

FLAMING FIFTIES AND BEYOND: AN INTERNATIONAL COMPARISON OF AGE DISCRIMINATION LAWS AND HOW THE UNITED STATES COULD IMPROVE THE LAWS FOR ELDERLY WOMEN

Shaleen Morales Saldarriaga

Age discrimination in employment continues to be a major issue in developed countries. Older employees are more disadvantaged to retain or regain employment than their younger counterparts. The Age Discrimination Employment Act (the "ADEA") was implemented to protect older workers from adverse employment decisions based on age. There has been an increase in the population of elder individuals in the United States. Age discrimination continues to make it hard for elderly women in the United States to gain employment if they leave long-term employment for short-term or part-time work.

The United States can learn from the recent anti-discrimination measures that Germany has undertaken. Adhering to the European Council Directives, Germany has implemented anti-discrimination laws to combat age discrimination. The chancellor of Germany brought what has been called the Hartz IV Reform. In the United States the ADEA's efficacy has been diminished by exceptions for bona fide occupational requirements and professions where discrimination is allowed in the name of safety like the airline industry. While Germany struggles with less employees due to mandatory retirement ages, the United States could implement similar policies to those developed in Germany to provide some strength in the ADEA again. Women of all backgrounds, races, and cultures should be protected under a law that was intended to protect individuals over the age of fifty-five equally. The ADEA should be amended to allow for easier access to employer records. Federal law should also increase the applicability penalties for employers who unlawfully discriminate based upon age.

Shaleen Morales Saldarriaga is an Associate Editor 2016-2017, Member 2015-2016, *The Elder Law Journal*; J.D. Candidate 2017, University of Illinois, Urbana-Champaign; B.A. 2014 InterAmerican University of Puerto Rico.

I. Introduction

Are you a woman over the age of fifty-five and looking for a new exciting career? Do you feel like you have wasted your life in a boring job to keep your family stable, while other family members have exciting careers? Unfortunately, you might be out of luck. Age discrimination laws both in the United States and internationally do not adequately prevent an employer or interviewer from denying employment rights in hiring, firing, retirement, and pay.¹ Looking for a job and “dealing with” the recruiting process is generally a stressful time; the experience causes doubt even in the abilities of a professional.² The perceptions and attitudes “regarding” elderly women are similar in the U.S. as in other economically vibrant countries on a global level.³ Does the U.S. have the most effective laws to combat the perceptions of the elderly in the workforce, or are the laws ineffective in seeking justice for employees over the age of fifty? With the ever increasing demands of society, individuals are settling down and having children later in life.⁴ This means older parents are raising children.⁵ Those older parents are being forced to continue working, while having to provide for their families.⁶ Many times these people are past the age of retirement.⁷ The list of challenges for the elderly does not lighten even in countries implementing laws to combat ageism. In regards to age and gender bias, cultural and social standards cause individuals to indirectly target women.⁸ Consequently, these unwanted circumstances reduce the ability of women to move forward in their careers.

1. Jessica Z. Rothenberg & Daniel S. Garner, *Protecting Older Workers: The Failure of the Age Discrimination in Employment Act of 1967*, 38 J. SOC. & SOC. WELFARE 9, 10 (2011) [hereinafter Rothenberg].

2. Susan Bisom-Rapp & Malcolm Sargeant, *Diverging Doctrine, Converging Outcomes: Evaluating Age Discrimination Law in the United Kingdom and the United States*, 44 LOY. U. CHI. L. J. 717, 725 (2013) [hereinafter Bisom-Rapp, *Diverging Doctrine*].

3. See generally Marlene A. Lee & Mark Mather, *U.S. Labor Force Trends*, 63 POPULATION BULL. 1 (2008) [hereinafter Lee].

4. Ellie Kincaid, *Why having kids later is a really big deal*, BUS. INSIDER (Jun. 30, 2015, 5:43 PM), <https://www.businessinsider.com/why-delaying-parenthood-and-having-kids-later-is-a-big-deal-2015-6>.

5. *Id.*

6. *Recession Turns a Graying Office Grayer*, PEW RESEARCH CTR. (Sept. 3, 2009), <http://www.pewresearch.org/2009/09/03/recession-turns-a-graying-office-grayer/>.

7. *Id.*

8. Lee, *supra* note 3, at 4-5.

Age discrimination in employment is a significant issue that causes unemployment to affect older people more harshly “than younger people,” when considering political, legal and ethical stigmas.⁹ As the population continues to increase, the number of younger employees is on the rise.¹⁰ Elder individuals are being pushed to the side, while younger employees hold management positions. Harder economic times come with more challenges for women all around the world. As the global workforce manifestly grows older,¹¹ necessity causes women to continue working after retirement.¹²

Furthermore, older employees are more disadvantaged in their efforts to retain or regain employment. Despite it being illegal to ask a possible or current employee about their age, it is possible to infer ‘age’ by looking at a resume.¹³ However, age is not the only disadvantage. Technology is also a major factor when determining whether a candidate is ‘right’ for the position.¹⁴ As a result, employees of all ages are required to stay up-to-date on the new trends to be able to ‘keep up’ in the workforce. Unfortunately for the elderly, technology is a common tool that generally is second nature to younger individuals.¹⁵

The notion that elderly individuals are not able to work in a progressive environment is one that has been around for a long time. On a global scale, the effects of age discrimination laws affect men and women, but the negative treatment of women is at an all time high.¹⁶ At times, the comparison of elderly men and women in the workforce is not available for analysis because of the different cultural views of women in the workforce. Where it is customary to view women as traditional “housewives,” social constructs create greater issues for

9. Frank J. Cavico & Bahaudin G. Mujtaba, *Discrimination and the Aging American Workforce: Legal Analysis and Management Strategies*, J. OF LEGAL ISSUES AND CASES IN BUS. 1, 2 (2015) [hereinafter Cavico].

10. Robert Shimer, *The Impact of Young Workers on the Aggregate Labor Market*, 116 Q. J. ECON. 969, 972 (2001).

11. Cavico, *supra* note 9, at 9.

12. *Fact Sheet: Older Women and Work*, U.S. DEP’T OF LABOR 1, 5, https://www.dol.gov/wb/resources/older_women_and_work.pdf.

13. Lee, *supra* note 3, at 2.

14. *Id.*

15. *Id.*

16. See generally Joanna N. Lahey, *International Comparison of Age Discrimination Laws*, 32 RES. AGING 679, 682 (2010) [hereinafter Lahey].

women all around the world.¹⁷ The cultural impact that age discrimination has on women over the age of fifty-five leads to complications, even in “liberal” countries.¹⁸

Part II of this Note addresses the background of age discrimination laws in the United States and similar laws in Germany. Part III of this Note will analyze and critique: 1) the age discrimination laws in various nations, 2) cultural differences and how it affects women in the elder community, and 3) the support given to those women whom have been terminated. Part IV proposes recommendations on how to improve the Age Discrimination Employment Act of 1967, after being analyzed alongside the comparable laws in Germany. Part V concludes this Note on the aforementioned recommendations surrounding the Age Discrimination Employment Act.

II. Background

A. Past and Present: Age Discrimination Laws

The Age Discrimination Employment Act (“ADEA”) was implemented to aid the elderly population of the United States.¹⁹ At first, the law did what it intended to do by promoting the elderly population as contributing members of society.²⁰ Unfortunately, it is now extremely difficult to prove discrimination based on age.²¹ If the government continues to let employers take advantage of the ADEA and elderly employees, the long-lasting effects could hurt the economy, among other things.²²

1. LAWS IN EFFECT TO PROTECT THE ELDERLY

In 1965, under the direction of the Secretary of Labor W. Willard Wirtz, the Wirtz Report (the “Report”) was published.²³ It assessed the need for age discrimination legislation in the United

17. Susan Bisom-Rapp & Malcolm Sargeant, *It's Complicated: Age, Gender, and Lifetime Discrimination Against Working Women—The United States and U.K. as Examples*, 22 *ELDER L. J.* 1, 18-19 (2014) [hereinafter Bisom-Rapp, *It's Complicated*].

18. Bisom-Rapp, *Diverging Doctrine*, *supra* note 2, at 730-32.

19. *Id.* at 736.

20. *Id.* at 735.

21. *Id.* at 736.

22. *How Age Discrimination Affects the Economy*, HUBPAGES (Jan. 4, 2012), <http://hubpages.com/politics/How-Age-Discrimination-Affects-the-Economy>.

23. Bisom-Rapp, *Diverging Doctrine*, *supra* note 2, at 724.

States.²⁴ The Report found significant evidence of age discrimination in the workplace that resulted in unfounded assumptions about older workers.²⁵ Mr. Wirtz recommended national legislation after research showed that affected workers were middle-aged or older.²⁶ Common stereotypes were used in regards to race, religion, or national origin.²⁷ The historical significance of the Wirtz Report is significant in the analysis of the ADEA and its future.²⁸ Before the enactment of the ADEA, employers had absolute control over the hiring process.²⁹ Unfortunately, employers created policies that prohibited people over a certain age to be hired, usually set from ages forty-five to fifty-five.³⁰ The limitations were conveyed through employment advertisements and during the hiring process.³¹ Complete discretion was given to employers to conduct their business in ways could be viewed as biased.³² The Wirtz Report examined the following reasons for age limitations: physical capacity, the ability to hire younger members of society for less pay, pension plans, lower life and health insurance costs, lower training costs, and the lack of adaptability in elderly individuals, among others.³³ In 1967, the United States enacted the Age Discrimination Employment Act.³⁴ All workers over the age of forty were protected from adverse employer decisions based on age, including but not limited to: hiring, firing, layoffs, demotions, and promotions.³⁵ The ADEA originally included provisions for training and re-education programs to help older workers acquire the necessary tools that would allow them to compete for jobs.³⁶ The programs did not seem to aid individuals, so they were abandoned.³⁷

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 719.

29. *Id.* at 724.

30. *Id.* at 719.

31. *Id.*

32. *Id.* at 725.

33. William W. 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, (1965) [hereinafter Wirtz].

34. Bisom-Rapp, *Diverging Doctrine*, *supra* note 2, at 724.

35. Carole Fleck, *Forced Out, Older Workers Are Fighting Back*, AARP (May 2014), <http://www.aarp.org/work/on-the-job/info-2014/workplace-age-discrimination-infographic.htm> [hereinafter Fleck].

36. *Id.*

37. *Id.*

The purpose of the ADEA was to promote the employment of older persons based on their abilities and not their ages.³⁸ The ADEA specifically made it illegal for employers to refuse or fail to hire a person, discharge an employee, or to otherwise discriminate against any person with respect to compensation, terms, conditions, or the privileges of employment.³⁹ However, the ADEA did not apply in certain circumstances.⁴⁰ Military personnel, elected officials, independent contractors, and employees in companies with twenty or less workers were and continue to not be protected.⁴¹ Originally, the ADEA was only intended to protect individuals age forty to sixty-five years of age.⁴² Years later, the age cap was removed to safeguard a larger portion of the population.⁴³ Fifty years later, the law that was implemented to protect elder individuals has now decreased in value.⁴⁴

In 1979, the Department of Labor moved enforcement of the ADEA to the Equal Employment Opportunity Commission ("EEOC," or the "Commission").⁴⁵ The EEOC was given the task of enforcing the ADEA.⁴⁶ During that time, the EEOC presented two reasons for the dismissal of the majority of cases.⁴⁷ First, there needed to be a substantial showing of "reasonable cause."⁴⁸ Second, "administrative reasons" barred the EEOC from continuing the fact finding.⁴⁹ Claimants had 180 days to file a claim for unlawful discrimination.⁵⁰ The time frame was extended to 300 days if there was a state anti-discrimination law

38. Cavico, *supra* note 9, at 5.

39. Bisom-Rapp, *Diverging Doctrine*, *supra* note 2, at 724.

40. *Age Discrimination Fact Sheet*, AARP (Apr. 2014), http://www.aarp.org/work/employee-rights/info-02-2009/age_discrimination_fact_sheet.html [hereinafter *Fact Sheet*].

41. *Id.*

42. David Neumark, *Reassessing the Age Discrimination in Employment Act*, AARP (June 2008), <http://www.aarp.org/content/dam/aarp/ppi/reassessing-the-age-discrimination-in-employment-act.pdf.pdf>.

43. See generally Jeremy J. Glen & Katelan E. Little, *A Study of the Age Discriminations in Employment Act of 1967*, 31 GP SOLO 6 (2012).

44. Fleck, *supra* note 35.

45. Lahey, *supra* note 16.

46. *Id.*

47. *Id.*

48. *Id.*

49. Rothenberg, *supra* note 1, at 16. (Stating there is no sufficient evidence to support the claims of the elder individual. In 2009, the EEOC states that out of the 16,134 resolutions issued in ADEA cases in 2007, 10,002 were found to have "no reasonable cause" and 2,754 were closed for administrative reasons. Only four percent of resolutions were found to have reasonable claims of age-discrimination. One percent of claims were successfully mediated.)

50. *Id.*

available.⁵¹ Discouragingly, filing discrimination claims was hindered because evidence of bias is not easily detectable or apparent.⁵² It is no easy task to determine whether a concrete pattern of discrimination exists or if the behavior of the employer consists of isolated incidents.⁵³

2. WOMEN IN THE WORKFORCE

There has been an increase in the population of elder individuals in the United States.⁵⁴ There was a slight change in the elderly population in 2014, with an estimated 46.2 million Americans aged sixty-five and older.⁵⁵ The population ratio was one hundred and twenty-seven women to one hundred men.⁵⁶ An upward trend of the elderly population is estimated to continue beyond 2050.⁵⁷ The rough calculation of the population will double to 83.7 million elderly individuals.⁵⁸ Calculations have steadily been showing a gender imbalance in the population.⁵⁹

i. Cultural Perceptions

A more diverse older population is expected to continue growing as the population of elderly individuals increases.⁶⁰ The population of each race-based group is expected to increase at different rates.⁶¹ Projections show that the expected number of Hispanic women will quadruple, the number of black women will double, and the number of Asian women will triple.⁶²

51. *Id.*

52. *Id.*

53. *Id.*

54. *A Statistical Profile of Black Older Americans Aged 65+*, U.S. DEP'T OF HEALTH AND HUMAN SERVS. (Sept. 30, 2015), http://www.aoa.acl.gov/aging_statistics/minority_aging/Facts-on-Black-Elderly-plain_format.aspx.

55. *Id.*

56. *Id.*

57. *Id.*

58. Jennifer M. Ortman et al., *An Aging Nation: The Older Population in the United States*, U.S. DEP'T OF COM., (2014), <https://www.census.gov/prod/2014pubs/p25-1140.pdf> (stating in 2012, it was estimated that 43.1 million individuals in the U.S. would be elderly).

59. *Fact Sheet*, WOMEN'S BUREAU, U.S. DEP'T OF LABOR (2013), http://www.dol.gov/wb/media/reports/WB_OlderWomen_v10%20WEB.pdf [hereinafter WOMEN'S BUREAU].

60. Marlene A. Lee & Mark Mather, *U.S. Labor Force Trends*, 63 POPULATION BULL. 3, 6, (2008) [hereinafter Lee, *U.S. Labor Force Trends*]; Lee, *supra* note 3, at 3, 6.

61. *Id.*

62. WOMEN'S BUREAU, *supra* note 59.

During the last three decades, the labor force participation of women has grown and is projected to continue to grow for the next twenty years.⁶³ However, studies indicate that seventy-three percent of men aged fifty-five to sixty-five years are economically stable compared to forty-seven percent of women that age.⁶⁴ The statistics might amount to the fact that older women's educational attainment is quite different from the educational attainment of younger men and women.⁶⁵ Limited education has created less earning opportunities for women in elderly communities.⁶⁶ A 2011 United States Census Bureau chart highlights the disparity between the educational attainment of women fifty-five years or older and men in that category.⁶⁷ This is not indicative of the level of education between the two groups on a whole.⁶⁸ Fewer men have completed high school, but more men have received a bachelor's degree, which is one of the reasons for the limited employment opportunities for women.⁶⁹ The occupations women do hold often require college degrees, such as registered nurses and teachers.⁷⁰

The statistics of employed, elderly individuals get progressively worse when viewing the racial profile of full-time employees.⁷¹ In addressing stereotyping through law and policy, the Supreme Court stated: "We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[in] forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'"⁷² In addition to concerns about the economy suffering, age-related reasons and age discrimination were

63. *Id.*

64. *Older Women Count*, GLOBAL AGEWATCH INDEX 2015, <http://www.helpage.org/global-agewatch/population-ageing-data/infographic-older-women/> (last visited Mar. 4, 2017).

65. WOMEN'S BUREAU, *supra* note 59.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Staying Ahead of the Curve 2013: The AARP Work and Career Study*, AARP, (Jan. 2014), http://www.aarp.org/content/dam/aarp/research/surveys_statistics/general/2014/Staying-Ahead-of-the-Curve-2013-The-Work-and-Career-Study-AARP-res-gen.pdf [hereinafter *Staying Ahead of the Curve*].

72. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion).

mentioned most often by older individuals when stating why they were unemployed.⁷³

The American Association of Retired People (“AARP”) conducted a study that exhibited the decrease in full-time jobs held by employees aged forty-five to seventy-four.⁷⁴ These are potential problems stemming from age discrimination which affect individuals over the age of sixty-five who leave their long-term employment for short-term or part-time.⁷⁵ Unfortunately, those numbers are comparably *low* when viewing discrimination only in terms of women in the United States.⁷⁶ The rate of unemployment doubled for women between 2007 and 2011, from 3.0 to 6.1 percent for women ages fifty-five to sixty-four and 3.1 to 6.5 percent for women ages sixty-five and older.⁷⁷ Once an older woman is unemployed, it is substantially harder for her to gain employment.⁷⁸ Gender-based concerns are factors directly connected to social or psychological aspects of gender, such as gender stereotyping and women’s traditional roles in family caring activities.⁷⁹ For elderly women in the U.S., the poverty rate in 2012 was around eleven percent.⁸⁰ Older women of color, sixty-five and older, were the poorest after retirement; 20.5 percent of black women, 20.9 percent of Latinas/Hispanic women, and 15.3 percent of Native American women lived in poverty.⁸¹ In the modern day, gender-based stereotypes run rampant through the minds of those hiring.⁸² Age-based constructs are often triggered automatically and operate unconsciously.⁸³ Constructs regarding age can unintentionally cause implicit bias that may affect actions, feelings, or thoughts.⁸⁴

73. *Staying Ahead of the Curve*, *supra* note 71.

74. *Id.*

75. *The Past and Future of the Age Discrimination in Employment Act*, NAT’L BUREAU OF ECON. RES., <http://www.nber.org/bah/2008no3/w14317.html> (last visited Mar. 4, 2017) [hereinafter *Past and Future*].

76. See generally WOMEN’S BUREAU, *supra* note 59.

77. *Id.* at 4.

78. *Id.*

79. Bisom-Rapp, *It’s Complicated*, *supra* note 17, at 1.

80. Joan Entmacher et al., *Insecure & Unequal, Poverty and Income Among Women and Families 2000-2012*, NAT’L WOMEN’S L. CTR., http://www.nwlc.org/sites/default/files/pdfs/final_2013_nwlc_povertyreport.pdf.

81. *More To Do: The Road to Equality for Women in the United States*, MS. FOUND. FOR WOMEN 8, 13 (2013), http://www.ncdsv.org/images/MSFW_MoreToDoTheRoadToEqualityforWomenInTheUS_3-2013.pdf.

82. Bisom-Rapp, *It’s Complicated*, *supra* note 17, at 21.

83. *Id.* at 19.

84. *Id.*

An AARP work and career study established that more women age fifty and above believe that workplace age discrimination is a factor than younger women.⁸⁵ The belief regarding frequency of age discrimination is similar between both groups.⁸⁶ While discriminatory treatment of individuals once they turn fifty might not be seen to the naked eye, individuals are treated differently because of age.⁸⁷ Sixteen percent of individuals have seen a change in treatment from their employers.⁸⁸ A four point gain, though modest, is the largest change registered for any item listed (sexual preference, sex, education, religion).⁸⁹ One in five individuals perceive that they were not hired for a job due to age, and twelve percent believe they were passed over for a promotion because of age.⁹⁰ In researching negative perceptions attributed to age discrimination, more men reported that they were passed up for employment related promotions because of age.⁹¹ While some continue to work, others decide to retire to gain benefits, like pension plans.⁹²

Retirement plans for the elderly should include lounging on the beach with a good pension for their years of service. Continuing to work after retirement might be attributed to other reasons.⁹³ Individuals who have been working their whole lives might not feel useful after retirement or may need something to keep them feeling "young." However, a recent survey showed that money is the reason that individuals work part-time jobs.⁹⁴ When asked what best represents what individuals plan to do during retirement, seventy-two percent stated that they intended to work for net gain.⁹⁵ Hispanics, African Americans, and Caucasians all stated that extra money and enjoyment of the job was a reason for continuing to work.⁹⁶

85. *Staying Ahead of the Curve*, *supra* note 71, at 30.

86. *Id.*

87. *Id.* at 29.

88. *Id.* at 31.

89. *Id.*

90. *Id.* at 33.

91. *Id.* at 35.

92. *Id.* at 45.

93. *Id.* at 39.

94. *Id.*

95. *Id.*

96. *Id.* at 13.

B. The European Approach to Combating Age Discrimination

Many European countries recently had their first experiences with age discrimination in the workplace.⁹⁷ In 2000, European legislators passed four guidelines on the basis of equality in the workplace, including equal pay for women and men.⁹⁸ The Employment Framework Directives required members to design their own anti-discrimination laws by 2003 with an extension to 2006 that allowed for age discrimination laws.⁹⁹ The Council Directive from June 2000 until December 2004 implemented unique directives to combat inequality in the workplace; these included the *European Racial Equality Directive*, the *Framework Directive on Employment*, the *Gender Directive Civil Law*, and the *Gender Guideline Employment Law*.¹⁰⁰ The laws all combat different, but similar, problems in the workplace including age discrimination.¹⁰¹ The protections implemented required extra steps to improve the integration into the labor market.¹⁰² The main goal was to prevent and eliminate discrimination in the access of goods and services.¹⁰³

1. WOMEN STILL SUFFER FROM AGE DISCRIMINATION IN THE WORKPLACE IN A CULTURALLY PROGRESSIVE NATION

While adhering to the European Council Directives, Germany implemented anti-discrimination laws to follow the “European Approach.”¹⁰⁴ Germany conformed to the laws of the *European Union’s Framework Directive on Equal Treatment in Employment and Occupation* (“EU Directive”).¹⁰⁵ The “Allgemeines Gleichbehandlungsgesetz” (“AGG”) or General Equal Treatment Act, came into effect in 2006 to combat age discrimination, among other critical issues in the workplace.¹⁰⁶ Through this Act, Germany strove to allow the older population to obtain their rights and the advantages that should come with

97. Lahey, *supra* note 16, at 1.

98. *Guide to the General Equal Treatment Act 7*, FED. ANTI-DISCRIMINATION AGENCY (2010), http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/EN/publikationen/agg_wegweiser_engl_guide_to_the_general_equal_treatment_act.pdf?__blob=publicationFile [hereinafter *Guide to the General Equal Treatment Act*].

99. Lahey, *supra* note 16, at 1.

100. *Guide to the General Equal Treatment Act*, *supra* note 98, at 8.

101. *Id.*

102. *Id.* at 9.

103. *Id.*

104. Bisom-Rapp, *Diverging Doctrine*, *supra* note 2, at 719.

105. *Id.*

106. *Guide to the General Equal Treatment Act*, *supra* note 98, at 39.

age. The protections of the AGG are unique to the German culture on grounds of a number of characteristics.¹⁰⁷ All people who are discriminated against in regards to race, gender, religion or belief, disability, age, or sexual orientation are able to argue “unjustified difference of treatment.”¹⁰⁸ Grounds that are acceptable include “exceptional conditions under which differences of treatment in relation to working life or access to goods and services are admissible.”¹⁰⁹ Germany’s age discrimination law protects the biological age of an individual, not limiting the scope to the elderly population.¹¹⁰ With the motto, “Im besten Alter. Immer,” (In its prime. Always.) Germany took a stand against all forms of age discrimination, for the young, as well as for the elder population.¹¹¹

The aim of this law was to prevent and abolish discrimination, whether it is direct or indirect.¹¹² However, the law gave employers an advantage.¹¹³ The law now allows employers to create contracts that specify a maximum age of termination.¹¹⁴ The employer can use the contract to terminate an employee solely for his or her age.¹¹⁵ Employers are not required to provide legitimate reasons as to why the employee was terminated after such employee reaches the age of fifty-one.¹¹⁶ In general, employers expressed that employees are let go for one simple reason: decreased performance.¹¹⁷ Mandatory proposed retirement laws are set in place in some professions.¹¹⁸ Unfortunately, the AGG does not extend its protections to soldiers but does protect civil servants, judges, and individuals doing social service in place of military service.¹¹⁹ Differential treatment does not constitute discrimi-

107. *Id.*

108. *Id.* at 10.

109. *Id.*

110. *Id.*

111. *Germany Declares 2012 the Year Against Age Discrimination*, EUR. COMM’N: EMP’T SOC. AFFAIRS & INCLUSION (Mar. 29, 2012), <http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=1256&furtherNews=yes>.

112. Kliemt & Vollstadt, *Age Discrimination Internationally: Germany*, AGE DISCRIMINATION, <http://www.agediscrimination.info/international/Pages/Germany.aspx> (last visited Mar. 4, 2017) [hereinafter Kliemt].

113. Declan O’Dempsey & Anna Beale, *Age and Employment*, EUR. COMM’N 1, 38 (2011), http://ec.europa.eu/justice/discrimination/files/age_and_employment_en.pdf.

114. *Id.* at 48.

115. *Id.* at 65.

116. *Id.* at 75.

117. *Id.*

118. *Id.*

119. Kliemt, *supra* note 112.

nation if there is a genuine and determining occupational requirement, provided that the objective is legitimate and appropriate.¹²⁰ In extreme cases, harassment can be considered as defamation, which can result in criminal sanctions according to the German Criminal Code.¹²¹

The Federal Anti-Discrimination Agency's study shows that "every fifth German claims to have already experienced discrimination at work based on age."¹²² This study does not categorize the participants by age, however.¹²³ Sixty-three percent of older people residing in Germany are employed.¹²⁴ It is extremely difficult to establish whether unemployment numbers "are a result of discrimination, or of real differences in productivity or labor market ambitions."¹²⁵ "With older persons working longer years, financial problems of the welfare state will become more serious."¹²⁶ Age discrimination has been seen as an issue for more than fifty years: "In business and industry there are significant restrictions in the hiring, upgrading, and retention of older workers, i.e. men and women forty-five of age and older."¹²⁷ Even though some argue that discrimination on the basis of age is a result of the decline of productivity of elder individuals, "there is hardly any gerontologic evidence for a decline in productivity and performance of an older individual."¹²⁸

Only an estimated ten percent of the older population, sixty years of age or older, are living in poverty.¹²⁹ Research reveals three

120. *Id.*

121. *Id.*

122. *The Latest from Germany, More Holidays for Older Employees—Necessary Protection or Discrimination?*, ORRICK, HERRINGTON & SUTCLIFFE LLP (June 4, 2015), <http://blogs.orrick.com/employment/2015/06/04/the-latest-from-germany-more-holidays-for-older-employees-necessary-protection-or-discrimination/>.

123. *Id.*

124. *AgeWatch Report Card: Germany*, GLOBAL AGEWATCH, <http://www.helpage.org/global-agewatch/population-ageing-data/country-ageing-data/?country=United+States+of+America> (last visited Mar. 4, 2017) [hereinafter *AgeWatch Report Card*].

125. Victoria Busch et al., *Age Discrimination in Hiring Decisions—A Comparison of Germany and Norway*, 3 (Inst. For Res. In Econ. And Bus. Admin, SNF Working Paper No. 75/04, 2004), http://brage.bibsys.no/xmlui/bitstream/handle/11250/165514/A75_04.pdf?sequence=1&isAllowed=y [hereinafter Busch].

126. *Id.*

127. *Id.*; see also Jacob Tuckman & Irving Lorge, *Attitudes Toward Older Workers*, 36 J. OF APPLIED PSYCHOL. 149, 149 (1952).

128. Busch, *supra* note 125, at 3.

129. *AgeWatch Report Card*, *supra* note 124.

predominant ways that women are stereotyped as they age.¹³⁰ First, women are viewed as having reached “old age” from age fifty-five to fifty-nine in comparison to men who are not seen as reaching “old age” until later in life.¹³¹ Second, compared to older men, aging women are seen as “less competent, intelligent and wise.”¹³² Finally, older women are viewed as more nurturing and sensitive, usually referencing stereotypes of “grandmothers.”¹³³

2. GENDER AND EQUALITY

The European Union implemented the Gender Equality Index to measure the gender gaps within a range of areas relevant to the EU policy framework.¹³⁴ It provided a measure that captured gender gaps in regards to work, money, knowledge, time, and power while taking into account the levels of achievement of each EU member country.¹³⁵ Interestingly enough, the EU found that member states and countries were half way towards equality. Because gender equality plays a significant role in enhancing economic and social growth, the Gender Equality Index and the gross domestic product across EU member states is assessed to determine what can be done to gain equality throughout the European Union.¹³⁶ The goal of the EU was not to make “gender mainstreaming” the primary goal.¹³⁷ It is only used to integrate gender concerns into all policies and programs of the Union institutions and Member States so that there is no need to rely solely on measures specifically targeting gender equality.¹³⁸

The Gender Equality Index measures quality of work by using a multi-dimensional concept that relies on three components: a transparent and solid methodology, sound statistical principles, and statistical coherence within the theoretical framework.¹³⁹ To calculate the statistics, an initial metric was developed to calculate the position of

130. Silvia S. Canetto, *Older Adult Women: Issues, Resources, and Challenges*, HANDBOOK OF PSYCHOL. OF WOMEN AND GENDER 183, 184 (Rhoda K. Unger ed., 2001) [hereinafter Canetto].

131. *Id.*

132. *Id.*

133. *Id.*

134. EUROPEAN INSTITUTE FOR GENDER EQUALITY, GENDER EQUALITY INDEX 2015: MEASURING GENDER EQUALITY IN THE EUROPEAN UNION 2005-2012 1, 7 (2015), <http://eige.europa.eu/sites/default/files/documents/mh0215616enn.pdf>.

135. *Id.* at 8.

136. *Id.*

137. *Id.* at 7.

138. *Id.*

139. *Id.* at 13.

women and men in relation to each other.¹⁴⁰ This computes the ration of the value for women to the average value, subtracting one and taking the absolute value.¹⁴¹ The score is bound between zero and one, which stands for the distance between women, or equivalently men, to the equality point, regardless of their representation in the population.¹⁴² In the end, the gender gap where women are at a disadvantage compared to men is treated in the same way as a gap where men are at a disadvantage.¹⁴³ The factors that are incorporated in the multi-dimensional concept of quality of work are not gender neutral, nor will the key trends be affected.¹⁴⁴

Due to the democratic and societal shifts, new trends are showing that in a highly intensive labor effort, women are disproportionately involved in non-standard and/or precarious work.¹⁴⁵ Gender biases are measured to include health and safety.¹⁴⁶ This allows for a better understanding of the impact of biases in health and safety that can be understood and the shift in how the labor market and households are organized.¹⁴⁷

3. DEMOGRAPHICS AND CULTURAL STIGMAS OF WOMEN

If societies take measures to adapt their labor force to aging, demographic change may turn out to be a source of growth.¹⁴⁸ Age discrimination is not only an issue for women in the United States. Germany, along with other countries, is taking adequate steps to combat discrimination towards its own people.¹⁴⁹ Some EU member countries require protections for all individuals, while others allow for only individuals aged sixty-five years of age or older to be protected under the law.¹⁵⁰ Those who have experienced discrimination based on the color of their skin, their qualifications, and gender are being oppressed. But imagine your grandmother, grandfather, or parents be-

140. *Id.* at 16.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 22.

145. *Id.* at 34.

146. *Id.*

147. *Id.*

148. Richard Wolf, *How women save our wealth*, PROJECT M (July 31, 2015), <http://projectm-online.com/demographics/how-women-can-mitigate-effects-of-aging-on-wealth-decline/> [hereinafter Wolf].

149. *Id.*

150. *Guide to the General Equal Treatment Act*, *supra* note 98.

ing discriminated against because of perceptions regarding their age? Even countries that are taking the adequate steps to combat age discrimination face an up-hill battle. After the early retirement options in the 1970's, men left the workforce.¹⁵¹ To a degree, women kept the burgeoning welfare state alive after the gaps left by retirees.¹⁵² Germany is going grey: one in twenty individuals is over the age of eighty.¹⁵³ By 2050, that number will be one in six.¹⁵⁴ Seventy out of one hundred German women from age fifteen to sixty-four are taking part in a gainful economic activity.¹⁵⁵

III. Analysis

The ADEA laws have weakened in protections for the elderly population since the implementation of the Act in 1967. The stereotypical views of elderly women in the workforce have increased the number of implicit discrimination issues in employment.¹⁵⁶ The ADEA recognized that women, minorities, and the unemployed were particularly vulnerable to age-based employment discrimination.¹⁵⁷ Consequently, it does not provide sufficient protections to "older workers as a group," and it allows rationalized discriminatory practices against the elder population to continue.¹⁵⁸ Over the last fifty years, the number of manual labor jobs has decreased, and more white-collar jobs have been created.¹⁵⁹ A greater number of jobs have become available to women.¹⁶⁰ Better wages have provided incentives for women to enter the workforce and limit the number of children they have.¹⁶¹ Women have had to start careers or develop track records in the labor force.¹⁶² Many women now need to work for economic reasons but are also compelled to work even when there is no economic necessity.¹⁶³

151. Wolf, *supra* note 148.

152. *Id.*

153. Stefen Wagstyl, *Germany's Demographics: Young People Wanted*, FIN. TIMES (Aug. 24, 2015), <https://www.ft.com/content/b30c8de4-4754-11e5-af2f-4d6e0e5eda22>.

154. *Id.*

155. Wolf, *supra* note 148.

156. Rothenberg, *supra* note 1, at 11.

157. *Id.* at 10.

158. *Id.* at 19.

159. Marlene A. Lee & Mark Mather, *U.S. Labor Force Trends*, 63 POPULATION BULL. 1, 5 (2008) [hereinafter Lee, *U.S. Labor Force Trends*].

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

However, Americans hold unfortunate views of elder women. The stereotype of elderly women is that they are “senile, sad, lonely, poor, sexless, ill, dependent, demented and disabled.”¹⁶⁴ The aging of the population affects all aspects of society.¹⁶⁵

The ADEA has had both positive effects on currently employed workers and negative effects on those searching for employment.¹⁶⁶ While the ADEA was “originally introduced to protect the productive elderly from age stereotypes,” changes in the law have eroded its protection over time.¹⁶⁷ While the US implemented age discrimination laws more than fifty years ago, the European Union became aware of the ever-growing problem in the elderly population in the recent years.¹⁶⁸ The European legislation was driven by political and economic consideration and calls for less enforcement.¹⁶⁹ However, penalties, disability, unemployment, and social security have potentially greater effects on social norms for retirement age than does anti-discrimination legislation.¹⁷⁰

The employment market for older workers is less dynamic in Germany than in the United States.¹⁷¹ The demographic shift is a result of three factors: rising life expectancy; declining birth rates; and “the cycles of high and low birth rates, which have historically been pronounced.”¹⁷² The trends in the employment market over the last two decades have been underwhelming.¹⁷³ Germany has the oldest population within the European Union, with the median age being forty-five.¹⁷⁴ The labor market in Germany has shrunk by a visible amount.¹⁷⁵ However, more has to be done to extend the ability of individual workers to continue working for longer.¹⁷⁶ The rate of employment for women in their sixties increased by fifty-one percent between

164. Bisom-Rapp, *Diverging Doctrine*, *supra* note 2, at 730.

165. Wim J. A. van den Heuvel & March M. van Santvoort, *Experienced Discrimination Amongst European Old Citizens*, EUR. J. AGEING 291, 291 (2011).

166. Lahey, *supra* note 16, at 1.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 2.

171. Alberto Lozano, *Germany Must Respond to Graying Workforce*, CORNER (Mar. 22, 2014), <http://thecorner.eu/news-europe/germany-gets-old-shrinks/36133/>.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

2005 and 2011.¹⁷⁷ Unfortunately, pension reforms over the last two decades have been correlated with benefits being cut and retirement ages rising.¹⁷⁸ Without the government's help in creating better integration of the elderly, such groups will continue receiving backlash for being older.

Ageism—"a form of discrimination and prejudice, particularly experienced by the elderly"—¹⁷⁹ is not only a cultural phenomenon in the U.S. but an element of all cultures around the world.¹⁸⁰ Studies have found that individuals perceive older generations as burdens, drains of resources, and persons in need of care.¹⁸¹ The continuing existence of negative, age-based stereotypes is a recurring phenomenon that is shared by many economically viable countries.¹⁸² Symptomatic of the negative, appearance-based judgments of gendered ageism, the elderly are labeled "over the hill" and "old bags."¹⁸³ Along with discrimination based on age, disparities in employment for women are greater than that of men.¹⁸⁴ For example, Mr. Phillips was an elderly man searching for a job.¹⁸⁵ He went to a headhunter in search of a job.¹⁸⁶ He was turned down for an interview after being told by the headhunter that he was too old for the position.¹⁸⁷ Mr. Phillips said, ". . . [t]hen the (employer/client) found my LinkedIn profile and decided I'm a little long in the tooth for the job."¹⁸⁸ The headhunter did not understand how this could be discrimination.¹⁸⁹ This problem can come back to haunt employers but only if discriminated-against indi-

177. *Id.*

178. Tom Bristow, *Elderly German Workers Just Keep on Going*, THE LOCAL DE (May 19, 2014), <http://www.thelocal.de/jobs/article/elderly-germans-stay-on-in-jobs>.

179. *Ageism*, ARGENTUM, <http://www.alfa.org/alfa/Ageism.asp> (last visited Mar. 4, 2017).

180. U.N. Secretary-General, *Follow-up to the Second World Assembly on Aging: Comprehensive Overview: Rep. of the Secretary-General*, ¶ 72, U.N. Doc. A/65/157 (July 21, 2010).

181. *Id.* at ¶ 75.

182. Bisom-Rapp, *Diverging Doctrine*, *supra* note 2, at 730.

183. Canetto, *supra* note 130, at 184 (usually referring to women from fifty to fifty-five based off of stereotypes).

184. Nancy Duff Campbell, *Our Moment: An economic agenda for women and families*, NAT'L WOMEN'S L. CTR. 1, 2 (2015), http://www.nwlc.org/sites/default/files/pdfs/final_nwlc_ourmomentreport2015.pdf.

185. Liz Ryan, *The Ugly Truth About Age Discrimination*, FORBES (Jan. 31, 2014, 3:16 AM), <http://www.forbes.com/sites/lizryan/2014/01/31/the-ugly-truth-about-age-discrimination/> [hereinafter Ryan].

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

viduals come together and find proof of discrimination.¹⁹⁰ How would Mr. Phillip be able to prove discrimination if he were to be the only one to be discriminated against? Unless he had someone on the inside who could testify on his behalf, there would be no way to prove that he was turned down because of his age.¹⁹¹ Not even the headhunter understood that age discrimination is the act of an individual taking age into consideration rather than considering his past professional work experience.¹⁹² The effects of the ADEA may not be fixed over time. After the nature of the legal environment that surrounds age discrimination in the United States changed, the laws have not allowed the elderly to gain employment in a fair and decisive manner.

A. Failure to Hire

Do employers believe that new qualified individuals will quit when better opportunities are presented? That answer may never be clear. However, based on research and testimony of people in the workforce, employers are fearful of employees quitting without reason.¹⁹³ Inevitably, there are individuals who assume that older individuals are looking for better opportunities.¹⁹⁴ This is a sweeping contrast when examining the research that has been conducted about older Americans in the workforce.¹⁹⁵ The Center for Disease Control conducted research that revealed inconsistencies between employers and older employees' perceptions about the workforce.¹⁹⁶ Employers have reported that older workers have a greater knowledge of the job tasks they perform than their younger colleagues, willingly learn new tasks quickly, bring wisdom and resilience to work, and are able to keep up with the physical demands their jobs require.¹⁹⁷ The contradiction falls within the mindset of employers when judging older employees. Nevertheless, employers still believe older workers are more

190. Rothenberg, *supra* note 1, at 16.

191. *Id.*

192. Ryan, *supra* note 185.

193. See generally Kimberly Weisul, *The Generation Gap at Work: Managing the Older Worker—or Younger Boss*, CBS NEWS (Jan. 19, 2011, 4:51 PM), <http://www.cbsnews.com/news/the-generation-gap-at-work-managing-the-older-worker-or-younger-boss>.

194. *Id.*

195. *Id.*

196. *Older Employees in the Workplace*, CTR. FOR DISEASE CONTROL (2012), https://www.cdc.gov/workplacehealthpromotion/tools-resources/pdfs/issue_brief_no_1_older_employees_in_the_workplace_7-12-2012_final508.pdf.

197. *Id.*

costly than younger workers.¹⁹⁸ Those beliefs are unwarranted. Older workers are seen as costly mostly because of health insurance, higher pensions, and other benefits.¹⁹⁹

In 2015, the EEOC charged Seasons 52, a national restaurant chain, with refusing to hire older workers nationwide.²⁰⁰ The lawsuit alleged that since 2010, Seasons 52 had been discriminating against a class of applicants for both “front of the house” and “back of the house” applications by failing to hire them because of their age when opening new restaurants.²⁰¹ According to the EEOC, older applicants across the nation were given varying explanations for their failure to hire, including “too experienced.”²⁰² Seasons 52 desired a youthful image, looking for “fresh” employees, and telling applicants that Seasons 52 “wasn’t looking for old white guys.”²⁰³ The Seasons 52 lawsuit is one of the hundreds of lawsuits brought against employers who fail to hire individuals because of their age.²⁰⁴ Peter Cappelli, the director of the Center for Human Resources at the Wharton School, offered blunt commentary as to why older workers are not being hired.²⁰⁵ Mr. Cappelli noted that employers prefer the younger candidates even though there is no good reason for such a preference.²⁰⁶

B. Unemployment

Congress declared that the ADEA would be for the purpose of combating “the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment

198. *Id.*

199. *Id.*

200. *Seasons 52 Refused to Hire Older Workers Nationwide, EEOC Charges in Lawsuit*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N (Feb. 12, 2015), <http://www.eeoc.gov/eeoc/newsroom/release/2-12-15a.cfm>.

201. *Id.*

202. *Id.*

203. *Id.*

204. See generally *Selected List of Pending and Resolved Cases Under the Age Discrimination in Employment Act (ADEA)*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N (Aug. 2012), <https://www.eeoc.gov/eeoc/litigation/selected/adea.cfm> (last visited Mar. 4, 2017).

205. Peter Cappelli, *Room for Debate*, N.Y. TIMES (Apr. 12, 2009, 8:18 PM), http://roomfordebate.blogs.nytimes.com/2009/04/12/older-workers-need-not-apply/?_r=0.

206. *Id.*

problems grave.”²⁰⁷ There are 6.7 million more women aged fifty-five and older in the U.S. than there are men of the same age range.²⁰⁸ Given societal views, women are not seen in the same light as men. There is an old adage about women that highlights such unfortunate stereotypes: men age like a fine wine, while women age like a glass of milk.²⁰⁹ About four in ten U.S. citizens aged twenty and older have been unemployed for more than six months while searching for work.²¹⁰ Fifty-one percent of women age fifty-five to sixty-four and forty-six percent of women age sixty-five and older are unemployed for more than six months, compared to forty-six and thirty-six percent for men of the same age.²¹¹ Women fifty-five and older have the highest rates of long-term unemployment and the longest spells of unemployment when compared to women of other ages.²¹² Asian American and African American women have the highest rates of long-term unemployment of women of all races and ethnicities.²¹³ Could the differences in age have anything to do with societal views of women?

A *Guardian* news article shows that elderly individuals are experienced enough to gain employment based on their resumes.²¹⁴ However, age is what is stopping the employer from hiring individuals over the age of 45.²¹⁵ Mr. Anthony Barlow, a sixty-year old man with many years of experience under his belt,²¹⁶ had been unemployed for more than a year before he decided to tweak his resume.²¹⁷ The tweaking he did involved creating a twenty-three year old alter ego — to see the difference that age would do to his possible career.²¹⁸ Barlow, the sixty year old, was told that he did not reach a “required

207. 29 U.S.C. § 621(a)(3) (2015).

208. *Id.*

209. Samantha Olson, *Aging Differences Between Men and Women: How the Sexes Grow Old Together (And Apart)*, MED. DAILY, <http://www.medicaldaily.com/aging-differences-between-men-and-women-how-sexes-grow-old-together-and-apart-318632> (last visited Mar. 4, 2017).

210. Joan Entmacher et al., *Long-Term Unemployment: Spotlight on Women and Families* NAT'L WOMEN'S CTR., 1, 1 (2014), http://www.nwlc.org/sites/default/files/pdfs/long_term_ui_spotlight_on_women_and_families2.pdf [hereinafter Entmacher et al.].

211. WOMEN'S BUREAU, *supra* note 59.

212. Entmacher et al., *supra* note 210.

213. *Id.*

214. Katie Allen, *Ageism is Back as Unemployed Over-50s Struggle to get Back into Work*, GUARDIAN (Apr. 14, 2012, 7:06 PM), <http://www.theguardian.com/society/2012/apr/15/unemployed-older-workers-struggle-to-find-work>.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

standard," while Barlow's twenty-three year old alter ego was given an interview.²¹⁹ Barlow felt like he was a malingerer, just sitting around his home increasing his debt every passing day.²²⁰ Official statistics show that half of those in the elder community who are not working have been looking for a job for more than a year and a half.²²¹ The same is happening with women who have had the same job for countless years. These women try to change jobs or try to get back in the labor market without any luck.²²² Economics have blamed the inability of the elderly to gain employment on a number of problems: employer prejudice, health issues, and the relative difficulty in relocating to new jobs due to mortgages and other commitments.²²³ Experts warn that by 2020, a third of the working age-population will be over the age of fifty.²²⁴ Unfortunately, if employers are reluctant to hire these individuals, there could be a huge cost in benefit payments and lost spending power.²²⁵

In 2002, the chancellor of Germany, Gerhard Schroder, brought a so-called smooth centre-left reform to Germany's labor market called the Hartz IV Reform.²²⁶ Many unemployed Germans were bewildered with new terms, referred to as the "Denglish" terms, like "jobcenter," "personal Service Agentur," or "Mini-Job."²²⁷ The Hartz IV Reform bundled the unemployment benefits and social welfare into one "neat" package.²²⁸ The immediate effect left those living on benefits worse off.²²⁹ For example, as of 2013, the standard rate for a single person is €382 a month plus the cost of adequate housing and healthcare.²³⁰ A new element, which brought a profound change, was

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. Ben Knight, 'Hartz reforms': How a Benefits Shakeup Changed Germany, *GUARDIAN* (Jan. 1, 2013, 7:44 AM), <http://www.theguardian.com/commentisfree/2013/jan/01/germany-hartz-reforms-inequality> [hereinafter Knight].

227. *Id.* (Denglish is a term that is a portmanteau of the German words Deutsch and English. The term is used in all German-speaking countries to refer to the increasingly strong influx of macaronic English or pseudo-English vocabulary into German); see also Robert Compton, *What is Denglish? Public Viewings, Wellness and Shootings*, *BABEL*, <https://www.babel.com/en/magazine/denglish-words> (last visited Mar. 4, 2017).

228. Knight, *supra* note 226.

229. *Id.*

230. *Id.* (calculating that 382 euros translates to 428.37 USD).

the contract drawn up between the “jobseeker” and the “jobcenter” in order to get back on somebody’s payroll.²³¹ Germany began to accept the modern interpretation of the word “incentive” in the job market: the doctrine that poor people will only work if they are not given money.²³² There was an institutional change after the European labor market changed drastically.²³³ The Hartz IV Reforms were supposed to reduce the numbers of features in the public pension system and par down the unemployment insurance system.²³⁴

231. *Id.*

232. *Id.*

233. *Id.*

234. Stephan Dlugosz et al., *Fixing the Leak: Unemployment Incidence Before and After a Major Reform of Unemployment Benefits in Germany*, Discussion Paper No. 09-079 (ZEW), CTR. FOR EUR. ECON. RES. (2009), at 5.

C. Mandatory Retirement

The “sandwich generation” is emerging stronger than ever. These women are caught between providing for grandchildren and elderly parents, many times continuing to pursue their careers.²³⁵ Many women find themselves acting as caregivers in their lives even though caregiving impacts their future and retirement.²³⁶ Distinctive factors cause women to take the caregiver roles even though these roles make life more difficult for working women.²³⁷ Sixty percent of women, mostly in their fifties, work on a full-time basis.²³⁸ However, there is a substantially large population that must continue to work after retirement. Research indicates that more men continue to work full-time after the age of sixty-two than women.²³⁹ Women with ambition often do not stick around—mirroring gets harder and harder as women push towards the forties and fifties.²⁴⁰ Research shows that women feel trapped in offices that do not allow flexibility and personal control.²⁴¹

Ageism and discrimination in the workplace remain serious impediments to employment, retirement, and financial well being of the elderly, especially women and individuals of color.²⁴² The provisions of the ADEA intended to make it unlawful to force or institute “mandatory” retirement age policies.²⁴³ However, it provides a few exceptions to the general prohibition against age discrimination and *mandatory* retirement. Businesses are not allowed to institute policies that require those over the age of sixty-five to retire, unless such individual is a high-level policymaker or an executive.²⁴⁴ This exception applies to employees aged sixty-five or older employed as bona fide

235. Dalia Ben-Galim & Amna Silim, *The Sandwich Generation: Older Women Balancing Work and Care*, INST. FOR PUB. POL’Y RESEARCH, 4, 7 (Aug. 25, 2013), <http://www.ippr.org/publication/55/11168/the-sandwich-generation-older-women-balancing-work-and-care>.

236. *Id.* at 2.

237. *Id.* at 9.

238. U.S. DEP’T OF HEALTH AND HUM. SERVS., GROWING OLDER IN AMERICA: THE HEALTH AND RETIREMENT STUDY, 41 (2012).

239. *Id.* (referencing Figures 2-1.1-2-1.2).

240. Lisa Miller, *Why We Need Older Women in the Workplace*, NY MAG. (Aug. 4, 2015, 8:52 AM) <http://nymag.com/thecut/2015/08/why-we-need-older-women-in-the-workplace.html>.

241. *Id.*

242. Rothenberg, *supra* note 1, at 10.

243. See 29 U.S.C. 623 (2015); Keisha-Ann G. Gray, *Mandatory Retirement Incentive Programs*, HUM. RES. EXEC. ONLINE (Dec. 30, 2013), <http://www.hreonline.com/HRE/view/story.jhtml?id=534356540>.

244. 29 U.S.C. § 623 (2015).

executives or in a high policymaking position for a two-year period immediately before retirement and entitled to an immediate, non-forfeitable annual retirement benefit from an employer pension, profit-sharing, saving, or deferred compensation plan, or any combination of those plans, which equals in the aggregate at least \$44,000 per year.²⁴⁵ Executives and policymakers are defined as those who play significant roles in the development of companies or corporate policy, directing at least two other employees, and having the authority to make significant decisions that would influence others.²⁴⁶

The last exception allows for *mandatory* reassignment if the employer can show that age is a “bona fide occupational qualification.”²⁴⁷ The ADEA provides that it shall not be unlawful for an employer, employment agency, or labor organization to take any action otherwise prohibited by the other subsections of the provision where age is a “bona fide occupational qualification” reasonably necessary to the normal operation of the particular business.²⁴⁸ This provision stipulates that age may be considered in employment decisions where there is a “bona fide occupational qualification.”²⁴⁹ Employers can discriminate against employees for any reason if such employees are not capable of performing the essential functions of the job in the manner that is not necessary to the operation of the business.²⁵⁰ A “bona fide occupational qualification” is allowed only in certain instances.²⁵¹ It is often used as a defense for employers in occupations where public safety is a concern, such as against airline pilots, firefighters, and prison guards.²⁵²

“Germany recently lowered its retirement from age sixty-five to sixty-three for long time workers.”²⁵³ The decision of the legislators to lower the retirement age has been highly controversial.²⁵⁴ The contrast between elderly workers in the U.S. and Germany is stark. While

245. *Id.*

246. 29 C.F.R. § 1625.12(e) (2016) (explaining that the EEOC has the authority to determine whether an individual falls under this category).

247. 29 U.S.C. § 621(f)(1) (2012).

248. *Id.*

249. *Id.*

250. Rothenberg, *supra* note 1, at 18.

251. *Id.*

252. *Id.*

253. Soraya Sarhaddi Nelson, *Older German Workers Jump at Chance to Retire at 63*, NPR (Aug. 13, 2014, 4:57 AM), <http://www.npr.org/sections/parallels/2014/08/13/340005019/older-german-workers-jump-at-chance-to-retire-at-63>.

254. *Id.*

Germany struggles with an economic downturn and less employees,²⁵⁵ the U.S. is growing at a steady rate.²⁵⁶ More than 50,000 individuals in Germany have applied for the chance to retire, which would not work if the amount of people who are educated do not outweigh the amount of people wanting to retire.²⁵⁷ There are more than 240,000 individuals who are eligible to retire under the new law.²⁵⁸ The number of young workers going into the workforce is not enough to surplus those workers wanting to retire.²⁵⁹ This new law only allows those in good economic standing to retire when they desire.²⁶⁰ Early retirement would not benefit the poor or disabled individuals who need it most.²⁶¹ Many times those individuals have not worked enough to qualify and cannot afford to quit early.²⁶² The government has not yet signaled plans to raise the overall retirement age to sixty-seven.²⁶³ More than 761,000 German pensioners are supplementing their pensions through additional work – more than 100,000 of those are aged seventy-five and older.²⁶⁴

1. RIGHTS OF EMPLOYERS

Another way an employer can get around the anti-age discrimination law is by arguing that the firing or demotion of an individual is based on another “reasonable factor.”²⁶⁵ In these cases, employers should provide evidence that the decision to fire was based on “business” decisions that could be seen as reasonable.²⁶⁶ In 2005, the Supreme Court held that “reasonable factors other than age” were the appropriate standard for determining the legality of practices that disproportionately affect older individuals.²⁶⁷

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. Marilee Haraldsson, *Making Ends Meet in Germany*, PROJECT M (Apr. 10, 2012), <http://projectm-online.com/social-security/making-ends-meet-in-germany/>.

265. Rothenberg, *supra* note 1, at 18.

266. *Id.*

267. Lahey, *supra* note 16, at 3.

Research studies have found that individuals over the age of fifty-five experience age discrimination.²⁶⁸ One study required employers to compare the resumes of two equally qualified individuals—one identified as a fifty-seven year old and the other as a thirty-two year old.²⁶⁹ The older worker received less favorable feedback twenty-seven percent of the time.²⁷⁰ The disparities in hiring are particularly difficult for older adults who have been laid off or seek employment after retirement.²⁷¹ To establish a prima facie case with evidence of a legitimate nondiscriminatory reason for an adverse action, an employee must have an established case of age discrimination for the burden to shift to the employee.²⁷²

The United States Court of Appeals for the Fifth Circuit established that an individual must show four elements to establish her claim.²⁷³ First, an individual must show that she was in fact discharged.²⁷⁴ This is the easiest element to establish out of the four. Second, the individual must be qualified for the position.²⁷⁵ Unfortunately, the “qualification” requirement is usually a subjective element that may leave out those who are qualified but not the “most qualified.” The third requirement has three sub-elements: an individual has to 1) be replaced by someone outside the protected class, 2) be replaced by someone younger, or 3) be otherwise discharged because of her age.²⁷⁶ Fourth, the individual must be in the protected class at the time of discharge.²⁷⁷

The ADEA does, however, allow employers to take into account the individual’s age if public safety is at issue.²⁷⁸ Such consideration is seen in occupations affecting airline pilots, fire fighters, and prison guards.²⁷⁹ The employer can treat older adults as a homogenous

268. Rothenberg, *supra* note 1, at 11.

269. *Id.*

270. *Id.*

271. *Id.*

272. See 29 U.S.C. § 623(a)(1) (2015); see also Moore v. Staples, Inc., 635 F. Supp. 2d 337, 341 (D. Del. 2009); see generally In Re Olick, 398 B.R. 532 (Bank. E.D. Penn. 2008).

273. Jackson v. Cal-Western Packaging Corp., 602 F.3d 374, 378 (5th Cir. 2010); see generally 29 U.S.C. § 621 (2015).

274. Jackson, 602 F.3d at 378.

275. *Id.*

276. *Id.*

277. *Id.* (providing that protected class in this instance is an individual who meets the requirements of the Age Discrimination in Employment Act, i.e. one who is over the age of sixty-five).

278. Rothenberg, *supra* note 1, at 16.

279. *Id.* at 18.

group instead of evaluating each individual on her merits.²⁸⁰ Laying off the most economically impracticable worker, who has the most seniority but is disproportionately older, has been accepted in the past as a defense as a “sound business decision.”²⁸¹ Unfortunately, there is no way for an individual to show that he or she is capable of performing the essential job functions, when a reasonable accommodation was necessary for the employer. The courts have ruled in favor of employers on countless occasions where “economic necessity” and the “free market” were motivating factors for layoffs.²⁸² The ADEA was implemented to aid employees and prohibit *age discrimination* in employment.²⁸³ Regrettably the elderly population is not being protected from discrimination and ageism.

IV. Recommendation

The ADEA can be improved based off of the findings of similar laws in the European Union, more specifically Germany.²⁸⁴ As countries start to ban employment discrimination, more and more studies show that there is a need to start enforcing anti-discrimination laws.²⁸⁵ The United States implemented the ADEA in 1967 to combat the widespread age discrimination that was occurring in the nation.²⁸⁶ As we have seen above, there are countries with age discrimination laws that allow broad protections for all age groups. Some have argued that having a widespread law that protects everyone leads to higher standards. However, compared with the ADEA, foreign laws are weak, poorly conceived, lightly enforced, and riddled with exceptions.²⁸⁷ However, should the ADEA have to protect all age groups, and both men and women equally? As a society that values equality in the workplace and in other respects, the answer is yes. Women of all backgrounds, races, and cultures should be protected under a law

280. *Id.*

281. *Id.* at 19.

282. *Id.*

283. 29 U.S.C. § 623 (2015).

284. See Baker & McKenzie, *Worldwide Guide to Termination, Employment Discrimination, and Workplace Harassment Laws*, CORNELL UNIV. ILR SCH. 1, 148 (2009) [hereinafter Baker and MacKenzie]; see generally Donald C. Dowling, *Bringing Global Age Discrimination Provisions into Compliance*, SOC'Y FOR HUM. RES. MGMT. (Sept. 23, 2013), <https://www.shrm.org/resourcesandtools/hr-topics/global-age-discrimination-compliance.aspx> [hereinafter Dowling].

285. *Past and Future*, *supra* note 75.

286. *Id.*

287. See generally Dowling, *supra* note 284.

that was intended to protect individuals over the age of fifty-five equally. The government has to decide whether the progression of the age discrimination in employment laws should be pushed to prohibit discrimination in employment and allow for violations to be shown in a clearer light. One of the main issues of age discrimination laws is how difficult it is for individuals to actually show that there is an issue, whether it be in recruitment, retirement, or pay among other things. Other than the weaknesses in federal law, states can supplement federal laws to broaden the scope of discrimination towards women by creating provisions in already created laws to protect all elderly individuals.²⁸⁸ This might cause an uproar in states because of already set systemic approaches to these issues.

A. Create Laws That Allow for Easier Access to Employer Records

The issue that Germany is facing regarding a lack of people in the workforce does not take away from the fact that their anti-discrimination laws are helping their elderly community.²⁸⁹ When an alleged discrimination takes place, employers should have the burden of proving that employees cannot do the essential job functions of the position they are in or the position that they desire. The ADEA should take an approach like the German approach,²⁹⁰ which requires that employees be reasonable in their want or desire for a new position and then create the burden of proving “hardship” for employers.²⁹¹ The hardship requirement should be more than making an employer show that an individual did not have the “*bona fide occupational qualification*.” The protection affects employers and not the actual individual over the age of fifty-five. Things especially get complicated when other forms of discrimination are at play, i.e. being a woman or a woman of color, and being older than sixty-five.

The EEOC has recently implemented the “Employer Information Report” that requires employers with more than one hundred employees to provide data; including gender and race/ethnicity by some type of job grouping.²⁹² This information could be used as a way

288. See generally Lahey, *supra* note 16, at 2.

289. See generally Mirjana Redović-Marković, *An Aging Workforce: Employment Opportunities and Obstacles*, 1 CADMUS 142 (2013).

290. 42 U.S.C. § 12101 (2013).

291. See *U.S. Airways v. Barnett*, 535 U.S. 391, 391 (2002).

292. EEO REPORTS/SURVEYS, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/employers/reporting.cfm> (last visited Mar. 4, 2017).

to hold employers accountable for not having many elderly individuals employed in the field. The EEOC is currently asking for employees to give this information so there would be no need to spend more tax dollars on investigation.²⁹³

1. GREATER PROTECTIONS FOR OLDER AMERICANS

The issues in the elderly community of proving discrimination because of age starts with the EEOC.²⁹⁴ The actions of the EEOC when misconduct is reported needs to be quicker so that individuals can move on with future employment. The failure of the EEOC when investigating cases makes it extremely difficult for anyone who has reported discrimination to prove their story with evidence.

i. Increase the Penalties for Employers Who Violate Federal Law

Employers would be burdened by the rule changes if it is made easier for employees to argue that they were discriminated against because of their age.²⁹⁵ Employers need to be protected so that they are not held accountable for all reported discrimination claims. However, the penalties that are set in place allow for employees to be treated fairly and equally under the law.²⁹⁶ The current penalties require employers to give damages to employees; pay wages, benefits, and other forms of compensation; take action to remedy the effects of the discrimination; and pay penalties.²⁹⁷ The penalties are not enough to give the ex-employee a peace of mind. Unfortunately, the EEOC needs to take action immediately to show employers that the penalties they could face are great. The German system focuses on monetary damages that allows for injury of body, health, freedom or sexual determination that provides compensation for non-material losses.²⁹⁸ Severance packages should be required if the employer decides to terminate the employment relationship. Severance payments should be required for companies with more than 100 employees, or depending on how much income the company generates per year. Yes, the process will be costly and might take years, but the EEOC needs to be held accounta-

293. *Id.*

294. *Id.*

295. *Id.*

296. 29 U.S.C. § 1621 (2010).

297. Lisa Guerin, *Common Penalties Associated with Age Discrimination*, NOLO, <http://www.Employmentlawfirms.com/resources/employment/discrimination/common-penalties-associated-with-age-discrimination> (last visited Mar. 4, 2017).

298. Baker and Mackenzie, *supra* note 284.

ble for the hundreds of thousands of individuals who are fired every year for being “too old.”

V. Conclusion

Age discrimination laws do not work in a vacuum so the effects of these laws are not completely understood. With the number of older individuals in the workplace, the United States should implement protections that allow for these individuals to be protected from age discrimination. If the United States took similar approaches as to the laws of Germany, elderly women could be helped in tremendous ways.

