attaining age 50 to retire, in accordance with a state mandatory retirement law. The police officer argued that the statute should not be measured pursuant to the commonly used very low level of judicial scrutiny that merely asks if there is any “reasonably conceivable state of facts that could provide a rational basis” for the law at issue.<sup>153</sup> Rather, Officer Murgia urged the Court to apply the same heightened level of judicial scrutiny utilized by the courts in assessing laws making distinctions on the bases of race and national origin.<sup>154</sup> In other words, and to use the standard legal parlance, he argued that age was a *suspect* classification.<sup>155</sup>

The Court responded by first noting some of the criteria it had devised for identifying suspect classes: “[A] suspect class is one ‘saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.’”<sup>156</sup> The Court then applied these criteria to age classifications and deemed them undeserving of suspect status:

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<sup>151</sup> *Bellotti v. Baird*, 443 U.S. 622, 633 - 634 (1979) (citations omitted).

<sup>152</sup> 427 U.S. 307 (1976); see generally Howard Eglit, *Mandatory Retirement, Murgia, and Ageism*, in *EMPLOYMENT DISCRIMINATION STORIES* 259 (Joel Wm. Friedman, ed. 2006).

<sup>153</sup> See, e.g., *Federal Communications Comm’n v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993); see also *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955).

<sup>154</sup> Pursuant to this strict scrutiny, the burden is on the defender of the law to prove that the law serves a compelling governmental interest and that the means used to achieve that interest – i.e., the law in question – is necessary, or the least discriminatory. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972).

<sup>155</sup> See generally *Of Age and the Constitution*, *supra* n. 146.

<sup>156</sup> 427 U.S. at 313.



While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a “history of purposeful unequal treatment” or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities. . . . [O]ld age does not define a “discrete and insular” group . . . in need of “extraordinary protection from the majoritarian political process.” Instead, it marks a stage that each of us will reach if we live out our normal span.<sup>157</sup>

On balance, it seems correct to conclude that Murgia and his lawyers indeed were overreaching: the analogy between the classic suspect group for which the Equal Protection Clause was originally designed – i.e., African-Americans – and those deemed “too old” was, and is, too tenuous a one to be persuasive. There is no long and tragic history of adverse treatment of older people that at all parallels the enormous injustices heaped upon blacks and certain ethnic minorities in the United States.<sup>158</sup> Nor have elders (and certainly not those short of elder status, such as 50-year-old Murgia himself) been subjected to a host of politically and socially imposed disabilities.<sup>159</sup>

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<sup>157</sup> *Id.* at 313 - 314.

<sup>158</sup> As to historians’ assessment of the role and treatment of the elderly over the centuries in the United States, see W. Andrew Achenbaum, *OLD AGE IN THE NEW LAND* (1978); David Hackett Fischer, *GROWING OLD IN AMERICA* (expanded ed. 1978); Carole Haber, *BEYOND SIXTY-FIVE* (paperback ed. 1983); cf. Thomas R. Cole, *THE JOURNEY OF LIFE* 48 n.1 (paperback ed. 1993): “Although historians have spilled a good deal of ink debating the power and status of old age in early America, we do not yet have enough empirical data – especially outside of New England – to justify strong generalizations.” For a more global discussion, see George Minois, *HISTORY OF OLD AGE* (1989).

<sup>159</sup> Still, the *Murgia* Court’s assessment of the level of judicial scrutiny properly due age classifications merits some criticism. See *Of Age and the Constitution*, note 146 *supra*. Moreover, the Court played somewhat fast and loose by addressing the treatment of the “aged,” since Office Murgia was only 50 when he lost his job and so he hardly qualified as a member of that group. Of course, his relative youthfulness actually cut against his legal claim, since

A few years after *Murgia* the Supreme Court upheld a mandatory retirement requirement imposed on United States Foreign Service officers in *Vance v. Bradley*.<sup>160</sup> Here, the Court justified the requirement with an additional rationale not used in *Murgia*: forcing people out when they reached the age of 60 was perfectly reasonable because there was a need to make room for younger people who wanted to move up in the ranks. Another post-*Murgia* explanation for the Court's turning its back on age discrimination is a strategic one, as revealed in *City of Cleburne v. Cleburne Living Center*,<sup>161</sup> which arose out of the city's refusal to issue a special-use permit to allow the construction and operation of a group home for the mentally retarded in a neighborhood that was not zoned for such entities. The Court rejected the claim that the policy, which allegedly discriminated against the mentally retarded, should be seen as embodying a quasi-suspect classification that, so it was argued, should be subjected to more than the usual minimal judicial examination. In doing so the *Cleburne* Court invoked as justification the proverbial 'slippery slope' argument commonly employed in American legal reasoning:

[I]f the large and amorphous class of the mentally retarded were deemed quasi suspect, . . . it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative response, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only *the aging*, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.<sup>162</sup>

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individuals of his vintage had, and have, even less of a valid basis for claiming a history of discrimination and/or political powerlessness than do the elderly.

<sup>160</sup> 440 U.S. 93 (1979).

<sup>161</sup> 473 U.S. 432 (1985).

<sup>162</sup> *Id.* at 445 - 446 (emphasis added).

While the Court did not so state in 1976 when it decided *Murgia*, likely the same ‘slippery slope’ concern lurked in the background there: had it opened the door to special consideration under the Constitution for the “aged,” inevitably other groups would have and could have claimed like consideration – an eventuality the Court no doubt did not relish in 1976 when Officer Murgia was before it any more than it did in 1985 in *Cleburne*.

The final key Supreme Court decision is *Gregory v. Ashcroft*,<sup>163</sup> in which the Court addressed a mandatory retirement provision contained in a state constitution that required judges to leave the bench at age 70. At the time judicial officers in the state of Missouri initially were appointed by the governor; thereafter, they could seek to stay in their positions by submitting themselves to the electorate for a retention vote. Each of the plaintiffs in *Gregory* had been retained by the voters, but because of the state constitutional provision they eventually had to give up their positions upon turning age 70. These judges thus were somewhat different than employees. The latter keep their jobs at the sufferance of their supervisors and generally may be terminated either arbitrarily or, if protected by contract or statute, for good cause, whereas the judges who were the litigants in *Gregory* retained their positions by means of election by the voters. Even so, the Supreme Court’s willingness to uphold the state constitutional provision and thereby rule against the judges is instructive because it added to the *Murgia* and *Vance* analyses another common argument for the legitimacy of age as a basis for decision making in the workplace, i.e., the difficulty of making individualized determinations of competence:

“The statute draws a line at a certain age which attempts to uphold the high competency for judicial posts and which fulfills a societal demand for the highest caliber of judges in the system”; “the statute . . . draws a legitimate line to avoid the tedious and often perplexing decisions to determine which judges after a certain age are physically and mentally qualified and those who are not”; “mandatory

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<sup>163</sup> 501 U.S. 452 (1991).

retirement increases the opportunity for qualified persons . . . to share in the judiciary and permits an orderly attrition through retirement”; . . . any one of these explanations is sufficient to rebut the claim that “the varying treatment of different groups or persons . . . is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the actions were irrational.”<sup>164</sup>

In sum, the United States Supreme Court (whose nine justices of course are life-tenured<sup>165</sup>) has consistently rejected constitutionally-based attacks on the use of age in the workplace. All that the Court has required, from *Murgia* to the present day, is that an employer’s decision or action be minimally rational, and as an examination of the case law both within the age discrimination context as well as other settings reveals, this is a test that almost always is satisfied.<sup>166</sup> Indeed, the Supreme Court’s rulings demonstrate that this test is so extremely deferential to the decision maker (the employer, for our purposes here) that the decision will be upheld if any conceivable rational basis for it can be conjured up – if not by the decision maker itself, then by the court on behalf of the decision maker.<sup>167</sup> Why is this so? Do American courts – led by the Supreme Court – harbor some special hostility when it comes to extending constitutional protection to the too-old?

The ready answer is ‘no.’ Ageist animus is not at work here. Rather, the better explanation for the Supreme Court’s dismissive attitude vis-a-vis age classifications would seem to lie in the Court’s understanding of its role in American society. While this court, as

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<sup>164</sup> *Id.* at 471 - 472, quoting *O’Neil v. Baine*, 568 S.W.2d 761 (Mo. Sup. Ct. 1978), and *Vance v. Bradley*, 440 U.S. 93 (1979).

<sup>165</sup> As of December, 2008, the nine justices ranged in age from 88 (Justice Stevens), 75 (Justice Ginsberg), 72 (Justice Scalia), 71 (Justice Kennedy), 70 (Justice Breyer), 69 (Justice Souter), 60 (Justice Thomas), 58 (Justice Alito), down to age 53 (Chief Justice Roberts).

<sup>166</sup> See Erwin Chemerinsky, CONSTITUTIONAL LAW 623 (2d ed. 2005): “The Supreme Court generally has been extremely deferential to the government when applying the rational basis test. . . . The result is that it is rare for the Supreme Court to find that a law fails the rational basis test.”

<sup>167</sup> See ELDERS ON TRIAL, *supra* n. 1, at 127.

well as the lower federal courts which take their lead from it, have the power to overturn federal, state, and municipal laws, they actually exercise that power reluctantly.<sup>168</sup> This is in part because the power of judicial review is seen as being anti-democratic: it puts life-tenured federal judges in the position of second-guessing the popularly elected legislators who draft our legislation, and the popularly elected presidents, state governors, and city mayors who sign these legislative exercises into law. Absent very strong historical/social/political reasons for overturning a given statute, the courts will uphold it and thereby demonstrate respect for, and commitment to, the majoritarian democratic process that produced that enactment. And so, with regard to laws dealing with age the Supreme Court has in effect said: ‘There is not enough here to warrant our overruling the democratic process and supplanting our vision of a good society for that embodied in the laws imposing some sort of burden – typically, in the past, mandatory retirement – on older men and women.’ Implicit in this judicial posture is the further notion that if a given use of age in the workplace is to be condemned, that condemnation should come through the democratic process, i.e., through legislation. And, in fact, that is exactly what has happened. Older workers have been able to prevail politically by reason of the force of their own numbers, the political attractiveness of their cause, and their ability to garner support from other groups.<sup>169</sup> Thus, as

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<sup>168</sup> To this end, the courts have been instructed by Supreme Court decisions to follow certain avoidance principles, so as to avoid deciding constitutional questions unless a decision is strictly necessary. See *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346 - 348 (Brandeis, J., concurring) (1936); see generally Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C.L. Rev. 1003 (1994).

<sup>169</sup> The generally accepted, albeit flawed, mythology seems to be that older men and women vote as a bloc, and unblinkingly use the ballot box to foster their own interests at the expense of the young. See generally ELDERS ON TRIAL, *supra* n. 1, at 30 - 31. The data, however, do not bear out this myth of a monolithic voting bloc of older men and women. See, e.g., Robert H. Binstock, *Aging, Politics, and Public Policy*, in GROWING OLD IN AMERICA 325 (Beth B. Hess and Elizabeth W. Markson, eds. 1991); Robert H. Binstock, *Politics*, in ENCYCLOPEDIA OF AGEISM 250 (Erdman B. Palmore, Laurence Branch, and Diana K. Harris, eds. 2005). This is not to say, however, that the elderly, as a group, do not have very significant political clout – both actual and perceived. See generally ELDERS ON TRIAL, *supra*, at 31; Howard Eglit, *Health Care Allocation for the*

earlier noted, every state, as well as the federal government, has adopted legislation severely limiting the use of age in the workplace, even to the extent at the federal level of the ADEA's ultimately being amended in 1986<sup>170</sup> to outlaw by legislative action in most situations the very age-based mandatory retirement that the United States Constitution, as interpreted by the Supreme Court in *Murgia*, *Vance*, and *Gregory*, tolerates.<sup>171</sup>

#### IV. OTHER LAW-BASED APPROACHES TO AGE BIAS IN THE WORKPLACE

The primary foci of this paper's discussion of legal issues concerning age bias in the workplace are the ADEA, the United States Constitution, and the case law developed under them. But there are some other relevant legal directives and theories that merit some passing discussion here, as well.

##### A. State and Local Anti-Discrimination Laws and Ordinances

Most immediately on point are the fair employment practice state laws that exist in every state.<sup>172</sup> (There are also local municipal ordinances in some instances that provide protection to the claimed

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*Elderly: Age Discrimination by Another Name?*, 26 Hous. L. Rev. 813, 825 (1989); Sherry J. Holladay and W. Timothy Coombs, *The Political Power of Seniors*, in HANDBOOK OF COMMUNICATION AND AGING RESEARCH 383 (Jon F. Nussbaum and Justine Coupland eds. 2004). Some have bitterly deplored their supposed power. See, e.g., Phillip Longman, BORN TO PAY (1987); William Neikirk, *The Over-65 Gang is Overpowerful*, Chicago Tribune, § 7, p. 3 (Nov. 29, 1987); Eric Schurenberg and Lani Luciano, *The Empire Called AARP*, 17 Money 128 (Oct. 1, 1988); see also Sandra Day O'Connor and James R. Jones, *What We Owe Our Young*, Washington Post, p. A19 (June 16 (2008) (retired Justice O'Connor and former Ambassador and Congressman Jones were the honorary co-chairs of the Youth Entitlement Summit, an assembly of what the authors of the Post op-ed piece described as youth activists that convened in Washington, D.C., on June 16 and 17, 2008)).

<sup>170</sup> Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 2, 100 Stat. 3342, at 3342.

<sup>171</sup> *Supra* n. 147.

<sup>172</sup> See generally Cara Yates, *Application of State Law to Age Discrimination in Employment*, 51 A.L.R.5th 1 (1997).

victims of age discrimination.)<sup>173</sup> These state laws not only are integrally procedurally connected to the ADEA,<sup>174</sup> but they stand as independent and alternative routes for seeking redress. For a variety of reasons, grievants' attorneys often do not focus on these fora. In some states (perhaps all) the agencies that enforce these statutes are underfunded and understaffed. Some attorneys feel that federal courts are more hospitable to, and more attuned to, discrimination issues, although certainly the small percentage of plaintiffs who prevail in the federal setting<sup>175</sup> cuts against this perception. Some attorneys are inclined by virtue of their law school training to go to the federal agency and thence to the federal courts; in other words, most law school courses (and certainly virtually all law school course textbooks) on employment discrimination focus exclusively, or close thereto, on the federal anti-discrimination statutes and thus either intentionally or coincidentally bias the students in these courses against utilizing state laws and state agencies.

### B. Tort Law

Tort law offers another avenue for age discrimination plaintiffs. Most specifically, the tort of intentional infliction of emotional distress, also known as the tort of outrage, often is included as a separate count in the federal court complaints filed by plaintiffs seeking redress in the first instance under the ADEA.<sup>176</sup> Of course such a tort claim also may be pursued independently in state court.<sup>177</sup> Historically, tort liability would not lie absent bodily harm,

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<sup>173</sup> See Chicago, Illinois, Human Rights Ordinance, § 2-160-010 *et seq.*; Cook County, Illinois, Human Rights Ordinance, Ordinance No. 93-0-13; Johnson County, Iowa, Human Rights Ordinance, Ordinance 12-28-06-01.

<sup>174</sup> Even if the grievant does pursue redress under the ADEA, the federal statute requires that recourse initially be pursued at the state law level. 29 U.S.C. § 633(b) (2000). See generally 1 AGE DISCRIMINATION, *supra* n. 42, at § 6:8.

<sup>175</sup> *Supra* n. 97 and accompanying text.

<sup>176</sup> See generally 1 AGE DISCRIMINATION, *supra* n. 42, at § 6:37.

<sup>177</sup> For that matter, ADEA claims also may be litigated in state court. See, e.g., *Chapman v. City of Detroit*, 808 F.2d 459, 463 (6th Cir. 1986); *Patrowich v. Chemical Bank*, 63 N.Y.2d 541, 483 N.Y.S.2d 659, 473 N.E.2d 11 (1984); *Eagleburger v. Fort Sanders Regional Medical Center*, 677 S.W.2d 455 (Tenn. Ct. App. 1983).

and so the infliction of unintended emotional distress was not compensable absent some bodily harm being experienced by the claimed victim. But, as the law developed the intentional infliction of emotional distress that was likely to result in illness or other bodily harm came to be recognized as giving rise to liability. And, more importantly here, the civil wrong known as the tort of intentional infliction of emotional distress eventually came to be recognized as a basis for liability even without any bodily harm being caused or resulting from the wrong. The sticking points in establishing liability, not just in the discrimination arena, but generally, flow from the requirements that (1) the conduct giving rise to such liability must be outrageous, and (2) the emotional distress of which the plaintiff complains must be severe in nature. Plaintiffs rarely are able to satisfy one or the other, or both, of these requirements,<sup>178</sup> which are set forth in Section 46 of the RESTATEMENT (SECOND) OF TORTS.<sup>179</sup> The commentary accompanying the RESTATEMENT emphasizes that outrageousness is a particularly high hurdle for a claimed victim to surmount:

It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the

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<sup>178</sup> See the cases collected in the periodic supplements to the RESTATEMENT (SECOND) OF TORTS § 46 (1965).

<sup>179</sup> RESTATEMENT (SECOND) OF TORTS (1965) § 46 provides: "(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." While § 46, published in 1965, only purports to be a summary of then-existing state law, its provisions have been pretty much embraced by state courts as articulating the requirements that plaintiffs must satisfy.



case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"<sup>180</sup>

Given the difficulties of fashioning a winning tort claim, it is more likely that an individual who has been subjected to abuse will pursue under the ADEA a harassment claim, which is certainly cognizable under the statute.<sup>181</sup> However, there is a countervailing factor here. Unlike the situation in a tort case, there can be no recovery under the ADEA for compensatory damages, that is, damages for pain and suffering.<sup>182</sup> Nor can a prevailing plaintiff in an ADEA action recover punitive damages,<sup>183</sup> which again are available in tort actions. The availability of compensatory and punitive damages in tort counsel plaintiffs to include in their complaints the tort cause of action for intentional infliction of emotional distress, even recognizing the difficulty of prevailing on that claim.

A classic and tragic case in which the rare plaintiff succeeded with this tort claim is illustrative. At least in terms of reported cases, this ruling – *Wilson v. Monarch Paper Co.*<sup>184</sup> – presents a scenario of employer abuse leading to dreadful consequences that thankfully has been rarely, if ever, matched (at least insofar as reported judicial rulings are revelatory). Even so, it shows the potential for very significant damages that an egregious enough situation can create. The plaintiff was awarded \$3.4 million in his suit, in which he

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<sup>180</sup> RESTATEMENT (SECOND) OF TORTS, § 46, Comment d., at 73 (1965).

<sup>181</sup> *Supra* n. 84 and accompanying text.

<sup>182</sup> *Supra* n. 82 and accompanying text.

<sup>183</sup> *Supra* n. 81 and accompanying text. Liquidated damages are available in an amount equal to back pay when it can be proved that the defendant willfully violated the ADEA or acted in reckless disregard of the statute. 29 U.S.C. § 626(b) (2000). *See generally* 2 AGE DISCRIMINATION §§ 8:30 - 8:38. Of course, if the plaintiff recovers no back pay, i.e., the amount of compensation plus benefits she would have received had she not been wrongfully treated, there will be no basis for a liquidated damages award since two times zero equals zero. And even if there is a back pay award, if it is meager in amount, the liquidated damages award – assuming the plaintiff can establish the requisite willfulness on the defendant's part – will likewise be small.

<sup>184</sup> 939 F.2d 1138 (5th Cir. 1991).

claimed that he was both the victim of age discrimination in violation of the ADEA and that he had been subjected to the tort of intentional infliction of emotional distress. Of the total award, \$312,000 was for the ADEA age discrimination claim; \$847,000 constituted damages directly due to the defendant's intentional infliction of emotional distress. The remainder – \$2.25 million – was awarded as punitive damages arising out of the tort.

Wilson had been hired by the defendant company at the age of 48 in 1970. By 1981 he had risen to the dual positions of vice-president and assistant to the president of the company. In that same year a new 42-year-old president was brought in to run the company. The new president immediately began to ostracize Wilson, with the encouragement of the president of Monarch's parent company. Things quickly went drastically downhill for Wilson. Initially, he was demoted – he was placed in the position of an entry level supervisor, which required only one year's experience in the paper business.<sup>185</sup> As the court noted, "Wilson, with his thirty years of experience in the paper business and a college degree, was vastly overqualified and overpaid for that position."<sup>186</sup> He soon was being subjected to harassment and verbal abuse by his supervisor at the warehouse – Paul Bradley, a man who had previously been Wilson's subordinate. Things got even worse, as the court detailed:

Finally, Wilson was further demeaned when he was placed in charge of housekeeping but was not given any employees to assist him in the housekeeping duties. Wilson, the former vice-president and assistant to the president, was thus reduced finally to sweeping the floors and cleaning up the employee's cafeteria, duties which occupied 75 percent of his working time.<sup>187</sup>

By the fall of 1972 Wilson was suffering respiratory problems due to the dusty conditions in the warehouse and the stress caused by the harassment to which he was being subjected. In early January,

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<sup>185</sup> Although his pay remained the same, his benefits were reduced.

<sup>186</sup> 939 F.2d at 1140.

<sup>187</sup> *Id.* at 1140 - 1141.

1983, he was diagnosed as suffering from reactive depression and as being possibly suicidal as a result of the on-the-job stress. His condition deteriorated and in March, 1983, he was involuntarily hospitalized with a psychotic manic episode. (Prior to the difficulties at Monarch that started with the new president coming in in 1981, Wilson had not had any history of emotional illness.) The court described Wilson's next several years:

Wilson's emotional illness was severe and long-lasting. He was diagnosed with manic-depressive illness or bipolar disorder. After his first hospitalization for a manic episode, in which he was locked in a padded cell and heavily sedated, he fell into a deep depression. The depression was unrelenting for over two years and necessitated an additional hospital stay in which he was given electroconvulsive therapy (shock treatments). It was not until 1987 that Wilson's illness began remission, thus allowing him to carry on a semblance of a normal life.<sup>188</sup>

So much for the facts. In its discussion leading up to the conclusion that the trial court jury's award should be affirmed, the Court of Appeals for the Fifth Circuit sought to walk a careful line – expressing support on the one hand for the exercise of managerial discretion in the workplace, while on the other expressing appreciation for the abuses that that discretion may occasion. In this vein, the court first made a verbal bow to the interests of the employer:

The facts of a given claim of outrageous conduct must be analyzed in context, and ours is the employment setting. We are cognizant that “the work culture in some situations may contemplate a degree of teasing and taunting that in other circumstances might be considered cruel and outrageous.” *Keeton*,

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<sup>188</sup> *Id.* at 1141.

*et al.*, *Prosser & Keeton on Torts* (5th ed. 1984 & 1988 Supp.) We further recognize that properly to manage its business, every employer must on occasion review, criticize, demote, transfer, and discipline employees. *Id.* We also acknowledge that it is not unusual for an employer, instead of directly discharging an employee, to create unpleasant and onerous work conditions designed to force an employee to quit, i.e., “constructively” to discharge the employee. In short, although this sort of conduct often rises to the level of illegality, except in the *most* unusual cases it is not the sort of conduct, as deplorable as it may sometimes be, that constitutes “extreme and outrageous” conduct [which is the standard required in Texas to establish the tort of intentional infliction of emotional distress].<sup>189</sup>

Here, the court actually concluded that most of the adverse treatment directed against Wilson did not reach the requisite level of extreme and outrageous conduct:

Wilson argues that substantial evidence of outrageous conduct supports the jury’s verdict, including: (1) his duties in physical distribution were assigned to a younger person; (2) Bisbee [the new president] deliberately refused to speak to him in the hallways of Monarch in order to harass him; (3) certain portions of Monarch’s long-range plans expressed a desire to move younger persons into sales and management positions; (4) Bisbee wanted to replace Wilson with a younger person; (5) other managers within Monarch would not work with Wilson, and he did not receive his work directly from Bisbee; (6) he was not offered a fully guaranteed salary to transfer to Corpus Christi; (7) he was assigned to Monarch’s Houston warehouse as a supervisor, which was “demeaning”; (8) Paul

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<sup>189</sup> *Id.* at 1143.

Bradley, the Warehouse Manager, and other Monarch managers, referred to Wilson as old; (9) Bradley prepared a sign stating “Wilson is old” and, subsequently, “Wilson is a Goldbrick”; and (10) Monarch filed a counterclaim against Wilson [for libel and slander] in this action. . . .

. . . We hold that all of this conduct . . . is within the “realm of an ordinary employment dispute,” and, in the context of the employment milieu is not so extreme and outrageous as to be properly addressed outside of Wilson’s ADEA claim [that is, by means of a tort claim].<sup>190</sup>

Even so, the court affirmed. For there was one more piece of this workplace scenario that did rise to the level of outrageousness that the tort of intentional infliction of emotional distress requires:

Wilson, a college graduate with thirty years experience in the paper field, had been a long-time executive at Monarch. His title was Corporate Director of Physical Distribution, with the added title of Vice-President and Assistant to the President. He had been responsible for the largest project in the company’s history, and had completed the project on time and under budget. Yet, when transferred to the warehouse, Wilson’s primary duty became housekeeping chores around the warehouse’s shipping and receiving area. Because Monarch did not give Wilson any employees to supervise or assist him, Wilson was frequently required to sweep the warehouse. In addition, Wilson also was reduced to cleaning up after the employees in the warehouse cafeteria after their lunch hour. Wilson spent 75 percent of his time performing these menial, janitorial services. . . .

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<sup>190</sup> *Id.* at 1144 - 1145.

. . . We find it difficult to conceive a workplace scenario more painful and embarrassing than an executive, indeed a vice-president and the assistant to the president, being subjected before his fellow employees to the most menial janitorial services and duties of cleaning up after entry level employees: the steep downhill push to total humiliation was complete. The evidence, considered as a whole, will fully support the view, which the jury apparently held, that Monarch, unwilling to fire Wilson outright, *intentionally and systematically* set out to humiliate him in the hopes that he would quit. A reasonable jury could have found that this employer conduct was intentional and mean spirited, so severe that it resulted in institutional confinement and treatment for someone with no history of mental problems. Finally, the evidence supports the conclusion that this conduct was, indeed, so outrageous that civilized society should not tolerate it.<sup>191</sup>

### C. *The Americans with Disabilities Act*

A third avenue of potential recourse turns out to be unavailable, after all. One might envision looking to the Americans with Disabilities Act (ADA)<sup>192</sup> as another route to redress for individuals who have been subjected to adverse employment decisions. This enactment is directed, obviously, to discrimination based on disability, and given that there is a correlation between disabilities and advancing age<sup>193</sup> there may be occasions when an

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<sup>191</sup> *Id.* at 1145.

<sup>192</sup> 42 U.S.C. §§ 12101 *et seq.* (2000).

<sup>193</sup> Indeed, the very first finding set forth by Congress in the original act, prior to its being amended in 2008 by the ADA Amendments Act of 2008, Pub. L. No. \_\_\_, 122 Stat. 3553 (2008), noted this correlation: “The Congress finds – (1) that some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older. . . .” 42 U.S.C. § 12101(a) (2000). The 2008 Act removed this finding, but not because Congress no longer agreed with the age/disability correlation. Rather, the 2008 Act amended the original language as a means to express

older individual who has confronted an adverse employment decision may be able to pursue a claim of disability discrimination under the ADA in addition to, or in lieu of, an age discrimination claim under the ADEA. However, the ADA claim clearly would have to be based on an employer decision arising out of the plaintiff's disability because age *per se* is expressly rejected as constituting a disability for purposes of the ADA.<sup>194</sup> Moreover, and in any event, there are some data derived from claims pursued under state statutes suggesting that coupling an age claim with a disability claim actually produces negative results for grievants.<sup>195</sup> (There are also data revealing that

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Congress's rejection of the Supreme Court's reliance upon the specific number of 43 million as a basis for limiting the reach of the ADA when it decided *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999). See Comm. on Education and Labor, U.S. House of Reps., *ADA Amendments of 2008*, Rept. 110-730, Part 1, 110<sup>th</sup> Cong., 2d Sess. 7 - 8 (2008)). The *Sutton* Court had looked to the finding regarding 43 million people as justification to exclude from protection individuals whose disabilities were corrected or mitigated by medications, prosthetics, and/or other types of ameliorative devices or treatments that resulted in amelioration such that their impairments, when considered in a mitigated state, were not sufficiently limiting to qualify as disabilities under the ADA. The *Sutton* Court reasoned as follows: "Had Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings." 527 U.S. at 487. (See *supra* nn. 102 - 119 regarding the ability of older men and women to perform in the workplace).

<sup>194</sup> The report of the Senate Committee on Labor and Human Resources regarding the ADA specifically set forth the view that age in and of itself was not intended to be considered an impairment falling within the reach of the statute. Comm. on Labor and Human Resources, S. Rep. No. 116, *The Americans with Disabilities Act*, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess. 22 (1989). However, the committee did assert that medical conditions often associated with age, such as hearing loss and osteoporosis, could be deemed to be impairments within the scope of the statute. *Id.*

<sup>195</sup> See David Neumark, *The Age Discrimination in Employment Act: A Retrospective and Prospective Assessment* (paper prepared for AARP's Public Policy Institute (June, 2008) (on file with the author):

Using state laws, Stock and Beegle (2004) . . . find that for disabled individuals aged 40-64, when the two types of laws are combined, the employment affect is negative (i.e., reduces employment) compared to an age discrimination law alone [footnote omitted]. . . . Again, though, workers aged 65 and over are not examined. However, Stock and Beegle present results for

regardless of the matter of age, ADA plaintiffs generally have fared very poorly in the federal courts.)<sup>196</sup>

## V. WHAT THE FUTURE HOLDS

The stars are pretty much aligned in a configuration that does not auger well for older men and women in the workforce. The number of older individuals is growing enormously – the baby boomers are upon us. This means that those who want to remain in the workforce confront the facts that they likely will constitute a surplus<sup>197</sup> – certainly as contrasted to the numbers of their

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this age group that do *not* distinguish the disability status of the individual, and they find marginally significant evidence of employment reductions overall and relative to 40 - 64-year-olds.

Thus, there is some likelihood that the increasing share of older and disabled individuals in the population, coupled with the availability of disability-related discrimination claims for a growing share of workers protected under the ADEA, could undermine some of the potential beneficial effects of the ADEA as the population ages.

*Id.* at 25 - 26, citing Wendy A. Stock and Kathleen Beegle, *Employment Protections for Older Workers: Do Disability Discrimination Laws Matter?*, 22 Contemp. Econ. Policy 111 (2004).

<sup>196</sup> See Ruth Colker, *Winning and Losing under the Americans with Disabilities Act*, 62 Ohio St. L. J. 239 (2001).

<sup>197</sup> It is often observed that for a period of time there is going to be a shortage of younger workers, and so large numbers of older individuals will be needed to offset this shortfall of younger men and women. This idea is of questionable validity, however. For one, this perception is premised on “the notion that the economy will grow at its historical rate.” WORKING LONGER, *supra* n. 29, at 110. If this were to be the case, “[e]mployers would clearly need to scramble to find enough workers . . . .” *Id.* But there certainly is no guarantee that such growth will occur. And indeed there are good reasons (including, in the short term and at the time this paper is being written, the dire contraction of the American economy) to question the certainty of such future growth. *Id.* A second factor here is that the labor shortage notion ignores the fact that “U.S. employers increasingly operate in a global economy and respond to swings in the global, more than the domestic, supply of labor.” *Id.* Given the vast numbers of workers in India, China, Vietnam, and elsewhere, shortages of labor in the United States can be readily offset by shipping jobs overseas where the labor pools are large and cheap. There is a third factor, as well:



counterparts who in past decades remained in the workforce.<sup>198</sup> And more than that, they will constitute a surplus of workers who generally earn more than their younger counterparts, whether or not they are more productive than those younger folks. Moreover, the data show that typically these older, pricier workers indeed are, on balance, not more productive than their younger colleagues and arguably may even be less so – although the data are mixed and the productivity gap, if it exists, may or not be a significant one, depending upon the job involved.<sup>199</sup>

Another factor inimical to the interests of older workers and job applicants is the undercurrent of old-ageism throughout American society. Older men and women may not confront the blatant, brazen manifestations of age-based dislike, condescension, and disrespect that were seen (certainly not always, however) in workplaces 40 and even 30 years ago. But ageism still exists, and it is a barrier with which older workers and job applicants must contend, in contrast to their younger counterparts who are already in the workforce or are, or will be, seeking to enter the workforce.

Exactly how this demographic phenomenon of burgeoning numbers of older men and women, when combined with the reality of old-ageism, will intersect in the work place is as difficult to predict today as it was 11 years ago, when this author made the following observations:

It takes no predictive skill to conclude that given the burgeoning numbers of older workers, employers which are disposed to engage in age-biased decision

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Older workers tend to be in older industries and occupations, where employment is growing slowly or even declining. Young workers seek employment in fast-growing sectors; old workers tend to be employed in sectors that were fast growing when they were young but might not be growing any more. . . . Rather than contribute to an economy wide labor shortage, the impending wave of retirements in such occupations should bring staffing levels closer to equilibrium levels.

*Id.* at 112.

<sup>198</sup> *Supra* n. 12.

<sup>199</sup> *See* WORKING LONGER, *supra* n. 29, at 92 – 100.

making are going to have an enormous available pool of age-qualified targets for those decisions.

Of course, numbers themselves are not determinative. They cannot tell us, after all, whether the frequency of age discriminatory actions and decisions in the workplace will remain static, or change. Nor, if change in the rate of occurrence of such actions and decisions is to occur, can the demographic data confirm in which direction – up or down – that change will go. We can venture some informed speculation, however. One might predict, for example, that the growing numbers of older workers may have the salutary effect of changing lingering negative attitudes. Or maybe the ‘baby bust,’ e.g., the decline in the birth rate that followed the baby boom [in the years 1946 - 1964] , combined with other trends – such as increasing numbers of ill-educated immigrants entering the American work force – will make older men and women more attractive in the employment market. Perhaps the merits of older men and women simply will come to be valued more. Or – and indeed this may well be the most likely scenario – perhaps the same misperceptions and negative attitudes that exist today (to greater or lesser degrees, depending upon whose ox is gored and who is doing the goring) will persist. At bottom, of course, these are all realistic, but currently unconfirmable, possibilities.<sup>200</sup>

Pessimism is probably most properly warranted, a posture confirmed by a recent commentator, as well as an expert he quotes:

Even as workers in their 40s, 50s and 60s accept having to work years longer than anticipated, many companies are laying off employees amid the

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<sup>200</sup> *The Age Discrimination in Employment Act at Thirty*, *supra* n. 14, at 667 - 668 (footnote omitted).

economic downturn. This often means that older workers are pushed out first, because they are usually the highest-paid employees.

“You have 401(k) plans going into the tank and the cost of health insurance rising, so many people see they need to work longer,” said Karen Ferguson, director of the Pension Rights Center, an advocacy group for retirees in Washington. “At the same time, many employers don’t have money to hire people, and they’re getting rid of their more expensive employees, so it’s kind of a perfect storm.”<sup>201</sup>

There is one further matter, at first blush arguably much more mundane but in fact enormously important as a practical matter, that must be recognized here. That is the fact – and this is nothing new and thus is independent of issues of demographic shifts as well as the rise or fall of old-ageism – that pursuing legal recourse typically is both a psychologically stressful<sup>202</sup> and financially expensive venture.

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<sup>201</sup> Steven Greenhouse, *Working Longer As Jobs Contract*, New York Times, Special Section – Retirement, pp. 1, 8, at p. 1 (Oct. 23, 2008); see also Barbara Rose, *Greater pay putting older workers at risk*, Chicago Tribune, Business Sec., p. 2 (April 14, 2008). But see Jonathon Peterson, *Older workers becoming valued prize for firms*, Chicago Tribune, Business Sec., pp. 1, 4 (Sept. 10, 2007).

Data reported by the Bureau of Labor Statistics, as summarized in an article in the April 13, 2009, New York Times, revealed that “[w]orkers ages 45 and over form a disproportionate share of the hard-luck recession category – the long-term unemployed,” even though the same group had a lower overall unemployment rate in 2008 than did younger workers. Michael Luo, *Longer Periods of Unemployment for Workers 45 and Older*, New York Times, p. A11, at p. A11 (April 13, 2009).

<sup>202</sup> See generally Brenda Major and Cheryl R. Kaiser, *Perceiving and Claiming Discrimination*, in HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH 285 (Laura Beth Nielsen and Robert L. Nelson, eds. 2005). The authors make the following observations, *inter alia*:

Why would people who believe that they are targets of discrimination be reluctant to report it? Evidence indicates that the reluctance stems from the belief that the costs of doing so will be too high. For example, women who are sexually harassed and who do not report it cite a number of reasons for not doing so, including anticipation of retaliation, fear of not being

It is easy enough, at least insofar as financial cost is concerned, to file with the EEOC a charge of unlawful discrimination. That can be accomplished by a lay person by simply filling out a form. Even if one fails to file the requisite counterpart charge with the relevant state anti-discrimination agency in one's jurisdiction,<sup>203</sup> almost invariably the EEOC will have a worksharing agreement with that agency which will result in the EEOC on its own initiative transferring a copy of the federal filing to the state agency.<sup>204</sup>

But then the difficulties start to come to the fore. For one, the ADEA requires, appropriately, that the employer who is charged with wrongdoing promptly be notified of the charge.<sup>205</sup> Thus, a degree of intestinal fortitude, so to speak, is required of the individual who, by filing a charge, 'makes waves' that will soon be known to her employer. (In the instance of an individual who complains of having been wrongfully discharged, she is no longer in the charged entity's workplace and so concern about alienating the boss should be diminished thereby.) The ADEA bans retaliation against someone who seeks to avail himself of the statute's protection,<sup>206</sup> but realistically, employers and their employees can make life in the workplace uncomfortable for so-called 'troublemakers' without running afoul of that prohibition (which, to be complained of by the victim requires making *more* waves, in any event). Psychological stress aside, the fact is that actual enforcement in the courts of discrimination claims is almost completely dependent upon action by

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believed, and not wanting to harm the harasser. . . .

People who report discrimination to authorities or the perpetrator report they often are targets of retaliation. . . . Experiments show that blaming outcomes on discrimination can damage perceptions of the blamer's character, even if he or she has a very good reason for making this claim.

*Id.* at 296 - 297.

<sup>203</sup> 29 U.S.C. § 633(b) (2000).

<sup>204</sup> See *Peters v. Fansteel, Inc.*, 736 F. Supp. 198 (N.D. Ill. 1990); *Agostine v. Iowa Beef Processors*, 35 F.E.P. Cas. (BNA) 328 (D. Neb. 1984); see generally 1 AGE DISCRIMINATION, *supra* n. 42, at § 6.25. Such agreements are authorized by 29 C.F.R. § 1626.10 (2008).

<sup>205</sup> 29 U.S.C. § 626(d) (2000).

<sup>206</sup> 29 U.S.C. § 623(d) (2000).

individual grievants, not the EEOC,<sup>207</sup> and such enforcement is financially beyond the capacities of the great majority of people who might with some validity claim to be victims of wrongdoing. Justice costs. Even an ‘easy’ case involving just a couple of depositions and, if the case goes to trial, only a couple of days of testimony, will run into many thousands of dollars.

While the willingness of attorneys to represent such individuals on a contingent fee basis can ameliorate this problem (assuming the plaintiff does not have to still bear the costs of discovery, which can be exorbitant), in many instances the limited potential financial recovery should the grievant prevail will disincline attorneys to represent clients other than on some sort of straight fee basis.<sup>208</sup> Moreover, the rather lackluster success of such grievants –

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<sup>207</sup> With regard to employment discrimination cases generally, Professor Selmi reported more than 10 years ago that “[p]rivate attorneys typically file 95% of the cases that end up in federal court . . . .” Michael Selmi, *The Value of the EEOC: Reexamining the Agency’s Role in Employment Discrimination Law*, 57 Ohio St. L. J. 1, 6n.17 (1996).

<sup>208</sup> The ADEA authorizes the award of attorney’s fees to prevailing plaintiffs. 29 U.S.C. § 626(b) (2000). See generally 2 AGE DISCRIMINATION, *supra* n. 42, at §§ 8:60 - 8:66. And there need not be proportionality between the plaintiff’s award and the fee award so long as the plaintiff recovers more than a nominal monetary amount. See, e.g., *Dunlap-McCuller v. Riese Organization*, 980 F.2d 153 (2d Cir. 1992); see generally 2 AGE DISCRIMINATION, *supra* n. 42, at § 8:64. Thus, even if a plaintiff were to recover only a small amount of back pay, that would not necessarily preclude a large fee award (so long as the basis for that award could be properly documented). Accordingly, Professor Selmi has argued that the low monetary value of employment discrimination cases should not act as a deterrent to private attorneys taking on such cases. See Michael Selmi, *The Value of the EEOC: Reexamining the Agency’s Role in Employment Discrimination Law*, 57 Ohio St. L. J. 1, 32 - 40 (1996). However, because plaintiffs so frequently lose, both at the trial level and at the appellate level, see note 97 and accompanying text *supra*, the attorney’s decision to take on a case logically must in major respect turn on her assessment of the likelihood of prevailing, since of course there will be no fee award if the plaintiff loses.

Then, too, there is the matter of settlement; it may be that a case that is of low value will be more easily settled than one involving a claim for a large amount of back pay, plus liquidated damages equal to that back pay award. (Liquidated damages are available in an amount equal to back pay when it can be proved that the defendant willfully violated the ADEA or acted in reckless disregard of the statute. 29 U.S.C. § 626(b) (2000). See generally 2 AGE DISCRIMINATION §§ 8:30 - 8:38). There is no clear answer to the settlement

at least those who wind up actually being able to stay in court<sup>209</sup> – likewise creates a disincentive for contingent fee attorneys to take on any clients save those with what look to be surefire winning claims, or at least very, very strong, claims.<sup>210</sup>

So one can talk all one wants about theory, about demography, about statutorily- and constitutionally-based claims. But the bottom line to this discussion is that most people just cannot afford to seek those remedies. That, unfortunately, is the grim reality check on all this.

So, after all, the United States has made commendable strides in recognizing, addressing, and combating age discrimination in the workplace. At the risk of sounding chauvinistic, one can venture that the United States indeed has done more than any other country. So despite the problems, there is much to applaud in terms of success, as well.

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question insofar as the issue of the encouragement or discouragement of litigation is concerned. See Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, *supra*, at 34 - 39.

<sup>209</sup> *Supra* n. 97 and accompanying text.

<sup>210</sup> Judge Richard A. Posner has reasoned that because, according to his analysis, recoveries in denial-of-hire cases are, or will be, less than those in termination cases, the attorney fee awards in the former will be less than those in discharge cases, thereby increasing the disincentive for lawyers to take on denial-of-hire clients. Richard A. Posner, *OLD AGE AND AGING* 332 - 333 (1995).

