BUSTING THEIR WALKERS FOR TIPS: AGE DISCRIMINATION, THE ELDERLY, AND THE RESTAURANT BIZ

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Elder discrimination is a widespread issue; but in some industries it is often overlooked. The restaurant industry is one of these industries. Because most restaurants use "unofficial" policies of hiring only youthful employees or find reasons to terminate the elderly employees that are not applied to younger employees, the elderly are often unfairly discriminated against in these settings. The current standard to prove age discrimination makes it hard to hold restaurant-employers responsible for termination due to these unofficial policies, and as a result, limits the civil remedies available to elders. This Note analyzes how age discrimination against those over the age of sixty-five is a common occurrence due to "unofficial" policies and restaurant procedures. It further examines how the current laws in place make this elder discrimination harder for those experiencing it to prove in court. This Note recommends that through imposition of strict record-keeping requirements, changes in policies that unfairly disadvantage the elderly, and a change in litigation standards to prove elder discrimination, a large part of this discrimination against the elderly in the restaurant industry can be eliminated.

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I. Introduction

Age discrimination and the elderly often go hand-in-hand.[1] Elder discrimination is an especially common form of discrimination in the restaurant industry.[2] Despite this, many scholars fail to acknowledge that job specifications result in elderly workers' termination or lack of hiring.[3] In service industries like the restaurant industry, the elderly are not a natural choice to fit within the innerworkings of a restaurant.[4]

Teenagers and young adults most often come to mind when thinking of restaurant staff—not the elderly.[5] The restaurant industry's hustle and bustle, combined with the long hours and often grueling work, is not associated with this demographic.[6] Older populations more often struggle with physical health problems, like arthritis and joint issues.[7] The ability to work long hours and continuously be on one's feet is not something that naturally comes to mind when thinking of the older population.

Consequently, restaurant owners' policies result in the discrimination of elderly workers. According to the co-founder of the Central Florida Restaurant Association, avoiding employing the elderly is not an explicit policy, but rather "an unwritten rule in many establishments."[8] Employers often have specific qualities in mind, such as the ability to lift heavy cases, that lead them to certain candidates. But restaurants often specifically seek young workers.[9] Some restaurants, such as Texas Roadhouse, have even gone as far as imposing a thirty-day

1. Dana Wilkie, *Discrimination Against Older Workers May Be Common but Hard to Prove*, SOC. FOR HUMAN RES. MGMT. (May 3, 2018), https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/age-discrimination-.aspx.
2. *Id.*
3. Kyle Arnold, *Youthful hires are 'unwritten rule' at restaurants, EEOC and others allege*, ORLANDO SENTINEL (May 26, 2017, 10:40 AM), https://www.orlandosentinel.com/business/os-bz-age-discrimination-20170417-story.html.
4. *Id.*
5. *Id.*
6. *Id.*
7. Jennifer M. Hootman et al., *A Public Heath Approach to Addressing Arthritis in Older Adults: The Most Common Cause of Disability*, 102 AM. J. PUB. HEALTH 426, 426 (2012), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3487631/.
8. Arnold, *supra* note 3.
9. Gabriella Mlynarczyk, *The Bar Industry Has an Age-Discrimination Problem. And No One Seems to Care*, LIQUOR.COM (Dec. 21, 2018), https://www.liquor.com/articles/bartender-age-discrimination/#gs.1zv1pq.

notice—a precursor to termination—to managers hiring "poor image employees."[10]

In response to these attitudes and "unofficial policies," the Equal Employment Opportunity Commission ("EEOC") has taken measures to prevent age discrimination in the service industry.[11] Over the past fifteen years, plaintiffs are increasingly litigating age discrimination suits against restaurants because of the policies and the attitudes they harbor toward the elderly.[12]

This pattern of discriminatory practices has led to numerous restaurants settling or litigating age discrimination issues concerning their hiring and termination practices.[13] In the past decade, age discrimination actions brought against restaurants have increased in frequency.[14] Various restaurants, including popular chains like Ruby Tuesdays and Texas Roadhouse, have been sued for age discrimination and have paid out as much as $12 million.[15]

This Note argues that to prevent age discrimination in the restaurant industry, new recordkeeping policies should be used and practices that unfairly burden the elderly should be changed. Additionally, the current standard to prove age discrimination should be reexamined to allow elderly employees to more easily prove age-related terminations. In particular, a more lenient standard will likely decrease age discrimination in the restaurant industry.

Part II reviews the Age Discrimination in Employment Act ("ADEA"), as well as Supreme Court decisions affecting both disparate treatment and disparate impact theories. Then, Part III analyzes the specifics of elderly age discrimination in the restaurant industry and how age-based termination often occurs in this context. Finally, Part IV recommends that the restaurant industry enact policies that prevent age discrimination by altering recordkeeping policies, eliminating burdens that unfairly impact the elderly, and changing the standard of causation for proving age discrimination under the ADEA.

10. Equal Emp. Opportunity Comm'n v. Tex. Roadhouse, Inc., 215 F. Supp. 3d 140, 151–52 (D. Mass. 2016).

11. EQUAL EMP. OPPORTUNITY COMM'N, *Ruby Tuesday to Pay $45,000 to Settle EEOC Age Discrimination Suit*, JDSUPRA (Oct. 27, 2017), https://www.jdsupra.com/legalnews/ruby-tuesday-to-pay-45-000-to-settle-54772/.

12. Wilkie, *supra* note 1.

13. Tex. Roadhouse, Inc., 215 F. Supp. 3d at 140.

14. *See, e.g.*, *id.*

15. *Id.*

II. Background

When someone over the age of forty is fired, it often incites notions of age discrimination.[16] Unsurprisingly, many of the occupations held by the elderly are positions that require a college education or are physically demanding.[17] Historically, adults sixty-five and older have had a harder time finding employment than those who are younger.[18] Yet, as the population aged from 1995 to 2016, the percentage of elderly workers in the labor force increased 10 percent for men and 12 percent for women.[19] A 2006 survey conducted by the United States Department of Labor showed that when seeking re-employment, only 25 percent of workers aged sixty-five and older were successful.[20] Because age discrimination is and has been a prevalent problem for decades, many things have been done to try and combat it.

Congress and the Supreme Court have repeatedly attempted to address age discrimination over the past fifty years. This Section broadly discusses the ADEA. Next, this Section gives a brief overview of the disparate treatment theory and the burdens of persuasion on both sides. Disparate treatment is the most common form of bringing an age discrimination claim against an employer.[21] Then, this Section details the disparate impact theory under the ADEA. Finally, applicable defenses to both disparate treatment and disparate impact are provided.

A. The Age Discrimination in Employment Act

The ADEA, passed by Congress in 1967,[22] prevents employers from discriminating against people simply because of their age.[23] Enacted as a result of the changing attitudes regarding social justice in the 1960s, the ADEA seeks to protect the rights of a vulnerable population:

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16. 29 U.S.C. § 623 (2018).
17. Richard W. Johnson & Claire Xiaozhi Wang, *What Are Top Jobs for Older Workers?*, URBAN INST. (Dec. 2017), https://www.urban.org/sites/default/files/publication/95011/what-are-the-top-jobs-for-older-workers_0.pdf.
18. Jessica Z. Rothenberg & Daniel S. Gardner, *Protecting Older Workers: The Failure of the Age Discrimination in Employment Act of 1967*, 38 W. MICH. UNIV. J. SOCIO. & SOC. WELFARE 9, 10 (2011).
19. Johnson & Wang, *supra* note 17.
20. Rothenberg & Gardner, *supra* note 18, at 12.
21. *See id.* at 21.
22. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–34 (2018).
23. *Id.* at § 623.

the elderly.[24] The ADEA seeks to promote elder employment by incentivizing the employer to focus on older workers' abilities instead of their age.[25]

Overall, the ADEA bans discrimination based upon age in the context of hiring, promotions, discharges, compensation, or conditions of employment.[26] Employees often face adverse actions that, in turn, affect their job. "Failure or refusal to hire" and "termination" are two adverse actions explicitly named under the ADEA.[27] If motivated by age, these actions are considered discrimination.[28]

In addition to discriminatory treatment because of age, it is also unlawful to harass a person due to his or her age.[29] Derogatory remarks about a person's age qualify as harassment and are therefore covered under the ADEA.[30] Although the ADEA prohibits harassment due to age, the prohibition expressly does not apply to "teasing" or isolated incidents that do not appear to be serious.[31] The EEOC does not provide a set definition for what conduct is serious enough to be considered illegal.[32] Instead, the EEOC states that "harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted)."[33] An employee can be harassed by supervisors, co-workers, or even a client or customer.[34]

Since its enactment, the ADEA has been shaped and expanded in different ways by various Supreme Court cases.[35] Overall, the ADEA continues to ban discrimination based on age in employment.[36]

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24. Rothenberg & Gardner, *supra* note 18, at 10.
25. *Id.*
26. 29 U.S.C. § 623 (2018).
27. 29 U.S.C. § 623 (2020); Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 29 Stat. 621.
28. *See* Equal Emp. Opportunity Comm'n v. Int'l House of Pancakes, 411 F. Supp. 2d 709, 713 (E.D. Mich. 2006) (citing 29 U.S.C. § 623(a)(1) (2018)).
29. *Age Discrimination*, EEOC, https://www.eeoc.gov/laws/types/age.cfm (last visited Nov. 16, 2020).
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. Victoria A. Lipnic, *The State of Age Discrimination and Older Workers in the U.S. 50 Years After the Age Discrimination in Employment Act (ADEA)*, EEOC (June 2018), https://www.eeoc.gov/reports/state-age-discrimination-and-older-workers-us-50-years-after-age-discrimination-employment.
36. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 29 Stat. 621.

If Congress does not make statutory changes after a Supreme Court decision, congressional acquiescence is assumed.[37] On the other hand, when the Supreme Court appears to misinterpret the congressional intent of the ADEA, Congress swiftly responds with amendments to the ADEA and new statutes in order to set the record straight.[38] One example of this is the Supreme Court decision in *Public Employees Retirement System of Ohio v. Betts*. In *Betts*, the Supreme Court held that the ADEA does not prohibit discrimination in terms of employee benefits.[39] Following *Betts*, Congress quickly enacted the Older Workers Benefit Protection Act ("OWBPA").[40] The OWBPA was added to the ADEA two years after the holding in *Betts* to expressly prohibit age discrimination regarding employee benefits issues.[41] The OWBPA was passed because Congress firmly believed that age is not a permissible reason for workers to be paid different wages.[42] Age cannot be the sole reason for paying older workers less than their younger counterparts.[43]

Similar to *Betts*, courts have not always interpreted the rest of the ADEA to protect older workers from the potential discrimination they may face on other fronts while in the workforce.[44] As was the case following *Betts*, Congress steps in when the Supreme Court misreads the intentions of not only the ADEA, but many of the other anti-discrimination statutes, including Title VII and the Americans with Disabilities Act.[45]

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37. *See generally* William N. Eskridge, Jr., *Interpreting Legislative Inaction,* 87 MICH. L. REV. 67, 69 (1988).
38. *See, e.g.*, Pub. Emps. Ret. Sys. v. Betts, 492 U.S. 158 (1989).
39. *Id.* at 165.
40. *Id.* (stating the Supreme Court held that the ADEA generally does not prohibit discrimination in employee benefits); *see generally Q&A-Understanding Waivers of Discrimination Claims in Employee Severance Agreements*, EEOC, (July 15, 2009) https://www.eeoc.gov/laws/guidance/qa-understanding-waivers-discrimination-claims-employee-severance-agreements.
41. Betts, 492 U.S. 158.
42. 136 CONG. REC. H8617 (1990).
43. *Id.*
44. Betts, 492 U.S. at 165; *see generally* Lipnic, *supra* note 35.
45. *See* Michael Selmi, *The Evolution of Employment Discrimination Law: Changed Doctrine for Changed Social Conditions*, 2014 GW L. FAC. PUBL'NS. & OTHER WORKS 1, 36 (explaining that "Congress allows the Court to shape the law until it provides too restrictive a definition at which point it provides a correction" in the context of antidiscrimination statutes).

B. Disparate Treatment

Many actions brought under the ADEA are for disparate treatment. Disparate treatment is shown when an employer treats a single employee differently because of their membership in a protected class.[46] This type of employment discrimination is intentional on the part of the employer.[47] Disparate treatment applies to many protected groups, including the elderly through the ADEA.[48] This Section will first look at the framework for proving disparate treatment. Next, it will discuss the previous mixed motive standard for proving disparate treatment. Finally, it will discuss the shift from a mixed motive analysis to the current but-for standard.

1. *MCDONNELL DOUGLAS* FRAMEWORK

In 1973, the Supreme Court decided *McDonnell Douglas Corporation v. Green*, which established a burden-shifting framework to help courts and factfinders decide if there was individual disparate treatment by employers regarding many forms of discrimination, including age.[49] The framework first requires the plaintiff to show a prima facie case to establish discrimination.[50] In order to show a prima facie case, the plaintiff must demonstrate that (1) the plaintiff is a part of a protected class; (2) the plaintiff is qualified for the position; (3) the plaintiff suffered an adverse employment decision; and (4) circumstances indicating discrimination were present.[51] After the plaintiff proves these elements, a presumption of discrimination is established and the defendant must then respond by providing a legitimate, non-discriminatory reason for the decision.[52] This burden is a low standard because seemingly the only way an employer would lose is if it provided no reason at all.[53]

After the defendant provides a reason, the burden then shifts back to the plaintiff to prove, by a preponderance of the evidence, that the

46. *What are disparate treatment and disparate impact?*, SOC. FOR HUMAN RES. MGMT., https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/disparateimpactdisparatetreatment.aspx (last visited Nov. 16, 2020).

47. *Id.*

48. *See generally* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 29 Stat. 621; 29 U.S.C. § 623 (2018).

49. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

50. *Id.* at 802.

51. *Id.*

52. *Id.*

53. *See generally id.* at 802–03.

reason given by the employer was pretext for discrimination.[54] In order to prove pretext, the plaintiff need not disprove the employer's reason for its decision.[55] In fact, even if the employee is able to disprove the reason provided by the employer, it is not necessarily enough to prove that the employer actually discriminated against the employee.[56] The Court, however, made it explicitly clear that disproving the employer's reasoning can be sufficient for the plaintiff to prove that the reason provided by the employer was merely pretext for discrimination.[57] This framework, although often thought of as confusing and outdated, is still used by many courts in deciding discrimination claims under the ADEA.[58]

a. Mixed Motive Standard for Litigation

Prior to 2009, many courts using the *McDonnell Douglas* test applied the mixed motive standard to ADEA cases when the burden shifted to the employer to provide a non-discriminatory reason for the adverse action.[59] In these cases, similar to Title VII cases, plaintiffs were only required to show that age was a factor in the employment decision when bringing suit against an employer.[60]

The "because of" language in Title VII parallels the "because of" language present in the ADEA.[61] There was no requirement that claimants show age was the but-for cause of their termination or lack of employment.[62] In 1989, *Price Waterhouse v. Hopkins* was brought before the

54. *See id.* at 807; Patterson v. McLean Credit Union, 491 U.S. 164, 187 (1989).
55. Patterson, 491 U.S. at 187–88.
56. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 517 (1993).
57. Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 147 (2000).
58. *See* Bran Noonan, *The Impact of Gross v. FBL Financial Service, Inc. and the Meaning of the But-For Requirement*, 43 (4) SUFFOLK U. L. REV. 921, 921 (Fall 2010); *see, e.g.,* Gorzynski v. Jetblue Airways Corp., 596 F.3d 93, 106 (2d Cir. 2010) (noting that Gross v. FBL Servs., 557 U.S. 167 (2009) did not completely abandon the *McDonnell Douglas* framework).
59. *See* Gross v. FBL Fin. Servs., 557 U.S. 167, 180 (2009) (holding that burden does not shift to the defendant in an ADEA disparate treatment claim).
60. *See generally* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
61. *Age Discrimination*, CAREY & ASSOC. P.C., https://capclaw.com/age-discrimination/#top (last visited Feb. 15, 2021); *compare Civil Rights Act of 1964*, Pub. L. 88-352, 78 Stat. 241, 255 (1964) (amended 1972); *with Age Discrimination in Employment Act of 1967*, Pub. L. 90-202 §2, 81 Stat. 602, 603 (1967).
62. Noonan, *supra* note 58, at 923–24.

Supreme Court.[63] In this gender discrimination case brought under Title VII, the Supreme Court interpreted the statutory language in order to determine the standard of causation and the allocation of the burden of persuasion.[64] In *Price Waterhouse*, the plurality held that if the plaintiff showed an illegitimate factor was a motivating part of the adverse decision, the defendant then held the burden of persuasion to show that it would have made the same decision even if this factor had not been taken into account.[65] Justice O'Connor, concurring in the plurality's decision, reasoned that the burden did not shift to the defendant unless the plaintiff showed with direct evidence that the illegitimate factor was a substantial factor in the decision.[66] In that situation, she wrote, the employer would be able to "convince the factfinder that, despite the smoke, there is no fire."[67]

By allowing employers off the hook via a burden-shifting scheme wherein they still would have terminated the employee, the Supreme Court armed employers with a defense.[68] The dissent in *Price Waterhouse* disagreed with this approach because it ultimately let the burden of persuasion lie in the defendant-employer's hands.[69] If the defendant could not provide evidence as to non-discriminatory, legitimate reasons for termination, the court would accept the plaintiff's showing.[70] Notably, when Congress amended the language of Title VII in 1991, it did not amend the similar parts of the ADEA.[71]

Mixed motive cases do not generally require the terminated employees to show that age was the only motivating factor in the termination.[72] Even if there were legitimate reasons for the employer's decision to terminate, such as failure to show up for a shift or tardiness, there is no need to show that age was the predominant reason for termination.[73]

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63. Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989) (interpreting "because of" language to forbid consideration of gender in termination decision).

64. Noonan, *supra* note 58, at 924.

65. *Id.* at 925; *see also* SHAWE & ROSENTHAL, 1 *Emp. L. Deskbook* § 18.02 (2020).

66. *See* SHAWE & ROSENTHAL, *supra* note 65.

67. Price Waterhouse, 490 U.S. at 266 (O'Connor, J., concurring).

68. Noonan, *supra* note 58, at 924; Price Waterhouse, 490 U.S. at 246.

69. Noonan, *supra* note 58, at 925; Price Waterhouse, 490 U.S. at 286 (Kennedy, J., dissenting).

70. *See* Price Waterhouse, 490 U.S. at 286 (Kennedy, J., dissenting).

71. *See* Gross v. FBL Fin. Servs., 557 U.S. 167, 174 (2009). *Compare Civil Rights Act of 1991*, Pub. L. 102-166, 105 Stat. 1071 (1991), *with Age Discrimination in Employment Act of 1967*, Pub. L. 90-202 §2, 81 Stat. 602, 603 (1967).

72. Noonan, *supra* note 58, at 922–23.

73. *Id.*

Because age played a role in the decision to terminate, the employer could face liability.[74] An employee could simply show that the employer had shown hostility or animus toward his or her age and that it merely played a part in the adverse employment decision.[75] Yet, in *Gross v. FBL Financial Services*, the Court changed the burden of persuasion to be on the plaintiff in showing that the employer's reasons were not the predominant reasons for lack of hiring or termination.[76]

b. Shift to the But-For Standard in Litigation

In 2009, the Supreme Court decided *Gross v. FBL Financial Services*, which held that the plaintiff must show, by a preponderance of the evidence, that his or her age was the but-for cause of the defendant's adverse employment action.[77] In other words, the employee would have to identify the illegitimate reason as the main motive behind the adverse action.[78] The employee would ultimately need to show that the other reasons the employer was putting forth for the action would not have resulted in the adverse action, but for the employee's age.[79]

The Court made it explicitly clear in the *Gross* opinion that *Price Waterhouse* did not apply to cases arising under the ADEA—despite the fact that most courts had been applying it up until that point.[80] In fact, the district court had instructed the jury to find age as a motivating factor if it played a part in the adverse employment action.[81] By contrast, the Supreme Court concluded that the ADEA requires a higher burden of proof.[82] The Supreme Court held that Title VII was "materially different" from the ADEA in regards to the burden of persuasion and, therefore, the two could not be construed the same way.[83] The Court

74. *Id.*
75. *Id.*
76. Gross v. FBL Fin. Servs., 557 U.S. 167, 177 (2009).
77. *Id.* at 129 (2009) ("A plaintiff bringing an ADEA disparate-treatment claim must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.").
78. Noonan, *supra* note 58, at 924.
79. *Id.*
80. *See* Gross, 557 U.S. at 175, 179.
81. *Id.* at 170–71.
82. *Id.*
83. *Id.*

wrote that Congress took it upon themselves to amend Title VII by authorizing the motivating factor claim, while not amending the ADEA to state the same.[84] The Supreme Court reasoned that Congress would have amended the ADEA if it had intended the motivating factor standard to apply in age-discrimination cases.[85] Moreover, the Court stated: "This Court has never held that this burden-shifting framework applies to ADEA claims. And, we decline to do so now."[86]

With this ruling, the Supreme Court also held that the burden of persuasion does not shift to the employer, even if the plaintiff has shown that his or her age played a part in the decision.[87] The burden of persuasion is continuously on the plaintiff.[88] In order for a plaintiff to make a successful ADEA claim, he or she must use the *McDonnell Douglas* framework to show, by a preponderance of the evidence, that he or she is (1) in the protected class (i.e., over the age of forty); (2) the defendant-employer acted adversely against him or her; (3) he or she was qualified for the position; and (4) he or she was replaced by a different employee who was "sufficiently" younger but similarly situated.[89]

Although the but-for standard is helpful to plaintiffs in that it provides clarity for what the plaintiff must show, it often weighs in favor of the defendant.[90] The burden of persuasion never shifts from the employee to the employer to show that the business had a legitimate reason for terminating an employee.[91] Unless the plaintiff can present evidence, circumstantial or direct, that the defendants would not have taken the same action but-for the plaintiff's age, they do not have to provide a rebuttal.[92] The ruling in *Gross* imposed a higher burden of proof on employees to prove age discrimination than any other type of discrimination.[93]

84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. Wilkie, *supra* note 1.

C. Disparate Impact

Disparate impact occurs when an employer's facially neutral policy nevertheless has an impact on a protected group.[94] The employer does not need to intend to discriminate and, in fact, can be acting completely innocent of any discriminatory animus.[95] This theory is available in ADEA cases.[96] Both Congress and the courts have allowed the disparate impact theory in both subjective and objective evaluation criteria of an applicant because the goal of the disparate impact theory is to reduce discrimination, regardless of intent.[97] Although an employer may not have a reason to discriminate, they may still possess prejudices or implicit biases that they are not aware of.[98]

In an age-related disparate impact analysis, the plaintiff has the burden of both persuasion and production to show that an employer's facially neutral policy has a disparate impact on the elderly.[99] The plaintiff must show that the particular employment practice or policy is in use by the employer and has a significant impact on the protected group.[100] More specifically, the plaintiff must present evidence that elderly employees are under-represented in the company or are denied a specific job benefit more frequently than non-elderly workers.[101] Additionally, an employee must show a causal connection between the facially neutral policy and the adverse impact on the elderly population applying to or working for the employer.[102]

The Supreme Court, however, has reasoned that the scope of protections in disparate impact under the ADEA is narrower than its scope under Title VII.[103] The ADEA permits disparate impact in an employment action where there is a "reasonable factor other than age" in the mix.[104] The burden of persuasion to show that a reasonable factor other

94. SHAWE & ROSENTHAL, *supra* note 65.
95. Griggs v. Duke Power Co., 401 U.S. 424, 433–36 (1971); Smith v. City of Jackson, 544 U.S. 228, 241 (2005).
96. *See* SHAWE & ROSENTHAL, *supra* note 65.
97. Griggs, 401 U.S. at 433–36.
98. Griggs, 401 U.S. at 433–36; Smith, 544 U.S. at 241.
99. Griggs, 401 U.S. at 433–36; Smith, 544 U.S. at 241; SHAWE & ROSENTHAL, *supra* note 65.
100. *See* SHAWE & ROSENTHAL, *supra* note 65.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*

than age was used falls on the defendant.[105] This is not so for disparate treatment cases under the ADEA.

D. Applicable Defenses for Employers

Two main affirmative defenses apply to age discrimination claims: the bona fide occupational qualification defense and the reasonable factors other than age defense. Although each only applies in particular situations, they nonetheless have an impact on the way courts interpret age discrimination claims in certain industries.

1. BONA FIDE OCCUPATIONAL QUALIFICATION (DISPARATE TREATMENT)

In some professions, age may be a permissible factor in employment decisions if considered to be a "bona fide occupational qualification" ("BFOQ").[106] This, in effect, creates an exception for hiring people over a certain age.[107] The BFOQ defense allows discrimination when the employee would not be able to perform the job to the standards of the business, in its normal operations, in that line of particular business because of their age.[108] It should be noted that this defense is narrowly interpreted.[109] The BFOQ defense is often only applicable to occupations that are vital to public safety concerns.[110] These professions include firefighters, paramedics, and prison guards.[111] This defense is unique because it gives employers the ability to legally justify not hiring a candidate because of their age.[112] For an employer to invoke this defense, they must be able to reasonably say that all older people would not be able to perform the job in a "safe and efficient manner."[113] Courts have even gone as far as stating that preferences of customers will not qualify as a BFOQ.[114] Generally, for this defense to succeed, its policy goal—public safety—would need to be demonstrated.[115]

105. *Id.*
106. Rothenberg & Gardner, *supra* note 18, at 18.
107. *Id.*
108. *Id.*
109. *Id.*
110. *See id.*
111. *Id.*
112. Frank J. Cavico & Bahaudin G. Mutjtaba, *Discrimination and the Aging American Workforce: Legal Analysis and Management Strategies*, 1 J. LEGAL ISSUES & CASES BUS. 28, 47–48 (2012), https://works.bepress.com/bahaudin-mujtaba/116/.
113. *Id.*
114. Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276–77 (9th Cir. 1981).
115. Cavico & Mutjtaba, *supra* note 112.

2. REASONABLE FACTOR OTHER THAN AGE (DISPARATE IMPACT)

It is commonly believed that the ADEA broadly protects older workers.[116] Yet, the ADEA was intended only to prevent "unreasonable" or gross cases of discrimination.[117] Federal courts often take the view that as long as there is a rational basis for age discrimination or a legitimate reason for termination or lack of hiring aside from age, it is justified.[118]

As a result of this view, employers enjoy an additional defense in disparate impact claims.[119] This defense is known as the "reasonable factor other than age" ("RFOA") defense.[120] When using this defense, the employer only needs to show that factors aside from age were considered in the adverse decision.[121] Important considerations in deciding if an RFOA applies to an employer are: the extent to which age relates to the employer's business purpose; the way the employer defines age and applies it; and the extent of harm to older employees, among other factors.[122] It is generally accepted that an "economically sound business decision, such as laying off the most expensive workers who happen to have the most seniority and were disproportionately older, would qualify as an acceptable RFOA defense."[123] This was evident in *Hazen Paper Company v. Biggins*, which held that while seniority and age may be correlated, they differ when it comes to making a decision solely based on age.[124] The Supreme Court stated that an employer may make a decision, in which their business is affected, based on "seniority" without it necessarily being based on the employee's age.[125] In other words, the motivating factor of an adverse employment decision must

116. *See* Rothenberg & Gardner, *supra* note 18.
117. *Id.* (citing John Macnicol, AGE DISCRIMINATION: AN HISTORICAL AND CONTEMPORARY ANALYSIS, Cambridge: Cambridge University Press (2006)).
118. *Id.*
119. SHAWE & ROSENTHAL, *supra* note 65.
120. Rothenberg & Gardner, *supra* note 18 (citing Stuart L. Bass & Dr. George S. Roukis, *Age Discrimination in Employment: Will Employers Focus on Business Necessities and the 'ROFTA' defense?*, 104 COM. L.J. 229–39 (1999)).
121. *Id.* (citing Dennison Keller, *Older, wiser and more dispensable: ADEA options available under Smith v. Jackson: Desperate times call for disparate impact*, 33 N.KY. L. REV. 259–81 (2006)).
122. SHAWE & ROSENTHAL, *supra* note 65.
123. Rothenberg & Gardner, *supra* note 18 (citing Dennison Keller, *Older, wiser and more dispensable: ADEA options available under Smith v. Jackson: Desperate times call for disparate impact*, 33 N.KY. L. REV. 259–81 (2006)).
124. Hazen Paper Company v. Biggins, 507 U.S. 604, 617 (1993).
125. *Id.*

be their protected trait: age.[126] This other motivating factor could be hidden by using the notion of seeking other qualities employers look for when hiring, such as strength and experience.

III. Analysis

Because many restaurants can evade age discrimination laws by having other reasons to terminate or not hire a person, the elderly face a larger barrier when seeking jobs in the industry. Employers are entitled to exercise their own business judgment when it comes to their business, so long as their employment policies are not a ruse to discriminate.[127] Often times restaurant policies and job descriptions call for the strength to lift over forty pounds or the ability to be on one's feet for hours at a time, physical abilities that are not readily associated with the elderly population.[128] Prospective plaintiffs must be able to show that age was the predominant reason for the adverse action from the employer, not merely a motivating factor.[129] Because of this, it often appears that there is a special kind of capability for restaurants to get around the age discrimination factor.[130] Because of their job requirements, employers are often able to give a legitimate reason as to why they did not hire the elderly plaintiff.[131] Additionally, many restaurants look for and hire applicants that reflect the company's brand and culture.[132] Many times, the restaurant does not associate its brand or culture with the elderly population.[133]

126. *See id.*
127. Loeb v. Textron, Inc., 600 F.2d 1003, 1019–20 (1st Cir. 1979).
128. *See* Matthew Marks, *Are Height, Weight Or Lifting Requirements Legal?* (May 23, 2018), https://www.queensemploymentattorney.com/2018/05/height-weight-lifting-requirements-legal/.
129. Gross, 557 U.S. 175–78 (2009).
130. *Id.*
131. *See* SHAWE & ROSENTHAL, *supra* note 65.
132. *See id.*
133. Equal Emp. Opportunity Comm'n v. Tex. Roadhouse, Inc., 215 F. Supp. 3d 140 (D. Mass. 2016).

A. Reasons for Termination: The Disparate Treatment Issue

The current application of the *Gross* decision does not effectively combat age discrimination, including in many restaurants in the service industry.[134] Unless there is explicit and deliberate discrimination, proving specific instances of age discrimination is especially hard.[135] Additionally, for those who are merely applicants, and not employees facing wrongful termination, age discrimination is even harder to prove because of the lack of concrete evidence showing why he or she was not hired.[136]

Restaurants can easily avoid ADEA liability.[137] In one case at an International House of Pancakes ("IHOP") restaurant, the seventy-two-year old plaintiff, Nanine Boon, filed an age discrimination suit against the company because multiple derogatory comments were made about her age.[138] These comments include suggesting she was of the age to retire, that she was slow, and unable to perform the duties that someone in her position was required to do, and asking if she was able to work in her current station.[139] Further, her work days per week were cut, work hours per day were cut, and she was assigned a smaller section; all of which would result in her making less money than her younger counterparts.[140] In addition to these complaints, Boon was never offered opportunities to advance in the company, endured other age-related remarks, and received different treatment compared to her younger co-workers.[141] When terminated, the reason provided by the firing manager was that she allegedly stole two trash bags.[142] Younger co-workers were not terminated for the same or similar behavior.[143]

Another case against IHOP was filed by a sixty-seven-year old waitress, Jinks Greiner, who claimed that the restaurant refused to hire her.[144] A fellow waitress overheard multiple comments about how Greiner would not fit into the persona of the restaurant and that she

134. Noonan, *supra* note 58.
135. Rothenberg & Gardner, *supra* note 18.
136. *Id.*
137. *See generally* SHAWE & ROSENTHAL, *supra* note 65.
138. Boon v. Clark Foods, Inc., No. 7:16-CV-160 (HL), 2017 WL 6622554, at *1 (M.D. Ga. Dec. 28, 2017).
139. *Id.* at *2.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. Equal Emp. Opportunity Comm'n v. Int'l House of Pancakes, 411 F. Supp. 2d 709, 711 (E.D. Mich. 2006).

was "too old" when she came in to apply.[145] When she had ultimately been hired and "completed orientation," Greiner claims that the starting employment date was left up in the air and she was told that she had not completed orientation forms.[146] The manager testified that he told Greiner that she would be working the following week and provided her with a date and time.[147] Greiner was ultimately terminated for "job abandonment" because of her failure to show up for her scheduled shifts.[148] On whether or not she was supposed to report to work the following week, the court stated that even if the manager, Dan White, had an "honest belief" that she knew of her schedule, he did not act or inquire to ensure that she actually knew.[149]

A prevalent issue in this case was the fact that another manager, Melanie Brown, made comments about the plaintiff's age.[150] Because Brown had authority over the terminated person as an assistant manager, the comments made about her age could be viewed as a part of the adverse action against Greiner. The Sixth Circuit has held that a corporate employer can be held liable for a supervisor's statements under an agency liability theory, even if the supervisor did not make an official employment decision, because a supervisor is an agent of the corporation.[151] Brown did the scheduling for the servers at IHOP and had the same capabilities and powers for the restaurant that White, the manager, had.[152] The Court opined that a reasonable person could find that Brown had authority over the schedule of Greiner and played a part in the decision of whether or not to schedule her.[153]

According to the Court, however, a "statement by an intermediate level management official is not indicative of discrimination when the ultimate decision to discharge is made by an upper level official."[154] The Sixth Circuit has further clarified that this is not a formal rule, but rather

145. *Id.*
146. *Id.* at 712.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id*. at 711 (referring to plaintiff as "that old lady").
151. *Id*. at 714 (stating "The Sixth Circuit has consistently held that a supervisor's statements may be imputed to her corporate employer even if the supervisor was not the ultimate decision-maker.").
152. *Id.* at 715.
153. *Id.*
154. McDonald v. Union Camp Corp., 898 F.2d 1155, 1161 (6th Cir. 1990).

a guide that if remarks were made relevant to the employee's age, it could play a factor in a finding of age discrimination.[155]

The Court found that Brown perceived Greiner as "too old" for the position of server and a jury would be able to find, in circumstances most favorable to the plaintiff, that this was the result of age discrimination.[156] A reasonable person could conclude that IHOP used job abandonment as a pretext for age discrimination in her termination.[157] The assistant manager's comments on Greiner's age were able to be used by the EEOC as evidence that IHOP terminated the plaintiff due to her age.[158] Ultimately, the court concluded that the EEOC had met its burden of proof for age discrimination.[159] IHOP's motion for summary judgment was thus denied.[160] These cases illustrate that although the burden on the plaintiff has increased since *Gross*, it does not mean that proving age discrimination in the restaurant industry is impossible.

Prevalent attitudes and ruses to discriminate against elderly employees highlight the need for stricter regulations against restaurants. Although plaintiffs can use statements to prove there is pretext for discrimination, it is still hard to withstand a motion for summary judgment in most cases.[161] Because restaurants are able to give essentially any "valid" reason for the termination or refusal to hire of a candidate, the framework makes it somewhat hard to find the alleged facts in favor of the plaintiff.[162]

It has also been found that in some industries, employers believe youth drives sales.[163] Restaurants are no exception.[164] Restaurant employers are seeking to "maximize longevity" of their younger employ-

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155. Int'l House of Pancakes, 411 F. Supp. 2d at 715.
156. *Id.* at 717.
157. *Id.* at 716.
158. *Id.*
159. *Id.* at 717.
160. *Id.*
161. *See generally* Arnold, *supra* note 3 (stating, "'The courts have set high bars to bring forward hiring discrimination cases,' said Jill Schwartz, a labor employee attorney in Winter Park.").
162. *Id.*
163. Kathy Gurchiek, *Steering Clear of Ageism in the Workplace: A Q&A with Patricia J. Barnes, J.D.*, SOC. FOR HUMAN RES. MGMT. (Mar. 5, 2018), https://www.shrm.org/resourcesandtools/hr-topics/behavioral-competencies/global-and-cultural-effectiveness/pages/viewpoint-how-to-steer-clear-of-ageism-in-the-workplace.aspx.
164. *See generally id.*

ees while finding people who are consistent with their "business philosophy and the manner in which [they] operate."[165] This is often a discreet practice for hiring the younger generations, even if occasionally unintended. Seasons 52, a national restaurant chain, was sued by the EEOC on behalf of a class of plaintiffs alleging that Seasons 52 had a regular practice of denying employment to those in the age group protected by the ADEA.[166] The complaint submitted by the EEOC states that Seasons 52 has explicitly told unsuccessful applicants that "you are too experienced"; "we are looking for people with less experience"; "we are not looking for old white guys"; "we are looking for 'fresh' employees" and that Seasons 52 wanted a "youthful" image."[167]

Elderly workers also have reputations as being difficult to train, resistant to change, and less adaptable than their younger counterparts, which makes them less-desirable candidates to managers when hiring.[168] Managers routinely seek people whom they can develop and mold into model employees by their own standards.[169]

Additionally, managerial discretion often plays a major role in determining serving staff roles, including side work and primary work, with the possible eventuality that it could affect the plaintiff's position and status with the restaurant.[170] Motives for assigning these tasks could be seen as discrimination but would be entirely too hard to prove within the context of *Gross*.[171] Cases of managers deliberately assigning harder or more grueling side-work to elderly staff members is an issue of great concern in the industry.[172] But on the other hand, some factfinders might find it unfair that the elderly employees' younger counterparts are continually having to do harder and more taxing side work.

Because of the Supreme Court's but-for approach, the elderly population is especially vulnerable when working in a restaurant. Typically, large restaurant corporations are able to get around age-based

165. Arnold, *supra* note 3.
166. Equal Emp. Opportunity Comm'n v. Darden Restaurants, Inc., 143 F. Supp. 3d 1274, 1277 (S.D. Fla. 2015).
167. *Id.*
168. Rothenberg & Gardner, *supra* note 18, at 12.
169. *Id.* at 14.
170. *Id.* at 11.
171. *See generally* Gross v. FBL Fin. Servs., 557 U.S. 167 (2009).
172. *See generally* Samantha McLaren, *Older Professionals Often Face Discrimination at Work—Here's Why Your Company Should Change That*, LINKEDIN TALENT BLOG (Mar. 21, 2019), https://business.linkedin.com/talent-solutions/blog/diversity/2019/older-professionals-face-discrimination-at-work-your-company-should-change-that.

discrimination because they can provide a legitimate reason for termination or refusal to hire by stating that the employee could not do what the job required of them.[173] Simply citing the reason for termination as failing to comply with policies and procedures or failing to perform the job up to standard leaves many elderly people jobless and without recourse against the wrongful termination.

B. Unofficial Policies: Youth Required—The Disparate Impact Issue

The *Gross* decision has a major intersection with termination or failure to hire the elderly in the restaurant industry. When filling out employment applications or acknowledging orientation materials, employees are generally required to certify that they possess the physical capabilities required for job performance.[174] More specifically, restaurants have policies that their employees must be able to lift at least forty pounds or be able to stand on their feet for a certain number of hours per day.[175] By requiring employees to sign off on these policies and procedures, employees risk later warnings or termination if he or she cannot perform those tasks.[176] Elderly restaurant workers are not able to do these things easily, but younger generations almost always can.[177]

Across many professions, older workers endure stereotypes that they are less competent, less attractive, and slower.[178] Because the restaurant industry is fast paced and looks are largely emphasized, the elderly are disparately impacted.[179] Companies like Texas Roadhouse have had managers make comments such as "[w]e think you are a little too old to work here…we like younger people," and "[w]e're hiring for greeters, but we need the young, hot ones who are chipper and stuff."[180] Some companies even have standard operating procedures that call for

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173. *Id.*

174. *Employment Application: Host/Server Assistant*, RUBY TUESDAY (2021) https://recruiting.adp.com/srccar/public/RTI.home?c=2176907&d=ExternalCareerSite&grp=%22Restaurant%20Hourly%22#/ [hereinafter *Employment Application*].

175. *Id.*

176. *Id.*; *see New Hire Standard Operating Procedures Manual*, RUBY TUESDAY (2021), https://recruiting.adp.com/srccar/public/RTI.home?c=2176907&d=ExternalCareerSite&grp=%22Restaurant%20Hourly%22#/.

177. *See generally* Rothenberg & Gardner, *supra* note 18, at 13.

178. *Id.* at 11.

179. *Id.* at 21.

180. Patricia Barnes, *Texas Roadhouse Goes To Congress*, AGE DISCRIMINATION IN EMP. (May 11, 2015), https://www.agediscriminationinemployment.com/tag/hooters/.

a "focus on image" which calls for "hosts who are happy and attractive, bartenders who are all-American types, and servers who are great looking."[181] These forms of age discrimination, found in both internal hiring policies and outward comments to potential applicants, make for an easy case under the ADEA and disparate impact theories, and even the but-for standard under the disparate treatment theory.[182]

But explicit forms of age discrimination are not always the case when interviewing or hiring.[183] Many times, people use language or code words such as "go-getters" or people who are "with-it" when describing youthful employees.[184] These comments lend themselves to the use of the *McDonnell Douglas* test in identifying a pretext for disparate treatment, but that test entails a greater burden of proof on the plaintiff's end.[185] Instead, a plaintiff might consider using this as evidence of the disparate impact of an employer's seemingly neutral policies. Some courts may not accept the disparate impact theory of applicants under a strict reading of the ADEA, but nevertheless, if an employee has already been hired and is then terminated, it is an available theory.[186] Regardless of how overt managers are with their comments, the impact of their comments perpetuates the issue of age discrimination.

By consistently using unofficial policies, restaurants are susceptible to discriminatory practices and reinforce their negative hiring reputations.[187]

C. Legitimate Reasons for Termination: The Proof Standard

Even in management positions where experience is preferred, age discrimination is common.[188] In her case against Steak N' Shake, plaintiff Stephanie Eichler—age sixty-eight—alleged that age discrimination was part of the reason for her termination.[189] Eichler claimed that the other managers joked about her age and made gestures suggesting that she was "crazy" or "losing it" as direct evidence of discrimination.[190]

181. Tex. Roadhouse, Inc., 215 F. Supp. 3d at 140.
182. *See id.* at 146.
183. Cavico & Mutjtaba, *supra* note 112, at 3–5.
184. *Id.* at 3.
185. *Id.* at 4.
186. *Id.* at 15.
187. *Id.* at 25.
188. Wilkie, *supra* note 1.
189. Eichler v. Steak N' Shake Operations, Inc., No 2:12-cv-332, 2013 WL 4041834, *1 (S.D. Ohio Aug. 8, 2013).
190. *Id.*

The court found that because there was no proof suggesting that there were comments about her age, the court could not find them to be direct evidence that age discrimination took place.[191] Additionally, because the hand gestures were implicit, meaning they implied her age, but did not explicitly reference it, the gestures could not be directly linked to the claims of age discrimination.[192]

In Eichler's case, because the defendant was able to put forth reasons for termination not involving age, the burden shifted back to Eichler to disprove these reasons.[193] She needed to show that the employer's statements did not have a basis, the reasons stated did not motivate her termination, and that the reasons given by the employer were not sufficient to warrant the adverse action against her.[194] Because Eichler made mistakes at her job that resulted in counseling records, the court found that her termination was motivated by the mistakes, not her age.[195]

Eichler's mistakes were clearly documented in her personnel file.[196] The court found that these counseling records were what ultimately led to her termination, not her age.[197] The combination of misinformation to new hires, time spent on office work rather than helping the employees, and issues communicating with employees led to Steak N' Shake terminating her employment.[198] Because the direct evidence from the counseling records detailed Eichler's sub-par performance, the case was easily dismissed.[199] In this case, the fact that there was direct proof illustrating and backing the restaurant's decision to terminate shows that a paper trail is a useful tool for the employer. The counseling records have the potential to assist in eliminating frivolous lawsuits by dismissing them at an early stage, saving both time and money for the judicial system. At the same time, these processes protect the integrity of those who present cases of actual age discrimination, or rather, those who can prove it.

191. *Id.*
192. *Id.* at 6.
193. *Id.* at 6–7.
194. *Id.* at 6.
195. *Id.* at 9.
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*

D. The Growing Workforce

The issue of a proper remedy for this problem still remains. When the face of the industry is so young, what can be done when age discrimination does occur? Stricter policies and paper trails seem to be an appropriate solution when it comes to terminating elderly employees.

Some argue that with the growing number of elderly people in the work force, there will be less discrimination because restaurants will be forced to staff more than just the younger generation.[200] Some argue that the age discrimination issue may simply resolve itself.[201] In 2017, just 6 percent of the workforce was aged sixty-five or older.[202] Over the past several years, however, there has been a general labor shortage in the job market.[203] The flexibility that working in the restaurant industry provides is appealing to elderly people who may not be seeking to work a lot of hours or even full time.[204] It is estimated that between 2014 and 2024, the number of working Americans from ages sixty-five to seventy-four will grow by almost 5 percent, while the number of those working between ages sixteen to twenty-four will shrink by roughly 1.4 percent.[205] These growing numbers of the elderly population are in alignment with the need of the restaurant industry to staff part-time employees.

200. *See generally* SUSAN M. COLLINS & ROBERT P. CASEY JR., AMERICA'S AGING WORKFORCE: OPPORTUNITIES AND CHALLENGES, SPECIAL COMM. ON AGING: U.S. SENATE 4 (2017), available at https://www.aging.senate.gov/imo/media/doc/Aging%20Workforce%20Report%20FINAL.pdf; REBECCA PERRON, THE VALUE OF EXPERIENCE: AGE DISCRIMINATION AGAINST OLDER WORKERS PERSISTS, AARP 11 (2018), available at https://www.aarp.org/content/dam/aarp/research/surveys_statistics/econ/2018/value-of-experience-age-discrimination-highlights.doi.10.26419-2Fres.00177.002.pdf; Joe Kita, *Workplace Age Discrimination Still Flourishes in America*, AARP (Dec. 30, 2019), https://www.aarp.org/work/working-at-50-plus/info-2019/age-discrimination-in-america.html.

201. *See generally* Marlene Satter, *Tight labor market could benefit from less age discrimination*, BENEFITS PRO (Jan. 10, 2020), https://www.benefitspro.com/2020/01/10/tight-labor-market-could-benefit-from-less-age-discrimination/?slreturn=20201013145445.

202. Lipnic, *supra* note 35.

203. Leslie Patton, *Senior Citizens are Replacing Teenagers as Fast-Food Workers*, BLOOMBERG (last updated Nov. 5, 2018, 10:17 AM), https://www.bloomberg.com/news/articles/2018-11-05/senior-citizens-are-replacing-teenagers-at-fast-food-joints.

204. *Id.*

205. *Id.*

Additionally, some restaurants are seeking the elderly to join their teams, such as Bob Evans and McDonald's.[206] The search for elderly employees is a target for many restaurants because the elderly are wanted for their experience and generally nicer demeanor than younger generations.[207] When it comes to hiring new workers, restaurants are finding ways to attract elderly applicants.[208] In targeting the elderly population for employment, many restaurants have posted job openings on websites such as AARP.[209] Some places have even gone as far as to look to churches or nursing homes to help fill positions.[210] Their hope is that by hiring elderly workers, the atmosphere of their restaurants will become more welcoming and friendly to guests.[211] As a result of this atmosphere, they hope it will drive up sales as well as profits.[212]

These establishments have found that older workers bring skills to the table that younger workers do not yet possess.[213] Often times, the elderly population boasts skills such as professionalism, productivity, and a stronger work ethic from their time at previous jobs.[214] Additionally, elderly workers have had time to develop their "soft skills" such as resilience and remaining calm under pressure, among others.[215] Because service jobs are often a first job for teenagers or young adults, or a part-time "side gig," younger workers do not always offer these skills with their performance.[216] With having both age groups concurrently employed, some restaurants have even found that the elderly group is able to coach the younger generation on how to conduct themselves professionally in the workplace.[217]

Aside from the skills elderly workers may bring to the table, when working with both older and younger employees, scheduling issues

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206. *Id.*
207. *Id.*
208. Donna Pols Trump, *McDonald's Push To Hire Older Workers*, FORBES (May 31, 2019, 1:46 PM), https://www.forbes.com/sites/nextavenue/2019/05/31/mcdonalds-push-to-hire-older-workers/#70d8cb4c61al.
209. Patton, *supra* note 203.
210. *Id.*
211. *See id.*
212. *See id.*; Josh Bersin & Tomas Chamorro-Premuzic, *The Case for Hiring Older Workers*, HARV. BUS. REV. (Sept. 26, 2019), https://hbr.org/2019/09/the-case-for-hiring-older-workers.
213. Pols Trump, *supra* note 208.
214. *Id.*
215. *Id.*
216. *See generally id.*
217. Patton, *supra* note 203.

can often be resolved.[218] With both generations looking for different things out of a work schedule, it seemingly fits together.[219] Elderly workers generally want to work earlier shifts, which most teenagers cannot do because of their schooling.[220] This benefits both groups because they can work the hours that are better suited to their respective needs and wants, as well as benefitting the restaurant because of the ample number of available employees.[221]

On the other hand, though, this may not necessarily be true for many employers. Most places still adhere to their "unofficial policies" when it comes to hiring.[222] And unless these restaurants are forced to forgo these policies by law, there will still be a lack of elderly people working in the restaurant industry.[223] Because addressing this issue is hard to do when the claimant must prove age discrimination as a but-for reason for termination or refusal to hire, this issue can only be solved by the reversal of *Gross*. The restaurant industry, like many other industries, cannot combat this problem on its own because if left to its own devices, it will continue in the pattern in which it has been going. If Congress or the Supreme Court decides to go back to the mixed motive standard for proving age discrimination, it will make age discrimination claims easier to prove while also holding restaurants—and other industries—accountable for the actions they take and the statements they make toward the elderly.

IV. Recommendation

Changes need to be made to combat the age discrimination that the elderly face when working in the restaurant industry, in terms of both disparate treatment and disparate impact. The question these changes raise is how do you balance the policies behind anti-discrimination laws with the restaurants' rights to hire who they prefer to fit in with their culture? The perpetuation of unofficial policies and youth culture in restaurants makes it hard to prevent elderly discrimination.

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218. Pols Trump, *supra* note 208.
219. *See generally id.*
220. *See generally id.*
221. *See generally id.*
222. Arnold, *supra* note 3.
223. Arnold, *supra* note 3.

Several ways to prevent age discrimination against the elderly in the restaurant industry while still adhering to a corporation's rights already exist.[224] The first way to address the problem would be imposing stricter record-keeping requirements on restaurants. Second, restaurants could do away with job requirements that unfairly burden the elderly in comparison to younger employees. Lastly, the problem would be effectively combatted by shifting the litigation standard back to a mixed motive analysis rather than but-for causation. Any of these recommendations or a combination of the three would be effective in eradicating elderly discrimination in the industry.

A. Imposition of Strict Record-Keeping Requirements

Ultimately, the easiest solution to implement may be a system for restaurants to ensure a stricter paper trail when it comes to many of the issues elderly plaintiffs face. If Greiner would have had her schedule in writing or available to her in a hard or web copy, her wrongful termination for job abandonment could have been avoided. By documenting counseling records and instances of wrongdoing by employees, the records can prevent plaintiffs from saying that their employer used termination as a ruse for age discrimination.[225] It would thus be beneficial for both employers and employees. The paper trail allows employers to quickly disprove unfounded age discrimination claims brought about by disgruntled ex-employees.[226] Moreover, it could potentially help a plaintiff who may not have received any counseling records and find themselves in the position of being terminated. Having employees certify receipt of the counseling records would give the employee notice of their record as well as the opportunity to speak to those holding him or her accountable. In the end, it would allow courts to better decipher which cases are frivolous and which hold merit.

B. Eliminate Requirements Unfair to the Elderly

Another potential option would be to eliminate explicit policies that apply unfairly to the elderly in certain positions. By eliminating policies that require employees to lift a certain amount of weight, there

224. *See generally Employment Application*, *supra* note 174.
225. *See generally* Eichler v. Steak N' Shake Operations, Inc., No 2:12-cv-332, 2013 WL4041834, *6 (S.D. Ohio Aug. 8, 2013).
226. *Id.*

would be no way to falsely fire someone due to their physical ability as a pretext for discrimination. This is not to say that these potential requirements should be eliminated from every single job in the restaurant. In order for the restaurant to run efficiently, certain positions still need to be able to lift certain amounts of weight, such as kitchen prep-cooks or dishwashers. On the other hand, there seems to be no good argument as to why servers or hosts need to be able to lift in excess of forty pounds. The main focus of their jobs is interacting with customers that walk through the door and driving sales so that these customers return.[227] Chances are that these positions are not typically lifting the heavy objects that these policies require in the first place.[228] Moreover, it has been shown through companies like McDonald's and Bob Evans that the elderly population can have a positive effect on the industry workforce through their demeanor and developed soft skills.[229] Shifting the focus of these job requirements while promoting skills that will help drive sales in the restaurant would help prevent discrimination in the long run for not only that specific restaurant, but the restaurant industry in general.

C. Return to the Mixed Motive Standard

Finally, a less plausible but still viable way to combat elderly discrimination in the restaurant industry would be to return to the mixed motive standard in litigation. Prior to *Gross*, the Supreme Court generally applied the Title VII analysis to their interpretation of the ADEA.[230] With the decision in *Gross*, however, the Court found that *Price Waterhouse* does not apply to ADEA cases.[231] The decision in *Gross* made clear that the burden was the but-for causation standard.[232]

Because the Court held but-for causation to be the standard in ADEA cases, the most effective way to combat the unofficial practice of discriminating against elderly applicants would ostensibly be to go

227. *See Hostess Job Description*, BETTERTEAM (July 2, 2020), https://www.betterteam.com/hostess-job-description#:~:text=a%20hostess%20do%3F-,A%20hostess%20or%20host%20greets%20customers%20as%20they%20enter%20a,with%20bussing%20or%20serving%20duties; *see also Server Job Description*, BETTERTEAM (May 16, 2019), https://www.betterteam.com/server-job-description#:~:text=A%20restaurant%20server%20takes%20orders,as%20a%20waiter%20or%20waitress.

228. *See generally id.*

229. Patton, *supra* note 203.

230. Gross v. FBL Fin. Serv., 557 U.S. 167, 172–74 (2009).

231. *Id.* at 174.

232. *Id.*

back to the mixed motive standard. Restaurants cannot look to other industries for guidance because this is an issue across all employment contexts.[233] Thus, an overhaul is needed. A mixed motive standard for age discrimination lawsuits would make it harder for restaurants, and employers in general, to terminate or fail to hire someone simply because of their age.[234] Granted, failing to hire someone due to age discrimination would still be a hard case to prove due to a frequent lack of evidence, even though direct or circumstantial evidence may be used.[235] Using the mixed motive standard, a plaintiff proving age discrimination could show by a preponderance of the evidence that age played a factor in their termination, or that it was a motivating factor.[236] This would make it easier to hold restaurants accountable for their discriminatory policies. Naturally, this would impact restaurant hiring policies by forcing them to shape their policies to avoid a wrongful termination or refusal-to-hire lawsuit. It would help to prevent restaurants from using "unofficial policies" of youth in their hiring procedures. Over time, it would change hiring attitudes and the overall culture in the industry.

To make this shift, Congress should overturn *Gross* via statute. Like they did with the 1991 Amendments to Title VII, Congress could add additional amendments to the ADEA to effectively overrule *Gross*.

D. The Expanding Labor Force

On one hand, some might argue that with the increasing number of elderly workers in the workforce, the issue of age discrimination in the restaurant industry will balance itself out. Because the restaurant will need to staff older workers due to the lack of availability among younger workers, it could be argued that the issue has created a solution for itself already. This is not a convincing argument, though. Many jobs that were once available to teenagers have been consumed by other jobs or have become automated.[237] This, in turn, can decrease the number of people needed in the workforce, which leads to stiffer competition for fewer jobs.[238]

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233. *See generally* Noonan, *supra* note 58.
234. *Id.*
235. *Id.*
236. *Id.*
237. Sean Fleming, *A short history of jobs and automation*, WORLD ECON. F. (Sept. 3, 2020), https://www.weforum.org/agenda/2020/09/short-history-jobs-automation/.
238. *Id.*

The solution to let the workforce balance itself out simply will not work for age discrimination in the restaurant industry. Even if more seniors are entering the restaurant industry, this problem is not one that can solve itself. Because of this, the need to eliminate age discrimination becomes even more pressing. As evidenced by other forms of discrimination, mere allowance of disadvantaged groups into the workplace does not prevent discrimination.[239] Active policies and enactment of laws were needed to help get the workforce to the place it is in currently. This is the solution for the restaurant industry: enactment of active policies and laws. Enhancing record-keeping policies and eliminating requirements that unfairly burden the elderly would be a good first step in combatting age discrimination. If this does not work, help from Congress is needed to shift the standard back from but-for to the mixed motive standard. A combination of these efforts is the most effective way to change the "unofficial policies" that are controlling in the restaurant industry.

V. Conclusion

Age discrimination in the restaurant industry is often due to unofficial policies in hiring and negative attitudes toward the elderly.[240] Because employers believe that youth and beauty drive sales,[241] those qualities are valued above all else in hiring employees. Elderly job candidates are often overlooked from the start of the application process because of biases and prejudices in hiring policies.[242] When it comes to proving disparate treatment, the current framework that age discrimination suits follow makes it hard for plaintiffs to succeed in litigation against restaurants.[243] By allowing the burden to shift back to the plaintiff after the defendant has identified a plausible reason for termination or lack of hiring, the current framework places a substantial burden on the plaintiff, especially because there is often no paper trail to accompany what the employer is saying.[244] If restaurants were forced to have

239. *Job Discrimination Against the Disabled: Not Just an Academic Issue*, WHARTON UNIV. PA. (Jun 18, 2013), https://knowledge.wharton.upenn.edu/article/job-discrimination-against-the-disabled-not-just-an-academic-issue/ (stating that disability discrimination is still prevalent despite it being against federal law).

240. *See generally* Arnold, *supra* note 3.

241. *Id.*

242. *Id.*

243. Rothenberg & Gardner, *supra* note 18.

244. *Id.*

stricter standards in place for documenting issues with employees, it could make it easier for a plaintiff to prove their case of age discrimination. Or, by eliminating unnecessary job requirements that are difficult for elderly employees to meet, it could help to prevent pretextual discrimination or the disparate impact against the older employees. Finally, reverting the but-for standard back to a mixed motive standard would be very helpful in combatting elderly discrimination in the restaurant industry. This standard would allow for plaintiffs to recover even if age only played a part in the employer's decision to terminate.[245] Overall, the need for a change in the restaurant industry's culture and a shift from the current unofficial policies of hiring youthful candidates is needed to effectively include the elderly in this area of the labor force.

245. Noonan, *supra* note 58.