

**IS FORTY THE NEW THIRTY, OR SHOULD  
IT BE UNDER THE ADEA?: RAISING THE  
ADEA COVERAGE AGE IN EXCHANGE  
FOR “MAKE-WHOLE” PAIN AND  
SUFFERING DAMAGES**

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*Since Congress passed the Age Discrimination in Employment Act (ADEA) in 1967, Americans continue to work later in life, delaying retirement and contributing to an increasingly older workforce. Despite elder Americans being healthier and working longer than ever before, the age of the protected class under the ADEA has remained unchanged. In this Note, Ms. Van Kampen begins by providing an in-depth analysis of the Congressional intent behind the age threshold found in the ADEA, followed by an examination of how this inflexible standard negatively affects employer attitudes toward elder workers. Furthermore, the author explores employer-held stereotypes of older workers and how the psychological effects of such age-based discrimination are not adequately compensated under the current statutory regime. To address these concerns, Ms. Van Kampen recommends the ADEA be amended to increase the age of the protected class from forty to forty-five in exchange for an amendment to the ADEA allowing pain and suffering damages to be available to victims of age discrimination.*

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## I. Introduction

The existence and pervasiveness of age discrimination in the workplace is undeniable.<sup>1</sup> In response to this longstanding concern, Congress passed the Age Discrimination in Employment Act (ADEA) in 1967. The purpose of the Act was “to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment.”<sup>2</sup> Since the Act’s passage in 1967, the American workforce has changed dramatically in terms of longevity, ability, and age of retirement.<sup>3</sup> The ADEA has undergone amendments to accommodate the new American worker, including successive amendments regarding the age cap, which was originally sixty-five, then amended to age seventy, and now completely eliminated.<sup>4</sup> These amendments reflect Congressional acknowledgment of the fact that the American worker is getting older and working into life phases that were once linked with retirement. Given the aging workforce, one of the most pressing questions for Congress to address is: when does age discrimination actually occur? Currently, workers age forty and older are protected from age discrimination.<sup>5</sup>

“A necessary backdrop to assessing the [current] significance of age bias in the workplace are the data regarding . . . baby boomers: the almost 76 million men and women born between 1946 and 1964 in the

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1. Per year since 2006, the EEOC received the following number of age discrimination complaints: 2006: 16,548; 2007: 19,103; 2008: 24,582; 2009: 22,778; 2010: 23,264; 2011: 23,465. U.S. EQUAL EMP’T OPPORTUNITY COMM’N, AGE DISCRIMINATION IN EMPLOYMENT ACT: ENFORCEMENT AND LITIGATION STATISTICS, FY 1997–FY 2010, <http://www.eeoc.gov/eeoc/statistics/enforcement/adea.cfm> (last visited Mar. 6, 2013); Barbara L. Hassell & Pamela L. Perrewé, *An Examination of the Relationship Between Older Workers’ Perceptions of Age Discrimination and Employee Psychological States*, 5 J. MANAGERIAL ISSUES 109, 111 (1993) (noting the existence of age discrimination in the workplace as supported by available research and information from the EEOC and AARP); see RAYMOND F. GREGORY, AGE DISCRIMINATION IN THE AMERICAN WORKPLACE: OLD AT A YOUNG AGE 1 (2001) (noting that all middle-aged or older workers will experience “the consequences of an age-biased employment-related action” during their careers).

2. 29 U.S.C. § 621(b) (2006).

3. The average life expectancy in 1900 was age forty-nine, as compared to seventy-six in 2001. The Baby-Boomer generation of workers is the best educated in history, and better-educated workers tend to work longer and defer retirement. See GREGORY, *supra* note 1, at 2, 10.

4. JODY FEDER, CONG. RESEARCH SERV., RL 34652, THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA): A LEGAL OVERVIEW 1 (2010).

5. 29 U.S.C. § 631(a) (2006).

United States.”<sup>6</sup> In 2005, persons age sixty-five and older represented 12.4% of the United States population; in 2030, it is projected that individuals in this age group will grow to represent 20% of the population.<sup>7</sup> According to the United States Bureau of Labor and Statistics, the percentage of workers in the American labor force age fifty-five to sixty-four is expected to climb in the coming years, with the most dramatic percentage increase projected for those between the ages of sixty-five and seventy-four, and age seventy-five and older.<sup>8</sup> The baby boomers, who currently fall or will soon fall within these increasingly prominent age groups in the workforce, are now considered “older workers,” a branding that they do not approve of, but one that they will have to live with since many plan to continue working after retirement age.<sup>9</sup>

The result of this influx of older individuals in the population is that there will be a substantial increase in the number of older workers in the American workforce.<sup>10</sup> A natural conclusion is that the increased number of older employees in the workplace will lead to increased incidences of age discrimination.<sup>11</sup> Peripherally, age discrimination can be linked to employer perceptions regarding the negative effects of age on performance ability, and the cost to the employer in terms of benefits and salary.<sup>12</sup> These employer assumptions, however, may be incorrect; the contemporary American older worker is healthier, working longer,<sup>13</sup> and, according to empirical studies,

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6. Howard Eglit, *Age Bias in the American Workplace—An Overview*, 3 J. INT’L AGING L. & POL’Y 99, 104 (2009).

7. *Id.* at 105 (discussing statistics found in the ADMIN. ON AGING, U.S. DEP’T OF HEALTH AND HUMAN SERVS., A PROFILE OF OLDER AMERICANS: 2007 (2008) at 3).

8. See *infra* text accompanying note 163.

9. Bahaudin G. Mujtaba et al., *Cultural Paradigms of Age Discrimination and Unearned Privileges*, 12 J. BUS. & ECON. RES. 31, 32 (2004).

10. See Eglit, *supra* note 6, at 105–06.

11. Howard C. Eglit, *The Age Discrimination in Employment Act at Thirty: Where It’s Been, Where It Is Today, Where It’s Going*, 31 U. RICH. L. REV. 579, 667 (1997) (“It takes no predictive skill to conclude that given the burgeoning numbers of older workers, employers which are disposed to engage in age-biased decision making are going to have an enormous available pool of age-qualified targets for those decisions.”).

12. See generally Eglit, *supra* note 6, at 127–42 (analyzing the sources of age bias in the workplace).

13. See Peter H. Schuck, *The Golden Age of Aging, and Its Discontents*, 18 ELDER L.J. 25, 28 (2010) (noting that the average life span of an American born approximately a century ago was forty-seven years, as compared to the current figure of seventy-eight for men and about eighty-three for women).

productive.<sup>14</sup> Perhaps employer concerns regarding the negative effects of age in the workplace are no longer implicated at age forty and instead are attached to workers older than forty. If this theory is correct, then the answer to the question “when does age discrimination occur?” may be different today than it was in 1967 when the ADEA was enacted.

If age discrimination is triggered by an older age today than when the ADEA was passed, perhaps the need for protection at that young age is obsolete. Even if some age discrimination occurs at age forty, allowing broad protection may not be a win-win.<sup>15</sup> First, since the American worker continues to get older and work longer, the potential for age discrimination will increase.<sup>16</sup> Putting age aside, under the ADEA, victims of age discrimination are not explicitly granted the right to recover pain and suffering damages when the Act is violated, and the circuits have unanimously interpreted the Act as not affording this type of damages.<sup>17</sup> Like the legally-recognized psychological effects of gender or race discrimination, pain and suffering can be a very real and debilitating result of age discrimination.<sup>18</sup> Increasing the age of those protected under the ADEA, and thus lessening the li-

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14. See Eglit, *supra* note 6, at 130–31 (discussing empirical studies that have shown that stereotypes related to age, including intellectual decline such as diminished memory and learning ability, are inaccurate); Hassell & Perrewé, *supra* note 1, at 110 (“people are living healthier and longer lives.”).

15. *Age Discrimination: What Employers Need to Know*, AARP 1, 7 (2006), available at [http://assets.aarp.org/www.aarp.org/\\_articles/money/employers/age\\_discrimination.pdf](http://assets.aarp.org/www.aarp.org/_articles/money/employers/age_discrimination.pdf).

16. GREGORY, *supra* note 1, at 1, 10 (comparing the baby-boomer generation to a “vast army of workers . . . ready to contest employer acts of age discrimination”); see Eglit, *supra* note 11, at 667.

17. 29 U.S.C. § 626(b) (2006); *Comm’r v. Schleier*, 515 U.S. 323, 326 (1995) (“Courts of Appeals have unanimously held . . . that the ADEA does not permit a separate recovery of compensatory damages for pain and suffering or emotional distress.”); see Richard Neumeg, Annotation, *Propriety of Awarding Compensatory Damages for Pain and Suffering in Action under § 7 of Age Discrimination in Employment Act of 1967* (29 U.S.C.A. § 626), 52 A.L.R. FED. 837, 841–54 (2011) (discussing circuit court treatment of damage awards under the ADEA).

18. *Rogers v. Exxon Research & Eng’g Co.*, 404 F. Supp. 324, 329 (D.N.J. 1975), *vacated*, 550 F.2d 834 (3d Cir. 1977), *overruled by* *Smith v. Joseph Schlitz Brewing Co.*, 584 F.2d 1231 (3d Cir. 1978) (noting that age discrimination is a “cruel blow to the dignity and self-respect” of the victim and can cause both psychological and physiological damage); see U.S. EQUAL EMP’T OPPORTUNITY COMM’N, STATEMENT OF JOHN STANNARD, AGE DISCRIMINATION IN THE 21ST CENTURY—BARRIERS TO THE EMPLOYMENT OF OLDER WORKERS (July 15, 2009), <http://www.eeoc.gov/eeoc/meetings/7-15-09/stannard.cfm> (last visited Mar. 6, 2013) (victim of age discrimination recounts feelings of humiliation, anxiety, stress, and loss of self-esteem).

tigious burden on employers and the courts, would make more resources available to allow adequate compensation in the form of compensatory pain and suffering damages for age discrimination victims.<sup>19</sup>

This Note proposes that Congress amend the ADEA to increase the age of the protected class from forty to forty-five in exchange for an additional amendment clarifying that pain and suffering damages are available for victims of age discrimination. In support of this recommendation, Part II will outline the purpose, legislative reach, and available remedies under the ADEA, followed by a discussion of the framework and burden of proof that a plaintiff must satisfy to prove his or her age discrimination claim. Part III will explore general stereotypes of older workers as evidenced by various empirical studies. Next, this Note will attempt to establish *when* age discrimination occurs, followed by an analysis of Congressional intent in choosing forty as the starting point for ADEA protection. This Note moves on to discuss the increased presence of older individuals in the modern American workforce and ageist stereotypes that make these individuals susceptible to age discrimination. Finally, this Note will describe the negative psychological effects of age discrimination and the corresponding need for compensatory damages for age discrimination victims. The recommendation, found in Part IV, entails a legislative trade-off in narrowing the age parameter of the protected class in exchange for allowing pain and suffering damages.

## II. Background

### A. The ADEA's Purpose

As noted in Part I, the ADEA was enacted to eliminate age discrimination in the workplace, to encourage hiring and evaluation of older workers based on their ability rather than their age, and to assist

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19. See GREGORY, *supra* note 1, at 10. The baby boomers view themselves as young and thus are particularly unnerved by perceived age discrimination. Unlike their generational predecessors, baby boomers are more aware of their legal rights. This awareness coupled with increased sensitivity to perceived age bias will cause the number of age discrimination claims to skyrocket and "the courts will be inundated by a deluge of these [ADEA] claims." *Id.* See generally Rogers, 550 F.2d at 841 (discussing the potential for increased volume of litigation in the trial courts if pain and suffering damages are available under the ADEA).

workers in solving problems resulting from age discrimination.<sup>20</sup> In the wake of the civil rights movement and the passage of the Civil Rights Act of 1964, discrimination in the American workplace targeted at older workers triggered a national concern demanding political reaction.<sup>21</sup> Although the 1964 Congressional debates did not result in legislation protecting older workers from discrimination, Congress asked the Secretary of Labor to research the extent of age discrimination in the workplace and ultimately make a recommendation regarding the required legislative action.<sup>22</sup> The Secretary's 1965 report identified age bias in the workplace as a real problem affecting workers age forty and older, most noticeably in the hiring arena.<sup>23</sup> Congress responded to the Secretary's request for federal legislation by enacting the ADEA in 1967.<sup>24</sup>

#### **B. The ADEA: Who Is Protected from Whom and from What?**

The ADEA applies to employers, both those located in the United States and those incorporated in a foreign country but controlled by a U.S. employer, labor organizations, and employment agencies.<sup>25</sup> Furthermore, U.S. citizens employed by a U.S. employer who work in a foreign country are also covered by the ADEA, unless the legislation conflicts with the laws of that country.<sup>26</sup> To qualify as an employer, an entity must employ at least twenty employees each working day for at least twenty calendar weeks.<sup>27</sup> A labor organization is subject to ADEA regulation if it "exists for the purpose of . . . dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment."<sup>28</sup> An employment agency is covered by the ADEA regardless of whether it receives compensation for its services so long as it "regularly undertak[es] . . . to procure employees for an employer."<sup>29</sup>

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20. FEDER, *supra* note 4, at 1.

21. See Eglit, *supra* note 6, at 111.

22. *Id.* at 112.

23. *Id.*

24. *Id.*

25. FEDER, *supra* note 4, at 1.

26. 29 U.S.C. § 623(f)(1)-(h) (2006).

27. *Id.* § 630(b).

28. *Id.* § 630(d).

29. *Id.* § 630(c).

The ADEA makes it unlawful for an employer “to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment *because of such individual’s age.*”<sup>30</sup> The ADEA applies to an expansive range of employment practices, including discrimination because of age in hiring, termination, demotion, placement, transfer, and discipline, and in turn covers discrimination affecting salary, benefits, or time-off.<sup>31</sup> Like other anti-discrimination statutes, the ADEA prohibits retaliation by employers.<sup>32</sup> Generally, retaliation is a negative employment action in response to employee opposition to unlawful practices or participation in proceedings, investigations, or litigation.<sup>33</sup> The ADEA also prohibits employment advertisements containing age preferences unless age is a bona fide occupational qualification for the position.<sup>34</sup>

As stated in Part I, the ADEA protects employees age forty years and older, with no upper limit age cap.<sup>35</sup> It is worth noting that forty was not the original lower-limit age protected under the Act.<sup>36</sup> According to the House Report on the Act:

[The] Committee altered the lower age limit from 45 in the original bill to 40, in that testimony indicated this to be the age at which age discrimination in employment becomes evident. It is also the lower age limit found in most State statutes bearing on this subject. The committee declined to further lower the age limitation . . . [because] a further lowering of the age limit proscribed by the bill would lessen the primary objective; that is, the promotion of employment opportunities for older workers.<sup>37</sup>

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30. *Id.* § 623(a)(1) (emphasis added).

31. FEDER, *supra* note 4, at 3.

32. *Id.*

33. See 29 U.S.C. § 623(d) (2006).

34. *Id.* at § 623(e); see FEDER, *supra* note 4, at 4–5. The bona fide occupational qualification (BFOQ) defense will allow an employer to avoid liability if the employer can show that age is a BFOQ “reasonably necessary to the normal operations of the particular business.” The Supreme Court has required the BFOQ to be more than convenient or reasonable. The employer can also defend against liability if the employer can show that the adverse employment decision was based on “reasonable factors other than age” (RFOTA). *Id.* at 5.

35. 29 U.S.C. § 631(a) (2006); see FEDER, *supra* note 4, at 1 (discussing the various amendments to the ADEA, including the eventual elimination of the extended age seventy cap).

36. H.R. REP. NO. 805-90, at 5–6 (1967).

37. *Id.*

Aside from Congress's change regarding the age of the protected class, the available remedies for victims of age discrimination are limited.<sup>38</sup>

### C. Remedies Available Under the ADEA

If an ADEA violation is found, the court has discretion to grant legal and equitable relief "as may be appropriate to effectuate the purposes of [the] Act."<sup>39</sup> The ADEA was modeled after the Fair Labor Standards Act of 1938 (FLSA), and thus the available remedies mimic (and are limited by) the FLSA.<sup>40</sup> Under the FLSA, an aggrieved employee may be entitled to receive unpaid wages, unpaid overtime compensation, and liquidated damages.<sup>41</sup> The available remedies under the ADEA differ from the FLSA in that, under the ADEA, an award of liquidated damages requires proof of willful discriminatory conduct by the employer, and the court is (at least superficially) permitted to grant "such legal or equitable relief" as is necessary to carry out the legislative purposes of the Act.<sup>42</sup>

Remedies in ADEA cases can be divided into two categories: judgments compelling an employment action and monetary compensation.<sup>43</sup> The award of either or both types of compensation is dependent on the facts of each plaintiff's case.<sup>44</sup> The employment action damages include "judgments compelling employment, reinstatement, or promotion."<sup>45</sup> Reinstatement tends to be the preferred remedy in age discrimination cases.<sup>46</sup>

If there is pervasive hostility between the parties, or the plaintiff's position has already been filled, reinstatement is impracticable or impossible.<sup>47</sup> In this situation, the courts can award front pay.<sup>48</sup> Front

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38. See GREGORY, *supra* note 1, at 181 (commenting on the deficiency of available ADEA relief).

39. 29 U.S.C. § 626(b) (2006).

40. Lavinia A. James, Note, *Damages in Age Discrimination Cases—The Need for a Closer Look*, 17 U. RICH. L. REV. 573, 576 (1983).

41. *Id.*

42. See *id.* at 577 (quoting 29 U.S.C. § 626(b)).

43. See Kristofer K. Strasser, *Protecting the Growing Number of Older Workers: The Age Discrimination in Employment Act*, in 33 LAB. REL. & PUB. POL'Y SERIES 1989, at 59 (Supp. 1998) (explaining that remedies for ADEA violations are dependent on the facts of the case and take the form of reinstatement or financial compensation).

44. See *id.*

45. 29 U.S.C. § 626(b).

46. Strasser, *supra* note 43, at 59.

47. See *id.* at 64.

pay is a post-trial calculation which accounts for loss of future salary and benefits as a result of the discrimination.<sup>49</sup> Some circuits have held that it is within the province of the jury to determine front pay damages, while other courts have held that this determination is within the discretion of the district court judge.<sup>50</sup> A conservative award of front pay may limit pay to “future losses which can be projected with reasonable certainty.”<sup>51</sup> Conversely, other courts have been more generous in their award of front pay, allowing the figure to accommodate the remainder of the plaintiff’s working years.<sup>52</sup>

Financial remedies include back pay, front pay, and less commonly, liquidated damages.<sup>53</sup> Back pay includes compensation in the form of plaintiff’s base salary, lost benefits, and potential overtime.<sup>54</sup> The aim of awarding back pay is to “make the plaintiff[s] whole,” or to put them in the financial position they would have been in had the unlawful discrimination not occurred.<sup>55</sup> The most obvious component of back pay is the amount of income the plaintiff would have earned but for the discrimination;<sup>56</sup> however, this figure can also include the value of health and medical benefits.<sup>57</sup> Certain “set-offs” are deducted from this amount including any severance pay received, wages earned from a new job acquired between the discriminatory action and trial,<sup>58</sup> and income from third party sources, such as unemployment or Social

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48. *Id.*

49. GREGORY, *supra* note 1, at 169.

50. Strasser, *supra* note 43, at 64–65.

51. *Id.* at 65 (discussing the conservative approach to calculating back pay taken by the court in *Chace v. Champion Spark Plug*, such that front pay can only reflect future losses if capable of ascertainment with reasonable certainty. *Chace v. Champion Spark Plug*, 732 F. Supp. 605, 610 (D. Md. 1990)).

52. *Id.* (discussing the liberal award of back pay in *Padilla v. Metro-North Commuter R.R.*: the award reflected the difference between plaintiff’s salary at his replacement job as compared to the job he lost, to be paid until he reached age sixty-seven. *Padilla v. Metro-North Commuter R.R.*, 92 F.3d 117, 122 (2d Cir. 1996)).

53. 29 U.S.C. § 626(b) (2006); see Strasser, *supra* note 43, at 60 (discussing available remedies under the ADEA).

54. Strasser, *supra* note 43, at 60 (discussing *EEOC v. Kentucky State Police Dept.*, 80 F.3d 1086, 1100 (6th Cir. 1996), an ADEA case permitting an award of overtime as back pay if “it appears likely to be incurred”).

55. Daniel P. O’Meara, *Protecting the Growing Number of Older Workers: The Age Discrimination in Employment Act*, in 33 LAB. REL. & PUB. POL’Y SERIES 1989, at 290 (1989).

56. *Id.* at 291.

57. Strasser, *supra* note 43, at 60.

58. O’Meara, *supra* note 55, at 290–91.

Security benefits.<sup>59</sup> The plaintiff has the duty to mitigate damages by making reasonable efforts to seek alternative employment.<sup>60</sup>

The court can award liquidated damages if the employer's ADEA violation is considered "willful."<sup>61</sup> Liquidated damages are punitive and are calculated by doubling the plaintiff's back pay award.<sup>62</sup> In response to circuit confusion, the Supreme Court in *Hazen Paper Co. v. Biggins* established the "knew or showed reckless disregard" standard for willfulness.<sup>63</sup> In its analysis, the Court rejected a more expansive definition of willfulness that provided for liquidated damages "whenever the employer knew that the ADEA was 'in the picture.'"<sup>64</sup> The "knew or showed reckless disregard" standard requires more than a showing that the employer was aware of the "potential applicability of the ADEA to the [adverse employment] decision;"<sup>65</sup> however, the standard is certainly implicated if an employer "pretends that a decision was not age-based when in fact it was."<sup>66</sup> The standard involves a two-tiered liability scheme which precludes punitive relief "[i]f an employer incorrectly but in good faith and non-recklessly believes that the statute permits a particular age-based decision . . . ."<sup>67</sup> Although an award of liquidated damages for a "willful" violation of the ADEA does not require proof of the employer's motivation through direct evidence,<sup>68</sup> proving intentional discrimination is difficult because the affected employee was not likely sitting at the table when the adverse employment decision was reached nor will the employee be able to retrospectively get inside the head of the decision maker.<sup>69</sup>

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59. See Strasser, *supra* note 43, at 60 (noting that the current trend among the circuit courts is not to subtract unemployment benefits from back pay; however, in 1995, the First Circuit ruled that it is within the discretion of the court to determine whether unemployment should be deducted from the back pay award).

60. *Id.* at 61.

61. See 29 U.S.C. § 626(b) (2006).

62. O'Meara, *supra* note 55, at 291.

63. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 617 (1993).

64. *Id.* at 614 (quoting the previous rejection of the broader willfulness standard in *Trans World Airlines v. Thurston*, 469 U.S. 111, 127-28 (1985)).

65. Strasser, *supra* note 43, at 63.

66. *EEOC v. Watergate at Landmark Condo.*, 24 F.3d 635, 641 (4th Cir. 1994) (citing *Hazen Paper Co.*, 507 U.S. at 617).

67. *Hazen Paper*, 507 U.S. at 616.

68. *Id.* at 617.

69. Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN. L. REV. 587, 614 n.133 (2000) ("There will seldom be 'eyewitness' testimony as to the employer's mental processes," quoting *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983)).

#### D. Proving Age Discrimination

Plaintiffs who successfully prove age discrimination and make it to the damages phase of litigation are the lucky ones; generally, age discrimination victims face a steep uphill battle when trying to prove their claim.<sup>70</sup> For purposes of illuminating the difficulty in proving age discrimination, this Note will focus on disparate treatment claims.<sup>71</sup> Disparate treatment discrimination is “the most easily understood type of discrimination.”<sup>72</sup> It refers to employer treatment of certain individuals less favorably than others because of a protected characteristic—age in the context of age discrimination.<sup>73</sup> In a disparate treatment age discrimination case, liability hinges on whether age “actually motivated” the employer’s decision, and thus had a “determinative influence” on the adverse employment action.<sup>74</sup>

As amended by the Civil Rights Act of 1991, if a Title VII plaintiff demonstrates that an impermissible factor motivated an employer decision (even if the employer based his adverse employment decision on *both* legitimate and illegitimate factors) the employer is liable.<sup>75</sup> After the plaintiff has made this showing, the burden of persuasion shifts to the defendant to prove that it would have made the same decision had it not considered the impermissible factor.<sup>76</sup> Regardless of the defendant’s same-decision demonstration, the plaintiff

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70. See generally Leigh A. Van Ostrand, Note, *A Close Look at ADEA Mixed-Motives Claims and Gross v. FBL Financial Services, Inc.*, 78 FORDHAM L. REV. 399, 440 (2009) (discussing whether under *Gross* it will be more difficult for age discrimination plaintiffs to prove their claims under the ADEA).

71. See Katherine Krupa Green, Comment, *A Reason to Discriminate: Curtailing the Use of Title VII Analysis in Claims Arising Under the ADEA*, 65 LA. L. REV. 411, 425–26 (2004) (noting that, in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), the Court suggested that certain discrimination theories that are applicable to Title VII claims, such as disparate impact, are unavailable under the ADEA). Due to this uncertainty regarding available frameworks under the ADEA, this Note will only focus on the disparate treatment theory of workplace discrimination.

72. *Hazen Paper*, 507 U.S. at 609.

73. *Id.*

74. *Id.* at 610.

75. Nancy L. Lane, Note, *After Price Waterhouse and the Civil Rights Act of 1991: Providing Attorney’s Fees to Plaintiffs in Mixed Motive Age Discrimination Cases*, 3 ELDER L.J. 341, 363 (1995) (discussing the effect of the 1991 Civil Rights Act on mixed motive claims). The relevant statutory language is as follows, “an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.” 42 U.S.C. § 2000e-2(m) (2006).

76. Lane, *supra* note 75, at 363.

can still recover declaratory relief, injunctive relief, costs, and legal fees.<sup>77</sup> This burden-shifting framework has been described as a victory for Title VII plaintiffs.<sup>78</sup>

In the 2009 decision *Gross v. FBL Financial Services*, the Supreme Court differentiated between Title VII and ADEA plaintiffs by requiring ADEA plaintiffs to make a higher showing to prove a discrimination claim.<sup>79</sup> An ADEA plaintiff cannot shift the burden of persuasion to the defendant once she or he has shown that age was a motivating factor in the adverse employment decision. In other words, ADEA plaintiffs will not succeed on a mixed-motive claim.<sup>80</sup> Eliminating the availability of mixed-motive claims from an ADEA plaintiff's arsenal limits the plaintiff to one mode of attack: proving that age was the "but-for" cause of the employer's adverse decision.<sup>81</sup>

In proving "but-for" causation, plaintiffs retain the burden of persuasion throughout the litigation, even when they have demonstrated that age at least partially motivated the employer's decision.<sup>82</sup> In the *Gross* dissent, Justice Breyer criticized the imposition of a "but-for" causation standard when the employer may have had multiple motives in the adverse action:

[T]o apply 'but-for' causation is to engage in a hypothetical inquiry about what would have happened if the employer's thoughts and other circumstances had been different. The answer to this hypothetical inquiry will often be far from obvious, and, since the employee likely knows less than does the employer about what the employer was thinking at the time, the employer will often be in a stronger position than the employee to provide the answer.<sup>83</sup>

Justice Breyer noted that shifting the burden of persuasion to the employer would not be "unfair or impracticable" because the employer is well-equipped to prove, *hypothetically*, how he would have acted if age was not taken into consideration.<sup>84</sup> Unlike the victorious Title VII plaintiffs following the Civil Rights Act of 1991, ADEA plaintiffs are

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77. *Id.*

78. *Id.* at 364.

79. See Van Ostrand, *supra* note 70 at 438–39 (noting that proving that age was the "but-for" cause for an employment decision is a higher standard than "motivating factor" causation).

80. See *id.* at 439.

81. See *id.* at 430 (quoting causation language from *Gross*).

82. *Id.*

83. *Gross*, 129 S. Ct. at 2359 (Breyer, J., dissenting).

84. See *id.*

the losers with *employers* securing a “significant victory” after *Gross*.<sup>85</sup> Like the difficulty in proving employer willfulness to obtain liquidated damages, ADEA plaintiffs claiming discrimination will “almost certainly not be present while their employers discuss laying them off or demoting them” and thus will rarely have access to evidence that age was the reason behind an employer’s decision.<sup>86</sup> On the other hand, employers, never having to bear the burden of persuasion, need only show that there were other factors (say, employee performance record or company reorganization) affecting their decision and thus the same decision would have been reached regardless of age.<sup>87</sup>

The ADEA aims to eliminate age discrimination in the workplace and to provide redress for those who fall victim to such discrimination.<sup>88</sup> Realization of the compensatory and policy purposes of the ADEA is stunted by the limited available relief and stringent and pro-employer proof standard outlined in *Gross*.<sup>89</sup> With these limitations in mind, it is crucial to explore the potential sources of age discrimination and to attempt to identify when age discrimination occurs.

### III. Analysis

#### A. Inaccurate Stereotypes of Older Workers

Many people hold a laundry list of inaccurate stereotypes regarding older workers including perceptions that older workers are slow, lacking in creativity, resistant to change, less adaptable, disinterested in training, prone to accident and illness, and, perhaps most importantly, that they suffer from impaired mental functioning.<sup>90</sup> Many of these perceived characteristics are related to the commonly-

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85. See Van Ostrand, *supra* note 70, at 439.

86. See *id.* at 440 (quoting David G. Savage, *Age Bias Much Harder to Prove: The Supreme Court Shifts the Burden of Proof to the Worker Making the Claim*, L.A. TIMES, June 19, 2009, at A1); see also Lawton, *supra* note 69, at 647 (noting that the burden-shifting framework was designed to accommodate the fact that plaintiffs do not have access to their employer’s internal beliefs and motivations).

87. See Van Ostrand, *supra* note 70, at 439.

88. 29 U.S.C. § 621(4)(B) (2006).

89. See Van Ostrand, *supra* note 70, at 447.

90. Lisa M. Finkelstein & Michael J. Burke, *Age Discrimination in Simulated Employment Contexts: An Integrative Analysis*, 80 J. APPLIED PSYCHOL. 652, 652 (1995); Hassell & Perrewé, *supra* note 1, at 110 (noting that people believe older workers suffer from decreased physical and mental functioning and that they are lonely, averse to change, and do not desire activity).

held belief that old age is correlated with poor job performance.<sup>91</sup> Most of the above listed stereotypes are ill-founded and inaccurate: “a number of empirical studies and research reviews have indicated that there is often a positive . . . association between a worker’s age and many aspects of job performance.”<sup>92</sup> Furthermore, research indicates that age and job performance are “generally unrelated,” and conversely, that older workers are more reliable and possess positive work motivation, job satisfaction, and greater commitment to and involvement with the employer—characteristics that would likely correlate with positive performance.<sup>93</sup>

Inevitably, personal beliefs regarding the ability, or rather inability, of older workers can affect employment decisions in that older individuals may be chosen first for termination or lay-off, skipped over for promotion, or viewed as less-desirable hires when compared to younger applicants.<sup>94</sup> The effect of these negative stereotypes was revealed by a study surveying performance reviews of older workers as evaluated by 400 human resource managers.<sup>95</sup> As a whole, the human resource managers gave older workers lower ratings on education, motivation to get ahead, physical agility, and ability to feel comfortable using new technology.<sup>96</sup> Any negative effects suffered by an older worker because of these stereotypes are age discrimination, plain and simple. Isolating the number of incidents when these beliefs lead to an adverse employment action is, however, no easy feat.

## **B. Employer Perceptions of Old Age: The Good, the Bad, and the Ambivalent**

Statistical data regarding actual incidences of age discrimination are difficult to isolate because most compilations of such data group all employment discrimination cases together, including violations of Title VII and the Americans with Disabilities Act (ADA), as one enti-

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91. See generally Hassell & Perrewé, *supra* note 1, at 110 (noting that research on age discrimination has focused on the (perceived) relationship between old age and decreased job performance).

92. Finkelstein & Burke, *supra* note 90, at 652.

93. See Hassell & Perrewé, *supra* note 1, at 110.

94. See *id.* at 111 (discussing studies reflecting the effect of age bias in the workplace and its effect on job opportunities for older workers).

95. *Id.* at 110–11.

96. *Id.*

ty.<sup>97</sup> A 1993 study by the Fair Employment Council of Greater Washington, Inc., attempted to isolate and identify incidences of age discrimination in hiring by sending resumes of equal caliber and qualification to 775 large firms and employment agencies, only manipulating the applicant age: fifty-seven or thirty-two.<sup>98</sup> The younger applicant received a 25.6% more favorable response rate than the older applicant.<sup>99</sup> A question arises from the results of this study—what is it about older workers that triggers this adverse reaction in employers?

It has been suggested that, unlike discrimination because of race or religion, age discrimination is not based on hatred or malevolent motives, but instead relates to employer assumptions that older workers are less capable than their younger counterparts.<sup>100</sup> This notion is supported by stereotypes that older people suffer from intellectual decline, diminished enthusiasm and creativity, and a decreased learning ability.<sup>101</sup> These employer beliefs coupled with the perceived increased cost of health care for employing older workers fuels age discrimination in the workplace.<sup>102</sup> The United States does not have government-funded health programs available to all American citizens, so employers bear most of the cost of insuring their employees and health insurance costs are generally higher for older workers.<sup>103</sup> Similarly, older employees cost more on the payroll because salary typically increases with years worked, and older workers tend to have a longer tenure than their younger counterparts.<sup>104</sup>

Contrary to some of these stereotypes, the modern, older worker is far better educated than he or she was ten years ago, more physically fit, and more capable of performing job functions because the physical demands of work have declined.<sup>105</sup> To get clarification regarding

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97. Eglit, *supra* note 6, at 125 (discussing statistics found in the ADMIN. ON AGING, U.S. DEP'T OF HEALTH & HUMAN SERVS., A PROFILE OF OLDER AMERICANS: 2007, at 3 (2008)).

98. Eglit, *supra* note 6, at 126.

99. *Id.*

100. *Id.* at 127.

101. See Dorothy Fleisher & Barbara H. Kaplan, *Characteristics of Older Workers: Implications for Restructuring Work*, in WORK AND RETIREMENT: POLICY ISSUES 140, 151–53 (Pauline K. Ragan ed., 1980).

102. Eglit, *supra* note 6, at 133 (“A major factor that accounts for employer antipathy (or at least discomfort) regarding older workers is the matter of cost.”).

103. *Id.* at 133–34.

104. *Id.* at 137–38.

105. Alicia H. Munnell, Steven A. Sass & Mauricio Soto, Ctr. for Ret. Research at Boston Coll., *Employer Attitudes Towards Older Workers: Survey Results*, in WORK OPPORTUNITIES FOR OLDER AMERICANS 1–2 (2006).

employer attitudes towards older workers, two researchers at the Center for Retirement Research at Boston College surveyed 400 private sector employers, requesting evaluations of productivity and cost of white-collar and blue-collar workers age fifty-five and older, as compared to younger employees.<sup>106</sup> The results of this study contradict the perceived ageist stereotypes employers are concerned about.<sup>107</sup>

Few surveyed employers claimed workers age fifty-five and older were less productive and, conversely, age was a significant advantage in white-collar jobs.<sup>108</sup> In terms of productivity, the only significant negative employer assessment of older workers was that older rank-and-file employees were described 20% less productive, which is minor when compared to employers who claimed that 40% of older rank-and-file workers were *more* productive.<sup>109</sup> Another negative implication of the study was that over 40% of employers viewed older workers as more expensive than someone younger. This pattern was virtually the same across employer type.<sup>110</sup> In terms of attractiveness of older workers, two-thirds of the employers surveyed said an older employee is no more or less attractive than a younger applicant.<sup>111</sup> Nearly one in four white-collar employers, however, said that an older manager or professional is *more* attractive than someone younger.<sup>112</sup> According to the researchers, the study implies that older workers may have better prospects for extending their careers.<sup>113</sup> Despite employer perceptions of increased cost for older workers, these concerns are counterbalanced by positive employer views of older worker productivity and attractiveness (or at least equal attractiveness to their younger counterparts).<sup>114</sup> Like anyone, decision-makers in the em-

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106. *Id.* at 2.

107. Eglit, *supra* note 6, at 127–28 (describing employer age discrimination as stemming from assumptions about the compromised abilities of older workers to perform).

108. Munnell et al., *supra* note 105, at 2 (noting that a clear majority of employers surveyed claimed older managers and professionals were “more productive”).

109. *Id.*

110. *Id.* at 4.

111. *Id.*

112. *Id.* at 4–5.

113. *Id.* at 5.

114. *Id.*; see also Mujtaba, et al., *supra* note 9, at 41 (noting that a nationwide survey found that older workers were deemed to possess the following qualities: “functioning well in crisis; possessing basic skills in writing, reading, and arithmetic; loyal; solid performers; and good interpersonal skills”); Hendrik P. van Dalen, et al., *Unraveling the Age-Productivity Nexus: Confronting Perceptions of Employers and*

ployment context can be swayed by societal influence and thus it is worth exploring more common social perceptions of old age that can contribute to stereotypical, and often deep-seated, beliefs.<sup>115</sup>

### C. Societal Perceptions of Old Age

Although employer perception of old age and its effect on older workers is the most relevant inquiry in the context of the ADEA, it is also important to understand societal perceptions of this issue. Presumably, discrimination on the basis of age is based on the negative associations people make when they think of older individuals.<sup>116</sup> This type of adverse reaction based on age begs the question: at what age is a person “old?” Regardless of societal perceptions, the reality is that, according to a 2005 scientific study surveying the U.S. population, by 2050, middle-age will occur at 45.8, up from 41.7 in 2005.<sup>117</sup> With middle-age occurring later, perhaps perceptions regarding when *old* age occurs will also reflect an upward trend.

A 2009 study conducted by the Pew Research Center investigated perceptions of when old age begins based on the age of the observer.<sup>118</sup> The study surveyed a nationally representative sample of nearly 3,000 people and the results were as follows: individuals between the ages of eighteen and twenty-nine believed old age begins around age sixty; middle-aged participants considered the old age threshold to be seventy; and participants age sixty-five and older found old age to begin around age seventy-four.<sup>119</sup> In terms of self-perception of age, another 2009 Pew Research Center study found that a majority of

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*Employees*, CentER Tilburg University Discussion Paper 5 (Jan. 12, 2009). Research regarding the productivity of older workers has shown that attitudes and stereotypes about older workers are “mixed.” Positive characteristics associated with older workers include: “experience, loyalty to the organization, reliability, and interpersonal skills.” *Id.*

115. See Finkelstein & Burke, *supra* note 90, at 653 (noting that psychological literature usually cites stereotypes as a reason for age discrimination).

116. GREGORY, *supra* note 1, at 24 (noting common stereotypical assumptions of the abilities of older people including: (1) older workers as stubborn, inflexible, and resistant to change; (2) older workers as less productive than their younger colleagues; (3) older workers as less adept to learn new skills).

117. *Forty May Be the New 30 As Scientists Redefine Age*, MEDICINE ONLINE (June, 8 2005), <http://www.medicinenonline.com/news/12/640/Forty-May-Be-the-New-30-As-Scientists-Redefine-Age.html>.

118. PEW RESEARCH CTR. PUBL'NS, GROWING OLD IN AMERICA: EXPECTATIONS V. REALITY (June 29, 2009), <http://pewresearch.org/pubs/1269/aging-survey-expectations-versus-reality>.

119. *Id.*

adults over age fifty feel at least ten years younger than their actual age, one-third of those surveyed between sixty-five and seventy-four reported that they felt ten to nineteen years younger, and one-sixth of people over age seventy-five and older said they felt twenty years younger.<sup>120</sup>

A 1976 study surveying two age groups, undergraduate students and middle-aged individuals, found variations among the groups regarding perceptions of the onset of old and middle-age.<sup>121</sup> For the undergraduates, middle-age began between thirty-five and thirty-nine, while the middle-aged participant result ranged from forty to forty-five.<sup>122</sup> The undergraduates deemed old age to begin between sixty and sixty-five, the middle-aged individual perception ranged between sixty-seven and seventy-two.<sup>123</sup>

As is apparent from the Pew Research Center studies, most people view old age as occurring later as participant age increases.<sup>124</sup> Similarly, many people over age fifty report feeling younger than their actual age.<sup>125</sup> With the baby boomers, who comprise a considerable percentage of the population, approaching and passing age sixty, and with the first wave of boomers turning seventy in 2016,<sup>126</sup> perhaps social perceptions of old age will continue to shift in an upward direction.

#### D. When Does Age Discrimination Occur?

Since 2006, the EEOC has generally received an increasing number of age discrimination complaints each year. In 2006, the EEOC received 16,548 complaints, followed by 19,103 complaints in 2007; 24,582 complaints in 2008; 22,778 complaints in 2009; and 23,264 complaints in 2010.<sup>127</sup> Statistics illuminating the precise age of individuals

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120. Sarah Arnquist, *How Old Do You Feel? It Depends on Your Age*, N.Y. TIMES (June 30, 2009), <http://www.nytimes.com/2009/06/30/health/30aging.html?ref=health> (reporting the results of the Pew Research Center study).

121. Jean Drenstedt, *Perceptions of Onsets of Young Adulthood, Middle Age, and Old Age*, 31 J. GERONTOLOGY 53, 54–55 (1976).

122. *Id.*

123. *Id.*

124. PEW RESEARCH CTR. PUBL'NS, *supra* note 118.

125. *Id.*

126. *Id.*

127. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, AGE DISCRIMINATION IN EMPLOYMENT ACT: ENFORCEMENT AND LITIGATION STATISTICS, FY 1997–FY 2010,

bringing ADEA claims are rare.<sup>128</sup> Even more difficult to obtain are statistics regarding the age of successful ADEA plaintiffs.<sup>129</sup> Even if such statistics were available, it would be of little assistance to one attempting to discern the age at which age discrimination begins because not all discrimination is reported<sup>130</sup> and a majority of the cases settle confidentially.<sup>131</sup> As of 1989, the distribution of ADEA plaintiffs' ages was as follows: 55% were in the fifty to fifty-nine age bracket, 27% were in the sixty to sixty-nine age bracket, and 18% were in the forty to forty-nine age bracket.<sup>132</sup> An EEOC study surveying ADEA claims between 1980 and 1981 determined that the average age of an ADEA plaintiff was 55.2.<sup>133</sup>

Howard C. Eglit, a professor at Chicago-Kent College of Law, conducted a survey to collect all appellate and district court age discrimination rulings handed down between 1995 and 1996.<sup>134</sup> In this survey, Eglit made note of plaintiffs' ages if mentioned in the decision.<sup>135</sup> For the federal district court cases surveyed, the average age

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<http://www.eeoc.gov/eeoc/statistics/enforcement/adea.cfm> (last visited Mar. 6, 2013).

128. The author has contacted an Attorney Advisor/Senior Program Analyst for the EEOC and an attorney from the Office of (EEOC) General Counsel. Both individuals have informed the Note author that although the EEOC does keep records on the number of ADEA charges per year and related litigation statistics, the ages of ADEA plaintiffs are not recorded.

129. See Eglit, *supra* note 6, at 124–25 (noting that “specific data regarding the success or lack thereof of ADEA complainants who wind up actually litigating is not readily available,” and that the EEOC statistical data regarding the number of annual charges do not give a true picture of the extent of age discrimination in the workplace); GREGORY, *supra* note 1, at 4 (discussing frequency of confidential settlement agreements in ADEA disputes).

130. See Hassell & Perrewé, *supra* note 1, at 110 (reporting that, in 1987, AARP lawyers received between 400 and 500 letters *per month* from workers who believed they had suffered age discrimination, with a majority of potential victims being financially incapable of bringing suit).

131. JANE GOODMAN-DELAHUNTY & WILLIAM E. FOOTE, EVALUATION FOR WORKPLACE DISCRIMINATION AND HARASSMENT, 11, 14 (Thomas Grisso et al. eds., 2011) (commenting that most discrimination cases settle before trial); GREGORY, *supra* note 1, at 4 (noting that many ADEA claims are settled before or during trial, with a typical condition of settlement being a confidentiality agreement).

132. O'Meara, *supra* note 55, at 26.

133. *Id.* n.85.

134. Eglit, *supra* note 11, at 596–97 (Eglit's data set only includes cases that were published in 1996, and thus includes some 1995 decisions, and the 1996 decisions analyzed do not reflect the universe of cases brought in 1996 that will later be published in 1997).

135. *Id.* at 599. In the ninety-four federal court of appeals decisions, there were seventy-four age-identified plaintiffs. In the federal district court opinions, there were 131 age-identified plaintiffs from 222 decisions. *Id.* at 601.

of the plaintiff was fifty-five,<sup>136</sup> and the mean age at the appellate level was fifty-four.<sup>137</sup> At both court levels there were only nineteen plaintiffs under the age of forty-five, out of 205 age-identified plaintiffs.<sup>138</sup> Although these numbers provide a general idea of the average ages of plaintiffs during the relevant period, the author cautions that “[t]here is little reason to believe that reported cases are an accurate reflection of the actual incidence of age discrimination in the workplace.”<sup>139</sup>

In an American Bar Association Report analyzing age discrimination cases decided between January 1, 2010 and December 31, 2010, of the thirty-three cases that specifically mentioned the plaintiff’s age, only *two* cases involved plaintiffs under the age of forty-five.<sup>140</sup> Thirty-one cases involved plaintiffs forty-five and older, with only four cases involving plaintiffs between age forty-five and forty-nine.<sup>141</sup> Most plaintiffs fell into the age range of fifty to seventy.<sup>142</sup>

As indicated above, few ADEA cases in 2010 involved plaintiffs under the age of forty-five.<sup>143</sup> The small number of cases involving younger protected individuals compared with the lion’s share of cases involving workers forty-five and older may indicate that age discrimination occurs later than the ADEA’s prescribed age of forty.<sup>144</sup> Similarly, the 1989, 1980–81, and 1995–96 statistics reflect the notion that age discrimination, on average, occurs later than age forty.<sup>145</sup>

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136. *Id.* at 603.

137. *Id.* at 599.

138. *See id.* at 600–02.

139. *Id.* at 591.

140. NAUREEN AMJAD, ET AL., REPORT OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT SUBCOMMITTEE OF THE AMERICAN BAR ASSOCIATION SECTION OF LABOR AND EMPLOYMENT LAW FEDERAL LABOR STANDARD LEGISLATION COMMITTEE (2011). Please note that many cases did not specifically mention plaintiff’s age and that this analysis was conducted by the author. The age breakdown of the cases was as follows: age forty to forty-four: two cases; age forty-five to forty-nine: four cases; age fifty to sixty-four: twenty-two cases; age sixty-five and older: five cases. *Id.*

141. *Id.*

142. *Id.*

143. *See id.*

144. *See id.*

145. *See* Eglit, *supra* note 11, at 599–604; O’Meara, *supra* note 55, at 26; Michael Schuster & Christopher S. Miller, *An Empirical Assessment of the Age Discrimination in Employment Act*, 38 INDUS. & LAB. REL. REV. 64, 68–69 (1984). O’Meara’s study, published in 1989, drew on many previous empirical studies to conclude that discrimination occurs at a later age. Schuster & Miller’s data from 1980–81 as well as Eglit’s data from 1995–96, support O’Meara’s conclusion.

### E. Congress's Choice of Age Forty

When passing the ADEA in 1967, Congress was mainly concerned with age discrimination in the context of hiring and long-term unemployment among older workers.<sup>146</sup> This concern was triggered by a common employer practice at the time to observe a blanket exclusion of all applications from workers above a certain age, typically between age forty-five and fifty-five.<sup>147</sup> Congress also sought to prohibit employers from insisting on compulsory retirement for older workers.<sup>148</sup> In the original draft of the statute the protected age was forty-five, but the age was lowered to forty because "testimony indicated [forty] to be the age at which age discrimination in employment becomes evident. It [was] also the lower age limit found in most State statutes bearing on this subject."<sup>149</sup> In addressing the background of the statute, Congress noted its concern with the markedly high rates of unemployment for individuals age forty-five and older.<sup>150</sup>

Some of the Congressional concerns and motivations listed above still have contemporary relevance. The ADEA clearly prohibits the type of age screening that Congress initially sought to remedy in 1967.<sup>151</sup> Even then, however, the discriminatory screening generally did not exclude individuals until at least age forty-five.<sup>152</sup> The Congressional concern in 1967 regarding unemployment among older workers is of contemporary relevance, as evidenced by the fact that in 2010, the number of unemployed individuals age fifty-five and older had markedly increased since December 2007.<sup>153</sup> In terms of difficulty in obtaining employment, individuals age fifty-five and older spent approximately 35.5 weeks searching for work after job loss, as compared to 30.3 weeks for individuals age twenty-five to fifty-four.<sup>154</sup> Reemployment today is still not a likely option for older individuals, and the older the terminated worker, the more likely she or he is to

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146. O'Meara, *supra* note 55, at 1.

147. *Id.*

148. GREGORY, *supra* note 1, at 6.

149. H.R. REP. NO. 805-90, at 5-6 (1967).

150. *Id.* at 2.

151. 29 U.S.C. § 623(a)(1) (2006).

152. O'Meara, *supra* note 55, at 1.

153. U.S. Bureau of Labor Statistics, *Record Unemployment Among Older Workers Does Not Keep Them Out of the Job Market*, ISSUES IN LABOR STATISTICS 1 (2010), available at <http://www.bls.gov/opub/ils/pdf/opbils81.pdf>.

154. *Id.*

remain unemployed.<sup>155</sup> This bleak prospect has even been dubbed “the industrial equivalent of capital punishment.”<sup>156</sup>

These statistics demonstrate that *older* workers, i.e. those much older than age forty, are struggling due to unemployment and the enhanced difficulties involved in reentering the workforce at an older age.<sup>157</sup> These harsh realities for older workers, which reflect some of the Congressional concerns precipitating the passage of the ADEA, give rise to an inference that the ADEA protection of workers starting at age forty, viewed through a present day lens, misses the mark. Current national statistics indicate that there will be an increasing number of older workers (however “old” is defined) in the labor force, and this trend may affect the incidence and nature of age discrimination.<sup>158</sup>

#### F. Changes in the American Workforce

As a society, we are living longer and, consequently, working longer. At the beginning of the twenty-first century, the average life expectancy for an American was seventy-six, whereas in 2000 an American could expect to live an additional eighteen years.<sup>159</sup> The natural consequence of increased longevity is that Americans are working longer and thus retiring later.<sup>160</sup> “Full retirement age (also called ‘normal retirement age’) had been 65 for many years. However, beginning with people born in 1938 or later, that age gradually increases until it reaches 67 for people born after 1959.”<sup>161</sup> Although past research indicated that American workers were starting to retire earlier than age sixty-five, this downward trend has recently shifted in

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155. GREGORY, *supra* note 1, at 7.

156. *Id.* (citation omitted).

157. *Id.*

158. See Eglit, *supra* note 11, at 667.

159. William J. Wiatrowski, *Changing Retirement Age: Ups and Downs*, MONTHLY LAB. REV., Apr. 2001, at 4, available at <http://www.bls.gov/opub/mlr/2001/04/art1full.pdf>.

160. Hassell & Perrewé, *supra* note 1, at 110 (noting that “people are living healthier and longer lives” and thus expect to remain in the labor force longer); see GREGORY, *supra* note 1, at 11 (predicting that the baby-boomer generation will remain in the workforce longer than past generations).

161. THE FULL RETIREMENT AGE IS INCREASING, SOC. SEC. ADMIN., <http://ssa.gov/pubs/ageincrease.htm> (last modified June 6, 2012).

the opposite direction.<sup>162</sup> When analyzing the projected workforce between the years 2006 and 2016, organized by age category, the United States Bureau of Labor Statistics noted the following figures:

The number of workers in the youngest group, age 16-24, is projected to decline during the period while the number of workers age 25-54 will rise only slightly. In sharp contrast, workers age 55-64 are expected to climb by 36.5 percent. *But the most dramatic growth is projected for the two oldest groups.* The number of workers between the ages of 65 and 74 and those aged 75 and up are predicted to soar by more than 80 percent. By 2016, workers age 65 and over are expected to account for 6.1 percent of the total labor force, up sharply from their 2006 share of 3.6 percent . . . .<sup>163</sup>

The demographic shift towards an increasingly older workforce can be attributed to various factors, including the age increase for qualification for full Social Security benefits and other Social Security benefits, mounting economic concerns in the wake of the recession, and the overall increasing health and longevity of older individuals.<sup>164</sup> In the context of the recession, increasing participation of older workers in the labor force may also reflect the “need of many near retirees to work after large losses in their retirement accounts” and generally, a need to secure post-retirement incomes to accommodate increased life spans.<sup>165</sup> In sum, the American workforce is getting older. Correspondingly, there will likely be an increased incidence of age discrimination in the workforce due to the demographics of the new workforce.<sup>166</sup> This predicted surge in age-based discriminatory conduct will have profound negative psychological effects on the older population.<sup>167</sup>

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162. Eglit, *supra* note 6, at 105 (discussing statistics found in the ADMIN ON AGING, U.S. DEP’T OF HEALTH & HUMAN SERVS., A PROFILE OF OLDER AMERICANS: 2007 (2008) at 3).

163. *Id.* at 106 (quoting U.S. BUREAU OF LABOR STATISTICS, OLDER WORKERS, (July 2008), at 9).

164. *See id.* at 107–10.

165. U.S. BUREAU OF LABOR STATISTICS, *supra* note 153, at 1.

166. GREGORY, *supra* note 1, at 9 (“As our population grows older—as it is now doing—the incidence of age discrimination inevitably will rise.”).

167. *Id.* at 181 (noting that pain and suffering, including anger, guilt, humiliation, depression, and emotional distress and instability, are the natural consequences of *any* type of discrimination).

### G. Psychological Effects of Age Discrimination

Regardless of when age discrimination occurs, it can deeply affect its victim on a personal level, not just in financial terms.<sup>168</sup> Psychological harm resulting from employment discrimination (regardless of type) is accommodated by its own class of damages, known as pain and suffering or compensatory damages.<sup>169</sup> Separate recovery for psychological injury in the form of pain and suffering damages or emotional distress is not available under the ADEA.<sup>170</sup>

The EEOC has identified possible symptoms associated with employment discrimination, including “anxiety, stress, depression, humiliation, emotional distress, loss of self-esteem, marital strain, and nervous breakdown.”<sup>171</sup> Although some researchers question the validity of psychological injury as compared to physical injury, others have declared that “workplace discrimination qualifies as a human-generated traumatic event,” which can lead to the development of serious psychological disorders, such as Post-Traumatic Stress Disorder (PTSD).<sup>172</sup>

Researchers analyzing the psychological effects of workplace discrimination have found that targets of different types of discrimination, such as gender, race, or age discrimination, have similar experiences.<sup>173</sup> Studies assessing the effects of workplace discrimination generally have suggested a link between discrimination and poor physical and mental health, including depression.<sup>174</sup> Studies analyzing age discrimination specifically have shown that an older worker’s loss of self-esteem resulting from age-based termination, and the impact of this loss on the worker and his or her family, can be “even more devastating than the loss of income.”<sup>175</sup> Psychologists have identified eleven types of mental suffering that can afflict a victim of age discrimination:

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168. *Id.*

169. GOODMAN-DELAHUNTY & FOOTE, *supra* note 131, at 24–25.

170. *See* *Comm’r v. Schleier*, 515 U.S. 323, 326 (1995).

171. GOODMAN-DELAHUNTY & FOOTE, *supra* note 131, at 25 (emphasis added).

172. *Id.* at 61.

173. *Id.* at 69.

174. *Id.* at 74–75.

175. GREGORY, *supra* note 1, at 253.

[S]tress; feelings of helplessness; disillusionment; feelings of hopelessness; guilt and self-blame, loss of self-esteem and self-confidence; a sense of loss of self-identity; decreased ability to cope and function, both at work and in other areas of life; compromised ability to think clearly, with poor judgment and decision making; passivity; and the feeling of being trapped.<sup>176</sup>

A study focusing on the effects of perceived age discrimination found that such beliefs have a significant effect on older employee self-perceptions, more specifically self-esteem and personal control.<sup>177</sup> These researchers were not only interested in the effects of *intentional* discrimination; they noted that older workers can *infer* people's perceptions of their incompetence from "subtle environmental and interpersonal cues," and these internalizations can lead to lower self-esteem and feelings of decreased personal control.<sup>178</sup> As noted in Part III.C, certain individuals hold negative stereotypical beliefs about the abilities of older workers and about the diminished capacities of older people in general.<sup>179</sup> These beliefs may indirectly affect their interactions with older colleagues in the workforce, fueling the fire of older workers' feelings of uselessness and powerlessness.<sup>180</sup> The researchers in this study were also interested in the relationship between age and job satisfaction, and hypothesized that as a result of age discrimination, job challenges are lowered, and thus overall job satisfaction decreases.<sup>181</sup>

In terms of self-esteem, perceived age discrimination accounted for 7.1% of the variance in self-esteem scores.<sup>182</sup> In other words, reports of self-esteem are lower for older workers who believe they are discriminated against based on their age.<sup>183</sup> With respect to personal control, both age and perceived age discrimination had significant effects such that perceptions of control may actually increase with age,

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176. *Id.*

177. Hassell & Perrewé, *supra* note 1, at 111.

178. *Id.*

179. See Green, *supra* note 71, at 423 ("[A]ge discrimination occurs because employers rely on stereotypical beliefs that older persons are incapable of functioning within the workforce because of their age, instead of evaluating each individual's skills and abilities.").

180. See generally Hassell & Perrewé, *supra* note 1, at 111–12.

181. *Id.* at 112. The researchers note that, according to past studies, job satisfaction and age usually have a positive relationship. However, they hypothesize that perceived age discrimination will counteract this positive trend, thus ultimately decreasing reported levels of job satisfaction. *Id.*

182. *Id.* at 113.

183. *Id.*

but decrease if age discrimination is perceived.<sup>184</sup> Furthermore, older workers who perceive age discrimination are less satisfied with their job than their counterparts (of similar ages) who do not perceive age discrimination.<sup>185</sup>

The effects of perceived age discrimination, such as low self-esteem and perceived loss of control, can have negative consequences, including self-reports of burnout, personal strain, and somatic complaints.<sup>186</sup> More indirect effects of low self-esteem include sour work attitudes and decreased motivation to attain professional goals.<sup>187</sup> Furthermore, older individuals with low self-esteem who are consequently more sensitive to negative feedback (subtle or overt) may respond by avoiding risk-taking behavior, in part to maintain a lower profile in the workplace and thus avoid negative feedback.<sup>188</sup> "This type of behavior on the part of an older worker unfortunately reinforces the stereotypes of older workers who are 'set in their ways' or uninterested in learning new methods or upgrading their skills."<sup>189</sup>

According to this study, the negative psychological effects of age discrimination are twofold. The victim of age discrimination is impacted internally through decreased feelings of self-worth and control.<sup>190</sup> The effects of age discrimination transcend the internal and affect the external workplace by promoting unconstructive behavior among older workers which reinforces negative societal beliefs about elderly employees.<sup>191</sup> In the context of the continuing employment relationship, this self-fulfilling prophecy demands curtailment, at least in part through informing management of ways to dispel the myths about older workers and the aging process.<sup>192</sup>

Regardless of whether age discrimination occurs in or outside the workplace, it can have negative effects on mental well-being. A recent study published in *Research on Aging* documented that that

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184. *Id.* The study surveyed workers between the ages of eighteen and sixty-three years old. *Id.* at 112. The trend that perceived control (in the absence of age discrimination) increases with age makes sense in that, as workers gain age and experience, they feel more in control at work. *Id.* at 113-14.

185. *Id.* at 114.

186. *Id.* at 115.

187. *See id.*

188. *See id.* at 115-16.

189. *Id.*

190. *See id.* at 113.

191. *See* GREGORY, *supra* note 1, at 28-29.

192. *See generally id.* at 27-30 (discussing managerial recommendations in response to the study's results).

63% of older people surveyed (6,400 participants, all older than age fifty-three) reported experiencing age discrimination.<sup>193</sup> Dr. Luo, the sociologist conducting these surveys and studies over a two-year period, has found that everyday discrimination (i.e. regularly feeling harassed or threatened, as opposed to a more distinct stressor such as denial of a promotion) was associated with higher rates of depression and poorer self-rated health.<sup>194</sup> These negative psychological effects were constant even when the researchers controlled for general stress.<sup>195</sup> The New York Times columnist commenting on these studies noted that, although the researchers could not definitively conclude that these individuals were in fact being treated differently because of their age, “if one needed another reason to try to tackle age discrimination . . . here it is. It’s apparently not good for older people’s health.”<sup>196</sup>

Regardless of the form age-discrimination-related psychological effects take, these effects are not an automatic response to workplace discrimination for all victims, and there is no “one size fits all” response to discrimination.<sup>197</sup> For those who do suffer from psychological problems resulting from discrimination, “[t]he legal focus when determining damages [should not be on] the type or basis of discrimination, but on the similarity in the *harm* experienced by the complainant,” as compared to a case involving the same type of harm, including symptom severity and duration.<sup>198</sup> According to the studies discussed above, age discrimination (like the other forms of employment discrimination) can have psychological effects on the victim and as a result, legal relief that addresses this type of injury should be available under the ADEA.

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193. Paula Span, *Age Discrimination Takes Its Toll*, N.Y. TIMES NEW OLD AGE BLOG (Jan. 12, 2012), <http://newoldage.blogs.nytimes.com/2012/01/12/age-discrimination-takes-its-toll/?scp=1&sq=perceptions%20of%20old%20age&st=cse>.

194. *Id.*

195. *Id.*

196. *Id.*

197. GOODMAN-DELAHUNTY & FOOTE, *supra* note 131, at 81.

198. *Id.* at 66–67 (emphasis added).

## H. What Types of Damages Should Be Available Under the ADEA?

As stated in Part II.C, damages are limited under the ADEA.<sup>199</sup> Title VII plaintiffs claiming intentional discrimination because of race, gender, national origin, religion, or color, are entitled to the same damages available under the ADEA *and* compensatory pain and suffering damages.<sup>200</sup> In 1995, the Supreme Court made it clear that relief for pain and suffering in the form of compensatory damages is not available under the ADEA.<sup>201</sup>

### 1. COMMISSIONER V. SCHLEIER: COMPENSATORY DAMAGES NOT RECOVERABLE

In dicta, the Supreme Court acknowledged the unanimous decision among the circuit courts “that the ADEA does not permit a separate recovery of compensatory damages for pain and suffering or emotional distress.”<sup>202</sup> *Commissioner v. Schleier* involved a plaintiff who successfully proved that his employer violated the ADEA and was rewarded backpay and liquidated damages.<sup>203</sup> When filing his taxes, the plaintiff neglected to include the sum of his liquidated damages as taxable gross income, claiming that this amount was exempt from taxation as “compensation for personal injuries or sickness,” which includes damages received from a suit for such injuries or sick-

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199. See GREGORY, *supra* note 1, at 181 (commenting on the deficiency of available ADEA relief).

200. *Id.*

201. *Comm’r v. Schleier*, 515 U.S. 323, 326 (1995).

202. *Id.* (citing the following cases: *Schmitz v. Comm’r*, 34 F.3d 790 (9th Cir. 1994); *Goldstein v. Manhattan Indus., Inc.*, 758 F.2d 1435, 1446 (11th Cir. 1985); *Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143, 147 (2d Cir. 1984); *Perrell v. FinanceAmerica Corp.*, 726 F.2d 654 (10th Cir. 1984); *Hill v. Spiegel, Inc.*, 708 F.2d 233 (6th Cir. 1983); *Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806 (8th Cir. 1982); *Pfeiffer v. Essex Wire Corp.*, 682 F.2d 684, 687–88 (7th Cir. 1982), *cert. denied*, 459 U.S. 1039 (1982); *Slatin v. Stanford Research Inst.*, 590 F.2d 1292 (4th Cir. 1979); *Vazquez v. E. Air Lines, Inc.*, 579 F.2d 107 (1st Cir. 1978); *Dean v. Am. Sec. Ins. Co.*, 559 F.2d 1036 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978); *Rogers v. Exxon Research & Eng’g Co.*, 550 F.2d 834 (3d Cir. 1977)).

203. *Id.*

ness.<sup>204</sup> These types of excluded damages have been described as those awarded for violations of “tort type rights.”<sup>205</sup>

According to the Court, the remedies under the ADEA are limited to those of an “economic character,” and do not resemble the compensation available for “traditional harms associated with personal injury.”<sup>206</sup> Further, the Court noted that liquidated damages, “serve no compensatory function,” and thus recovery under the ADEA is not based on violation of a tort-type right.<sup>207</sup> Although this case ultimately deals with a tax issue, it reaffirms the Court’s view that compensatory pain and suffering damages are not available under the ADEA, and, similarly, that ADEA violations do not entitle plaintiffs to any damages that may be considered compensation for injury or sickness.<sup>208</sup>

## 2. ARGUMENTS FOR ALLOWING COMPENSATORY DAMAGES

*i. The Schleier Dissent: Age Discrimination Inflicts a Personal Injury* The dissenting justices in *Schleier* make strong arguments in support of exclusion of ADEA damages from taxable income.<sup>209</sup> The justices also indirectly make arguments for the allowance of compensatory damages under the ADEA.<sup>210</sup> The dissenting justices recognized that “[a]ge discrimination inflicts a *personal injury*.”<sup>211</sup> The justices also noted that racial discrimination inflicts injury to an individual’s fundamental rights and that this type of injury “attaches regardless of whether the discrimination is based on race, sex, *age*, or other suspect characteristics.”<sup>212</sup> Because age discrimination causes a

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204. *Id.* at 327–29. Under section 61(a) of the Tax Code, the plaintiff’s award of liquidated damages would be considered gross income, and thus taxable, unless it fell under one of section 104(a)’s five categories for “compensation for personal injuries or sickness.”

205. *Id.* at 333–35 (noting “one of the hallmarks of traditional tort liability is the availability of a broad range of damages to compensate the plaintiff ‘fairly for injuries caused by the violation of his legal rights’” and these included intangible injuries).

206. *Id.* at 335.

207. *Id.* at 336.

208. *See id.* at 327–36.

209. *See id.* at 337–46 (O’Connor, J., Thomas, J., and Souter, J., dissenting).

210. *See id.* at 339 (Scalia, J., concurring).

211. *Id.* at 337 (emphasis added).

212. *Id.* at 339 (emphasis added).

personal injury, which can include injury to mental health, the justices believed that ADEA damages are excludable from taxation.<sup>213</sup>

ii. *District and Circuit Court Analyses* Before the circuits began to follow one another like ducks in a row, some district courts made strong arguments for allowing recovery of pain and suffering damages under the ADEA.<sup>214</sup>

The New Jersey District Court supported its decision awarding compensatory damages to an ADEA plaintiff in part by looking to remarks made during the floor debates on the ADEA.<sup>215</sup> President Johnson, recommending the ADEA to Congress in his Older American message of January 23, 1967, commented that “the greater loss is the cruel sacrifice in happiness and well-being which joblessness imposes on these citizens and their families.”<sup>216</sup> During the House debate, Rep. Eilberg recognized that the economic injury sustained as the result of age discrimination is:

[N]othing compared with the costs in terms of human suffering and welfare . . . . Employment plays a very important role in the makeup of the modern American and this role cannot be measured in the dollars he carries home on payday. Self-esteem, self-satisfaction, and personal security are important by-products of employment in [ ] America.<sup>217</sup>

Rep. Dwyer echoed these sentiments in the House by opining about the effects of job loss on a hypothetical older worker (he specified age fifty-five) and the sincere possibility that the worker will face “long months of *frustration, fear, and insecurity*” during the job search due to the toxic effect of employer aversion to applicants his or her age.<sup>218</sup> Rep. Dwyer also noted that the “cost of such experience in

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213. *Id.* at 342 (“ADEA damages should be excludable from taxable income under our precedents.”).

214. See *Flynn v. Morgan Guar. Trust Co.*, 463 F. Supp. 676 (E.D.N.Y. 1979); *Hassan v. Delta Orthopedic Med. Grp., Inc.*, 476 F. Supp. 1063 (E.D. Cal. 1979); *Gifford v. Diagnostics*, 458 F. Supp. 462 (N.D. Ohio 1978); *Rogers v. Exxon Research & Eng'g Co.*, 404 F. Supp. 324 (D.N.J. 1975), *vacated* 550 F.2d 834 (3d Cir. 1978), *overruled by* *Smith v. Jos. Schlitz Brewing Co.*, 584 F.2d 1231 (3d Cir. 1978), *vacated* 442 U.S. 908 (1979).

215. *Rogers*, 404 F. Supp. at 330.

216. *Id.* at 330 n.3 (citation omitted).

217. *Id.*

218. *Id.* (emphasis in the original).

terms of *mental anguish*, family *suffering*, lost income, and damaged self-respect is too high to measure.<sup>219</sup>

The New Jersey court also analogized the ADEA to Title VII of the Civil Rights Act of 1964 in both purpose and scope.<sup>220</sup> In comparing the language of the two statutes, the Court noted that the prohibitions are largely the same, with the word “age” substituted for “race, color, religion, sex, or national origin.”<sup>221</sup> Under Title VII, the Supreme Court has noted that the statutory remedies seek to make victims whole for the injuries sustained as the result of unlawful discrimination.<sup>222</sup> The New Jersey court determined that a make whole remedy in the context of age discrimination should include relief for economic *and* psychological injuries sustained as a result of employer discrimination.<sup>223</sup> “In measuring the wrong done and ascertaining the appropriate remedy here, the Court is aware that the most pernicious effect of age discrimination is not to the pocketbook, but to the victim’s self-respect.”<sup>224</sup> The Court then noted that, in some cases, the direct financial effect of discrimination can be “negligible” when compared to the physiological and psychological damage caused by unlawful discrimination.<sup>225</sup>

While the legislative thrust behind the passage of the ADEA was a key component of the New Jersey court’s decision, so was the mental and physical trauma plaintiff experienced after his discriminatory termination.<sup>226</sup> The plaintiff, Dr. Rogers, was a “scientist and inventor of recognized merit, and the developer of 51 patents.”<sup>227</sup> Despite these impressive qualifications, Dr. Rogers was forced into an early retirement by his employer at age sixty.<sup>228</sup> After his “retirement,” Dr. Rogers suffered from: “indigestion, heartburn, bloating, nausea, insomnia, light-headedness, lack of ambition, fatigue, depression, impotency, and an itching skin rash.”<sup>229</sup> Medical and lay person testimony confirmed that these ailments were proximately caused by “an anxiety

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219. *Id.* (emphasis in the original).

220. *Id.* at 328.

221. *Id.*

222. *Id.* (discussing *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975)).

223. *Id.* at 328–29.

224. *Id.* at 329.

225. *Id.*

226. *Id.* at 330.

227. *Id.* at 329.

228. *Id.* at 326.

229. *Id.* at 330.

reaction or a nervous disturbance” to defendant’s illegal discrimination.<sup>230</sup> If Dr. Rogers was not permitted to recover pain and suffering damages, his stipulated out-of-pocket loss was only \$30,000.<sup>231</sup> Dr. Rogers was a productive and high-functioning employee prior to the defendant’s discriminatory act; an economic loss-based damages award hardly accommodates the suffering and deterioration that he endured at the hands of his employer.<sup>232</sup>

In support of an award for pain and suffering damages, the Eastern District of New York argued that awarding such damages is indispensable to the effectuation of the policies underlying the ADEA.<sup>233</sup> The New York court recognized that age discrimination can cause psychological effects and that the financial remedies explicitly available under the ADEA may be insufficient to make a plaintiff whole.<sup>234</sup> According to the debates, the Court argued that Congress recognized the psychological harm that can result from age discrimination and sought to inform the public of *both* the economic and psychological effects that can result from age discrimination.<sup>235</sup> Beyond the statutory realm, the Court noted that allowing compensatory damages would inform employers of the serious mental harm caused by age discrimination, thus serving an educative and deterrent value.<sup>236</sup>

The Northern District of Ohio looked to the statutory language in awarding pain and suffering damages in *Gifford v. Diagnostics*.<sup>237</sup> The Court reasoned that the broad remedial language contained in

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230. *Id.*

231. *Id.* at 329.

232. *Id.* at 329–30.

233. See Neumeg, *supra* note 17, at 847 (discussing Flynn v. Morgan Guar. Trust Co., 463 F. Supp. 676 (E.D.N.Y. 1979)).

234. See *id.*

235. See *id.* at 11–12; see also Hassan v. Delta Orthopedic Med. Grp., Inc., 476 F. Supp. 1063, 1065 (E.D. Cal. 1979) (noting that, in passing the ADEA, Congress was concerned with the “psychological suffering of older persons denied employment opportunities” and such concern would justify the award of compensatory damages under the ADEA).

236. See Hassan, 476 F. Supp. at 1065.

237. See Neumeg, *supra* note 17, at 848 (discussing Gifford v. Diagnostics, 458 F. Supp. 462, 464 (N.D. Ohio 1978)). The court in *Gifford* determined that Congress’s concern regarding the emotional trauma associated with age discrimination leads to the conclusion that such trauma should be considered “damage” under the statute. This notion coupled with the broad remedial language under section 626(b), “such legal or equitable relief as may be appropriate to effectuate the purposes of this Chapter . . . without limitation . . . seems more than enough to justify an award of damages for pain and suffering.” *Id.*

section 626(b) of the ADEA allowing “such legal or equitable relief as may be appropriate to effectuate the purposes of this Act,” permitted courts to determine relief without limitation.<sup>238</sup> The Northern District of Illinois adopted a similar approach, reasoning that the only limit on the award of damages was the “purposes” element in section 626(b) of the statute.<sup>239</sup> The Illinois court also reasoned that awarding damages for mental trauma resulting from age discrimination was consistent with the statutory purpose of the Act.<sup>240</sup>

### 3. ARGUMENTS FOR DENYING COMPENSATORY RELIEF

The Third Circuit ultimately reversed the New Jersey court opinion discussed above.<sup>241</sup> In its opinion, the Third Circuit paid homage to the district court for its warm and fuzzy policy-based opinion, but denied compensatory relief to all ADEA plaintiffs based on the statutory text of the ADEA and Congress’s silence on the subject.<sup>242</sup> The Court viewed the ADEA as limited by the remedies available under the FLSA, e.g. unpaid wages and/or overtime, liquidated damages, and equitable relief.<sup>243</sup> The Court also chose to ignore the poignant Congressional comments highlighted by the lower court, speculating Congress adopted relief it deemed adequate and that any damage suffered during a job search would be adequately compensated through court-ordered employment or reinstatement.<sup>244</sup> The Court also commented on the hindering effect that pain and suffering awards would have on the conciliation and settlement processes that Congress delineated as the preferred methods of resolution.<sup>245</sup> Given that the unavailability of compensatory damages is the circuit consensus, many other cases have articulated additional arguments for denying compensatory damages to ADEA plaintiffs.<sup>246</sup> This Note does not attempt to provide a full explanation of these various arguments, however, and instead focuses on the arguments *for* allowing such relief, thus re-

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238. *See id.*

239. *Id.* at 13.

240. *Id.*

241. *Rogers v. Exxon Research & Eng’g Co.*, 550 F.2d 834, 834 (3d Cir. 1977).

242. *See id.* at 839.

243. *Id.*

244. *Id.* at 840.

245. *Id.* at 841.

246. *See generally* Neumeg, *supra* note 17.

spectfully dismissing the majority approach as insensitive and inadequate.

#### IV. Resolution and Recommendation

##### A. Increasing the ADEA's Protected Age to Forty-Five

The question "when does age discrimination occur?" can be answered speculatively, at best. It is clear, however, that a majority of plaintiffs who actually bring suit and make it before a judge (whether at the summary judgment, motion to dismiss, or trial level) are generally older than age forty.<sup>247</sup> Similarly, in 1984, more than half of ADEA plaintiffs were between the ages of fifty and fifty-nine, with plaintiffs ages forty to forty-nine comprising only 18% of the annual claims.<sup>248</sup> Within the 1984 age range, it is impossible to determine whether more claims fell within the forty to forty-four range versus the forty-five to forty-nine age parameter.<sup>249</sup> Similarly, in the Eglit 1995–96 survey discussed in Part III.D, the plaintiffs between ages forty and forty-five comprised only a sliver of the total age discrimination victims (who made it to court) during that period.<sup>250</sup>

It is undeniable that the older members of modern society are healthier than their counterparts were in 1967 when the Act was passed, whether due to scientific advancement, or a societal concern, or their arguable preoccupation, with youth, health, and fitness.<sup>251</sup> Not only are individuals actually healthier, they *feel* healthier and younger.<sup>252</sup> Increased longevity and the heightened need to ensure

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247. See *supra* Part III.D; GOODMAN-DELAHUNTY & FOOTE, *supra* note 131, at 11, 14 (noting that not all discrimination is reported, likely because employees "resort to self-help or avoidance instead of reporting the discriminatory incident(s)," and many cases settle, thus making obtaining accurate statistics on workplace discrimination difficult); see also AMJAD, ET AL., *supra* note 140. Analysis of the ADEA cases heard in 2010 reflects a very low incidence of age discrimination against individuals under the age of forty. *Id.*

248. Schuster & Miller, *supra* note 145, at 68.

249. See *id.*

250. See Eglit, *supra* note 6, at 600, 602.

251. See *The New Old Age—Senior Citizens Healthier, Perkier Than 30 Years Ago*, SENIOR JOURNAL.COM, <http://seniorjournal.com/NEWS/Aging/2011/20111101-TheNewOldAge.htm> (Nov. 1, 2011) (noting that, according to a longitudinal study conducted over the past thirty years, today's seniors are more independent, outgoing, and sexually active).

252. Arnquist, *supra* note 120. In terms of self-perception of age, a Pew Research Center study found that a majority of adults over age fifty feel at least ten

financial resources for retirement due to the recession, have led to a marked influx in the number of older people in the labor force.<sup>253</sup> The “surplus” of older workers is also a byproduct of the baby-boomers reaching and surpassing age sixty-five.<sup>254</sup> An older workforce opens the door to a potential increase in the incidence of age discrimination.<sup>255</sup> With this increase of age discrimination claims on the horizon, Congress may wish to reevaluate the protected age under the ADEA.

Presumably, age discrimination affects people who are viewed as “old.”<sup>256</sup> The natural consequence of this presumption is that, if people under the age of forty-five are not viewed as old, then they will not be discriminated against because of their age. The study of employer perception of old age discussed in Part III.B, did not concern itself with individuals under the age of forty-five, and instead inquired about employers’ perceptions of *older* workers, i.e., those older than fifty-five.<sup>257</sup> Similarly, the term “older worker” “has typically been operationalized in [ ] literature as an employee between the ages

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years younger than their actual age and one-third of those between sixty-five and seventy-four reported that they felt ten to nineteen years younger, and one-sixth of people over age seventy-five and older said they felt twenty years younger. *Id.*

253. See U.S. Bureau of Labor Statistics, *supra* note 153, at 1; Green, *supra* note 71, at 416

Because of the financial needs of older workers, the United States is facing the largest older workforce it has ever seen. . . . The unstable economy has encouraged employers to be more efficient and resourceful with their employees, while remaining productive. As a result, downsizing and early retirement options will be more commonplace.

*Id.*

254. See Eglit, *supra* note 6, at 161.

255. See generally Mujtaba et al., *supra* note 9, at 32 (noting that the presence of older workers in the labor force presents challenges for employers due to the prevalence of age-related stereotypes and age discrimination in the American workforce).

256. Eglit, *supra* note 6, at 127–28 (describing employer age discrimination as stemming from “assumptions about the compromised abilities of older workers to perform”). Age discrimination can also affect victims at any stage in their lives. *Id.* at 102 n.9. Within the context of the ADEA, however, the statute is aimed at protecting *older* workers from suffering adverse employment actions. In this vein, the Supreme Court has expressly rejected ADEA claims based on “reverse age discrimination,” or employer preference for older workers over younger workers, even if both are within the protected age class. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004). In its decision, the Court noted that the ADEA “manifestly intended to protect the older from arbitrary favor for the younger.” *Id.* The Court’s reasoning relied on its conception of the “common understanding of age discrimination,” e.g. discrimination that “helps the younger by hurting the older.” *Id.* at 583, 586.

257. Munnell et al., *supra* note 105, at 2.

of 55 and 65," and if this is true, then much of the studies discussed focusing on "older workers" did not even have workers in their early-to-mid-forties in their purview.<sup>258</sup> Even the younger participants in the 2009 study of societal perceptions of old age reported that being "old" begins around age sixty.<sup>259</sup>

Put simply, most individuals between ages forty and forty-four are not "old," biologically, according to their own personal reports, as perceived by their employers, or society. Therefore, individuals in this age range may not warrant protection under the ADEA. If this is the case, it is in the legislative spirit of the ADEA to increase the protected age under the ADEA: the ADEA is concerned with "protect[ing] a relatively old worker from discrimination that works to the advantage of the relatively young," leaving the "complaints of the relatively young outside the statutory concern."<sup>260</sup> It is certainly possible that some individuals under age forty-five have, or will, suffer from some type of age discrimination. Compromise and its associated sacrifices, however, are inevitable parts of legislative decisions made on behalf of the common good. As the ADEA stands, all victims of age discrimination cannot recover for pain and suffering damages. The aging process is something that will affect every member of society, whether personally or through the experience of loved ones.<sup>261</sup> Individuals under the age of forty-five who believe they have been discriminated against based on age should sacrifice their claim to increase the available resources for older victims of age discrimination who have bleaker reemployment prospects and who are unable to recover for the level of harm endured.

## B. Allowing Compensatory Damages for ADEA Violations

As evidenced by the comments made by legislators advocating for the ADEA's passage, personal indignities and mental trauma are very real effects of age discrimination.<sup>262</sup> For some reason, however, the legislative concern about the emotionally damning effects of age

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258. Finkelstein & Burke, *supra* note 90, at 653.

259. PEW RESEARCH CTR. PUBL'NS, *supra* note 118.

260. See *Gen. Dynamics*, 540 U.S. at 590-91, 593.

261. See Green, *supra* note 71, at 425 (inevitably, age "will cause every employee, if he or she lives long enough, to become an economic liability to his or her employer. In essence, age discrimination differs [from other types of discrimination] because age, the defining class factor, is a continuum.").

262. See *supra* Part III.H.2.a.

discrimination has gone by the wayside. Just as in 1967, age discrimination is still a malignancy that plagues the American workplace. Although efforts to eliminate age discrimination via preventative measures are necessary and should be of legislative concern; there also needs to be a focus on the back-end to adequately compensate victims of age discrimination who have suffered psychological injury.

In his report to Congress, the Secretary of Labor recognized that arbitrary age discrimination inflicts “economic *and* psychological injury.”<sup>263</sup> In discussing the psychological impact of age discrimination, the Secretary acknowledged that “[v]ictimised older employees who are actually capable workers can be frustrated and experience anxieties because of age discrimination.”<sup>264</sup> During the first ten years after the ADEA was passed, the Secretary’s concerns were amply addressed: the available remedies had actually been described as enabling plaintiffs “to get just about anything” due to the broad remedial language of the statute.<sup>265</sup> Today, however, this language is hardly construed liberally, and instead plaintiffs are left with damages that only reflect losses directly related to earnings, without any consideration paid to the inherent psychological repercussions of workplace discrimination.<sup>266</sup>

As suggested by the district court cases decided within ten to fifteen years of the Act’s passage, award of compensatory damages varied, likely depending on the judge’s sentiment.<sup>267</sup> As was made clear in 1995, the statutory interpretation of the ADEA as it applies to remedies is settled by the Supreme Court: the list of available damages is exhaustive.<sup>268</sup> This Note is not asking that *Schleier* be overruled, because leaving the statutory analysis to the discretion of the courts

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263. EEOC v. Wyoming, 460 U.S. 226, 231 (1983) (emphasis added).

264. Van Ostrand, *supra* note 70, at 401 (2009) (discussing W. WILLARD WIRTZ, THE OLDER AMERICAN WORKER, AGE DISCRIMINATION IN EMPLOYMENT: REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964, at 18–19 (1965)).

265. O’Meara, *supra* note 55, at 285.

266. See generally GOOMAN-DELAHUNTY & FOOTE, *supra* note 131, at 74–75 (recounting study results that have linked workplace discrimination with depression and other mental health problems). Similarly, a longitudinal study, controlling for the potential influence of individual demographic characteristics and job/life stressors, found that “workplace discrimination explained additional variance in problem drinking and mental health challenges *beyond* job and life stressors . . .” (emphasis added). *Id.* at 76.

267. See *supra* Part III.H.2.

268. Comm’r v. Schleier, 515 U.S. 323, 326 (1995).

would make plaintiffs again subject to the whim of trial judges, and would produce mixed results. Instead, this Note requests that Congress amend the ADEA to *explicitly* provide for compensatory pain and suffering damages.<sup>269</sup> Requesting amendment to the ADEA is not unreasonable; the ADEA (like other civil rights statutes) has been amended several times, often in response to judicial misinterpretation of the statute's commands and policy.<sup>270</sup> The Supreme Court's flawed interpretation of the ADEA stems, in part, from the Court's refusal to acknowledge the ADEA's legislative history, which "supports a liberal construction to effectuate its remedial purpose."<sup>271</sup> This Note does not seek to place blame or point fingers; perhaps the Court was incorrect in its narrowing of available remedies under the ADEA, or perhaps Congress is at fault for not promptly responding to this narrow judicial interpretation via amendment. What is important is that ADEA plaintiffs who suffer psychological injury are not receiving adequate compensation for their suffering, and this deprivation needs to stop.

Research has shown that victims of workplace discrimination, regardless of whether the discrimination is based on race or age, experience similar psychological impairments.<sup>272</sup> Furthermore, there is evidence that age-based discrimination, in its own right, can cause serious psychological and emotional problems, including depression, loss of self-esteem, and feelings of helplessness.<sup>273</sup> These psychological problems have also been shown to trigger general physical health problems.<sup>274</sup> Due to the empirical acknowledgement of the psychological effects of workplace discrimination, both generally, and as it affects age discriminatees, it follows that *all* discrimination victims

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269. See GREGORY, *supra* note 1, at 254 (requesting that Congress amend the ADEA to allow for mental and emotional distress damages because "[t]he make-whole doctrine of damages demands nothing less").

270. See Lane, *supra* note 75, at 367-68 ("[D]uring the last fifteen years, the Court's interpretation of civil rights statutes has often been at odds with what Congress intended, and Congress has found it necessary to formally clarify its intent through legislative amendments. . . . Congress's dissatisfaction with judicial interpretation of civil rights statutes is clearly indicated in legislative history.").

271. *Id.* at 370.

272. See GOODMAN-DELAHUNTY & FOOTE, *supra* note 131, at 69, 74-75 (recounting studies demonstrating that victims of different types of discrimination have similar experiences).

273. See *supra* Part III.G.

274. See *supra* Part III.G (specifically, the listing of Dr. Rogers' symptoms post-discrimination and the discussion of Dr. Luo's studies linking age discrimination to self-reports of poor health).

should be entitled to pursue the same remedial avenues as Title VII and ADA plaintiffs for compensatory relief. Under the 1991 amendments to the Civil Rights Act, Title VII plaintiffs were explicitly given the right to seek pain and suffering damages.<sup>275</sup> It is legislatively discriminatory to amend one statute prohibiting workplace discrimination, allowing certain victims to recover benefits that accurately acknowledge the damages suffered, without also amending the ADEA.

As noted in Part III.D, age discrimination plaintiffs are already at a disadvantage when compared to Title VII or ADA plaintiffs due to the Court's elimination of mixed-motive claims in ADEA cases and the associated "but-for" causation requirement announced in the *Gross* decision. Even before the disadvantageous *Gross* decision, age discrimination plaintiffs were already struggling, as evidenced by statistics demonstrating that most ADEA plaintiffs who made it to court lost.<sup>276</sup> Even assuming plaintiffs are able to sustain the heavy burden of persuasion by proving that age was the "but-for" cause of the adverse employment action, they will still likely be limited to back pay or front pay since proving willfulness in the context of liquidated damages is near impossible.<sup>277</sup> Also, even if liquidated damages were proven, liquidated damages by definition serve a punitive function aimed toward the employer, and thus would never make a plaintiff feel whole due to a lack of judicial-acknowledgement that she was entitled to compensatory relief.<sup>278</sup>

What is it about age that makes it deserving of less protection? Arguably, employers who engage in age discrimination are "doubly culpable." Victims of age discrimination are susceptible to increased emotional distress as compared to other discriminatees because they

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275. 42 U.S.C. § 1981a (2006).

276. Eglit, *supra* note 6, at 120 ("[C]ase law reveals that age discrimination is a very difficult phenomenon to prove. Most plaintiffs who get to court lose.").

277. See *supra* Part III.D.

278. See *Comm'r v. Schleier*, 515 U.S. 323, 332 (1995) (noting that "Congress intended for liquidated damages to be punitive in nature," quoting *Trans World Airlines v. Thurston*, 469 U.S. 111, 126 (1985)). The Court definitively stated that liquidated damages serve "no compensatory function. . . . [I]f liquidated damages were designed to compensate ADEA victims, we see no reason why the employer's knowledge of the unlawfulness of his conduct should be the determinative factor in the award of liquidated damages." *Id.* at 323, 332.

suffer mental distress in two distinct areas: loss of employment *and* an amplified inability to secure new employment.<sup>279</sup>

## V. Conclusion

Age discrimination emanates, at least in part, from negative employer and societal stereotypes related to the ability of older individuals, and for employers in particular, the perceived expense of employing older individuals. In today's society, forty is no longer the benchmark for the onset of old age. It follows that age-related stereotypes are not implicated at age forty. Furthermore, accommodating increased age discrimination in the recession cannot be legislatively ignored given the pressure for employees to work into later phases of their lives and pressure on employers to initiate layoffs.<sup>280</sup> Increasing the protected age under the ADEA to forty-five will lessen the amount of age discrimination claims filed and as a result employers will have increased available resources to adequately compensate age discrimination victims. Age discrimination can, and does, inflict psychological and emotional injury on its victims. With the increased availability of litigation funds as a result of increasing the protected age, employers could then afford to truly make victims of age discrimination whole by permitting pain and suffering damages.

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279. *Id.* at 336.

280. *See* Van Ostrand, *supra* note 70, at 447.

The poor economy is causing more workers to be laid off. When older workers are unemployed, it typically takes longer for them to find new jobs. The effect of large numbers of unemployed older workers could have a substantial impact on government resources, and therefore age discrimination should be deterred and avoided where possible.

*Id.*