

The State of Age Discrimination and Older Workers in the U.S. 50 Years After the Age Discrimination in Employment Act (ADEA)

by

Victoria A. Lipnic
Acting Chair
U.S. Equal Employment Opportunity Commission

June 2018

Dear Reader,

This month marks the 50th anniversary of the effective date of the Age Discrimination in Employment Act (the ADEA) -- one of the premier statutes enforced by the U.S. Equal Employment Opportunity Commission (EEOC).

When I first joined the EEOC in April 2010, the job market was very different than it is today. The effects of the Great Recession were still being widely felt throughout the economy, and predictions were that it would take the nation 10 years or more to recover from steep job losses. At the EEOC, we were concerned that these job losses would hit older workers particularly hard.

Accordingly, shortly after I joined the Commission, one of the first public Commission meetings we held in November 2010, was about the "[Impact of the Economy on Older Workers](#)."

Fast forward to today, and as of this month, the nation is experiencing its lowest unemployment rate in 18 years. Instead of shedding hundreds of thousands of jobs each month, the economy is gaining them. This is very good news for America's workers.

But consider this: older workers who lose a job have much more difficulty finding a new job than younger workers. A 54-year-old worker who may have lost his job in early 2008 at the beginning of the Great Recession is now 64 years old. The average unemployment duration for a 54-year-old was almost a year, and it may have taken that person two or three years to find a new job. Further, that new job may not have been on a par with the one he had before. To make up for that financial loss, he will likely need to work longer than originally planned.

Now consider a 54-year-old worker who loses her job in today's economy. Today, jobs are plentiful and conditions are much more favorable for finding new jobs compared to 10 years ago. But, there is one constant for today's 54-year-old and the one from 10 years ago -- age discrimination.

As experts testified at the EEOC's meeting in June 2017 on [The ADEA @ 50 -- More Relevant Than Ever](#), age discrimination remains a significant and costly problem for workers, their families, and our economy.

A few additional points for your consideration. Today's Baby Boomers range in age from 54 to 72 and because of that nearly 20-year span in age, they have widely different considerations about work and retirement. While about 10,000 Baby Boomers retire every day, many have inadequate savings for retirement. Work life has changed dramatically since Boomers entered the workforce. Instead of a career spanning one industry and a few positions as was expected at the beginning of their careers, most workers today are expected to have 11 different jobs in the modern, dynamic economy. Right behind the Boomers, the leading edge of Generation X are now in their early 50's. And, in 2016, Millennials surpassed the Baby Boomers as the largest segment of the workforce in 2016.

The scene having now been set, I offer this report, marking the 50th anniversary of when the ADEA took effect, culminating a year-long recognition by the EEOC of the importance of the ADEA as a significant civil rights law. While it is not exhaustive (as there are treatises devoted to the ADEA, after all), it is meant to serve as a guide to the history and significant developments of the law.

I hope the report also serves to put to rest outdated assumptions about older workers (who should more aptly be described as "experienced workers") and about age discrimination, which harm workers, their families and our economy. Today's experienced workers are healthier, more educated, and working and living longer than previous generations. Age-diverse teams and workforces can improve employee engagement, performance, and productivity. Experienced workers have talent that our economy cannot afford to waste.

I want to thank the staff at the EEOC for their contributions to this report, especially Cathy Ventrell-Monsees, whose passion for all things ADEA is priceless (and perhaps ageless).

Victoria A. Lipnic
Acting Chair
U.S. Equal Employment Opportunity Commission

June 2018

I. Overview

In 1967, Congress enacted the federal Age Discrimination in Employment Act (ADEA) to prohibit age discrimination in the workplace and promote the employment of older workers. The ADEA was an integral part of congressional actions in the 1960s to ensure equal opportunity in the workplace,^[1] along with the Equal Pay Act of 1963^[2] and the Civil Rights Act of 1964.^[3] Together, these laws transformed the workplace by breaking down barriers to opportunity and building foundations of equality and fairness.

In passing the ADEA, Congress recognized that age discrimination was caused primarily by unfounded assumptions that age impacted ability.^[4] To prevent and stop such arbitrary discrimination, the ADEA requires employers to consider individual ability, rather than assumptions about age, in making an employment decision.

A few years after the ADEA was enacted, the Senate Special Committee on Aging noted that the "ADEA was enacted, not only to enforce the law, but to provide the facts that would help change attitudes."^[5] It was commonly assumed that at some age and in some jobs, age limited the abilities of older workers.^[6] Today we ask: have attitudes about older workers, their abilities, and age discrimination changed in the wake of the ADEA over the past 50 years? Have employment practices changed to promote the employment of older workers?

This report examines the current state of age discrimination and older workers in the U.S. 50 years after the ADEA took effect in June 1968. It begins with a brief review of the history of the ADEA and its enforcement by the Department of Labor (DOL) and the EEOC. It describes the significant changes in who the older worker of today is compared to the typical older worker of 1967. Today's older workers are more diverse and more educated than previous generations. They are healthier and working and living longer. The women and men confronting age discrimination today are in all parts of our country -- in rural and urban communities, in blue and white-collar jobs, in service and tech industries, and are of all races, ethnicities and income.

Despite these dramatic changes, today's older workers still confront unfounded and outdated assumptions about age and ability and age discrimination persists.^[7] Despite decades of research finding that age does not predict ability or performance, employers often fall back on precisely the ageist stereotypes the ADEA was enacted to prohibit.^[8] After 50 years of a federal law whose purpose is to promote the employment of older workers based on ability, age discrimination remains too common and too accepted. Indeed, 6 out of 10 older workers have seen or experienced age discrimination in the workplace and 90 percent of those say it is common.^[9]

This report acknowledges the significant harm and costs to older workers, their families, and employers that age discrimination causes. It is time to put to rest outdated and unfounded assumptions about age, older workers, and discrimination. Changing practices can help change attitudes. This report concludes with promising practices for employers to not only avoid age discrimination, but to recognize the value of a multi-

generational workforce. Simply put, our economy cannot afford to waste the knowledge, talent, and experience of older workers.[\[10\]](#)

II. A Brief History of the ADEA

A. The 1965 Wirtz Report

Congress considered prohibiting age discrimination in employment as part of the Equal Employment Opportunity Act of 1962[\[11\]](#) and Title VII of the Civil Rights Act of 1964, but amendments to include age as a protected characteristic failed.[\[12\]](#) Instead, as part of Title VII, Congress directed the Secretary of Labor to make a "full and complete study of the factors which may tend to result in discrimination in employment because of age."[\[13\]](#) That report, "The Older American Worker, Age Discrimination in Employment,"[\[14\]](#) which became known as the "Wirtz Report" (after W. Willard Wirtz, then-Secretary of Labor) provided the foundation for the ADEA.

The Wirtz Report examined the nature, scope, and consequences of age discrimination in the workplace of the 1960s. It found that employers believed age impacted ability. It also found that without any factual basis or consideration of individual abilities, employers routinely barred workers in their 40s, 50s, and 60s from a wide range of jobs.[\[15\]](#)

The Wirtz Report contrasted this finding that age discrimination derived mostly from unfounded assumptions about ability with its finding that discrimination based on race, national origin and religion derived from "dislike and hostility" - specifically "feelings about people entirely unrelated to their ability to do the job."[\[16\]](#) These findings led the Wirtz Report to characterize age discrimination as "different" from discrimination based on race, color, religion or national origin,[\[17\]](#) and recommended against adding age to Title VII of the Civil Rights Act of 1964.[\[18\]](#)

The Wirtz Report found that one-half of employers used age limits to deny jobs to workers age 45 and older.[\[19\]](#) It found vast differences in perceptions of age and physical ability with some employers refusing to hire workers after age 25 and others hiring workers until age 60 for jobs involving comparable physical capabilities.[\[20\]](#)

The Wirtz Report also examined factors such as health, education, technology and "institutional arrangements" such as personnel policies, seniority systems, and benefit plans that may impact older worker employment.[\[21\]](#) Studies relating to health and age noted that older workers had fewer acute health issues than younger workers.[\[22\]](#) However, because older workers were more susceptible to chronic conditions, they were more likely to be rejected for employment even though such conditions wouldn't prevent them from working.[\[23\]](#) Educational levels of older workers in the 1960s significantly impacted their employment prospects, as three-fifths of those age 55 and older had less than a high school degree.[\[24\]](#) Technological changes at the time caused the displacement of traditional industries and geographic dislocation, and

resulted in young workplaces in new industries where the hiring of older workers would be viewed as "exceptional."[\[25\]](#)

Finally, the Wirtz Report considered the significant consequences of age discrimination on older workers, which it described as hardship and frustration, and on the economy with billion dollar costs in unemployment and early Social Security payouts, plus lost production and earnings.[\[26\]](#) The Report concluded with recommendations for a national policy against arbitrary discrimination in employment on the basis of age, actions to modify institutional arrangements that disadvantaged older workers, and actions to increase the hiring of older workers.[\[27\]](#)

President Lyndon B. Johnson proposed legislation based in part on the Wirtz Report.[\[28\]](#) Amendments to the Administration's bill by the leading proponents of a federal age discrimination bill, notably Senator Jacob Javits and Senator Ralph Yarborough,[\[29\]](#) led to the enactment of the ADEA on December 15, 1967.[\[30\]](#) The legislation took effect on June 12, 1968.[\[31\]](#)

B. The 1967 ADEA

Recognizing the challenge of changing both employment practices and attitudes about age and ability,[\[32\]](#) Congress set forth ambitious purposes for the ADEA:

It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.[\[33\]](#)

Congress crafted a statute based on provisions from both Title VII of the Civil Rights Act of 1964 and the Fair Labor Standards Act (FLSA).[\[34\]](#) The ADEA shares Title VII's purpose to eliminate discrimination from the workplace.[\[35\]](#) The ADEA's prohibitions were taken verbatim from Title VII,[\[36\]](#) as was its narrow exception for the use of age as a bona fide occupational qualification (BFOQ).[\[37\]](#) Courts interpret this language from Title VII, including its prohibitions and the BFOQ exception, to apply with "equal force" to the ADEA's substantive provisions.[\[38\]](#) The remedies of the ADEA, by contrast, flow from the FLSA. When initially enacted, Congress limited ADEA coverage to individuals age 40 to 64[\[39\]](#) and again directed the Secretary of Labor to study the ages protected by the statute.[\[40\]](#)

C. Amendments to the ADEA[\[41\]](#)

In its first decade, the ADEA was expanded to cover federal, state and local government employees.[\[42\]](#) Congress sought to provide older workers with the same basic civil rights as other workers.[\[43\]](#)

With each significant amendment to the ADEA, Congress laid out the scientific evidence refuting any assumed correlation between age and ability.[\[44\]](#) At the same time,

however, the early versions of the ADEA essentially fostered the belief that age affected ability by capping the age of coverage -- initially at 65, and then at age 70 in 1978.^[45] These age caps on coverage permitted employers to deny jobs to the oldest workers and to force workers to retire based solely on age.^[46] Congress finally resolved this tension in the 1986 amendments to the ADEA, which removed the age-70 cap on coverage.^[47] Congress supported removal of the age-70 cap with both scientific^[48] and public opinion evidence for the fact that age is not predictive of job-related ability or performance.^[49]

The most extensive revisions to the ADEA occurred in 1990 when Congress enacted the Older Workers Benefit Protection Act of 1990 (OWBPA)^[50] in response to the Supreme Court's decision in *Public Employees Retirement System of Ohio v. Betts*.^[51] The OWBPA amended the ADEA to restore its original congressional intent to prohibit age discrimination in employee benefits,^[52] and established new minimum standards for voluntary waivers and releases of ADEA claims or rights.^[53]

D. Enforcement of the ADEA

1. Department of Labor (1968 - 1979)

Congress initially debated what entity should have enforcement authority for the ADEA.^[54] Congress expressed concerns that the newly formed EEOC had a substantial backlog of charges after only two years in existence and deemed the agency under-resourced to handle responsibility for another discrimination statute.^[55] Congress decided that the existing enforcement staff in the Department of Labor's Wage and Hour Division^[56] would provide the most effective enforcement of the ADEA and thus granted enforcement authority to DOL.^[57]

DOL promptly issued regulations in 1968 under the ADEA that explicitly rejected the use of age-related assumptions about physical ability.^[58] In its first full year of enforcing the ADEA, DOL investigated over one thousand complaints of age discrimination.^[59] In a 1972 report to Congress just three years later, DOL had found violations of the ADEA in 36 percent of its 6,000 investigations in 1972.^[60] In its first few years of ADEA enforcement, DOL filed over 80 lawsuits under the ADEA with 30 successful resolutions.^[61]

Early in 1978, the Carter Administration recognized that fragmented enforcement of the nation's civil rights laws had impeded their effectiveness and resulted in "regulatory duplication and needless expense for employers."^[62] In particular, the overlap in those covered by Title VII and the ADEA was considered "burdensome to employers and confusing to victims of discrimination."^[63] With the goal of a "unified, coherent Federal structure to combat discrimination in all its forms," the Carter Administration transferred enforcement of the ADEA to the EEOC with congressional approval, effective January 1, 1979.^[64]

2. Equal Employment Opportunity Commission (1979 - Present)

When the EEOC assumed responsibility for enforcement of the ADEA in 1979, the EEOC had to overcome many challenges,^[65] such as different charge processing procedures from DOL, an increase in ADEA charge filings, and a lack of adequate training and resources.^[66] At the same time, the EEOC was already dealing with a backlog of over 100,000 Title VII charges.^[67] The challenges that the EEOC faced in the early years of ADEA enforcement^[68] led to difficulties in the timely investigations of ADEA charges, requiring two amendments to extend the statute of limitations for filing a lawsuit.^[69]

Despite these challenges, the EEOC's litigation docket of ADEA cases grew rapidly in the first few years after it was granted the authority to bring them.^[70] About one-quarter of EEOC's ADEA cases challenged maximum hiring and mandatory retirement ages for police and firefighters.^[71] In these cases, the EEOC successfully defeated constitutional challenges to the ADEA's application to state government employers.^[72] ADEA suits against state government employers continue to be a significant part of the EEOC's litigation program,^[73] particularly since the Supreme Court eliminated the right of private individuals to seek damages in such suits.^[74]

Throughout the history of its ADEA litigation program, many of the EEOC's major ADEA cases focused on discriminatory reductions-in-force, denial of benefits, and mandatory retirement policies.^[75] In the past decade, the EEOC has also focused on challenging discriminatory hiring policies, both individual^[76] and systemic.^[77]

Under its authority to issue substantive ADEA regulations,^[78] the EEOC has issued regulations detailing requirements for waivers under the OWPBA,^[79] exempting retiree health benefits from ADEA coverage,^[80] clarifying that the ADEA does not prohibit employers from favoring older workers,^[81] and explaining the reasonable factor other than age affirmative defense.^[82]

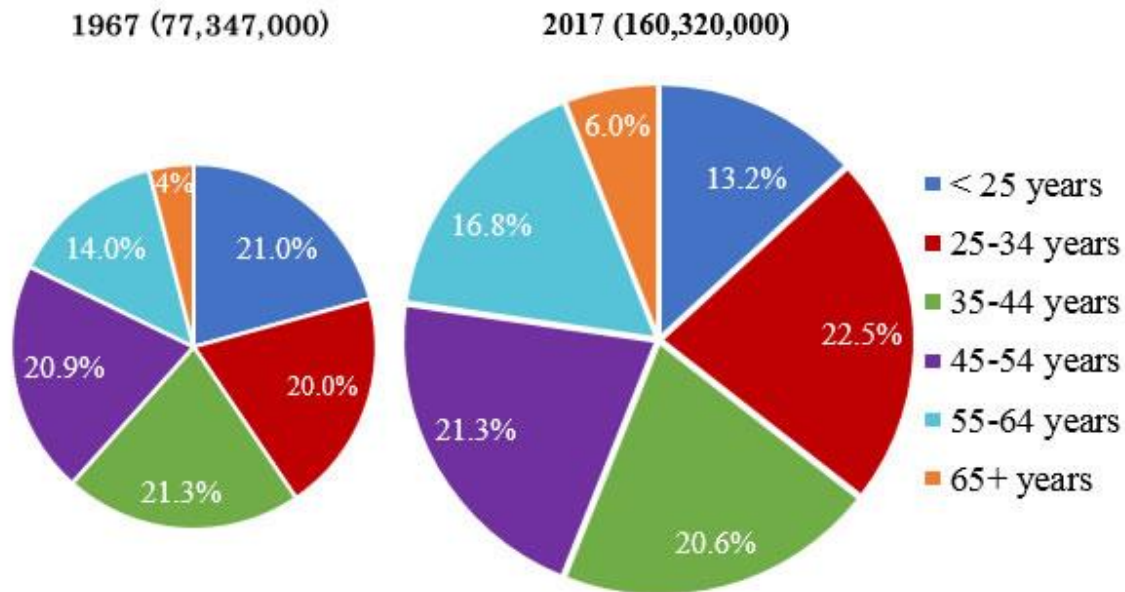
III. Demographics of the Older American Workforce

A. Significant Growth in the Older Workforce

The workforce of 1967 looked very different than it does today. Men worked most of their careers for one company or in one profession and retired at early ages with pensions.^[83] Just over one-third of workers were women.^[84] Average life expectancy was 67 for men and 74 for women.^[85] Many jobs were physically demanding. Members of the leading edge of the Baby Boom, those born between 1946 and 1964,^[86] were just entering the work force in 1967.

Today's US labor force has doubled in size,^[87] and is older, more diverse, more educated, and more female than it was 50 years ago.^[88]

Age of Civilian US Labor Force (Chart 1):



These trends are expected to continue for decades.[\[89\]](#) One of the most notable changes in the American workforce over the past 50 years is that it has aged significantly with the aging of the Baby Boom generation (79 million people) over that time.[\[90\]](#)

The most dramatic changes in the age of the labor force occurred in the last 25 years, as the share of workers age 55 and older in the workforce doubled.[\[91\]](#) In recent years, workers age 65 and older are staying in or re-entering the workforce in greater numbers. The Bureau of Labor Statistics (BLS) estimates that the oldest segments of the workforce -- those ages 65 to 74 and 75 and older -- are expected to increase the fastest through 2024.[\[92\]](#) This oldest cohort of workers of age 65+ workers is projected to grow by 75 percent by 2050, while the group of workers age 25 to 54 is only expected to grow by 2 percent over this same period.[\[93\]](#)

Increased labor force participation by older women is a significant factor in this growth of the older workforce. Women age 55 and older are projected to make up over 25 percent of the women's labor force by 2024, which is almost double their share from 2000. BLS also forecasts that twice as many women over 55 will be in the labor force as women ages 16-24 by 2024. BLS also estimates that women over 65 will make up roughly the same percentage of the female workforce as older men do of the male workforce.[\[94\]](#)

People are working longer today than their parents and grandparents did for a variety of reasons.[\[95\]](#) This generation of older workers is generally healthier and has longer life

expectancy than previous generations.[\[96\]](#) In addition, eligibility for full Social Security benefits starts at later ages[\[97\]](#) and the demise of traditional pension benefits provided by employers has shifted greater responsibility to individuals for their retirement income.[\[98\]](#) Now, less than half of the private sector workforce age 25 to 64 have an employer-sponsored plan of any type.[\[99\]](#)

The Great Recession of 2007-2009 [\[100\]](#)(also known as the Great Dislocation[\[101\]](#)) forced many older workers to revise their retirement plans and to work longer to recoup drained retirement accounts and lost savings. It left many older workers less confident that they would have sufficient income for a comfortable retirement.[\[102\]](#) As a result, the Great Recession flipped retirement plans and expectations for older workers. [\[103\]](#) Prior to 2009, most Americans planned to retire before age 65.[\[104\]](#) Since then, most say they will retire after age 65.[\[105\]](#)

Unfortunately, retirement expectations frequently do not pan out. For example, one study reports that while 40 percent of workers planned to work until age 70 or later, only 4 percent actually do.[\[106\]](#) Unexpected events such as ill health, caregiving responsibilities, getting laid off, and age discrimination can thwart the best-laid plans.

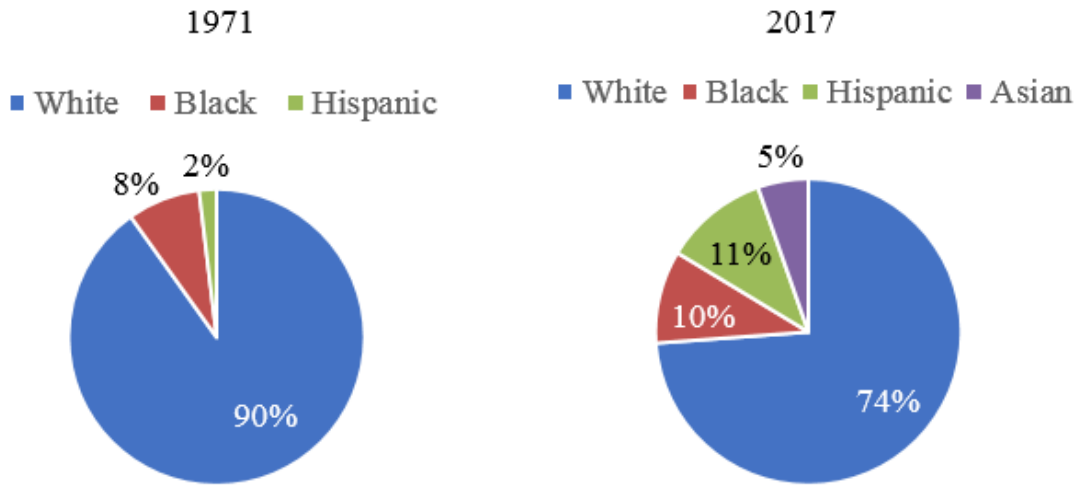
In addition, the concept of "retirement" has changed markedly with the Baby Boom generation. Retirement traditionally meant the end of paid employment. Today, retirement can also mean continued employment in another role, job or career.[\[107\]](#) Many retirees also must work,[\[108\]](#) even if those opportunities pay less than their previous jobs.[\[109\]](#) Many others work in "retirement" for personal fulfillment as well as financial security.[\[110\]](#)

B. Increasing Diversity of the Older Worker Population

Both the age and diversity of the US workforce has increased considerably over the past decades and will continue to increase in the coming decade.[\[111\]](#) Since 2000, the participation rate of both women and men age 55 and older in each of the four-major race[\[112\]](#) and ethnicity groups increased.[\[113\]](#) As indicated in Charts 2 and 3, the percentage of older workers who are Hispanic significantly increased over the past five decades. The proportion of Hispanics age 55 to 64 in the workforce jumped from 2 percent in 1971 to 11 percent in 2017. Hispanics workers also continued working past age 65 at increasing rates, from 1 percent in 1971 to 8 percent in 2017. The percentage of the labor force age 55 and older consisting of racial and ethnic minorities has grown substantially and is expected to continue to do so into the next decade.[\[114\]](#)

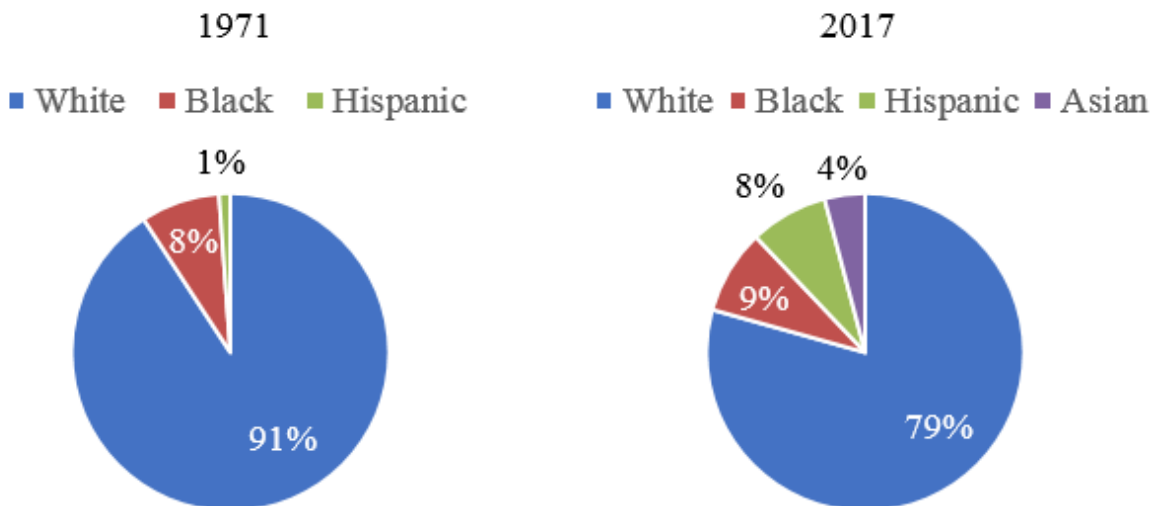
Change in Racial/Ethnic Composition of Labor Force Participants

Ages 55-64, 1971 - 2017 (Chart 2)[\[115\]](#)



Change in Racial/Ethnic Composition of Labor Force Participants

Ages 65+, 1971 - 2017 (Chart 3)



C. Older Workers are Employed in Many Occupations and Industries

The 1965 Wirtz Report noted that older workers were more likely to be employed in coal mining, agriculture, and railroads, and in older manufacturing industries such as textiles, leather, apparel, footwear, and food.[\[116\]](#) Today, workers ages 55 and older are employed across many types of occupations.[\[117\]](#) More than 42 percent of older workers are in management, professional, and related occupations, a somewhat higher proportion than that for all workers.[\[118\]](#) Thirty-six percent of older workers are engaged in blue collar work.[\[119\]](#) Workers age 65 and older are in part-time jobs at more than double the rate of younger workers, but they are increasingly seeking and obtaining full-time employment.[\[120\]](#) Finally, an increasing number of older workers are self-employed; the rate of self-employment is much higher for older than for younger workers.[\[121\]](#)

The five most common jobs for men and women age 62 and older are:[\[122\]](#)

Men		Women	
Top occupations	% of older workers	Top occupations	% of older workers
Delivery workers and truck drivers	3.95	Teachers, except postsecondary	6.30
Janitors and building cleaners	2.99	Secretaries and administrative assistants	6.04
Farmers and ranchers	2.58	Personal care aides	3.60
Postsecondary teachers	2.39	Registered nurses	3.45
Lawyers	2.37	Child care workers	3.36

Notably, many of the most common jobs held by older workers require a college education (e.g., teachers, lawyers, nurses), and/or are physically demanding (e.g., delivery workers, janitors, aides, and nurses.) [\[123\]](#)

Today, it is estimated that about 44 percent of older workers are employed in jobs with some physical demands or difficult working conditions.[\[124\]](#) The extent of physical demands in a job can vary considerably. For example, only about seven percent of all American workers and six percent of older workers hold highly physically demanding jobs, and this number is projected to decline to about five percent by 2041.[\[125\]](#)

To put this dramatic change of the physical demands of jobs into historical context, many of the jobs held by older workers in the 1960s were in manufacturing, mining, agriculture, and railroads and were highly physically demanding. As these industries contracted and as technology has changed how work gets done over the past fifty years, the total percentage of all workers employed in physically demanding jobs has

steadily decreased.[\[126\]](#) Across all industries, jobs requiring some form of physical activity fell from 57 percent in 1971 to 46 percent in 2006.[\[127\]](#)

IV. The Nature and Scope of Age Discrimination in Employment Today

Discrimination today, whether based on age, race, sex or other protected characteristics, frequently derives from stereotypes and unconscious bias,[\[128\]](#) although blatant or explicit discriminatory practices still exist.

A. The Persistent Drivers of Age Discrimination

Unfounded assumptions about age and ability continue to drive age discrimination in the workplace. Research on ageist stereotypes demonstrates that most people have specific negative beliefs about aging and that most of those beliefs are inaccurate.[\[129\]](#) These stereotypes often may be applied to older workers, leading to negative evaluations[\[130\]](#) and/or firing, rather than coaching or retraining.[\[131\]](#)

Given the dramatic changes in our understanding of aging, work, and discrimination, it is time to put aside such outdated assumptions about aging and age discrimination; the ADEA was intended and continues to be an important tool to do just that.

1. Research Demonstrates that Age Does Not Predict Ability

Decades of social science research document that age does not predict one's ability, performance, or interest.[\[132\]](#) Aging and its effect on cognitive abilities is highly individualized, as ability, agility and creativity vary widely among people of the same age.[\[133\]](#) Many older people out-perform or perform as well as young people,[\[134\]](#) and intellectual functions can actually improve with age.[\[135\]](#) While speedy thinking may decline over time, middle-aged brains adapt to reach solutions faster, make sounder judgments, and better navigate the complex world of today.[\[136\]](#) Innovation and creativity span the age spectrum as well.[\[137\]](#)

Physical ability also varies considerably from person to person and from one age to another age. While everyone experiences changes in physical functioning as they age, the extent and effects of aging on an individual's physical ability vary considerably from one person to another and are dependent on genetics, lifestyle, fitness, and health status.[\[138\]](#) If a job requires physical fitness standards,[\[139\]](#) it is common to provide ranges of both age and gender norms in tests to assess physical capacity.[\[140\]](#)

2. Today, Age Discrimination is More Like, Than Different from, Other Forms of Discrimination.

The notion that age discrimination is different than other forms of discrimination because of different historical origins is a central premise of the Wirtz Report and

continues to seep into ADEA jurisprudence today. For example, even recently, a judge questioned a plaintiff's evidence of age discrimination by saying:

No, age is different because we are all going to get old ... but when you're talking about gender or race or ethnicity those are immutable characteristics as the Supreme Court has said. But it's a little bit different because all of us are going to be older or elderly one day.[\[141\]](#)

When examined through today's understanding of how discrimination operates, age discrimination is more like, than different from, other forms of discrimination.

First, as a legal matter, Congress made irrelevant the view of the Wirtz Report that age discrimination was different by using the same words to prohibit age discrimination as it used in Title VII to prohibit discrimination based on race, sex, color, national origin, and religion.[\[142\]](#) Congress clearly viewed employment discrimination as a unified phenomenon suited to a unified legislative solution, regardless of whether the protected characteristic was age, race, sex, or another basis protected by Title VII.

Second, all employment discrimination shares prejudices about the competence of members of the protected group. For example, race discrimination unquestionably originated from a long history of malice, prejudice and intolerance. Yet, race discrimination also derives from negative views and stereotypes about the abilities of workers of a particular race,[\[143\]](#) like age discrimination does.

Third, when one compares age to sex discrimination, there are again important similarities. There is substantial evidence that in the 1960s, people believed that one's gender determined one's abilities, interests and qualifications,[\[144\]](#) just like age. Sex discrimination, like age discrimination, often results from stereotypes about women's abilities and on assumptions about the appropriate roles of women in the workplace and society.[\[145\]](#)

In sum, age discrimination shares a commonality with other forms of discrimination, just as the ADEA and Title VII share common purposes and prohibitions. Thus, this notion that age discrimination is "different" should not justify less protection for older workers in interpreting the ADEA.

B. Prevalence of Age Discrimination

It is difficult to measure with any accuracy the prevalence of discrimination in the workplace. One indicator of the prevalence of age discrimination is based on research of the perception of age discrimination by older workers in surveys. Another indicator is age discrimination claims. Most discriminatory and harassing conduct is unreported,[\[146\]](#) which means charges filed with federal and state enforcement agencies represent a fraction of the likely discrimination that occurs in the workplace.

1. Perceptions of Age Discrimination

The perception that age discrimination exists in our workplaces is prevalent. More than 6 in 10 workers age 45 and older say they have seen or experienced age discrimination in the workplace.[\[147\]](#) Of those, 90 percent say it is somewhat or very common, according to a 2017 survey.[\[148\]](#) In another survey in 2015, more than 3 of 4 older workers said their age was an obstacle to finding a job.[\[149\]](#)

African Americans/Blacks report much higher rates of having experienced age discrimination or knowing someone who had, at 77 percent, compared to 61 percent for Hispanics/Latinos and 59 percent for Whites.[\[150\]](#) More women than men also say older workers face age discrimination.[\[151\]](#)

Older workers in the technology industry report significantly high rates of age discrimination, with 70 percent of those on IT staffs reporting they had witnessed or experienced age discrimination.[\[152\]](#) More than 40 percent of older tech workers are worried about losing their jobs because of age[\[153\]](#) or consider their age to be a liability to their career.[\[154\]](#)

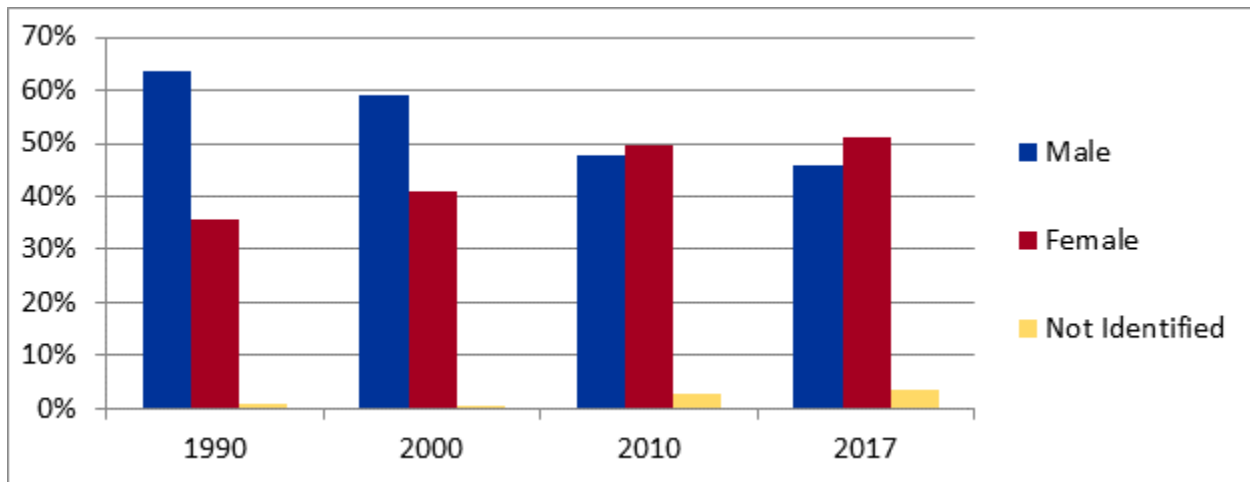
2. EEOC Charge Data

Older workers facing age discrimination can file ADEA charges with the EEOC or with state and local Fair Employment Practice agencies. While most older workers say they have seen or experienced age discrimination, only 3 percent report having made a formal complaint to someone in the workplace or to a government agency.[\[155\]](#) This suggests vast underreporting of the problem of age discrimination.

In the first years of ADEA enforcement, yearly charge filings with DOL ranged from just over 1,000 to over 5,000.[\[156\]](#) The EEOC assumed responsibility for the ADEA in 1979, ADEA charges jumped most significantly in 1983,[\[157\]](#) increasing by 67 percent from the previous year, which was also two times the percentage increase of other types of charge filings in 1983.[\[158\]](#) ADEA charges filed with the EEOC reached an all-time high of 24,582 in fiscal year 2008.[\[159\]](#)

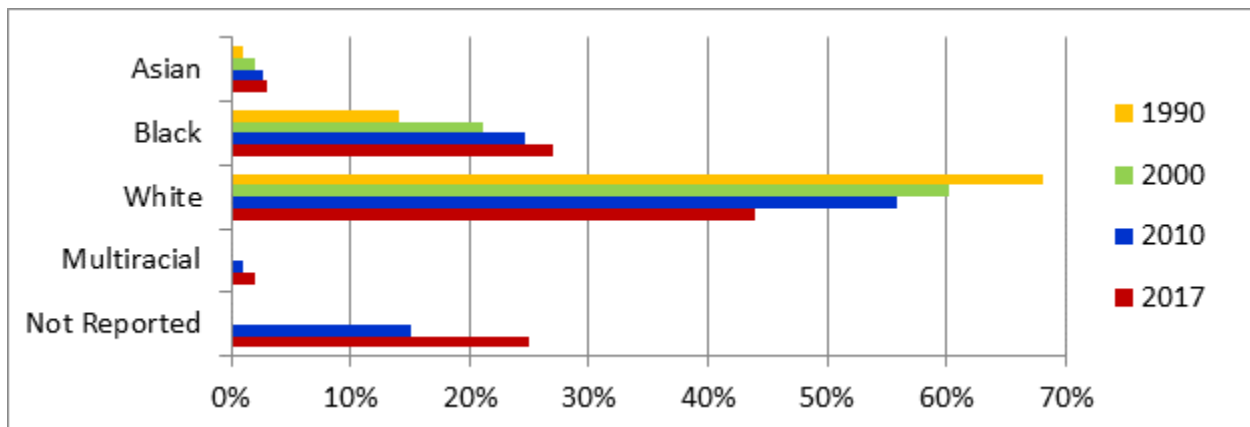
The demographics of older workers who file ADEA charges have changed markedly since 1967. The most dramatic change is in the gender of those filing ADEA charges, as depicted in Chart 4 below. In 1990, almost twice as many ADEA charges were filed by men than were filed by women. In 2010, the number of women filing age charges surpassed the number of men filing age charges for the first time, a trend that continues today.

ADEA Charges by Gender (Chart 4)



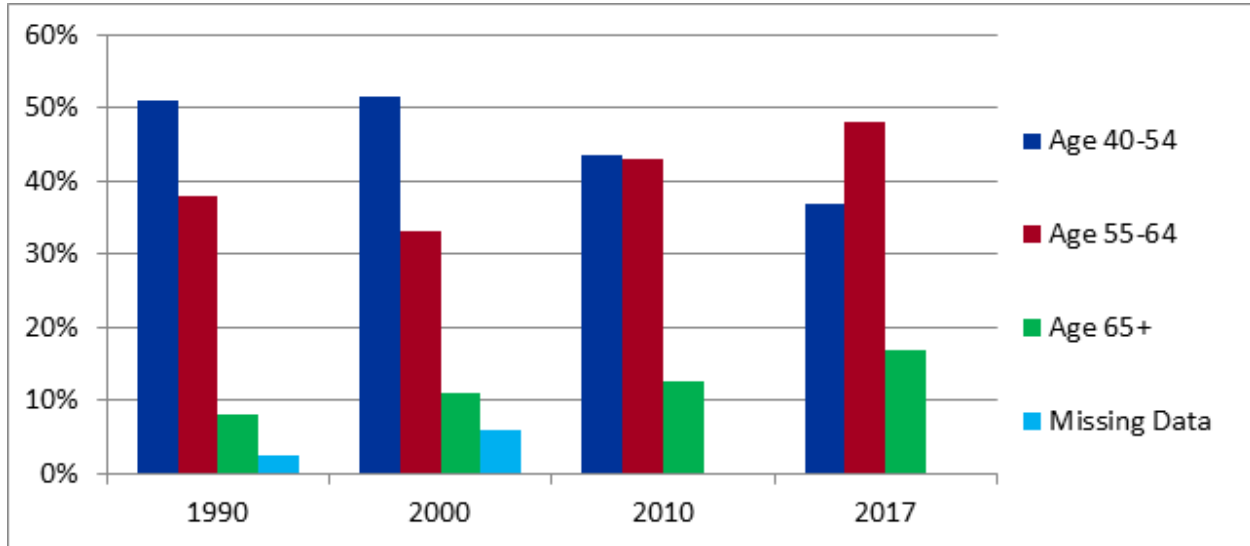
With each passing decade, the racial diversity of those who file age discrimination charges also is growing (Chart 5). The percentages of charges alleging age discrimination filed by Blacks^[160] and Asians^[161] doubled by 2017 compared to 1990 charge filings. The percentage of ADEA charges filed by Whites declined by over one third (from 68 percent to 42 percent).

ADEA Charges by Race (Chart 5)



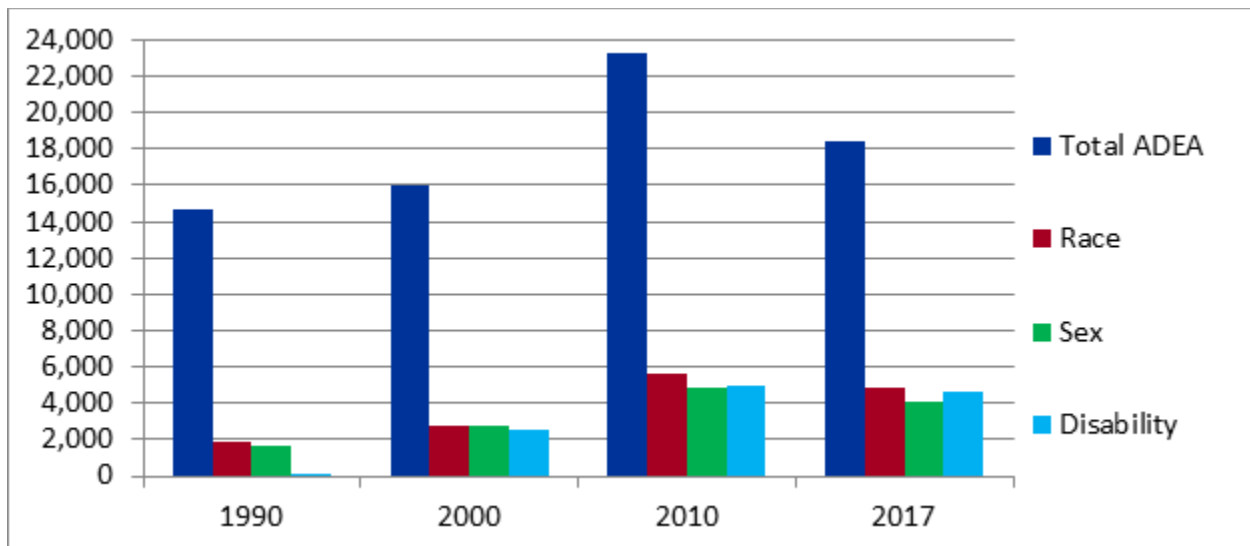
Additionally, the age of those filing ADEA charges has changed dramatically (Chart 6). In 1990, workers in the age 40-54 age cohort filed the majority of ADEA charges and workers in the age 65+ cohort filed relatively few. But by 2017, more charges were filed by workers ages 55-64 than the younger age cohort. Moreover, by 2017, the percentage of charges filed by workers age 65 and older was double what it was in 1990.

ADEA Charges by Age Group (Chart 6)



The percentage of charges alleging age discrimination plus race, sex or disability has also increased dramatically over the past 20 years as the older workforce has become more diverse. (Chart 7).

ADEA Charges Alleging Age and Race, Age and Sex, Age and Disability Discrimination (Chart 7)



C. Discriminatory Practices

While the ADEA has eliminated or changed many employment practices that explicitly used age to bar opportunities to older workers, discriminatory practices continue today to deny older workers equal opportunity. Research shows that older workers' continued denial of equal opportunity often derives from negative stereotypes.^[162] Indeed, there is strong "evidence that age bias and negative age stereotypes about older workers continue to affect older workers' employment experiences."^[163]

1. Discriminatory Discharge, Terms and Conditions, and Harassment are the Most Common Practices Alleged in ADEA Charges.

Unlawful discharge has always been the most common practice asserted in charges filed with the EEOC^[164] and that remains true for ADEA charges as well. In fiscal year 2017, 55 percent of ADEA charges alleged discriminatory discharge. Twenty-five years ago, about 45 percent of ADEA charges claimed unlawful discharge. ADEA lawsuits alleging unlawful discharge based on age, including constructive discharge, based on age have similarly dominated ADEA litigation, with one study finding discharges raised in 73 percent of ADEA district court and appellate court cases.^[165]

The next most common allegations in ADEA charges have varied over the years. Age-based harassment claims more than tripled by 2017 to 21 percent, compared to 6 percent in 1992. The types of harassment experienced by older workers is often like that experienced by other workers.^[166] ADEA charges raising claims of discriminatory terms or conditions nearly doubled to 25 percent in 2017 from 13 percent in 1992. Finally, allegations of discriminatory discipline nearly quintupled to 11.6 percent in 2017 from only 2.5 percent in 1992.

2. Age Discrimination in Hiring Remains a Significant Barrier for Older Workers.

As previously discussed, many older workers report that their age is an obstacle to getting a job.^[167] The extent of age discrimination in hiring has been documented in resume-correspondence studies conducted over the past two decades that compare interview rates of older and younger applicants.^[168] These studies find substantial evidence of age discrimination in hiring, as most hiring discrimination occurs when an interview is offered or not.^[169]

The largest and most recent field study of age discrimination in hiring was conducted in 2015 and involved over 40,000 applications for over 13,000 jobs in 12 cities across 11 states.^[170] It found evidence of age discrimination against both men and women, with older applicants - those age 64 to 66 years old -- more frequently denied job interviews than middle-age applicants age 49 to 51.^[171] Women, especially older women but also those at middle age, were subjected to more age discrimination than older men.^[172]

At an EEOC meeting on [Promoting Diverse and Inclusive Workplaces in the Tech Sector](#), the EEOC heard from experts about micro-targeting practices seeking to recruit younger workers. Experts also testified about job postings preferring younger workers as "digital natives," rather than older workers who are referred to as "digital

immigrants." [173] They also testified about online application systems that include dates of birth or graduation dates in fields that cannot be bypassed. Such practices may deter and disadvantage older applicants.

3. Mandatory Retirement and Discriminatory Denial of Benefits Have Also Dominated ADEA Litigation.

Challenges to mandatory retirement policies and the discriminatory denial of benefits dominated the early decades of ADEA litigation. The Supreme Court issued unanimous decisions in three cases in 1985, ruling for the older workers who challenged practices related to mandatory retirement policies.[174] The EEOC successfully eliminated numerous policies that forced the retirement of police, firefighters, and other public safety officers.[175] Congress, however, later amended the ADEA to allow state and local governments to impose mandatory retirement for police and firefighters in limited circumstances.[176]

The legality of early retirement incentives[177] and pension plans[178] that denied or reduced benefits based on age have been frequent claims in ADEA litigation. After the Supreme Court held that the ADEA did not generally prohibit discrimination in employee benefit plans in *Public Employees Retirement System v. Betts*, [179] Congress enacted the OWBPA[180] to make clear that the ADEA prohibits an employer from denying or reducing benefits based on age, except in specific circumstances sanctioned by the OWBPA.[181]

The ADEA was initially construed to protect retiree health benefits and prohibit the use of Medicare eligibility to determine benefits for retirees in *Erie County Retirees Ass'n v. County of Erie, Pennsylvania*. [182] Based on concerns that employer-sponsored health benefits would be dropped in their entirety unless employers could use Medicare-eligibility to determine their availability, the EEOC issued a regulatory exemption from the ADEA permitting the coordination of retiree health benefits with Medicare or a comparable state health benefit plan.[183]

4. Intersectional Claims

The EEOC has long recognized the theory of "intersectional discrimination"[184] under both Title VII[185] and the ADEA[186] when an individual is treated differently because he or she belongs to more than one protected category and is subjected to a set of stereotyping unique to his or her status. The availability of an intersectional claim has become increasingly important for older women as more of them experience both age and sex discrimination.[187]

D. Harm of Age Discrimination

The financial and emotional harm of age discrimination on older workers and their families is significant. Once an older worker loses a job, she will likely endure the longest period of unemployment compared to other age groups and will likely take a

significant pay cut if she becomes re-employed.^[188] The loss of a job has serious long-term financial consequences as older workers often must draw down their retirement savings while unemployed, and are likely to suffer substantial losses in income if they become re-employed.^[189]

The emotional harm of any discrimination is traumatic.^[190] For older workers, they typically feel betrayed when they have given many years of their working lives to one employer.^[191] Research shows that perceived age discrimination results in serious negative health effects, in part, because with advancing age, older individuals are exposed to more negative ageist stereotypes that make them feel older than their chronological age.^[192] Forced retirement correlates with significant declines in mental and physical health that can lead to shortened life spans.^[193]

Age discrimination also has significant monetary costs for employers. Lawsuits can impose substantial costs for employers for violating the ADEA,^[194] which just a few examples demonstrate. The largest ADEA suit to date, *Arnett v. California Public Employees' Retirement System*,^[195] settled for \$250,000,000, and a permanent injunction against the state pension system and 1,500 local agencies, for reducing the disability pension benefits of police and firefighters based on age. Sprint Nextel settled an ADEA collective action for \$57.5 million for 1700 older workers laid off between 2001 and 2003.^[196] An age discrimination lawsuit brought by 129 older workers at the Livermore National Laboratory settled for \$37.5 million in 2015.^[197]

EEOC resolved lawsuits involving mandatory retirement policies against Johnson & Higgins for \$28.1 million and Sidley and Austin for \$27.5 million. 3M resolved three-related ADEA lawsuits for \$15 million and significant organizational changes and monitoring by EEOC in 2011.^[198] Recent EEOC cases challenging age discrimination in hiring against Texas Roadhouse settled for \$12 million^[199] and against Seasons 52 for \$2.85 million.^[200]

V. State Law Protections

When Congress was considering the ADEA in 1967, 24 states and Puerto Rico had laws prohibiting age discrimination in the workplace.^[201] A majority of those state laws included a prohibition against age discrimination within an omnibus anti-discrimination law that also prohibited discrimination based on race, color, religion, national origin, and sex.^[202] Rather than follow the predominant model used by the states that would add age to Title VII, Congress chose to create a separate federal law, the ADEA.

Today, every state except South Dakota has a law prohibiting age discrimination in the workplace. Forty-three state laws^[203] include age within their omnibus anti-discrimination laws, meaning the same standards and damages apply in age cases as they do in other state law discrimination cases.^[204] Thirty-two state laws provide for either compensatory and/or punitive damages, with 21 states providing for both. Given the availability of greater damages than the federal ADEA permits and higher success

rates in state courts,[\[205\]](#) older workers in these states frequently pursue claims only under state law or under both state and federal law.[\[206\]](#)

VI. The Recent Fissuring of the ADEA's Ties to Title VII

Experts have testified before the EEOC expressing concerns about Supreme Court decisions in the past decade and a half that have severed the ADEA from its ties to Title VII, by relying on textual differences between the ADEA and Title VII, rather than their shared purposes and prohibitions.[\[207\]](#) The most significant ADEA case that experts point to that divorces the ADEA from Title VII precedent is *Gross v. FBL Financial Services, Inc.*[\[208\]](#) *Gross* held that older workers could no longer use the motivating factor framework derived from the same Title VII prohibition[\[209\]](#) shared by the ADEA to prove unlawful age discrimination. Instead, the Supreme Court reasoned that the 1991 addition to Title VII of a provision setting forth a motivating factor framework did not apply to the ADEA because Congress failed to similarly amend the ADEA.[\[210\]](#)

Thus, while individuals with race or sex discrimination claims under Title VII can prove unlawful disparate treatment under either a "but for" causation standard or a "motivating factor" standard, victims of age discrimination are limited to just one -- a "but for" standard.[\[211\]](#) And even though the Supreme Court said in *Gross* that there is no heightened standard to prove age discrimination,[\[212\]](#) some courts have interpreted *Gross* as making ADEA cases harder to prove.[\[213\]](#) This can be extremely problematic for older women and older minorities who often bring claims under both the ADEA and Title VII.[\[214\]](#)

VII. Moving Forward: Preventing Age Discrimination in the Workplace

Too many older Americans continue to face discrimination based on persistent stereotypes and outdated assumptions about age and work. Age discrimination is legally wrong and has been since the ADEA took effect five decades ago. But it remains too common and too accepted in today's workplace. While attitudes about older workers, their abilities, and age discrimination have improved somewhat over the past 50 years, much more can and should be done to make age discrimination less prevalent and less accepted.

What more can be done to fulfill the ADEA's promise that ability matters, not age? Research shows that stereotypes are tenacious and it takes generations to change a stereotype.[\[215\]](#) Workplace practices, however, can counter unconscious bias and stereotyping.[\[216\]](#) Changing practices rather than trying to just change attitudes to eliminate bias can produce real and sustainable benefits for both employees and employers.[\[217\]](#)

First and foremost, workplace culture determines whether workers are valued without regard to age or whether they are devalued based on age.[\[218\]](#) The leadership of an

organization is obviously critical to creating and fostering a culture that is committed to a multi-generational workplace where all workers can grow and thrive.[\[219\]](#) Workplace cultures that extol ability and reject discriminatory stereotypes and words result in more diverse, productive and engaged workforces.

Second, employers and employees can also help prevent age discrimination in the workplace by recognizing and rejecting stereotypes, assumptions, and remarks about age and older workers just as they reject such stereotypes, assumptions and remarks about someone's sex, race, disability, national origin, or religion.

In addition, the following strategies were recommended by experts at EEOC meetings to avoid age discrimination, increase age diversity in the workplace, and value a multi-generational workforce.

A. Increasing the Age Diversity of the Workforce

Based on research studies and their work with employers, experts recommend several strategies that can prevent biases from entering into recruitment, hiring, and human resource practices. One significant but often overlooked strategy is to include age in diversity and inclusion programs and efforts. A study by PriceWaterhouseCoopers found that 64 percent of firms surveyed in its 2015 Annual Global CEO survey had diversity & inclusion strategies, but only 8 percent of those included age.[\[220\]](#) Yet, the benefits of doing so appear to have strong positive outcomes for both employers and employees.

Research demonstrates that age diversity can improve organizational performance and lower employee turnover.[\[221\]](#) Studies also find that mixed-age work teams result in higher productivity for both older and younger workers.[\[222\]](#) Older workers who report their companies have a high "Workplace Diversity Focus" have the highest levels of employee satisfaction.[\[223\]](#)

An initial assessment of an organization's culture, practices, and policies may reveal outdated assumptions about older workers that could taint objective decisionmaking and limit opportunities. The Center on Aging & Work at Boston College, along with AARP, has developed an [assessment tool](#) that evaluates organizational strengths and weaknesses in attracting, managing, and retaining a multigenerational workforce.[\[224\]](#)

B. Recruitment and Hiring Strategies

With low unemployment and growing shortages of skilled, qualified workers, hiring older workers can help employers fill what has become known as the "skills gap" -- the lack of trained or experienced workers for higher-skilled jobs. Their employment also furthers economic and social policies that encourage continued work to strengthen personal financial well-being and our economy.[\[225\]](#)

Recruitment practices can avoid age bias by seeking workers of all ages and not limiting qualifications based on age or years of experience. Over 94 percent of working Americans visit companies' social media pages when searching for a job.[\[226\]](#) Websites and social media that include age-diverse photos, graphics, and content demonstrate a commitment to attracting a multi-generational workforce. Applications, whether online or paper, should not ask date of birth or other age-related questions, just as they should not ask an applicant to identify her race or sex.

Training recruiters and interviewers to avoid ageist assumptions and even common perceptions about older workers is critical. For example, the assumption that hiring a younger worker is less expensive and a better return on investment than hiring an older worker is outdated and flawed. Contrary to common perception, older workers do not cost significantly more than younger workers, as structural changes in compensation and benefits have created a more age-neutral distribution of labor costs.[\[227\]](#) And the presumed investment based on the assumption that the younger worker will be with the employer longer is less likely these days. Millennials are leaving their employers, on average, after three years, whereas older workers, on average, provide employers with more stability, longer tenures, and ultimately a greater return on investment.[\[228\]](#)

Experts also recommend an assessment of interviewing strategies to avoid age bias, as studies and experience show that interviewers tend to favor job candidates who remind them of themselves.[\[229\]](#) An age-diverse interview panel for prospective employees may be viewed more positively by candidates and may be less vulnerable to implicit bias. Training interviewers as to how to frame age-neutral questions and using a standard or structured process can help avoid age bias throughout the interview process.[\[230\]](#)

C. Retention Strategies

Effective retention strategies decrease unexpected turnover costs and loss of institutional knowledge, and increase engagement and productivity. Age is positively correlated with employee engagement, as workers age 50 and older have the highest levels of engagement in the workplace.[\[231\]](#) And high employee engagement increases employee productivity.[\[232\]](#)

Experts recommend strategies to provide career counseling, training and development opportunities to workers at all ages and at all stages of their careers. Mixed-age and reverse-age mentoring can increase worker productivity and satisfaction.[\[233\]](#) Workers of all ages value flexible work options that can provide work/life balance at various times in their careers.[\[234\]](#)

Conclusion

The ADEA has helped to bring equality and fairness to the workplace for older workers. But age discrimination persists based on outdated and unfounded assumptions about older workers, aging and discrimination. No one should be denied a job based on

stereotypes and it's time to put these outdated assumptions to rest. Ability, experience and commitment matter, not age. To achieve the promise of the ADEA, it's time to recognize the value of age diversity in the workplace and the benefits of a multi-generational workforce.

Appendix A

ADEA and Amendments

1964

- [Civil Rights Act of 1964](#), § 715, Pub. L. No. 88-352, 78 Stat. 241, 265 (July 2, 1964).
Congress directs the Secretary of Labor to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and the individuals affected."

1965

- **Report of the Secretary of Labor to the Congress under section 715 of the Civil Rights Act of 1964, *The Older American Worker: Age Discrimination in Employment*** (June 30, 1965), (known as the "Wirtz Report" after Secretary of Labor Willard Wirtz).
The Wirtz Report concludes there is substantial evidence of arbitrary age discrimination and suggests that Congress deal with the issue by enacting legislation.

1967

- [Age Discrimination in Employment Act](#), Pub. L. No. 90-202, 81 Stat. 602 (December 15, 1967; effective June 12, 1968 (180 days after enactment)).
Congress passes the Age Discrimination in Employment Act of 1967 (ADEA) protecting individuals who are between 40 and 65 years of age from discrimination in employment. Congress authorizes the Department of Labor to enforce the ADEA.

1974

- [Fair Labor Standards Amendments of 1974](#), Pub. L. No. 93-259, 88 Stat. 74 (April 8, 1974).

Congress extends ADEA protections to employees of federal, state, and local governments.

1977

- [Fair Labor Standards Amendments of 1977](#), [Pub. L. No. 95-151, 91 Stat. 1245](#) (November 1, 1977).
Congress expands remedies under FLSA § 16(b), 29 U.S.C. § 216(b) for retaliation claims under FLSA §15(a)(3), 29 U.S.C. § 215(a)(3). ADEA §7(b), 29 U.S.C. § 626(b), incorporates FLSA § 16(b), and deems acts prohibited under ADEA § 4, 29 U.S.C. § 623, to be prohibited acts under FLSA § 15, as amended.

1978

- [Age Discrimination in Employment Act Amendments of 1978](#), Pub. L. No. 95-256, 92 Stat. 189-93 (April 6, 1978).
Congress raises the private-sector age of coverage from 65 to 70 and removes the age cap for federal employees to cover individuals age 40 and older in § 12, 29 U.S.C. §§ 631(a), (b). Congress makes the right to a jury trial explicit in § 7(c), 29 U.S.C. § 626(c), and adds language to § 4(f)(2) to prohibit a seniority system or benefit plan from requiring or permitting involuntary retirement. 29 U.S.C. § 623(f)(2).
- [Reorganization Plan No. 1 of 1978](#), § 2, 43 Fed. Reg. 19807-809 (May 9, 1978) and Executive Order No. 12144, 44 Fed. Reg. 37193 (June 22, 1979).
Congress transfers enforcement authority for the ADEA to the Equal Employment Opportunity Commission, effective October 1, 1979.

1982

- [Tax Equity and Fiscal Responsibility Act of 1982](#), § 116, Pub. L. No. 97-248, 96 Stat. 324 (September 3, 1982).
Congress amends the ADEA to provide for non-discrimination in group health plan coverage for older workers.

1984

- [Older Americans Act Amendments of 1984](#), § 802, Pub. L. 96-459, 98 Stat. 1767 (October 9, 1984).
Congress amends the ADEA to include coverage of U.S. citizens employed abroad, and specifies the coverage of foreign entities controlled by U.S. employers.

1986

- [Age Discrimination in Employment Amendments of 1986](#), Pub. L. No. 99-592, 100 Stat. 3342 (October 31, 1986).
Congress extends ADEA coverage to all individuals at least 40 years of age and eliminates the upper-age coverage cap of 70. Congress provides an exemption through 1993 for state and local governments using maximum hiring or mandatory retirement ages for firefighters or law enforcement officials for plans in effect in March 1983. Congress provides a similar exemption for colleges and universities who may involuntarily retire professors at age 70, if the professor is serving under a contract of unlimited tenure.

1988

- [Age Discrimination Claims Assistance Act of 1988](#), Pub. L. No. 100-283, 102 Stat. 78 (April 7, 1988).
Congress reinstates the right to file lawsuits to charging parties who had lost that right when EEOC failed to process ADEA charges within the two or three year statute of limitation. The ADCAA extended the time for filing lawsuits for an additional 540 days (18 months).

1990

- [Older Workers Benefit Protection Act](#), Pub. L. No. 101-433, 104 Stat. 978 (October 16, 1990).
Congress responds to the Supreme Court's 1989 decision in *Public Employees Retirement System of Ohio v. Betts*. *Betts* held that ADEA did not forbid age discrimination in employee benefits except in rare circumstances. The OWBPA amends the ADEA to prohibit age discrimination in employee benefits and establishes minimum standards for voluntary waivers of ADEA claims or rights.
- [Age Discrimination Claims Assistance Amendments of 1990](#), Pub. L. No. 101-504, 104 Stat. 1298 (November 3, 1990).
Congress passes the Age Discrimination Claims Assistance Amendments of 1990 (ADCAA II) providing ADEA charging parties an additional 450 days in which to file their own private ADEA lawsuits. The ADCAA II preserves the rights of charging parties to later bring their own lawsuits while permitting EEOC to process the remaining backlog of age discrimination charges.

1991

- [Civil Rights Act of 1991](#), § 115, Pub. L. No. 102-166, 105 Stat. 1071 (November 21, 1991). Congress codifies the 90-day statute of limitations provision for filing ADEA civil actions.

1995

- [**Congressional Accountability Act of 1995**](#), § 201(c)(2), Pub. L. No. 104-1, 109 Stat. 3 (January 23, 1995).
Congress specifies that appropriate remedies for a violation of the ADEA are awarded under ADEA § 15(c), 29 U.S.C. § 633a(c), for legal and equitable relief, and under ADEA § 7(b), 29 U.S.C. § 626(b), for liquidated damages.

1996

- [**Omnibus Consolidated Appropriations Act**](#), Pub. L. No. 104-208, 110 Stat. 3009-23, 24 (September 30, 1996).
Congress reenacts and amends §4(j) to the ADEA (29 U.S.C. §623(j)) to permit state governmental employers to use maximum hiring and mandatory retirement ages for firefighters and law enforcement officers pursuant to bona fide plans that are not a subterfuge to evade the purposes of the ADEA. Congress also repealed §3(b), 29 U.S.C. §623(g) of the ADEA Amendments of 1986.

1998

- [**Higher Education Amendments of 1998**](#), § 941, Pub. L. No. 105-244, 112 Stat. 1581 (October 7, 1998).
Congress enacts the Higher Education Amendments of 1998 to amend Section 4 of the Age Discrimination in Employment Act (29 U.S.C. § 623) to permit colleges and universities to offer special age-based retirement incentives for tenured faculty members at institutions of higher education; this amendment replaces the former temporary exemptions which permitted colleges and universities to mandatorily retire tenured faculty members at age 65 and later at age 70.

2006

- [**Pension Protection Act of 2006**](#), §701(c), Pub. L. 109-280, 120 Stat. 780 (August 17, 2006).
Congress revises ADEA §4(i) to add special rules relating to pension benefit plans.

2009

- [**Lily Ledbetter Fair Pay Act of 2009**](#), §§ 4, 5, Pub. L. No. 111-2, 123 Stat. 5 (January 29, 2009).
Congress adds amendments to the ADEA § 7(d)(3), 29 U.S.C. § 626(d)(3), to clarify when an unlawful employment practice occurs with respect to claims of discrimination in compensation by private, public, and federal employees.

Appendix B

Supreme Court ADEA Decisions

1977

- *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977)
Retirement plan adopted before enactment of the ADEA could not be a subterfuge to evade the law, and came within the ADEA's § 4(f)(2) defense for bona fide employee benefit plans.

1978

- *Lorillard v. Pons*, 434 U.S. 575 (1978) (unanimous)
The parties to an ADEA action have the right to a jury trial because the ADEA incorporated the FLSA provision authorizing "legal" relief.

1979

- *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979)
If the state has a fair-employment-practice agency, an ADEA plaintiff must file a complaint with that agency before suing, but that complaint need not be timely under state law.

1981

- *Lehman v. Nakshian*, 453 U.S. 156 (1981)
When Congress amended the ADEA in 1974 to protect federal employees, it allowed federal employees to sue the federal government but did not give them the right to a jury trial.

1983

- *EEOC v. Wyoming*, 460 U.S. 226 (1983)
The 1974 extension of the ADEA to state and local governments was a valid exercise of Congress's powers under the Commerce Clause.

1985

- *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) (unanimous)
The McDonnell Douglas test is irrelevant where the plaintiff presents direct evidence of discrimination; the standard for willful violations is whether the

employer knew or showed reckless disregard for whether its conduct was prohibited by the ADEA. The EEOC intervened to join as a party in the case.

- *Johnson v. Mayor and City Council of Baltimore*, 472 U.S. 353 (1985) (unanimous)
A state-government employer must establish that its mandatory retirement age for firefighters is a bona fide occupational qualification and cannot rely on the federal provision permitting mandatory retirement of federal firefighters at age 55.
- *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985) (unanimous)
An airline defending a mandatory retirement age as a bona fide occupational qualification must show that that age is a legitimate proxy for appropriate job qualifications either because no persons over that age are qualified or because it is impossible or highly impractical to assess the fitness of employees over that age on an individual basis.

1989

- *Public Employees Retirement System v. Betts*, 492 U.S. 158 (1989)
Invalidated the EEOC's regulation defining "subterfuge"; held that the ADEA prohibits only those employee benefit plans that were designed to discriminate in the non-fringe-benefits aspects of employment, superseded by the Older Workers Benefit Protection Act of 1990.
- *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165 (1989)
District courts have discretion to facilitate notice to potential plaintiffs in ADEA collective actions under § 626(b).

1991

- *Stevens v. Department of the Treasury*, 500 U.S. 1 (1991)
A federal employee can sue his agency under the ADEA without first going through the agency's EEO process, but she must first notify the EEOC of her intent to sue within 180 days of the discrimination and at least 30 days before suing.
- *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)
Mandatory arbitration agreements are enforceable under the Federal Arbitration Act with respect to ADEA claims.
- *Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104 (1991) (unanimous)
If the state fair-employment-practice agency finds no discrimination but that finding is not reviewed by a state court, the finding does not preclude the employee from suing in federal court.
- *Gregory v. Ashcroft*, 501 U.S. 452 (1991)
The plaintiffs, appointed state judges, were "appointees on a policymaking level"

under ADEA § 11(f), 29 U.S.C. § 630(f), and therefore were not protected from age discrimination by the ADEA.

1993

- *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993)
Held that the plaintiff must show that age "played a role" in, and "had a determinative influence" on the employer's decision; clarified framework for analyzing a factor that is a proxy for age; affirmed *Thurston's* "knowledge or reckless disregard standard" for awards of liquidated damages in cases involving "informal decisions" by employers.

1995

- *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995) (unanimous)
If the employer violated the ADEA in firing the plaintiff and the employer later learned of facts that it can show would have caused the employer to fire the plaintiff lawfully, the plaintiff cannot secure reinstatement or front pay; the plaintiff may still obtain back pay, but only until the employer discovered the after-acquired evidence.
- *Commissioner of Internal Revenue v. Schleier*, 515 U.S. 323 (1995)
Amounts received by taxpayer as back wages in settlement of ADEA claims are not excludable from gross income; ADEA liquidated damages are punitive in nature and therefore also not excludable from gross income.

1996

- *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996) (unanimous)
ADEA plaintiffs need only show that their replacement was substantially younger to establish a prima facie case.
- *Lockheed v. Spink*, 517 U.S. 882 (1996)
ERISA does not prohibit employers from giving additional pension benefits to employees who release their potential employment-related claims; Congress amended ERISA and the ADEA in 1986 to prohibit age-based cessations of benefit accruals and age-based reductions in benefit-accrual rates, but those amendments did not apply retroactively.

1998

- *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998)
A release that did not comply with the Older Workers Benefit Protection Act did not bar the plaintiff's ADEA law suit, even though she had not returned, or offered to return, the money she had received in exchange for the release.

2000

- *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000)
The ADEA did not validly abrogate the states' Eleventh Amendment immunity from suit by private individuals.
- *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000)
If the plaintiff offered evidence establishing a prima facie case and evidence showing that the employer's articulated reason is pretextual, the jury may find for the plaintiff; the plaintiff is not required to introduce additional evidence to prove pretext.

2004

- *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004)
The ADEA bars discrimination favoring a younger employee over an older one; it does not prohibit favoring an older employee over a younger one.

2005

- *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005)
The ADEA authorizes disparate-impact claims; a practice having a disparate impact does not violate the ADEA if the employer's decision adopting the practice was based on a "reasonable factor[] other than age".

2008

- *Sprint/United Management Co. v. Mendelsohn*, 552 U.S. 379 (2008)
The Court rejected a *per se* admissibility rule with respect to trial witnesses and recognized the wide discretion of district courts in determining the admissibility of evidence.
- *Federal Express Corp. v. Holowecki*, 552 U.S. 389 (2008) (amicus)
An ADEA charge must include certain basic information and must ask the EEOC to take remedial action on the charging party's behalf; the EEOC's failure to do its duty does not render a charge invalid; here, the plaintiff's intake questionnaire and accompanying affidavit constituted a charge.
- *Gomez-Perez v. Potter*, 553 U.S. 474 (2008)
The ADEA provision barring "discrimination" against federal employees also prohibits retaliation.
- *Meacham v. Knolls Atomic Power Laboratory*, 554 U.S. 84 (2008)
If an ADEA plaintiff has offered evidence showing a disparate-impact claim, the employer bears the burden of proving that the non-age factor it relied on was a reasonable one.

- [*Kentucky Retirement Systems v. EEOC*](#), 554 U.S. 135 (2008)
The state's disability-retirement plan did not violate the ADEA: the trigger for less favorable treatment was the employee's pension status, not his age; the plan had a non-age-related purpose and did not rely on stereotypical assumptions; and the EEOC offered no evidence that the differential treatment was actually motivated by age as opposed to pension status.

2009

- [*14 Penn Plaza LLC v. Pyett*](#), 556 U.S. 247 (2009)
The provision in the collective bargaining agreement that clearly and unmistakably required union members to arbitrate their ADEA claims is enforceable under the Federal Arbitration Act.
- [*Gross v. FBL Financial Services, Inc.*](#), 557 U.S. 167 (2009)
An ADEA plaintiff must prove that his age was the but-for cause of the challenged adverse action; the burden of persuasion does not shift to the employer as it does in Title VII mixed-motive cases, even if the plaintiff has offered evidence of age discrimination.

[1] "The ADEA, enacted in 1967 as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflects a societal condemnation of invidious bias in employment decisions. The ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide. See Title VII of the Civil Rights Act of 1964." *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357-58 (1995) (citations omitted).

[2] Pub. L. 88-38, 77 Stat. 56 (1963) (codified at 29 U.S.C. § 206(d)).

[3] Pub. L. No. 88-352, 78 Stat. 241, 253-66 (1964) (codified at 42 U.S.C. § 2000e *et seq.*).

[4] U.S. Dep't of Labor, *The Older American Worker: Age Discrimination in Employment*, Report of the Secretary of Labor Under Section 715 of the Civil Rights Act of 1964 (1965) ("Wirtz Report"); *reprinted in* EEOC Legislative History of the Age Discrimination in Employment Act (1981).

[5] *Improving the Age Discrimination Law*, A Working Paper, S. Spec. Comm. On Aging, 93 Cong. 1st Sess. III (1973).

[6] Wirtz Report, *supra* note 4 at 21.

[7] Department of Labor, Employment and Training Administration, [Report of the Taskforce on the Aging of the American Workforce](#), 20 (2008).

[8] Daniel Kohrman & Mark Hayes, *Employers Who Cry "RIF" and the Courts That Believe Them*, 23 Hofstra Lab. & Emp. L.J. 153 (2005) (showing that bias against older people is more deeply embedded than other forms of bias including race, gender, religion, and sexual orientation).

[9] Rebecca Perron, *The Value of Experience: Age Discrimination Against Older Workers Persists*, AARP (forthcoming 2018) (study conducted in September 2017 of 3,900 of those aged 45 and older either working or looking for work).

[10] "If more skilled workers over 60 stayed in the workforce, it would make a significant impact on reducing the skilled worker shortage in the United States." [Written Testimony of John Challenger](#), CEO, Challenger, Gray & Christmas, Inc., *The ADEA 50 -- More Relevant Than Ever, Meeting of the U.S. Equal Employment Opportunity Commission* (2017).

[11] H.R. 10144 sought to prohibit "arbitrary employment discrimination because of race, religion, color, national origin, ancestry or age." H.R. Rep. No. 97-1370, 97th Cong. 2d Sess. 2155 (1962).

[12] The amendment to add a prohibition of age discrimination to Title VII failed in the House by a vote of 123 to 94. 110 Cong.Rec. 2596-99 (1964). The Senate rejected a similar amendment by a vote of 63 to 28. 110 Cong.Rec. 9911-13 (1964). Some ADEA historians claim that the move to add age discrimination to Title VII was intended to defeat passage, like the move to add sex discrimination. See Daniel P. O'Meara, *Protecting The Growing Numbers of Older Workers: The Age Discrimination in Employment Act* 11 (1989); *Disparate Impact Analysis and the Age Discrimination in Employment Act*, 64 Minn. L. Rev. 1038, 1053 (1984); Alfred W. Blumrosen, *Interpreting the ADEA: Intent or Impact*, *Age Discrimination in Employment Act: A Compliance and Litigation Manual for Lawyers and Personnel Practitioners*, 106-15 (1982). Historians also disagree on the reasons Congress added sex to Title VII. J. Freeman, *How Sex Got into Title VII: Persistent Opportunism as A Maker of Public Policy*, 9 *Law and Inequality: A Journal of Theory and Practice*, 163-184 (1991); M.E. Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for The Issue of Comparable Worth*, 19 *Duquesne Law Rev.* 453-477 (1980).

[13] Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 265 (1964).

[14] Wirtz Report, *supra* note 4.

[15] "Physical capability is by far the most prominent single reason advanced for imposing upper age limits." *Id.* at 8.

[16] *Id.* at 5.

[17] *Id.* at 6. The Wirtz Report did not compare the origins or motives driving sex discrimination to the motivations for age discrimination.

[18] *Id.* at 1.

[19] The 1965 Wirtz Report included a study of over 500 employers, and found that 3 out of 5 employers surveyed used age limits in hiring. Workers age 45 and older were barred from a quarter of all jobs, those 55 and older were barred from half of all jobs, and most jobs were barred to workers age 65 and older. Seventy percent of those employers surveyed who barred older workers from a wide variety of jobs reported no factual basis for the age cutoff they selected, while other employers hired and retained older workers for the same jobs at the same ages for which these employers barred them. *Id.* at 8.

[20] *Id.* at 8.

[21] *Id.* at 11-17.

[22] *Id.* at 11.

[23] *Id.*

[24] *Id.* at 12.

[25] *Id.* at 14.

[26] *Id.* at 18-19.

[27] *Id.*

[28] See 113 Cong. Rec. 1377, 2199-2200 (1967).

[29] See Age Discrimination in Employment Act of 1967, S. Rep. No. 723, 90th Cong. 1st Sess. 13-14 (1967) (statement of Sen. Javits). In the House, John H. Dent and Carl D. Perkins were the leading proponents of the ADEA.

[30] The House approved H.R. 13054 on December 4, 1967 by a vote of 344 to 13. 113 Cong. Rec. 34752 (Dec. 4, 1967). By unanimous consent, the Senate approved amendments to S.830 from the House bill. 113 Cong. Rec. 35055-57 (Dec. 5, 1967). The House, by unanimous consent, concurred on December 6, 1967. 113 Cong. Rec. 35132 (Dec. 6, 1967). President Lyndon B. Johnson signed the bill on December 15, 1967. (113 Cong. Rec. 37125 (Dec. 15, 1967). Pub. L. No. 90-202, 81 Stat. 607 (1967).

[31] Pub. L. No. 90-202, § 15, 81 Stat. 607 (1967) (effective 180 days after enactment).

[32] As Senator Yarborough, one of the leading sponsors of the ADEA, explained:

a great deal of the problem stems from ignorance: there is simply a widespread irrational belief that once men and women are past a certain age they are no longer capable of performing even some of the most routine jobs.

113 Cong. Rec. 31254 (1967); See *Improving the Age Discrimination Law*, *supra* note 5, at III.

[33] 29 U.S.C. § 621(b).

[34] Age Discrimination in Employment Act of 1967, S. Rep. No. 723, 90th Cong. 1st Sess. 13-14 (1967); Age Discrimination in Employment Act of 1967, H.R. Rep. No. 805, 90th Cong. 1st Sess. (1967).

[35] "There are important similarities between the two statutes, to be sure, in their aims - - the elimination of discrimination from the workplace -- and in their substantive prohibitions." *Lorillard, Inc. v. Pons*, 434 U.S. 575, 584 (1978); See *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979) (ADEA and Title VII share a common purpose).

[36] "[T]he prohibitions of the ADEA were derived *in haec verba* from Title VII." *Lorillard*, 434 U.S. at 584. The Court cited to both prohibitions in Title VII § 703(a)(1) and (2), 42 U.S.C. § 2000e-2(a)(1), (2), in comparing the almost identical language in the ADEA's prohibitions §§4(a)(1), (2), 29 U.S.C. §§ 623(a)(1), (2). *Id.* at n. 12.

[37] Compare 29 U.S.C. § 623(f)(1), with 42 U.S.C. § 2000e-2(e)(1).

[38] See *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985); *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 414, n.19 (1985).

[39] "The prohibitions in this Act shall be limited to individuals who are at least forty years of age but less than sixty-five years of age." Pub. L. No. 90-202, § 12 (1967).

[40] *Id.* at § 13.

[41] For a complete list of amendments to the ADEA, see Appendix A and EEOC's resource pages at <https://www.eeoc.gov/eeoc/history/adea50th/adea.cfm>.

[42] The Fair Labor Standards Act Amendments of 1974, § 28(a)(4), expanded the ADEA's definition of "employer" at § 630(b) to include state and local governments of any size and added another new provision, § 633a, to protect federal employees age 40 to 70. Pub. L. No. 93-259, 88 Stat. 74-76 (1974). In contrast, Title VII was amended in 1972 to cover state and local government employers that employ fifteen or more individuals through an addition to the definition of "persons" covered by the Act. Pub. L. No. 92-261, 86 Stat. 103 (1972).

[43] "The committee believes that as a matter of basic civil rights people should be treated in employment based on their individual ability to perform a job rather than based on stereotypes about race, sex, or age." S. REP. 95-493, 95th Cong., 1st Sess. 1977, at 3; 1978 U.S.C.C.A.N. 504, 1977 WL 9644.

[44] See Amending the Age Discrimination in Employment Act Amendments of 1977, S. Rep. 95-493, 95th Cong. 1st Sess. 2-4 (1977):

Scientific research now indicates that chronological age alone is a poor indicator of ability to perform a job....

... A person with the ability and desire to work should not be denied that opportunity solely because of age. The Act's current age limitation unfairly assumes that age alone provides an accurate measure of an individual's ability to perform work. In fact, the evidence clearly establishes the continued productivity of workers who are 65 years of age and older.

... the arguments for retaining existing mandatory retirement policies are largely based on misconceptions rather than a careful analysis of the facts.

See *also* Mandatory Retirement: The Social and Human Cost of Enforced Idleness, H.R. Rep. Select Comm. On Aging, 95th Cong. 1st Sess. VII (1977); The Next Steps in Combating Age Discrimination in Employment: With Special Reference to Mandatory Retirement Policy, A Working Paper, S. Spec. Comm. on Aging, 95th Cong. 1st Sess. 1 (1977).

The House and Senate Reports for the 1986 ADEA Amendments cited to a 1985 study by psychologists David Waldman and Bruce Avolio on the relationship between age and performance. The study "found that contrary to popular belief, older workers can be just as productive as their younger counterparts" and found little support for the belief that job performance declines with age. Eliminating Mandatory Retirement, A Report by The Chairman of The Subcomm. on Health and Long-Term Care of The Select Comm. on Aging, H.R. Rep. No. 99-561, at 107-08 (2d Sess. 1986); Working Americans: Equality at Any Age: Hearing Before the S. Spec. Comm. on Aging, 99th Cong. (1986).

[45] Pub. L. No. 95-256, § 12(a), 92 Stat. 189 (1978).

[46] *Supra* note 44. Following the 1977 studies, Congress removed the upper age limit for federal employees in the 1978 ADEA amendments. Pub. L. No. 95-256, § 5(a), 92 Stat. 191.

[47] Pub. L. No. 99-592, 100 Stat. 3342 (1986). At the same time, Congress added 7-year exemptions permitting mandatory retirement of public safety officers and tenured faculty. *Id.* §§ 3, 6.

[48] See *Eliminating Mandatory Retirement*, *supra* note 44; *Working Americans.*, *supra* note 44.

[49] Congress cited to survey results that 90 percent of the public agreed that nobody should be forced to retire because of age. Age Discrimination in Employment Amendments of 1986, H.R. Rep. No. 99-756, at 4 (2d Sess. 1986).

[50] Pub. L. No. 101-433, 104 Stat. 978 (1990).

[51] In *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989), the Supreme Court essentially held that the ADEA did not forbid age discrimination in employee benefits except in rare circumstances.

[52] The original congressional intent of the ADEA was to "prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations." Pub. L. No. 101-433, § 101, 104 Stat. 978.

[53] *Id.* § 201 (codified at 29 U.S.C. §§ 626(f)(1) -(4)).

[54] See 112 Cong. Rec. 20823 (1966) (statement of Sen. Javits); 113 Cong. Rec. 7076 (1967) (statements of Sen. Javits); Age Discrimination in Employment Act of 1967, S. Rep. No. 723, at 13-14 (1st Sess. 1967) (statements of Sen. Javits) (opposing Administration's bill which would create a "wholly unnecessary new bureaucracy" with DOL).

[55] See *Hearings on S. 830, S. 788 Before the Subcomm. on Labor of the S. Comm. on Labor and Pub. Welfare*, 90th Cong. 24, 29, 396 (1967) (statements of Sen. Javits and Sen. Smathers); *Age Discrimination in Employment - Proposed Amendments to S.830 Administration Bill, Before the S. Subcomm. On Labor of the Committee on Labor and Public Welfare*, 113 Cong. Rec. 7076 (1967) (statement of Sen. Jacob Javits) ("The EEOC is already years behind in disposing of its docket."); Craig Robert Senn, *Ending Discriminatory Damages*, 64 Ala. L. Rev. 187, 203 (2012) (summarizing legislators' concerns that the EEOC was under-resourced to handle enforcement of the ADEA, given lengthy EEOC charge backlog and "the possibility that age discrimination enforcement would be neglected in favor of other forms of discrimination.").

[56] The Wage and Hour Division of the Department of Labor (DOL) enforced the Equal Pay Act of 1963, 29 U.S.C. § 206, and the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*

[57] See Senn, *supra* note 55.

[58] See 33 Fed. Reg. 9172 (June 21, 1968) (codified at 29 C.F.R. § 860.103(f)(1)(ii)) (permitting a "differentiation based on a physical examination, but not one based on age" only for jobs with "stringent physical requirements" that involved safety or

hazardous work conditions). Conversely, the regulations interpreted the ADEA as prohibiting practices that assumed "every employee over a certain age in a particular job usually becomes physically unable to perform the duties of that job." *Id.* at §860.103(f)(1)(iii). The regulation continued:

"There is medical evidence, for example, to support the contention that such is generally not the case. In many instances, an individual at age 60 may be physically capable of performing heavy-lifting on a job, whereas another individual of age 30 may be physically incapable of doing so."

Id.

[59] DOL counted charges based on the number of respondents, while the EEOC counts charges by the numbers of charging parties. Thus, a layoff of 30 employees by a single employer on which ADEA charges have been filed would be counted as one charge by DOL and 30 charges by the EEOC. See S. Spec. Comm. on Aging, Equal Employment Opportunity Commission Enforcement of the Age Discrimination in Employment Act: 1979 To 1982, An Information Paper Prepared by the Staff of the S. Spec. Comm. on Aging, 97th Cong. 2d Sess. 98-691 at 3 (1982).

[60] "More than 6,000 establishments were investigated in 1972 and 36 percent were found in violation of one or more statutory provisions. So far, the discrimination practice disclosed most often is illegal advertising. However, a significant number of violations have been found in refusal to hire, discharge because of age, and the existence of promotional bars to workers in the 40 to 64 age category." See S. Spec. Comm. on Aging, Improving the Age Discrimination Law, A Working Paper, 93rd Cong. 1st Sess. 4 (1973).

[61] President Richard Nixon, [Special Message to the Congress on Older Americans](#) (Mar. 23, 1972).

[62] Message of the President, Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807, 92 Stat. 3781 (May 9, 1978).

[63] *Id.*

[64] *Id.* at § 2.

[65] "[T]he Commission has devoted substantially more to its ADEA program than the \$3.5 million budget and 119 positions transferred from Labor. Indeed, the Commission transferred Title VII positions into the age enforcement program during both fiscal years 1980 and 1981. The current budgetary allocation for the ADEA program is 128 positions and approximately \$14 million." S. Spec. Comm. on Aging, Equal Employment Opportunity Commission Enforcement of the Age Discrimination in Employment Act: 1979 To 1982, *supra* note 59, at 3.

[66] *Id.* at 2-3, 19-21.

[67] *Id.* at 15 n.5 (noting EEOC's backlog of over 100,000 charges in 1977).

[68] *Twenty Years of the Age Discrimination in Employment Act: Success or Failure? Hearing Before the S. Spec. Comm. on Aging*, 100th Cong. 1st Sess. (1987).

[69] See [Age Discrimination Claims Assistance Act of 1988](#), Pub. L. No. 100-283, 102 Stat. 78 (1988). Congress reinstated the rights of charging parties to file lawsuits who had lost that right when the EEOC failed to process ADEA charges within the two or three-year statute of limitation. The ADCAA extended the time for filing lawsuits for an additional 540 days (18 months). Congress authorized a second extension of the ADEA statute of limitations in 1990 when the EEOC again failed to timely process ADEA charges. See also, [Age Discrimination Claims Assistance Amendments of 1990](#), Pub. L. No. 101-504, 104 Stat. 1298 (1990) (providing charging parties an additional 450 days in which to file their own private ADEA lawsuits, while permitting the EEOC to process the backlog of age discrimination charges).

[70] S. Spec. Comm. on Aging, Equal Employment Opportunity Commission Enforcement of the Age Discrimination in Employment Act: 1979 To 1982, *supra* note 59, at 8.

[71] While the Senate Aging Committee noted the importance of EEOC challenging such age limits, it expressed concern that the volume of such cases precluded litigation on other important issues. *Id.* at 55.

[72] In *EEOC v. Wyoming*, 460 U.S. 226 (1983), the Supreme Court held that the 1974 extension of the ADEA to state governments as employers was a valid exercise of the Commerce Clause and rejected a Tenth Amendment challenge to the ADEA. However, in *Kimel v. Florida Board of Regents*, 528 U.S. 62, 78-79 (2000), the Court held that the ADEA did not validly abrogate states' Eleventh Amendment immunity from suit for monetary relief by individuals. *Kimel* explicitly limits its holding to suits by private individuals and reaffirmed the holding in *EEOC v. Wyoming*, 460 U.S. 226 (1983), that state and local government employers are covered by the ADEA. See *Kimel*, 528 U.S. at 91 ("We hold only that, in the ADEA, Congress did not validly abrogate the States' sovereign immunity against suits by private individuals.")

[73] See [Advancing Opportunity: A Review of the EEOC's Systemic Program](#) at III.G (2016).

[74] *Kimel*, 528 U.S. at 78-79.

[75] See [Top Ten EEOC ADEA Cases](#).

[76] See [Faces of the Cases](#) (describing five successful EEOC cases in which older workers were unlawfully denied jobs).

[77] See *EEOC v. Seasons 52*, No. 15-CV-20561-JAL (S.D. Fla. 2018) (*consent decree settling claims for failure to hire based on age*); *Texas Roadhouse*,

[78] 29 U.S.C. § 628.

[79] The regulations explaining the waiver requirements of the OWBPA were the product of a negotiated rulemaking, the first time the EEOC had used such a procedure that brought experts together to develop regulations for consideration by the Agency. *Waivers of Rights and Claims Under the ADEA*, 63 Fed. Reg. 30628 (June 5, 1998) (to be codified at 29 C.F.R. § 1625.22).

[80] *Coordination of Retiree Health Benefits with Medicare and State Health Benefits*, 72 Fed. Reg. 72945 (Dec. 2007) (codified at 29 C.F.R. § 1625.32).

[81] *Coverage Under the Age Discrimination in Employment Act*, 72 Fed. Reg. 36875 (Jul. 2007).

[82] *Differentiations Based on Reasonable Factors Other Than Age*, 77 Fed. Reg. 19095 (codified at 29 C.F.R. § 1625).

[83] A "culture of retirement" in the United States led many individuals to retire earlier than they might otherwise. Department of Labor, Employment and Training Administration, [Report of the Taskforce on the Aging of the American Workforce](#), 8 (2008).

[84] In 1966, there were 27.8 million American women workers, totaling 36 percent of all workers. DOL Women's Bureau, [Civilian Labor Force by Sex Women's Bureau 1948-2016 Annual Averages](#).

[85] Andrew Noymer & Michel Garenne, [Life expectancy in the USA, 1900-98](#).

[86] See <https://www.thoughtco.com/baby-boom-overview-1435458>.

[87] BLS reports the US civilian work force at 77,347,000 in 1967 and 160,320,000 in 2017. See <https://www.bls.gov/cps/cpsaat01.pdf>, and Bureau of Lab. Stat., *Labor Force Statistics from the Current Population Survey*, <https://www.bls.gov/cps/cpsaat03.htm> (last modified Jan. 19, 2018).

[88] Mitra Toossi, Dep't of Lab., Bureau of Lab. Stat., [A Century of Change: The U.S. Labor Force, 1950 - 2050, Table 5, Civilian Labor Force by Sex, Age, Race, and Hispanic Origin, 1950 - 2000 and Projected, 2010 - 2050](#), Monthly Lab. Rev. 15 (2002). See also [Written Statement of Patrick Button](#), Assistant Professor Dep't of Econ., Tulane U., *The ADEA @ 50 -- More Relevant Than Ever, Meeting of the U.S. Equal Employment Opportunity Commission* (2017) ("The United States is experiencing an aging population that is increasingly trying to work longer....").

[89] *Id.*

[90] Patrick Purcell, Cong. Research Serv., *Older Workers: Employment and Retirement Trends* (2007).

[91] In 1992, workers age 55 and older comprised just 12 percent of the labor force. Dep't of Lab., Bureau of Lab. Stat., [Labor force projections to 2022: the labor force participation rate continues to fall, U.S. Bureau of Labor Statistics](#), (2013). By 2017, they totaled over 24 percent of the labor force. 2017 Data from Dep't of Lab., Bureau of Lab. Stat., [Labor Force Statistics from the Current Population Survey](#)(2018).

[92] Mitra Toossi and Elka Torpey, Bureau of Lab. Stat., [Older workers: Labor Force Trends and Career Options](#), Career Outlook (May 2017).

[93] *Id.*

[94] Mitra Toossi & T.L. Morisi, Bureau of Lab. Stat., [Women in the Workforce Before, During, and After the Great Recession: Spotlight on Statistics](#) (2017).

[95] Mitra Toossi and Elka Torpey, Bureau of Lab. Stat., [Older Workers: Labor Force Trends and Career Options](#), Career Outlook, Chart 3 (2017); See also Alicia Munnell, "[Why the Average Retirement Age is Rising](#)," MarketWatch (2017).

[96] From 2008 to 2010, more than three out of every four adults age 65 and over rated their health as good, very good, or excellent. Fed. Interagency Forum on Aging-Related Stat., *Older Americans 2012: Key Indicators of Well-Being* (2012).

[97] The qualifying age for full Social Security retirement benefits has been increasing since 2000. In 2020, eligibility for full Social Security retirement benefits will be 67 years of age. CDC, *Older Employees in the Workplace*, Issue Brief No. 1 (2012) (citing Patrick Purcell, Congressional Research Service, *Older Workers: Employment and Retirement Trends* (2009)).

[98] See [Written Testimony of Patrick Button](#), *supra* note 88.

[99] *Id.* citing research by Munnell and Sass (2007) and Maestas (2010) that only 27.6 percent of those who stopped working to retire claimed a pension).

[100] The Great Recession of 2007-2009 led to historic unemployment for older workers, reduced lifetime earnings, limited savings, and caused declines in potential Social Security and pension income. The inability of older workers to get rehired was historically low after the Great Recession and many simply withdrew from the labor force, fueling a surge in Social Security applications among this group. Owen Haaga & Richard W. Johnson, *Social Security Claiming: Trends and Business Cycle Effects*, Ctr. for Ret. Research at B.C. (2012).

[101] [Over Fifty and Out of Work](#) (American Public Television 2012) (a film project of older workers' stories in the Great Recession).

[102] "[F]ewer and fewer people are very confident" that they have enough money for a comfortable retirement—only 18 percent of respondents in a recent survey. Lisa Greenwald, Craig Copeland, and Jack Van Derhei, [The 2017 Retirement Confidence Survey: Many Workers Lack Retirement Confidence and Feel Stressed about Retirement Preparations](#), EBRI Issue Brief (2017). See [Written Testimony of Jacquelyn B. James](#), PhD, B.C., *The ADEA @ 50 -- More Relevant Than Ever*, Meeting of the U.S. Equal Employment Opportunity Commission (2017).

[103] A 2017 Gallup survey reported "there has been a seismic shift since 1995 in the age at which non-retirees believe they will retire. In two polls conducted that year, an average of 14% said they expected to retire after 65 and 49% before 65. These percentages have flipped in the last two decades, as the age to start collecting Social Security has risen to 67 and more Americans feel a financial need to stay in the workforce." Gallup, [Most U.S. Employed Adults Plan to Work Past Retirement Age](#) (2017).

[104] Rebecca Riffkin, Gallup, [Americans Settling on Older Retirement Age](#), (2015).

[105] *Id.*

[106] See [The 2017 Retirement Confidence Survey](#), *supra* note 102.

[107] Workers' expectations regarding when and how they will retire represent a dramatic change from long-held societal notions about fully retiring at age 65. Although the numbers vary based on who was surveyed and the date of the survey, nearly 3 out of 4 workers plan to work past age 65. Gallup, [Most U.S. Employed Adults Plan to Work Past Retirement Age](#) (2017). This increase is five times the 14 percent who said this in 1995. Rebecca Riffkin, Gallup, [Americans Settling on Older Retirement Age](#) (2015). In the same study, 63 percent plan to work part-time and 11 percent say they will work full-time. *Id.* Thirteen percent of older workers surveyed say they do not plan to retire at all. Transamerica Center for Retirement Studies, [17th Annual Retirement Survey](#), 16, 258-60 (2016).

[108] Thirty-nine percent of those age 65 and older who were working say that they had previously retired. Maestas, N. et al., RAND Corporation, [Working Conditions in the United States: Results of the 2015 American Working Conditions Survey](#), 12 (2017).

[109] Richard W. Johnson & Clair Xiaozhi Wang, Urban Institute Program on Retirement Policy, [What Are the Top Jobs for Older Workers?](#) (2017).

[110] *The Associated Press NORC Public Center for Public Affairs Research, Working Longer: Older American's Attitudes on Work and Retirement*, 2-3 (2013).

[111] Bureau of Lab. Stat., *The Labor Force in 2026 is Expected to be Much Older and to Become More Diverse*, [Projections, Overview and Highlights: 2016-26](#) (2017); Toossi, M., *A Century of Change: the U.S. Labor Force, 1950-2050*, *supra* note 88.

[112] BLS breaks out race and ethnicity data by Black, White, Hispanic, and "Asian and other" which includes Asian, Pacific Islander, Native American and Alaska Natives. See Toossi, *A Century of Change*, *supra* note 88.

[113] *Id.*

[114] Toossi, M., & Joyner, L., [Blacks in the labor force: Spotlight on statistics](#), Bureau of Labor Statistics (2018).

[115] Bureau of Lab. Stat., Current Population Survey 1962-2017, IPUMS-CPS, University of Minnesota, www.ipums.org.

[116] Wirtz Report Supplemental Materials at 67-68, available at: <https://babel.hathitrust.org/cgi/pt?id=osu.32435014781413;view=1up;seq=5>.

[117] Mitra Toossi and Elka Torpey, Bureau of Lab. Stat., [Older Workers: Labor Force Trends and Career Options](#), Career Outlook, Chart 3 (May 2017).

[118] *Id.*

[119] AARP, *Staying Ahead of the Curve - The Career and Work Study (2013)* (Sample of 1502 workers ages 45-74; defining blue collar as skilled and semi-skilled labor, unskilled labor, and service and protective occupations; white collar as technician/minor administrative, clerical, and sales; and executive/professional as executive/admin/mgmt. jobs, top talent/major or less professional jobs, small business owners, and farmers.)

[120] David Baer, *Older Workers: More Likely to Work Part Time*, AARP Pub. Pol'y Inst. (Feb. 2015). Some older workers have had to settle for part-time jobs because they could not obtain full-time employment. *Id.*

[121] Older workers have much higher rates of self-employment than younger workers have. *Id.* at Chart 4.

[122] Richard W. Johnson & Clair Xiaozhi Wang, [What Are the Top Jobs for Older Workers?](#) Urb. Inst. Program on Retirement Pol'y 3, Table 1 (Dec. 2017).

[123] *Id.*

[124] See Richard W. Johnson et al., *Employment at Older Ages and the Changing Nature of Work* 4 (2007), available at <https://www.urban.org/research/publication/employment-older-ages-and-changing->

[nature-work](#); Benjamin A. Templin, *Social Security Reform: Should the Retirement Age Be Increased?* 89 Or. L. Rev. 1179, 1238 (2011).

[125] Templin, 89 Or. L. Rev. at 1238; Johnson et al., *Employment at Older Ages and the Changing Nature of Work* at 11, 14.

[126] *Id.* See also Richard W. Johnson et al., *Employment at Older Ages and the Changing Nature of Work* at vii.

[127] *Id.*

[128] Barbara F. Reskin, *The Proximate Causes of Employment Discrimination*, 29 Contemporary Soc. 319, 320 (Vol. 2 March 2000) ("much discrimination stems from normal cognitive processes" of "stereotyping, attribution bias, and evaluation bias" which "introduce sex, race, and ethnic biases into our perceptions, interpretations, recollections, and evaluations of others.").

[129] [Written Testimony of Jacquelyn B. James](#), supra, note 102; J. Levin & W.C. Levin, *Ageism: Prejudice and Discrimination Against the Elderly 70-96* (1980).

[130] See Rosen, B. & Jerdee, T., *Too Old or Not Too Old*, 55 Harv. Bus. Rev. 97 (1977) (study of Harvard Business Review reviewers assuming the role of manager and evaluating identical conduct of employees; half of the respondents assessed employees described as "older workers," and half assessed those described as "younger workers"; for the identical employee conduct, respondents rated older workers as more resistant to change, less motivated to keep up with technology, less creative, and less capable of handling stressful situations.)

[131] See, e.g., Rosen, B. & Jerdee, T., *The Influence of Age Stereotypes and Managerial Decisions*, 61 J. Appl. Psych. 428 (1976) (college business students playing the role of managers were more likely to fire or ignore an employee rather than retain or retrain if the employee was described as an "older employee.")

[132] "Scientific research now indicates that chronological age alone is a poor indicator of ability to perform a job." *Amending the Age Discrimination in Employment Act Amendments of 1977*, S. Rep. 95-493, 95th Cong. 1st Sess. 2-4 (1977). See Schaie, *The Longitudinal Study: A 21-year Exploration of Psychometric Intelligence in Adulthood*, in *Longitudinal Studies of Adult Psychological Development*, 33 (K. W. Schaie, ed. 1983) (studies show no decline in average intelligence at until age 80); McEvoy & Cascio, *Cumulative Evidence of the Relationship between Employee Age and Job Performance*, 74 J. of Appl. Psych. 11 (1989) (finding age bears no relationship to employee performance); (studies show no decline in average intelligence at least until age 80); Staudinger, Cornelius & Baltes, *The Aging of Intelligence: Potential and Limits*, 503 *The Annals*, 43, 45-46 (1989) ("Persons of the same chronological age are not identical as to their mental status. There are 70-year-

olds who function like 30-year-olds and vice versa."); Diane B. Howelson, *Cognitive Skills and the Aging Brain: What to Expect*, Cerebrum (Dec. 1, 2015).

[133] See Howelson, *supra* note 132.

[134] *Id.*

[135] See Staudinger, Cornelius & Baltes, *supra* note 132, at 45 (intellectual functions may improve with age).

[136] Barbara Strauch, *Brain Functions That Improve with Age*, Harv. Bus. Rev. (Feb. 2010).

[137] Research shows that twice as many tech entrepreneurs start ventures in their fifties as do those in their early twenties. Wadhwa, Vivek and Freeman, Richard B. and Rissing, Ben A., [Education and Tech Entrepreneurship](#) (May 1, 2008).

[138] Glen P. Kenny, Herbert Groeller, Ryan McGinn, and Andreas D. Flouris, *Age, Human Performance, and Physical Employment Standards*, 41 Applied Physiology, nutrition, and Metabolism (2016) ("the extent of the decline in physical functioning, and therefore the risk of work-related injuries or illness, is dependent on a myriad of individual factors including lifestyle, level of physical activity and fitness, and general health.")

[139] If an employer uses age as a specific job qualification, the employer would have to establish that age is a BFOQ. See *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985). If an employer maintains neutral physical-fitness requirements that disproportionately impact older workers, the employer would have to establish that they are relevant to successful performance of the particular job to prove a reasonable factor other than age defense if challenged as discriminatory. *Disparate Impact and Reasonable Factors Other Than Age Under the Age Discrimination in Employment Act*, 77 Fed. Reg. 19080, 19086, n.49 (March 30, 2012).

[140] See, e.g., [Disparate Impact and Reasonable Factors Other Than Age Under the Age Discrimination Employment Act, A Rule by the Equal Employment Opportunity Commission](#), 77 Fed. Reg. 19080-19095 (April 30, 2012); Federal Law Enforcement Training Centers [PEB Scores for Age and Gender](#). Subjecting only older workers to a test would be facially discriminatory. See, e.g., *EEOC v. Massachusetts*, 987 F.2d 64, 73 (1st Cir. 1993) (requirement that employees pass a physical exam only when they reached age 70 violated ADEA).

[141] *Waters v. Logistics Management Institute*, 2018 U.S. App. LEXIS 3122, *11 (4th Cir. 2018) <https://caselaw.findlaw.com/us-4th-circuit/1888867.html>

Although the notion of immutability is irrelevant to protections under Title VII or the ADEA, age is "immutable" in the sense that it is a characteristic the person has not

chosen and cannot change See Howard C. Eglit, *Age Discrimination*, § 1.02, at 1-12 (2d ed. 1994). Aging also creates a "we/them" dichotomy. It is "common and natural" for older people to exempt themselves from the negative stereotypes and decline attributed to age and "to be oblivious to the prejudices they hold, especially perhaps prejudices against the group to which they belong." *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359, 361-62 (7th Cir. 2001).

[142] "[T]he prohibitions of the ADEA were derived *in haec verba* from Title VII." *Lorillard, Inc. v. Pons*, 434 U.S. 575, 584 (1978). In the Civil Rights Act of 1991, Congress added provisions to Title VII setting forth standards of proof for disparate impact claims (§ 703(k), 42 U.S.C. § 200e-2(k)) and disparate treatment claims using a motivating factor/same decision framework (§ 703(m), 42 U.S.C. § 200e-2(m)). It did not amend §§ 703(a)(1) or (2) of Title VII and did not make similar amendments to the ADEA.

[143] See Bruno Bettelheim & Morris Janowitz, *Soc. Change and Prejudice* at 11 (1964). Isis H. Settles, Nicole T. Buchanan, & Stevie C. Y. Yap, *Race discrimination in the workplace*, at 8, *Praeger Handbook on Understanding and Preventing Workplace Discrimination* (M. A. Paludi, C. A. Paludi Jr., & E. DeSouza Eds., Westport, CT: Praeger Publishers 2010) ("discrimination - negative behaviors enacted toward members of a particular group - typically stem from prejudiced attitudes and stereotypes"); L. Duke, "White's Racial Stereotypes Persist: Most Retain Negative Beliefs About Minorities, Survey Finds," *Washington Post* (Jan. 9, 1991), p. A1.

[144] Women were relegated to "women's" jobs, viewed as the "weaker" sex, and not deemed fit for certain jobs. A 1969 Harvard Law Review article notes that "experience teaches that biological differences between the sexes are often related to performance." *Developments in the Law - Equal Protection*, 89Harv. L. Rev. 1159, 1174, n.61 (1969).

[145] See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1990); *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 708 (1978); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998). In *Los Angeles Dept. of Water and Power v. Manhart*, the Supreme Court held that Title VII prohibited a requirement that women make greater pension contributions than men, even though it was based on the accurate assumption that women generally live longer. The Court noted that "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes," even those that were true for the class. *Id.* n. 13. "[E]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." *Id.* See, e.g., [Merritt v. Old Dominion Freight Line, Inc., No. 6:07-CV-27, 2011 WL 322885 \(W.D. Va. Feb. 2, 2011\)](#) (comment that women unfit to be delivery drivers).

[146] See, e.g., [Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs, Chai R. Feldblum & Victoria A. Lipnic](#), at v, U.S. Equal Employment Opportunity Commission (June 2016)(noting three out of four individuals

who experienced harassment did not even notify their employer.) See also Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 Ohio St. L. J. 1, 27-28 n.99 (1996) (most individuals do not file formal complaints even when they suspect or firmly believe the law has been violated).

[147] In AARP's 2017 study of age discrimination, 61 percent of those age 45 and older reported seeing or experiencing age discrimination. Perron, *supra* note 9. This is a slight decrease from the 64.5% reporting personal experience with age discrimination in AARP's 2013 study. See AARP, *Staying Ahead of the Curve 2013: AARP Multicultural Work and Career Study Perceptions of Age Discrimination in the Workplace - Ages 45-74* (2013 survey of 1,500 workers age 45-74 reported that sixty four percent said they had seen or experienced age discrimination in the workplace).

[148] Perron, *supra* note 9.

[149] Careerealism, a career advice and employment branding site, polled its one million monthly readers in 2015 and 87 percent responded that they thought age discrimination hurt their job search. [CAREEREALISM Releases 2015 Age Discrimination Survey Results](#). See also Perron, *supra* note 9 (three-quarters of older workers blame age discrimination for their lack of confidence in finding new employment).

[150] Perron, *supra* note 9.

[151] In AARP's 2017 survey, 64 percent of women and 59 percent of men say they have seen or experienced age discrimination. While AARP's 2013 survey similarly found more women (72 percent) than men (57 percent) responded that older workers face age discrimination, the 2017 responses show a decline in the perception of age discrimination for women, but an increase in that perception for men.

[152] Susan Nunziata, *Too Old to Earn Big In IT?* Info. Wk., July 7, 2014.

[153] Indeed surveyed 1,011 employed US tech workers in 2017. Forty-three percent said they're worried about losing their job because of age. "[Report: Ageism in the Tech Industry](#)," Indeedblog (Oct. 2017), "[Tech Companies have a Baby Boomer problem](#)," Business Insider (Oct. 2017).

[154] Forty-two percent of adults age 50 and older who work or worked in the technology industry consider their age to be a liability to their career. Quentin Hardy, *Technology Workers Are Young (Really Young)*, N.Y. Times, July 5, 2013.

[155] Perron, *supra* note 9.

[156] See *The Next Steps in Combating Age Discrimination in Employment: With Special Reference to Mandatory Retirement Policy*, A Working Paper, S. Spec. Comm. on Aging, 95th Cong. 1st Sess. 7 (1977).

[157] In fiscal year 1983, ADEA charge filings jumped to 15,028 from 1982 receipts of 8,986. Overall charge receipts increased by 30 percent from fiscal year 1982. See <https://www.eeoc.gov/statistics/age-discrimination-employment-act-adea-charges-charges-filed-eeoc-fy-1992-fy-1996>.

[158] 18th Ann. Rep. of the U.S. Equal Employment Opportunity Commission, 10 (Sept. 4, 1984).

[159] ADEA charge data is available on EEOC's website at <https://www.eeoc.gov/statistics/age-discrimination-employment-act-charges-filed-eeoc-includes-concurrent-charges-title> and at <https://www.eeoc.gov/eeoc/statistics/enforcement/adea.cfm>. This charge data does not include charges filed with state or local Fair Employment Practice Agencies.

[160] In 1990, 14 percent of ADEA charges were filed by African Americans, which nearly doubled to 27 percent in 2017.

[161] In 1990, 1 percent of ADEA charges were filed by Asians, which tripled to 3 percent in 2017.

[162] "[N]umerous negative stereotypes about older workers still exist that often prevent or have a negative impact on employment opportunities for older people." See [Written Testimony of Dr. Sara J. Czaja](#), Director, CREATE (Center for Research and Education on Aging and Technology Enhancement), and Director of the Center on Aging at the University of Miami, *The ADEA @ 50 -- More Relevant Than Ever, Meeting of the U.S. Equal Employment Opportunity Commission* (2017). "Several studies have found evidence of biases against older adults during recruitment and hiring." See [Written Testimony of Jacquelyn B. James](#), *supra* note 102. See also [Written Statement of Michael Campion](#), Professor, Purdue University, *Age Discrimination in the 21st Century -- Barriers to the Employment of Older Workers, Meeting of the U.S. Equal Employment Opportunity Commission* (2009).

[163] [Written Testimony of Jacquelyn B. James](#), *supra* note 102. Neumark, David, Ian Burn, and Patrick Button, "Age Discrimination and Hiring of Older Workers" Federal Reserve Board of San Francisco Economic Letter # 2017-06 (2017).

[164] Retaliation is the most frequent statutory basis alleged in all discrimination charges filed with the EEOC. See EEOC Charge Statistics at <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

[165] Howard C. Eglit, *The Age Discrimination in Employment Act at Thirty: Where It's Been, Where It Is Today, Where It's Going*, 31 Univ. of Richmond L. Rev. 579, 626-29 (1997) (analyzing 316 ADEA federal district and appellate court opinions issued in 1996 and comparing findings to the Schuster-Kaspin-Miller study of 280 ADEA cases decided between 1968 and 1986 in which 67.5 percent alleged discharge, including forced retirement). In Professor Eglit's study of ADEA cases issued by federal district courts in

1996, the most common claims after discharge were retaliation, denial of promotion, refusal to hire, and demotion.

[166] See Written Testimony of Daniel B. Kohrman, AARP Foundation Litigation, *Age Harassment in the American Workplace and What the EEOC Can Do About It, Meeting of the EEOC Select Task Force on the Study of Harassment in the Workplace* (2015).

[167] [CAREERREALISM Releases 2015 Age Discrimination Survey Results](#), *supra* note 149; Perron, *supra* note 9. Yet few older workers file formal complaints of hiring discrimination, as age discrimination is often difficult to detect and to prove. See Perron, *supra* note 9 (only 3 percent formally complain); [Written Testimony of Joseph Sellers](#), Cohen Milstein Sellers & Toll PLLC, *Public Input into the Development of EEOC's Strategic Enforcement Plan, Meeting of the U.S. Equal Employment Opportunity Commission* (2012) (hiring discrimination is hard to detect).

[168] [Written Testimony of Patrick Button](#), *supra* note 88.

[169] *Id.*

[170] Neumark, David, Ian Burn, and Patrick Button, *Is It Harder for Older Workers to Find Jobs? New and Improved Evidence from a Field Experiment* (NBER, Working Paper No. 21669, 2015) cited in [Written Testimony of Patrick Button](#), *supra* note 88; "[Is there age discrimination in hiring?](#)" BLS Monthly Labor Review (April 2017); "[Age Discrimination and the Hiring of Older Workers](#)" (Federal Reserve Bank of San Francisco *Economic Letter*, no. 2017-06, February 27, 2017).

[171] *Id.*

[172] [Written Testimony of Patrick Button](#), *supra* note 88.

[173] [Written Testimony of Laurie A. McCann](#), AARP Foundation Litigation, *Promoting Diverse and Inclusive Workplaces in the Tech Sector, Meeting of the U.S. Equal Employment Opportunity Commission*, (2016).

[174] See *Johnson v. Mayor and City Council of Baltimore*, 472 U.S. 353 (1985) (state-government employer must establish that its mandatory retirement age for firefighters is a bona fide occupational qualification and cannot rely on the federal provision permitting mandatory retirement of federal firefighters at age 55); *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985) (affirming jury verdict that mandatory retirement of flight engineers at age 60 was not a bona fide occupational qualifications); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985)(denial of equal transfer privileges to captains forced to retire at age 60 violated ADEA).

[175] See *EEOC v. Wyoming*, 460 U.S. 226 (1983) (challenged involuntary retirement at age 55 of supervisor for Wyoming Game and Fish Department); *EEOC v. Pennsylvania*, 829 F.2d 392 (3d Cir. 1987) (state law requiring age 60 mandatory retirement for state

police was unenforceable, because it did not satisfy the requirements for proving a BFOQ); *EEOC v. City of St. Paul*, 671 F.2d 1162 (8th Cir. 1982) (age 65 mandatory retirement of a district fire chief was not justified as a BFOQ); *EEOC v. Santa Barbara Cty.*, 666 F.2d 373 (9th Cir. 1982) (age 60 mandatory retirement for corrections officers was not justified as a BFOQ); see also *Gately v. Massachusetts*, 2 F.3d 1221, 1234 (1st Cir. 1993) (affirming the district court's order to enjoin the state's mandatory retirement age policy); *Binker v. Pennsylvania*, 977 F.2d 738, 746 (3d Cir. 1992) (affirming the agreement to pay 86 troopers \$2.6 million after challenging mandatory retirement policy of Pennsylvania State Police); *EEOC v. O'Grady*, 857 F.2d 383, 394 (7th Cir. 1988) (reversing and remanding the district court's finding that defendant's mandatory retirement policy was a willful violation of the ADEA and affirmed the awards of back pay to all claimants).

[176] In 1996, Congress amended the ADEA to renew an exception that had expired in 1993 permitting the use of maximum hiring and mandatory retirement ages for police and firefighters employed by state and local governments. [Omnibus Consolidated Appropriations Act](#), Pub. L. No. 104-208, 110 Stat. 3009-23, 24 (September 30, 1996). The age limits must be pursuant to a bona fide plan that is not a subterfuge to evade the purposes of the ADEA to fall within ADEA § 4(j), 29 U.S.C. § 623(j).

[177] See *EEOC v. Minnesota Dep't of Corr.*, 648 F.3d 910 (8th Cir. 2011) (holding that an age "cliff" that foreclosed any retirement incentive to individuals once they reached age 55 was inconsistent with the purposes of the ADEA.); *Jankovitz v. Des Moines Indep. Cmty. Sch. Dist.*, 421 F.3d 649, 653 (8th Cir. 2005) (early retirement incentive plan that made employees age 65 or older ineligible for benefits was facially discriminatory). See also Cathy Ventrell-Monsees, *Take the Money and Run or It's Too Late Baby: Early Retirement Incentives and the Age Discrimination in Employment Act*, 29 Univ. of Memphis L.R. 783 (1999) (collecting cases).

[178] See *EEOC v. Baltimore Cty.*, 747 F.3d 267 (4th Cir. 2014) (requirement that older new-hires make larger pension contributions than younger new-hires for the same benefits violated ADEA). In a series of suits against New York municipal volunteer fire departments, EEOC challenged the denial of service credit for volunteer firefighters who worked past the entitlement age for retirement benefits. *EEOC v. Bayville Fire Co.*, No. 07-cv-4472 (E.D.N.Y. consent decree entered Apr. 8, 2010); *EEOC v. Brentwood Fire Dep't*, No. 09-cv-3298 (E.D.N.Y. consent decree entered Mar. 14, 2011); *EEOC v. Village of Minneola*, No. 08-cv-973 (E.D.N.Y. consent decree entered Jan. 20, 2010); *EEOC v. Selden Fire Dist.*, No. 08-cv-3974 (E.D.N.Y. consent decree entered Apr. 16, 2010); *EEOC v. Eaton's Neck Fire Dist.*, No. 08-cv-5089 (E.D.N.Y. consent decree entered Oct. 30, 2009); *EEOC v. Oyster Bay Fire Dep't*, No. 09-cv-3297 (E.D.N.Y. consent decree entered Sep. 16, 2011); *EEOC v. Amityville Fire Dep't*, No. 09-cv-3742 (E.D.N.Y. consent decree entered Mar. 15, 2011); *EEOC v. Village of N. Syracuse*, No. 12-cv-1465 (N.D.N.Y. consent decree entered Apr. 3, 2013). See also *Kentucky Retirement Systems v. EEOC*, 554 U.S. 135, 143 (2008); *Arnett v. California Public Employees' Retirement System*, 179 F.3d 690 (9th Cir. 1999) (injunction against CalPERS and some 1500 local agencies from enforcing a 1980

statute that reduced disability pension benefits of older police officers and firefighters from 50 percent of final compensation to as little as 13 percent); *AARP v. Farmers Grp. Inc.*, 943 F.2d 996 (9th Cir. 1991) (affirming summary judgment and award of liquidated damages to employees who continued working past age 65 but were denied profit sharing and pension contributions).

[179] 492 U.S. 158 (1989). The *Betts* decision caused the dismissal of many pending ADEA benefits cases that had been brought by the EEOC and private litigants. See *Age Discrimination in Employee Benefit Plans: The Impact of the Betts Decision: Joint Hearing Before the Select Comm. on Aging and the Subcomms. on Employment Opportunities and Labor-Management Relations of the H. Comm. on Education and Labor*, 101 Cong. (1989) (statement of Charles A. Shanor, General Counsel of the U.S. Equal Employment Opportunity Commission that the EEOC had 30 cases pending in trial and appellate courts, half of which would require dismissal due to the *Betts* decision; statement of Robert Laufman, Attorney at Law, Laufman, Rauh, and Gerhardstein) reprinted in 2 EEOC legislative history of the older workers benefit protection act of 1990 at 743, 732 (1991).

[180] Pub. L. No. 101-433, 104 Stat. 978.

[181] The OWBPA codified the specific language of the equal benefit or equal cost rule from the EEOC's regulations, 29 U.S.C. § 623(f)(2)(B)(i) and 29 C.F.R. § 1625.10, and provided narrow exceptions for early retirement incentives and the coordination of severance benefits.

[182] 220 F.3d 193 (3d Cir. 2000), *cert. denied*, 532 U.S. 913 (2001).

[183] 29 C.F.R. § 1625.32 (2003). The exemption was upheld in a lawsuit challenging it. *AARP v. EEOC*, 489 F.3d 558 (3d Cir. 2007).

[184] U.S. EEOC, *Threshold Issues*, compliance Manual § 2 (2000).

[185] See *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416 (10th Cir. 1987) (concluding that discrimination against African-American females could exist even in the absence of discrimination against white females or African-American males); *Jefferies v. Harris County Cmty. Action Ass'n*, 615 F.2d 1025, 1034 (5th Cir. 1980) (Black women); *Lam v. Univ. of Hawaii*, 40 F.3d 1551, 1562 (9th Cir. 1994) (Asian woman).

[186] See *Barnett v. PA Consulting Grp.*, 715 F.3d 354 (D.C. Cir. 2013) (reversing summary judgment noting that the "most significant differences between the two are that Gao is male and younger than Barnett."); *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 109 (2d Cir. 2010) (noting applicability of intersectional theory, without deciding, where plaintiff claimed she was treated differently because of her status as an older woman, "rather than because of age or gender acting as independent factors.").

[187] [Written Statement of Patrick Button](#), supra note 88 ("Even in the cases where both senior women and men face age discrimination, the magnitude of the discrimination against senior women is much larger.").

[188] Judith D. Fischer, *Public Policy and the Tyranny of the Bottom Line in the Termination of Older Workers*, 53 S.C. L. Rev. 211, 226-27 (2012) (explaining that finding work is more difficult for those over forty, and displaced older workers are likely to remain unemployed longer than younger persons. Earnings reductions are also common for older workers after being fired).

[189] See, e.g., Peter Gosselin & Ariana Tobin, [Cutting 'Old Heads' at IBM](#), Pro Publica (March 22, 2018).

[190] *Id.*

[191] *Id.*

[192] Angelina R. Sutin, Yannick Stephan, Henry Carretta, and Antonio Terracciano, *Perceived Discrimination and Physical, Cognitive, and Emotional Health in Older Adulthood*, 23 American J. of Geriatric Psychiatry, 171-179 (Feb. 2015).

[193] Somers, *Social, Economic, and Health Aspects of Mandatory Retirement*, 6 J. of Health, Pol., Pol'y & L. 542, 547 (1981).

[194] Research on the success rate of ADEA plaintiffs prior to the Supreme Court's decision in *Gross v. FBL* shows higher rates of success in the 1980s and 1990s than more recent decades. See Eglit, supra note 164. (analysis of ADEA cases decided in 1996 shows older workers prevailed in 29 percent of substantive ADEA cases at the appellate level and 25 percent at the district court level; and had a 90 percent win rate in jury trials. *Id.* at 655 (recognizing that the strongest cases survive summary judgment, but often settle prior to trial). Another study of data collected by the Administrative Office of the U.S. Courts for 1998-2001, ADEA plaintiffs won 21 percent of bench trials while the win rate for bench trials in employment discrimination cases overall was 26 percent. Kohrman & Hayes, *Employers Who Cry "RIF" and the Courts That Believe Them*, supra note 8, at 153.

[195] 179 F.3d 690 (9th Cir. 1999).

[196] *Williams v. Sprint/United Management Co.*, No. 03-cv-02200 (D. Kans. 2007); [Sprint Nextel Pays \\$57M to Settle Discrimination Suit](#) (May 18, 2007).

[197] CBS/AP, [Livermore Lab Settles Age Discrimination Lawsuit For \\$37.25 Million](#) (October 1, 2015 at 7:14 am).

[198] Susan Feyder, [3M Faces Years of Scrutiny Over Age Bias](#) (August 27, 2011).

[199] See [Texas Roadhouse to Pay \\$12 Million to Settle Age Discrimination Lawsuit](#) (March 31, 2017).

[200] See [Seasons 52 to Pay \\$2.85 Million To Settle EEOC Age Discrimination Lawsuit](#) (May 3, 2018).

[201] Age Discrimination in Employment Act of 1967, S.Rep. No. 723, 90th Cong. 1st Sess. 2 (1967); H.R.Rep. No. 805, 90th Cong. 1st Sess. 2 (1967).

[202] Colo. Rev. Stat. § 24-34-40 (1903); Conn. Gen. Stat. § 46a-60 (1965); 19 Del. Code § 711 (1960); Haw. Rev. Stat. § 378-2 (1965); La. Rev. Stat. § 23:321 (1934), Mass. Gen. Laws Ch. 151B (1937) (amended in 1950); N.J. Stat. § 10:5-12; N.Y. Exec. Law § 296 (1958); Ohio Rev. Code §4112.02 (1961); Or. Rev. Stat. § 659A.030 (through Leg. Sess. 2011); 43 Pa. Stat. § 955 (1956); Wash. Rev. Code § 49.60.180 (1961); Wis. Stat. §§ 111.321-322 (1959); P.R. Laws Ann. tit. 29, § 146 (1960).

[203] Arkansas' and Mississippi's laws only apply to state government employees. Six states have stand-alone age discrimination laws separate from other employment discrimination laws (Alabama, Arkansas, Georgia, Indiana, Kansas, and Nebraska).

[204] See *Diaz v. Jiten Hotel Management, Inc.*, 671 F.3d 78 (1st Cir. 2012) ("There is just one Massachusetts statute that outlaws both age and gender discrimination (Chapter 151B)) (holding *Gross* does not apply to state law claim); *Alamo v. Practice Management Information Corp.*, 148 Cal. Rptr. 3d 151, 161 (Cal. Ct. App. 2012) (holding the California Fair Employment and Housing Act prohibits age and other protected classes and declined to follow *Grossin* considering the proper standard of causation under FEHA); *Wagner v. Board of Trustees for Connecticut State University*, 2012 WL 668544 (Superior Ct. 2012) ("Given the legislature's decision to include multiple types of unlawful employment discrimination within a single statutory provision without setting out distinctive standards for the different types, the logical conclusion is that it intended that the same standard of proof be applied to all the types of discrimination.").

[205] Individuals also bring additional state and common law claims with their civil rights claims. A 2003 study found that workers won 57 percent of their non-civil rights employment claims in state court. Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 Disp. Resol. J. 44, 80 (2003).

[206] See Michael D. Moberly, *A Better ADEA? Using State Wage Payment Laws to Enhance Remedies for Age Discrimination*, 32 Tulsa L. J. 21, 25 (1996) ("Applying state wage payment statutes in ADEA cases may represent a more promising means of expanding the remedies available for age discrimination. Given the limited remedies available under the ADEA, state legislatures should be allowed to 'provide remedies for discriminatees in addition to those provided for in the ADEA.'").

[207] [Written Testimony of Michael Foreman](#), Director, Civil Rights Appellate Clinic, Pennsylvania State University Dickinson School of Law, *Impact of Economy on Older Workers, Meeting of the U.S. Equal Employment Opportunity Commission* (2010); [Written Testimony of R. Scott Oswald](#), Principal, The Employment Law Group, *Impact of Economy on Older Workers, Meeting of the U.S. Equal Employment Opportunity Commission* (2010); [Written Statement of Cathy Ventrell-Monsees](#), President Workplace Fairness, *Age Discrimination in the 21st Century -- Barriers to the Employment of Older Workers, Meeting of the U.S. Equal Employment Opportunity Commission* (2009). See Appendix B for a complete list of ADEA Supreme Court decisions, and at <https://www.eeoc.gov/eeoc/history/adea50th/supreme-court.cfm>.

[208] 557 U.S. 167, 174 (2009).

[209] See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (construing identical provision in Title VII §703(a)(1), [42 U.S.C. § 2000e-2\(a\)\(1\)](#)).

[210] *Gross*, 557 U.S. at 174.

[211] Several experts have examined the flaws they see in the *Gross* decision and the harm it has caused. See Mark R. Deethard, *Life After Gross: Creating A New Center for Disparate Treatment Proof Structures*, 72 La. L. Rev. 178 (2011); Michael Foreman, *Gross v. FBL Financial Services - Oh So Gross!* 40 U. Mem. L. Rev. 681 (2010); David Sherwyn & Michael Heisse, *The Gross Beast of Burden of Proof: Experimental Evidence on How the Burden of Proof Influences Employment Discrimination Case Outcomes*, 42 Ariz. St. L. J. 901 (2010).

[212] *Gross*, 557 U.S. at 178, n. 4. ("There is no heightened evidentiary requirement for ADEA plaintiffs to satisfy their burden of persuasion that age was the 'but for' cause of their employer's adverse action, see 29 U.S.C. § 623(a), and we will imply none.")

[213] See *Sherwyn*, *supra* note 211; [Written Testimony of Michael Foreman](#), *supra* note 207; [Written Testimony of R. Scott Oswald](#), *supra* note 207. The retrial of Mr. Gross' case demonstrates the difficulties resulting from the Supreme Court's decision. Mr. Gross prevailed in his first jury trial when the jury was given a motivating factor instruction. In the second trial when the jury considered the exact same evidence but was instructed to apply a "but for" standard of causation rather than the motivating factor standard, the jury ruled against Mr. Gross -- that he had not proven unlawful discrimination under the ADEA. *Gross v. FBL Financial Servs., Inc.*, 3498 Fed.Appx. 971, 972-73 (8th Cir. 2012).

[214] [Written Testimony of Laurie McCann](#), Senior Attorney, AARP Foundation Litigation, *The ADEA @ 50 -- More Relevant Than Ever, Meeting of the U.S. Equal Employment Opportunity Commission* (2017); [Written Testimony of John Challenger](#), *supra* note 10.

[215] Barbara F. Reskin, [The Proximate Causes of Employment Discrimination](#), 29 Contemporary Soc. 319, 327 (Vol. 2 March 2000).

[216] *Id.* at 323 ("research on contextual factors that appear to minimize the likelihood of stereotyping and its biasing effects ... include constructing heterogeneous groups, creating interdependence among ingroup and outgroup members, minimizing the salience of ascribed status dimensions in personnel decisions, replacing subjective data with objective data, and making decision makers accountable for their decisions.").

[217] [Written Testimony of Jacquelyn B. James](#), *supra* note 102.

[218] "Workplace culture has the greatest impact in allowing harassment to flourish, or conversely, in preventing harassment." *Select Task Force on the Study of Harassment in the Workplace*, Report of Co-Chairs, Chai R. Feldblum & Victoria A. Lipnic, at v, U.S. Equal Employment Opportunity Commission (June 2016). Culture is especially important with respect to age discrimination that often arises from an unconscious application or stereotyped notion of ability. See Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters? Discriminating in Multi-Actor Employment Decision-Making*, 61 La. L. Rev. 495, 508-09 (2001).

[219] See, e.g., *Palasota v. Haggard Clothing Co.*, 342 F.3d 569, 577 (5th Cir. 2003) (campaign to present a more youthful image coupled with executive's memo to thin the ranks of older employees was direct evidence of age discrimination); *Slattery v. Swiss Reinsurance America Corp.*, 248 F.3d 87, 93 (2d Cir. 2001) (statements by company chair about changes in corporate culture have probative value as to possible discriminatory acts by lower level supervisors); *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 333-34 (3d Cir. 1995) (CEO's statement that "two of our star young men are in their mid-40s. That group is our future" in company newsletter was relevant to show ageist corporate culture).

[220] Lori A. Trawinski, [Leveraging the Value of an Age-Diverse Workforce](#), SHRM Found. Exec. Briefing (Sponsored by AARP) (2015). See also [Written Testimony of Cornelia Gamlem](#), President GEMS Group, and Society for Human Resource Management, *Impact of Economy on Older Workers, Meeting of the U.S. Equal Employment Opportunity Commission* (2010).

[221] *Id.* See also David C. Wilson, *The Price of Age Discrimination*, Bus. J. (2006) (Work force diversity is highly correlated with overall employee satisfaction within companies).

[222] *Id.*

[223] *Id.*

[224] [Written Testimony of Jacquelyn B. James](#), *supra* note 102.

[225] In an extensive study of the economic effects of the aging population, the National Research Council of the National Academy of Sciences recommended encouraging people to work longer and to postpone retirement for their own financial security and for the benefit to the economy of prolonged employment. See [Aging and the Macroeconomy: Long-Term Implications of an Older Population](#), Comm. on the Long-Run Macro-Econ. Effects of the Aging U.S. Population Study Requested by U.S. Cong.; funded by U.S. Treasury and Nat'l Inst. on Aging(2012).

[226] iCIMS, *The Modern Job Seeker Report* (2017).

[227] Aon Hewitt, AARP, [A Business Case for Workers Age 50+: A Look at the Value of Experience in 2015](#).

[228] See [Written Testimony of John Challenger](#), *supra* note 10.

[229] John Challenger, CEO of Challenger, Gray & Christmas, a firm specializing in recruitment and placement, testified before the EEOC that "[r]ecruiting and talent management gatekeepers in many companies' staffing departments may not identify with or promote older applicants. If the initial interviewer cannot picture the older job seeker 'fitting in,' he or she will likely pass that applicant over for the position." [Written Testimony of John Challenger](#) *supra* note 10. Challenger recommended educating recruitment and talent managers on the benefits of employing older workers, and providing financial incentives to improve age-diverse recruitment and hiring. *Id.* See also [Written Testimony of Jacquelyn B. James](#), *supra* note 102.

[230] See [Written Testimony of Jacquelyn B. James](#), *supra* note 102.

[231] See [Written Testimony of Laurie A. McCann](#), AARP Foundation Litigation, *Promoting Diverse and Inclusive Workplaces in the Tech Sector, Meeting of the U.S. Equal Employment Opportunity Commission*, n. 19 (2016).

[232] *Id.*

[233] See [Written Testimony of Jacquelyn B. James](#), *supra* note 102.

[234] See [Written Testimony of Cornelia Gamlem](#), *supra* note 220 ("[O]ffering nontraditional scheduling options for employees not only improves work-life balance for the employees, but it also allows organizations to recruit and retain motivated workers who may not be able or willing to work a traditional nine-to-five schedule.")