Are Experience Ranges in Job Advertisements Unlawful Under the Age Discrimination in Employment Act?

James W. Moeller*

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* J.D., Harvard Law School, 1984; M.A., Fletcher School of Law and Diplomacy, 1984; B.A., Lake Forest College, 1980. The author practices law in Washington, D.C.

INTRODUCTION

Sixty years ago, job advertisements in newspapers often were segregated into job opportunities for men and those for women. That practice became unlawful under Title VII of the Civil Rights Act of 1964.[1] Today, job advertisements on employment websites often include "experience ranges" in their required qualifications. Should that practice be unlawful under the Age Discrimination in Employment Act of 1967 ("ADEA")?[2]

An "experience range" is a requirement in a job advertisement that a job applicant has, for example, two-to-five years of experience or three-to-six years of experience. Although they are commonplace in these advertisements, are experience ranges lawful under the ADEA? The answer to that question depends on: (i) how they are interpreted by prospective job applicants; and (ii) whether they deter such applicants from seeking employment.

In the case of a requirement for three-to-six years of experience, for example, the experience range might be interpreted to mean a minimum of three years of experience and a maximum of six years of experience. That interpretation would mean that individuals with more than six years of experience would be "overqualified" and ineligible for employment. Yet the federal courts have recognized that the term "overqualified" might be proxy language for "too old."[3]

1. 42 U.S.C. § 2000e.

2. 29 U.S.C. § 623.

3. *See, e.g.*, EEOC v. Ins. Co. of N. America, 49 F.3d 1418, 1421 (9th Cir. 1995) ("[R]eliance on 'overqualification' as a disqualifying factor in hiring can easily mask age discrimination when 'overqualified' is not defined."); Taggart v. Time, Inc., 924 F.2d 43, 47 (2d Cir. 1991) ("Denying employment to an older job applicant because he or she has too much experience, training or education is simply to employ a euphemism to mask the real reason for refusal, namely, in the eyes of the employer the applicant is too old."); Stein v. Nat'l City Bank, 942 F.2d 1062, 1066 (6th Cir. 1991) ("The defendants' criterion in *Taggart* amounted to a label—'overqualified'—without any objective content."). Bay v. Times Mirror Mags., Inc., 936 F.2d 112, 118 (2d Cir. 1991)(quoting Binder v. Long Island Lighting Co., 933 F.2d 187, 192–93 (2d Cir. 1991) ("[A] conclusory statement that a person is overqualified may easily 'serve as a mask for age discrimination.'") EEOC v. D.C. Dept. of Hum. Servs., 729 F. Supp. 907, 915 (D.D.C. 1990) ("[T]he very term 'over qualified and over specialized' is almost a buzzword for 'too old.'").

Moreover, because individuals over the age of forty typically have more than six years of work experience, a requirement that prospective job applicants have no more than six years of experience could deter those individuals from seeking employment in response to the job advertisement in which the experience range is included. To the extent that the advertisement deters individuals over the age of forty from seeking employment, the experience range could run afoul of the Section 4(e) of the ADEA.

In addition, the experience range could have a disparate impact on individuals over the age of forty. However, under existing law, disparate impact claims, while available to employees under Section 4(a)(2) of the ADEA, are unavailable to job applicants.[4] Thus experience ranges are not unlawful under Section 4(a)(2) but may be unlawful under Section 4(e).

Part I of the article will describe the ADEA, its relationship to Title VII of the Civil Rights Act of 1964, and the regulations promulgated under the ADEA. Part II will discuss employment discrimination litigation under Title VII and under the ADEA. It will also discuss legal challenges to job advertisements under Title VII and under the ADEA. Part III will discuss indirect challenges to experience ranges in job advertisements under the ADEA. Part IV will discuss EEOC guidance on experience ranges. Finally, Part V will argue that experience ranges are unlawful under the ADEA. The article will conclude with a proposal to amend ADEA regulations to prohibit experience ranges in job advertisements.

I. AGE DISCRIMINATION IN EMPLOYMENT ACT

A. Statute

Enacted in 1967,[5] the ADEA prohibits employment discrimination on the basis of age.[6] The prohibition, which protects individuals who are at least forty years old,[7] is applicable to employers with "twenty or more

4. *See, e.g.*, Kleber v. CareFusion Corp., 914 F.3d 480, 485–87 (7th Cir. 2019); *see also* Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 970 (11th Cir. 2016) ("As to his claim of disparate impact, we conclude that he failed to state a claim under section 4(a)(2) because the text protects employees, not applicants.").

5. Pub. L. No. 90-202, 81 Stat. 602 (1967 (codified as amended at 29 U.S.C. §§ 621–634).

6. 29 U.S.C. § 623(a). The prohibition protects individuals who are at least 40 years of age. *Id.* § 631(a) (as amended in 1986 by Pub L. No. 99-592.) , § 3(c), 100 Stat. 3342, 3342 (1986)).

7. 29 U.S.C.. § 631(a). The original statute was applicable to individuals between the ages of 40 and 65. Pub. L. No. 90-202, § 12, 81 Stat. at 607. In 1978, the upper age limit was increased to 70. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 3(a), 92

employees[.]"[8] The purpose of the statute is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."[9] Fundamentally, the ADEA requires that "employers are to evaluate [protected individuals under the statute] on their merits and not their age."[10]

Under Section 4(a)(1) of the statute, "[i]t shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age[.]"[11]

Under Section 4(a)(2), moreover, "[i]t shall be unlawful for an employer . . . to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age[.]"[12]

Under Section 4(e), it is unlawful "for an employer . . . to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer . . . indicating any preference, limitation, specification, or discrimination, based on age."[13]

Stat. 189, 189 (1978) Finally, in 1986, the upper age limit was eliminated. Age Discrimination in Employment Amendments of 1986, Pub L. No. 99-592, § 3(c), 100 Stat. 3342, 3342 (1986) However, "bona fide" executives may be forced into retirement when they attain 65 years of age. 29 U.S.C. § 631(c)(1).

8. 29 U.S.C. § 630(b) (definition of employer). Prior to 1974, the definition of employer required twenty-five or more employees. The definition was amended by Section 28(a)(1) of the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(a)(1), 88 Stat. 55, 74 (1974). An employee can be a government employee or a U.S. citizen employed overseas. 29 U.S.C. § 630(f) (definition of employee). The definition was amended by Section 802 of the Older Americans Act Amendments of 1984, Pub. L. No. 98-459, § 802(a), 98 Stat. 1767, 1792 (1984).

9. 29 U.S.C. § 621(b).

10. W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 422 (1985).

11. 29 U.S.C. § 623(a)(1). The prohibition on employment discrimination on the basis of age also is applicable to employment agencies and labor organizations. *Id.* §§ 623(b–c). Under Section 15, the prohibition also is applicable to the federal government. *Id.* § 633a. The language of Section 15, however, differs from the language of Section 4(a). Under Section 15, "[a]ll personnel actions affecting employees *or applicants for employment* who are at least 40 years of age . . . in executive agencies . . . shall be made free from any discrimination based on age." *Id.* § 633a(a) (emphasis added). Under Section 15, therefore, the prohibition protects employees as well as job applicants. *See generally Ford*. Section 15 identical to Section 717 of Title VII of the Civil Rights Act of 1964, except with respect to "race, color, religion, sex, or national origin" instead of "age[.]" *Compare* 42 U.S.C. § 2000e-16 *with* 29 U.S.C. § 633a(a) Indeed, Section 15 of the ADEA was patterned after Section 717. Lehman v. Nakshian, 453 U.S. 156, 163 (1981). Section 15 was added to the ADEA by the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(b)(2), 88 Stat. 55, 74 (1974); and was amended by Pub. L. No. 95-256, § 5(e), 92 Stat. at 191–92. (1978).

12. 29 U.S.C. § 623(a)(2).

13. *Id.* § 623(e).

Both Section 4(a) and Section 4(e) prohibit employment discrimination based on age. Under Section 4(a)(1), it is unlawful to "for an employer to fail or refuse to hire or to discharge *any individual* or otherwise discriminate against *any individual*" on the basis of age.[14] And under Section 4(a)(2), "[i]t shall be unlawful for an employer to limit, segregate, or classify his *employees* in any way which would deprive or tend to deprive any individual of employment opportunities" on the basis of age.[15]

Under Section 4(e), however, it is unlawful "for an employer . . . to print or publish . . . any [employment] notice or advertisement . . . indicating any . . . discrimination, based on age."[16] Section 4(a) directly protects individuals and employees against age-based employment discrimination. Section 4(e) indirectly protects individuals and employees but otherwise is directed towards employers.

Although the ADEA prohibits age-based employment discrimination, it is not unlawful to engage in otherwise prohibited practices "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or where the differentiation is based on reasonable factors other than age. . . ."[17] Thus the ADEA provides two exceptions to age discrimination in employment: the "bona fide occupational qualification" ("BFOQ") exception and the "reasonable factors other than age" ("RFOA") exception.

It also is not unlawful to engage in otherwise prohibited practices in accordance with a bona fide employee seniority system or a bona fide employee benefit plan.[18] The prohibition on age-based employment discrimination is applicable to the administration of employee pension benefit plans except under circumstances specified in the statute.[19]

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

15. *Id.* § 623(a)(2) (emphasis added).

16. *Id.* § 623(e).

17. *Id.* § 623(f)(1). Section 4(f)(1) was amended by the Older Americans Act Amendments of 1984, Pub. L. No. 98-459, §§ 802(b), 98 Stat. 1767, 1792 (1984).

18. 29 U.S.C. §§ 623(f)(2)(A)–(B). Section 4(f)(2) was amended by Pub. L. No. 95-256, § 2(a), 92 Stat. 189, 189 (1978); and by the Older Workers Benefit Protection Act, Pub. L. No. 101-433, § 103, 104 Stat. 978, 978 (1990). Notwithstanding its prohibition on age discrimination in employment, ADEA authorizes, *inter alia*, employee pension benefit plans to include minimum ages to be eligible for retirement benefits, deductions from severance payments equal to the value of pension benefits, and reductions in long-term disability benefits equal to the value of pension benefits. 29 U.S.C. § 623(i). Section 4(l) was added by the Older Workers Benefit Protection Plan, Pub. L. No. 101-433, §§ 103, 104 Stat. 978, 978–81 (1990); and amended by Pub. L. No. 101-521, 104 Stat. 2287 (1990); and the Pension Protection Act of 2006, Pub. L. No. 109-280, §§ 701(c), 1104(a)(2), 120 Stat. 780, 988, 1058 (2006); and the Every Student Succeeds Act, Pub. L. No. 114-95, § 9215(e), 129 Stat. 1802, 2166 (2015).

19. 29 U.S.C. § 623(i). Section 4(i) of ADEA was added by the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9201, 100 Stat. 1874, 1973 (1986); and amended by the Higher Education Amendments of 1998, Pub. L. No. 105-244, §§ 941(a)–(b), 112 Stat. 1581, 1834 (1998); the Pension Protection Act of 2006, Pub. L. No. 109-280, § 1104(a)(2), 120 Stat. 780, 1058 (2006);

The ADEA is administered by the Equal Employment Opportunity Commission ("EEOC").[20] Under Section 7(b) of the ADEA,[21] the EEOC enforces the statute in accordance with the powers, remedies, and procedures provided in Section 11(b),[22] Section 16,[23] and Section 17[24] of the Fair Labor Standards Act of 1938.[25] Under Section 11(b) of the FLSA, administered by the Secretary of Labor and by the Administrator of the Wage and Hour Division of the Department of Labor,[26] the Secretary and Administrator may utilize the services of state and local agencies to enforce the FLSA.[27] Section 16 provides for damages and equitable relief to employees affected by violations of the FLSA.[28] It also authorizes civil actions by aggrieved individuals for violations of the FLSA.[29]

In a civil action commenced by the EEOC for a violation of the ADEA, "[T]he court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment [and] reinstatement or promotion . . . ."[30]

Like the FLSA, the ADEA authorizes civil actions by aggrieved individuals for violations of the ADEA.[31] Thus, individuals aggrieved under

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and the Worker, Retiree, and Employer Recovery Act of 2008, Pub. L. No. 110-458, § 123(a), 122 Stat. 5092, 5114 (2008).

20. 29 U.S.C. § 625. Prior to October 1, 1979, the Department of Labor administered the ADEA. Pursuant to Reorganization Plan No. 1 of 1978 and Executive Order No. 12,144, the administration of the ADEA was transferred to the EEOC. Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19,807 (May 9, 1978); Exec. Order No. 12,144, 44 Fed. Reg. 37193 (June 22, 1979).

21. 29 U.S.C. § 626(b).

22. *Id.* § 211(b).

23. *Id.* § 216. Those enforcement powers exclude, however, Section 16(a). *Id.* § 216(a).

24. *Id.* § 217.

25. *Id.* § 201.

26. 29 U.S.C. § 204(a).

27. *Id.* § 211(b).

28. 29 U.S.C. § 216(b). Specifically, an employer shall be liable to employees for unpaid minimum wages and for additional liquidated damages for violations of Section 6 of the FLSA. *Id.* § 206 (minimum wage). An employer shall be liable to employees for unpaid overtime compensation wages and for additional liquidated damages for violations of Section 7 of the FLSA. *Id.* § 207 (maximum hours). Section 15(a)(3) of the FLSA prohibits discrimination against, or the discharge of, an employee who files a complaint with the Administrator under the FLSA. *Id.* § 215(a)(3). An employer who violates Section 15(a)(3) is liable for "such legal or equitable relief as may be appropriate to effectuate the purposes of section 15(a)(3) of this title, including without limitation employment, reinstatement, promotion . . . wages . . . and . . . liquidated damages." *Id.* § 216(b).

29. 29 U.S.C. § 216(b). The right of an employee to file a civil action for unpaid minimum wages or unpaid overtime compensation terminates upon the filing by the Secretary of an action to recover those wages or compensation. *Id.* § 216(c).

30. *Id.* § 626(b).

31. *Id.* § 626(c). The civil action may seek "such legal or equitable relief as will effectuate the purposes of [the ADEA]." *Id.* § 626(c)(1). Section 7(c) was amended by Pub. L. No. 95-256, § 4(a), 92 Stat. 189, 190 (1978). An individual may not waive a right or claim under the ADEA unless the

Section 4(e) may commence civil actions under that provision. However, no civil action may be commenced unless the aggrieved individual has first filed a charge with the EEOC.[32] In a civil action commenced by an aggrieved individual for a violation of the ADEA, "the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment [and] reinstatement or promotion. . . ."[33]

Section 9 authorizes the EEOC to issue rules and regulations, in accordance with the Administrative Procedure Act (APA),[34] to implement the statute.[35] Federal agencies are required to promulgate regulations pursuant to the notice-and-comment rulemaking requirements of the APA.[36] Those requirements, however, are inapplicable to the issuance of "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice[.]"[37]

Interpretive rules are "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."[38] Because they are not subject to the notice-and-comment rulemaking requirements of the APA, interpretive rules are relatively simple for federal agencies to issue. Such rules, however, "do not have the force and effect of law. . . ."[39] In contrast, regulations promulgated via notice-and-comment

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waiver is "knowing and voluntary." 29 U.S.C. § 626(f)(1). Section 7(f) was added to the ADEA by the Older Workers Benefit Protection Act, Pub. L. No. 101-433, §§ 103, 201, 104 Stat. 978, 978, 983 (1990).

32. 29 U.S.C. § 626(d). Upon receipt of the charge, the EEOC shall "seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion." *Id.* § 626(d)(2). Section 7(d) as amended by Pub. L. No. 95-256, § 4(b)(1), 92 Stat. 189, 190 (1978).

33. 29 U.S.C. § 626(b).

34. 5 U.S.C. § 551.

35. 29 U.S.C. § 628.

36. 5 U.S.C. § 553.

37. *Id.* § 553(b)(3)(A).

38. Perez v. Mortg. Bankers Ass'n., 575 U.S. 92, 97 (2015), (quoting Shalala v. Guernsey Mem'l. Hosp., 514 U.S. 87, 99 (1995)).

39. *Perez*, 575 U.S. at 97. *Perez* held that a federal agency is not required to use notice-and-comment rulemaking procedures to amend an interpretive regulation. *Id.* at 96. The decision overturned Paralyzed Veterans of Am. v. D.C. Arena, L.P., 117 F.3d 579 (D.C. Cir. 1997). Interpretive rules do not have the force and effect of law but are subject to judicial review. Under so-called the *Auer* deference, a federal court will accord an interpretive rule substantial deference and give it "controlling weight unless it is plainly erroneous or inconsistent with the regulation." Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)). *Auer* deference derives from Auer v. Robbins, 519 U.S. 452, 461–62 (1997). *Auer* deference is controversial in academic circles. *See, e.g.,* Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, 84 U. CHI. L. REV. 297 (2017) (favoring *Auer* deference); Kyle M. Asher, *Revisiting Judicial Review of Interpretive Rules: A Call to Paralyze* Auer *Deference in the Face of* Perez v. Mortgage Bankers Association*,* 41 U. DAYTON L. REV R. 1 (2016); Adam J. White, Perez v. Mortgage Bankers: *Heralding the Demise of* Auer *Deference?*, 2014–2015 CATO SUP. CT. REV. 333 (2014–2015).

rulemaking requirements—so-called "legislative" rules—have the force of law.[40] To implement the ADEA, the EEOC has elected to issue interpretive rules.[41]

Congress enacted the ADEA because it believed that inaccurate and stigmatizing stereotypes deprived employment to individuals over the age of forty.

> Although age discrimination rarely was based on the sort of animus motivating some other forms of discrimination, it was based in large part on stereotypes unsupported by objective fact. . . . Moreover, the available empirical evidence demonstrated that arbitrary age lines were in fact generally unfounded and that, as an overall matter, the performance of older workers was at least as good as that of younger workers.[42]

Proposals to enact federal legislation to prohibit age discrimination in employment appeared as early as 1951.[43] Thirteen years later, Section 715 of the Civil Rights Act of 1964 directed the Secretary of Labor to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age. . . ."[44] That congressional mandate resulted in the so-called Wirtz Report,[45] which was undertaken by then-Secretary of Labor W. Willard Wirtz.

The Wirtz Report found "clear evidence of the Nation's waste today of a wealth of human resources that could be contributed by hundreds of thousands of older workers, and of the needless denial to these workers of opportunity for the useful activity which constitutes much of life's

40. *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 295–96 (1979); Guardian Fed. Sav. & Loan Assc'n v. Fed. Sav. & Loan Ins. Corp., 589 F.2d 658, 664 (D.C. Cir. 1978). The practical distinction between "legislative" rules and interpretive rules—so-called "nonlegislative" rules—is, however, the subject of considerable scholarly debate. *See* Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 547 (2000) ("For over fifty years, courts and commentators have struggled to identify, and to apply, criteria that are appropriate to distinguish between legislative rules and interpretative rules."). *See also* David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 278 (2010) ("There is perhaps no more vexing conundrum in the field of administrative law than the problem of defining a workable distinction between legislative and nonlegislative rules.").

41. *See generally*. 29 C.F.R. §§ 1625.1–1625.12, 1625.21–1625.23, 1625.30–1625.32 (2022) (listing EEOC's promulgated interpretive rules).

42. EEOC v. Wyoming, 460 U.S. 226, 231 (1983).

43. Michael Evan Gold, *Disparate Impact Under the Age Discrimination in Employment Act of 1967*, 25 BERKLEY J. EMP. & LAB. L. 1, 6 (2004).

44. Pub. L. No. 88-352, § 715, 78 Stat. 241, 265 (1964).

45. U.S. EQUAL EMP. OPPORTUNITY COMM'N, *The Older American Worker Age Discrimination in Employment*, (1965), https://www.eeoc.gov/reports/older-american-worker-age-discrimination-employment [https://perma.cc/3CW7-VATE].

meaning."[46] In its Conclusions and Recommendations section, the report proposed federal legislation to prohibit the "persistent and widespread use of age limits in hiring that in a great many cases can be attributed only to arbitrary discrimination against older workers on the basis of age and regardless of ability."[47]

In response to the Wirtz Report, Congress directed the Secretary of Labor to propose remedial legislation.[48] In January 1967, the Secretary submitted proposed legislation,[49] which was soon thereafter introduced in the Senate and the House.[50] Following hearings in both chambers,[51] the legislation was approved and signed into law by President Johnson on December 15, 1967.[52]

In enacting the ADEA, Congress found that (1) "older workers find themselves disadvantaged in their efforts to retain employment[;]"[53] (2) "the setting of arbitrary age limits regardless of potential for job performance has become a common practice[;]"[54] (3) "the incidence of unemployment . . . is . . . high among older workers;"[55] and (4) "the existence . . . of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce."[56]

Insofar as Congress enacted the ADEA because it believed that inaccurate and stigmatizing stereotypes deprived employment to individuals over the age of forty, it appeared to discount prejudice against Americans based on age *per se*. Although "[p]rejudice against older persons may not have been the dominant reason for age discrimination, American worship of youth is not a new phenomenon, and it played—and continues to play—a large role in the work place."[57] In an article on age discrimination published

46. *Id.*

47. *Id.*

48. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 606, 80 Stat. 830, 845 (1966).

49. 90 CONG. REC. 1277 (1967).

50. S. 830, 90th CONG. (1st Sess. 1967); H.R. 3651, 90th CONG. (1st Sess. 1967).

51. *Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcomm. On Labor of the Senate Comm. On Labor and Public Welfare*, 90th CONG. (1st Sess. 1967); *Age Discrimination in Employment: Hearings on H.R. 3651, H.R. 3768, and H.R. 4221 Before the General Subcomm. on Labor of the Comm. on Education and Labor*, 90th CONG. (1st Sess. 1967).

52. 110 CONG. REC. 37125 (1967).

53. 29 U.S.C. § 621(a)(1).

54. *Id.* § 621(a)(2).

55. *Id.* § 621(a)(3).

56. *Id.* § 621(a)(4).

57. Gold, *supra* note 43, at 75. Gold describes several studies of age discrimination in employment, which studies attributed such discrimination in part to a "youth cult" that arose in the 20th century. *See, e.g.*, KERRY SEGRAVE, AGE DISCRIMINATION BY EMPLOYERS (MacFarland & Co., Inc., eds. 2001); H.L. Douse, *Discrimination Against Older Workers*, 83 INT'L LABOUR REV. 349, 349 (1961).

in 1961, the author observed that "[t]his glorification of the attributes of youth has been enhanced by contemporary authors and playwrights who almost invariably make their heroes and heroines young dynamic individuals, often bestowing upon them superior qualities quite incompatible with the inexperience of youth."[58] The observation is even more poignant today than it was in 1961.

B. ADEA And Title VII

The principal provisions of the ADEA parallel provisions of Title VII of the Civil Rights Act of 1964.[59] "There are important similarities between the two statutes, both in their aims—the elimination of discrimination from the workplace—and in their substantive prohibitions. In fact, the prohibitions of the ADEA were derived in *haec verba* from Title VII."[60] And "when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes."[61]

Title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin ("Protected Classes").[62] Under Section 703(a) of the statute, "[i]t shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge *any individual*, or otherwise to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin."[63]

Under Section 703(a)(2), moreover, "[i]t shall be an unlawful employment practice for an employer . . . to limit, segregate, or classify his *employees or applicants* for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise

58. Douse, *supra* note 57, at 349.

59. 42 U.S.C. § 2000e.

60. Lorillard v. Pons, 434 U.S. 575, 584 (1978).

61. Smith v. City of Jackson, Miss., 544 U.S. 228, 233 (2005) (citing Northcross v. Bd. of Educ. of Memphis City Schs., 412 U.S. 427, 428 (1973) (per curiam)).

62. 42 U.S.C. § 2000e-2(a)(1).

63. *Id.* § 2000e-2(a)(1) (emphasis added). The prohibition on employment discrimination against the Five Protected Classes also is applicable to employment agencies and labor organizations. *Id.* §§ 2000e-2(b)–(c). Under Section 717, the prohibition also is applicable to the federal government. *Id.* § 2000e-16. Section 15 of the ADEA was patterned after Section 717. Lehman v. Nakshian, 453 U.S. 156, 163, 167 (1981).

adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."[64]

Under Section 704(b), moreover, it is unlawful "for an employer . . . to print or publish, or cause to be printed or published any notice or advertisement relating to employment by such an employer . . . indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex or national origin. . . ."[65]

Both Section 703(a) and Section 704(b) prohibit employment discrimination against the Protected Classes. Under Section 703(a)(1), it is unlawful to "for an employer to fail or refuse to hire or to discharge any *individual* or otherwise discriminate against any *individual*" on the basis of race, color, religion, sex or national origin.[66] And under Section 703(a)(2), it is unlawful "for an employer . . . to limit, segregate, or classify his *employees or applicants* for employment in any way which would deprive or tend to deprive any individual of employment opportunities" on the basis of race, color, religion, sex, or national origin.[67]

Under Section 704(b), however, it is unlawful "for an employer . . . to print or publish . . . any [employment] notice or advertisement . . . indicating any . . . discrimination, based on race, color, religion, sex or national origin. . . ."[68] Section 703(a) directly protects individuals and employees against employment discrimination based on race, color, religion, sex, or national origin. Section 704(b) indirectly protects individuals and employees but otherwise is directed towards employers.

Although Title VII prohibits employment discrimination on the basis of, *inter alia*, religion, sex, or national origin, it is not unlawful to engage in otherwise prohibited practices "in those certain instances where religion, sex, or national origin is a bona fide occupational qualification ["BFOQ"] reasonably necessary to the normal operation of that particular business or enterprise. . . ."[69] Thus, the BFOQ exception to employment discrimination is unavailable to employment discrimination based on race or color.

Unlike the ADEA, there is no exception akin to the RFOA exception in Title VII. In this critical respect, the ADEA differs from Title VII. "Unlike Title VII . . . [Section] 4(f)(1) . . . contains language that significantly narrows its coverage by permitting any 'otherwise prohibited' action 'where

64. 42 U.S.C. § 2000e-2(a)(2) (emphasis added).

65. *Id.* § 2000e-3(b).

66. *Id.* § 2000e-2(a)(1) (emphasis added).

67. *Id.* § 2000e-2(a)(2) (emphasis added).

68. *Id.* § 2000e-3(b).

69. *Id.* § 2000e-2(e). It also is not unlawful to engage in otherwise prohibited practices in accordance with a bona fide seniority or merit system if the system is not the result "of an intention to discriminate because of race, color, religion, sex, or national origin. . . ." 42 U.S.C. § 2000e-2(h).

the differentiation is based on reasonable factors other than age[.]'"[70] Otherwise, the BFOQ exceptions under both statutes are quite similar, and the BFOQ provision under the ADEA has been interpreted with reference to the BFOQ provision under Title VII.[71]

Title VII established the EEOC for the administration of the statute.[72] Section 706 authorizes the EEOC "to prevent any person from engaging in any unlawful employment practice as set forth in [Section 703 or Section 704]."[73] The statute provides that the EEOC shall investigate charges of unlawful employment practices filed with the Commission by aggrieved persons.[74] If, after an investigation of such a charge, the EEOC finds that there is reasonable cause to believe that the charge is true, then the Commission shall use conference, conciliation, and persuasion to eliminate the unlawful practice.[75]

If the EEOC is unable to secure a conciliation agreement, then it may file a civil action in federal court against the subject of the charge.[76] If the Commission decides not to file a civil action, then the aggrieved person may do so.[77] Title VII authorizes the court in a civil action to provide injunctive relief as well as "such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate."[78]

During congressional deliberations on the Civil Rights Act of 1964, there were several proposed amendments to include age among the Protected Classes of Title VII.[79] The amendments were not adopted, but Congress did include the Section 715 mandate for the Wirtz Report.[80]

70. Smith v. City of Jackson, Miss., 544 U.S. 228, 233 (2005).

71. W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 416 (1985).

72. 42 U.S.C.§ 2000e-4.

73. *Id.* § 2000e-5(a).

74. *Id.* § 2000e-5(b).

75. *Id.*

76. *Id.* § 2000e-5(f)(1).

77. 42 U.S.C. § 2000e-5(f)(1).

78. *Id.* § 2000e-5(g)(1).

79. *See, e.g.*, 110 CONG. REC. 2596-99 (1964) (proposed House amendment defeated 123–94); 110 CONG. REC. 9911-13, 13490-92 (1964) (proposed Senate amendment defeated 63–28); Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 586–87 (2004).

80. Pub. L. No. 88-352, § 715, 78 Stat. 241, 265 (1964).

C. ADEA Regulations

The EEOC has promulgated interpretive regulations to implement the ADEA.[81] It has also adopted procedures to govern proceedings under the statute.[82] The interpretive regulations reiterate that "[i]t is unlawful for an employer to discriminate against an individual in any aspect of employment because that individual is 40 years old or older, unless one of the statutory exceptions applies."[83]

The interpretive regulations further state that job advertisements may not discriminate on the basis of age. Specifically, it is unlawful for job advertisements to contain language that may deter an individual protected under the statute from applying for employment:

> Help wanted notices or advertisements may not contain terms and phrases that limit or deter the employment of older individuals. Notices or advertisements that contain terms such as *age 25 to 35, young, college student, recent college graduate, boy, girl,* or others of a similar nature violate the Act unless one of the statutory exceptions applies. Employers may post help wanted notices or advertisements expressing a preference for older individuals with terms such as *over age 60, retirees*, or *supplement your pension*.[84]

Under the interpretive regulations, a determination that an occupational qualification is "bona fide" and "reasonably necessary to the normal operation of the particular business" will be based on "all the pertinent facts surrounding each particular situation."[85] However, "[i]t is anticipated that this concept of a bona fide occupational qualification will have limited scope and application [and] be narrowly construed."[86]

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81. 29 C.F.R. § 1625.

82. *Id.* § 1626. *See also id.* § 1627 (records to be made or kept relating to age; notices to be posted: administrative exemptions).

83. *Id.* § 1625.2.

84. *Id.* § 1625.4(a). Job advertisements may, however, request that job applicants disclose their age if the request is for lawful purposes. *Id.* § 1625.4(b). Job applications also may request that job applicants disclose their age if the request is for lawful purposes. *Id.* § 1625.5. When it enforced the ADEA, the Department of Labor promulgated a quite similar prohibition in 1968. 29 C.F.R. § 860.92(b), rescinded, 46 Fed. Reg. 47,724 (Sept. 29, 1981), transferred, 52 Fed. Reg. 23,812 (June 25, 1987).

85. 29 C.F.R. § 1625.6(a).

86. *Id.* § 1625.6(a). The regulations also address the provision of the statute that permits bona fide employee seniority systems and employee benefit plans. *Id.* §§ 1625.8–1625.10. The regulations explain that "[t]he legislative history of this provision indicates that its purpose is to permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations." *Id.* § 1625.10(a)(1). "Cost data used in justification of the benefit

Section 7(c) of the ADEA authorizes civil actions by aggrieved individuals for violations of the ADEA.[87] Under Section 7(d), however, no civil action may be commenced unless the aggrieved individual has first filed a charge with the EEOC.[88] The procedural regulations promulgated under the ADEA address, *inter alia*, the requirements for charges filed with the EEOC by aggrieved individuals.[89]

The regulations draw a distinction between a charge and a complaint. A "charge" is a "statement filed with EEOC or Commission by or on behalf of an aggrieved person which alleges that the named prospective defendant has engaged in or is about to engage in actions in violation of the Act[.]"[90] A "complaint" is "information received from any source, that is not a charge, which alleges that a named prospective defendant has engaged in or is about to engage in actions in violation of the Act[.]"[91] In either case, "[t]he identity of a complainant, confidential witness, or aggrieved person on whose behalf a charge was filed will ordinarily not be disclosed without prior written consent, unless necessary in a court proceeding."[92]

Upon receipt of the charge, the EEOC shall "seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference or persuasion."[93] Upon the failure of conciliation, the EEOC shall advise the aggrieved individual, who is then authorized to commence a civil action.[94] In the alternative, the Commission may file a civil action.[95] If the EEOC files a civil action, then the right of the aggrieved individual to file a civil action expires.[96] Finally, the EEOC may dismiss the charge or terminate its investigation of the charge.[97]

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plan which provides lower benefits to older employees on account of age must be valid and reasonable." *Id.* § 1625.10(d)(1).

87. 29 U.S.C. § 626(c). The civil action may seek "such legal or equitable relief as will effectuate the purposes of [the ADEA]. . . ." *Id.*

88. *Id.* § 626(d). Upon receipt of the charge, the EEOC shall "seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference or persuasion." *Id.* § 626(d)(2).

89. 29 C.F.R. § 1626.

90. *Id.* § 1626.3.

91. *Id.*

92. *Id.* § 1626.4.

93. 29 U.S.C. § 626(d)(2).

94. 29 C.F.R. § 1626.12.

95. *Id.* § 1626.15(d). But "[t]he right of the Commission to file a civil action under the ADEA is not dependent on the filing of a charge . . . ." *Id.* § 1626.19.

96. *Id.* § 1626.18(c).

97. *Id.* § 1626.17.

II. EMPLOYMENT DISCRIMINATION LITIGATION

A. Workplace Discrimination Under Title VII

Title VII is enforced by the EEOC but authorizes private enforcement of the statute through civil actions filed by aggrieved individuals under Section 7(c). Much of the jurisprudence under Title VII is derived from those lawsuits. Among the critically important jurisprudence derived from private lawsuits is the concept of unintentional employment discrimination.

Enacted in 1964 to prohibit employment discrimination, Title VII, over time, has been interpreted, and thereafter amended, to prohibit unintentional, as well as intentional, employment discrimination. In a seminal civil rights opinion, the Supreme Court stated in 1971 that Title VII addresses the "consequences of employment practices, not just the motivation."[98] The two forms of employment discrimination—intentional and unintentional—have given rise to two types of claims of employment discrimination, *i.e.*, disparate treatment claims for intentional discrimination, and disparate impact claims for unintentional discrimination.

Seven years after the enactment of the Civil Rights Act of 1964, the Supreme Court interpreted Title VII to prohibit unintentional as well as intentional employment discrimination. In *Griggs v. Duke Power Co*., the Court recognized that Section 703(a)(2) prohibited unintentional employment discrimination.[99] The opinion makes no reference to "disparate impact" claims *per se* but has been interpreted to recognize such claims.[100]

In *Griggs*, numerous African American employees of Duke Power Company challenged a requirement that applicants for promotions either have a high school diploma or pass an intelligence test.[101] Finding that the requirement bore no relationship to job performance,[102] the Court ruled that it was unlawful because, although race-neutral on its face, the requirement would tend to deprive those employees of employment opportunities in violation of Section 703(a)(2).[103]

In an oft-quoted holding, the Court ruled that:

98. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

99. *Id.*

100. *See, e.g.*, Smith v. City of Jackson, Miss., 544 U.S. 228, 230 (2005).

101. Griggs, 401 U.S. at 427–28.

102. *Id.* at 431.

103. *Id.* at 430.

> The Act proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.[104]

The Court acknowledged that there appeared to be no intent to discriminate against African Americans, but that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[105]

Finally, the Court held that, consistent with Section 703(h),[106] Title VII did not prohibit examinations to measure the qualifications and aptitudes of employees and job applicants. "Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance."[107]

Although the *Griggs* opinion makes no reference to "disparate impact" *per se*, the doctrine has become embedded in Supreme Court jurisprudence. Over two decades later, the Supreme Court noted that "[w]e long have distinguished between 'disparate treatment' and 'disparate impact' theories of employment discrimination."[108] The Supreme Court then expounded on the differences between the theories:

> "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion [or other protected characteristics.] Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . .
>
> [C]laims that stress "disparate impact" [by contrast] involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of

104. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

105. *Id.* at 432.

106. 42 U.S.C. § 2000e-2(h)("[N]or shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.").

107. *Griggs*, 401 U.S. at 436.

108. Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993).

> discriminatory motive . . . is not required under a disparate-impact theory.[109]

Reading a prohibition on unintentional discrimination into Section 703(a)(2) of Title VII gave rise to disparate impact claims. In 1991, Congress amended Title VII to establish the burden of proof required for disparate impact claims under Section 703(a)(2). [110] Included in the Civil Rights Act of 1991,[111] Section 703(k) was added to Title VII after the Supreme Court made it more difficult to prove a disparate impact claim in *Wards Cove Packing Co. v. Atonio*.[112] Indeed, in Section 2 of the 1991 legislation, Congress found that "the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio . . . has weakened the scope and effectiveness of Federal civil rights protections[.]"[113]

The burden of proof in a civil action alleging unintentional discrimination under Section 703(a)(2) is quite different from the burden of proof in a civil action alleging intentional discrimination under Section 703(a)(1). The latter burden of proof was not clarified in the Civil Rights Act of 1991.[114]

In a disparate impact case under Title VII, a plaintiff, pursuant to Section 703(k),[115] must demonstrate that an employment practice has a disparate impact on a protected group. Upon such a showing, the defendant must then demonstrate that the practice "is job related . . . and consistent with business necessity[.]"[116] In the alternative, the plaintiff must demonstrate that an "alternative employment practice" that has no disparate impact on a protected group can achieve the business purposes of the challenged practice.[117]

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109. *Id.* (citing Int'l Broth. of Teamsters v. United States, 431 U.S. 324, 335–36 n.15 (1977) (citation omitted) (construing Title VII of Civil Rights Act of 1964)).

110. 42 U.S.C. § 2000e-2(k).

111. Pub. L. No. 102-166, § 2, 105 Stat. 1071, 1074 (1991).

112. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989). In *Wards Cove*, the Supreme Court held that the plaintiff would have to prove that a "specific or particular employment practice" had a disparate impact on a protected group. *Id.* at 657. Second, the Court held that the business necessity for the employment practice would be subject to a mere "reasoned review." *Id.* at 659. Finally, the Court held that the burden of proof would "remain[] with the plaintiff at all times." *Id.* (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 997 (1988).

113. Pub. L. No. 102-166, § 2, 105 Stat. 1071, 1071 (1991).

114. Joseph A. Seiner, *Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach*, 25 YALE L. & POL'Y REV. 95, 104 (2006)(notes omitted)("While Congress altered disparate impact analysis in 1991, it kept intact the basic framework for determining whether a plaintiff had carried the burden of persuasion of showing *intentional* employment discrimination (i.e., disparate treatment). . . ."(emphasis added)).

115. 42 U.S.C. § 2000e-2(k).

116. *Id.* § 2000e-2(k)(1)(A)(i).

117. *Id.* § 2000e-2(k)(1)(A)(ii).

In a disparate treatment case, a plaintiff must demonstrate intent to discriminate with either direct or circumstantial evidence.[118] "Direct Evidence is that evidence which, if believed, 'establishes discriminatory intent without inference or presumption.'"[119] To constitute direct evidence of intent to discriminate, "a statement must relate to the motivation of the decision maker responsible for the contested decision."[120]

In the absence of direct evidence, a plaintiff must demonstrate intent to discriminate with circumstantial evidence, in which case a court will utilize the burden-shifting method set forth in *McDonnell Douglas Corp. v. Green*.[121] In *McDonnell*, the Supreme Court addressed the nature and order of "proof of intent" in disparate treatment claims under Title VII.

In that case, the Supreme Court held that the complainant in a Title VII case carries the initial burden to establish a *prima facie* case of employment discrimination.[122] To establish such a case, the complainant must show that: (i) he is a member of a Protected Group; (ii) he applied and was qualified for a job for which applications were being taken; (iii) despite his qualifications his job application was rejected; and (iv) after his rejection the position remained open and applications continued to be taken from applicants with complainant's qualifications.[123]

If the complainant establishes a *prima facie* case of employment discrimination, then the burden shifts to the employer to articulate a legitimate reason for the rejection of the complainant's job application.[124] Finally, the complainant must be afforded a "fair opportunity" to demonstrate that the articulated reason was a "pretext,"[125] meaning the complainant "must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision."[126]

Because there is no need to show intent, a disparate impact claim might be likened to a claim of negligent discrimination.[127] However, a duty of care is not an element of the proof in disparate impact cases. To prove unintentional discrimination, a plaintiff must provide a statistical analysis

118. *See, e.g.*, Geiger v. Tower Auto, 579 F.3d 614, 620 (6th Cir. 2009).

119. Dickson v. Amoco Performance Prod., Inc., 910 F. Supp. 629, 634 (N.D. Ga. 1994), (citing Clark v. Coats & Clark, Inc., 990 F.2d 1217, 1226 (11th Cir. 1993)).

120. Cheek v. Peabody Coal Co., 97 F.3d 200, 203 (7th Cir. 1996).

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

122. *Id.* at 802.

123. *Id.* at 802–03.

124. *Id.*; *see also* Tex. Dept. of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981), (clarifying that the employer must articulate a legitimate reason for the rejection but need not prove that the reason was the actual motivation for the rejection.).

125. *McDonnell Douglas Corp.*, 411 U.S. at 804.

126. *Id.* at 805.

127. *See* Seiner, *supra* note 115, at 99.

that demonstrates the impact of the unlawful employment practice on the protected class.[128] "The evidence in these 'disparate impact' cases usually focuses on statistical disparities, rather than specific incidents, and on competing explanations for those disparities."[129]

To establish a prima facie case of disparate impact, a statistical analysis must demonstrate a statistically significant disparity. A significant disparity can be shown with the EEOC's eighty-percent rule, approved by the Supreme Court,[130] or a rule utilizing standard deviations, also approved by the Supreme Court.[131]

Finally, a plaintiff in a Title VII lawsuit can file a "mixed motives" claim that alleges the defendant engaged in both intentional and unintentional discrimination.[132] A plaintiff also can file a "pattern and practice" claim under Section 707 of Title VII, if the claim alleges a pattern and practice of employment discrimination.[133]

In addition to intent and burden of proof, disparate treatment and disparate impact differ with respect to remedies. Under Section 706(g) of Title VII, the plaintiff in a disparate impact case is limited to equitable relief, including two years in back pay and reinstatement of employment.[134] The plaintiff in a disparate treatment case, however, may seek compensatory and punitive damages as well.[135] In the Civil Rights Act of 1991, Congress expanded the remedies available to victims of intentional discrimination.[136] In the new statute, Congress provided that the "complaining party [in a civil action] may recover compensatory and punitive damages . . . in addition to

128. Judith J. Johnson, *Semantic Cover for Age Discrimination: Twilight of the ADEA*, 42 WAYNE L. R. 1, 11–12 (1995).

129. Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 987 (1988).

130. Connecticut v. Teal, 457 U.S. 440, 443 n.4 (1982). Adopted by the EEOC, the eighty-percent rule provides that a disparity is statistically significant if the selection rate of the Protected Group is less than eighty-percent of the selection rate of the group with the highest selection rate. *See also* 29 C.F.R. § 1607.4(D) (articulating the four-fifths rule).

131. Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 n.14 (1977). The Court in *Hazelwood* held that a disparity is statistically significant if it is more than two or three standard deviations.

132. "[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). Section 703(m) of Title VII was added to Title VII by the Civil Rights Act of 1991. Pub. L. 102-166, § 107, 105 Stat 1071, 1075 (1991). The provision was in response to Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989); *see also* 42 U.S.C. § 2000e-5(g)(describing the relief in mixed motives case). Section 706(g) was also added by the Civil Rights Act of 1991.

133. 42 U.S.C. § 2000e-6(e). Section 707(e) was added by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 5, 86 Stat. 103, 107 (1972).

134. 42 U.S.C. § 2000e-5(g)(1).

135. *Id.* § 1981a.

136. *Id.*

any relief authorized by section 706(g) of the Civil Rights Act of 1964."[137] The practical distinction between disparate treatment claims and disparate impact claims under Title VII has generated considerable debate and criticism.[138]

B. Workplace Discrimination Under The ADEA

Although the principal provisions of the ADEA parallel the principal provisions of Title VII, the jurisprudence under Title VII did not "catch up" with the ADEA for decades. Indeed, although both statutes manifestly prohibit intentional employment discrimination, the Supreme Court did not explicitly recognize disparate treatment claims under the ADEA until 1993. In *Hazen Paper Co. v. Biggins*,[139] however, that recognition, as a practical matter, was accompanied by a rollback of protection under ADEA.

In *Hazen*, an employee who was terminated a few weeks before his pension vested, filed a disparate treatment claim under the ADEA.[140] Although the Court recognized disparate treatment claims, it held that the employee did not have such a claim because he was fired not on the basis of his age *per se* but because his pension was about to vest.[141]

Quoting Section 4(a)(1) of the ADEA, the Court held that "[t]he disparate treatment theory is of course available under the ADEA, as the language of that statute makes clear."[142] Elaborating on the defining characteristic of disparate treatment—under either Title VII or the ADEA—or intentional discrimination, the Court observed that "liability depends on whether the protected trait (under the ADA, age) actually motivated the employer's decision."[143] Thus "a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome."[144]

The Court observed that "[i]t is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age."[145] Yet an employee may

137. *Id.*

138. *See generally* Seiner, *supra* note 115.

139. Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993).

140. *Id.* at 606–07.

141. *Id.* at 612.

142. *Id.* at 609.

143. *Id.* at 610,(citing U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983); Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 252–56 (1981); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576–78 (1978)).

144. *Hazen Paper Co.*, 507 U.S. at 610.

145. *Id.* at 611.

lawfully be fired for reasons that are seemingly related to age but that in fact are "analytically distinct[.]" In *Hazen*, the employee was fired just before his pension vested not because he was sixty-two years old but because Hazen Paper Company did not want to pay his pension.[146]

The date on which a pension vests is a function of years of employment and not age *per se*. "Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily 'age based.'"[147] Thus, the Court held that the employee did not have a claim under the ADEA.[148]

The explicit recognition of disparate treatment under ADEA was a hollow victory because the Court held that an employee terminated not on the strict basis of age but on the basis of an age-related consideration, *e.g.,* pension status, had no claim for discrimination under ADEA. Thus, *Hazen* has been the subject of scathing critique.[149]

Prior to *Hazen*, numerous federal courts recognized the "age proxy" doctrine, under which age-related considerations, *e.g.,* pension status or experience, are so correlated and so "inextricably intertwined" with age that those considerations are the functional equivalent of age-based decisions. *Hazen* undermined that doctrine. "In one fell swoop . . . the Supreme Court in *Hazen Paper* displaced nearly twenty years of age proxy jurisprudence, substantially narrowing the scope of the age proxy doctrine as it had previously been interpreted and applied by the lower courts."[150]

The age proxy doctrine is distinct from the use of age as a proxy to judge competence, aptitude, or ability, the use of which the ADEA was specifically enacted to prohibit (subject to the BFOQ exception in Section 4(f)(1)).[151] "In enacting the ADEA, Congress sought to prohibit the arbitrary use of age as a proxy for an employee's productivity, ability, or competence."[152] Thus the Supreme Court observed in *Hazen* that "[i]t is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age."[153]

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146. *Id.* at 607.

147. *Id.* at 611.

148. *Id.* at 613. The Court observed, however, that the employee might have a claim under the Employee Retirement Income and Security Act ("ERISA"). *Id.* at 612; *see, e.g.*, 29 U.S.C. § 1140 (Section 510 of ERISA prohibiting interference with protected rights under employee pension plan).

149. *See, e.g.,* Toni J. Querry, *Rose by Any Other Name No Longer Smells as Sweet: Disparate Treatment Discrimination and the Age Proxy Doctrine After* Hazen Paper Co. v. Biggins, 81 CORNELL L. REV. 530 (1996).

150. *Id.* at 548.

151. *Id.* at 537–38.

152. *Id.* at 537 (1996) (citing Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393, 1399 & n.2 (3d Cir. 1984) (Adams, J., dissenting), *cert. denied,* 469 U.S. 1087 (1984)).

153. Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993).

The age proxy doctrine concerns not competence, aptitude, or ability but age-related considerations like experience, seniority, or years of service,[154] retirement,[155] or pension[156]—or even gray hair[157]—which might be proxies for age-based employment decisions. For example, the U.S. Court of Appeals for the Second Circuit held that a school district's policy not to hire teachers with more than five years of experience was a proxy for age discrimination.[158] The court held that "the high correlation between experience and membership in the protected age group . . . would render application of the . . . policy discriminatory as a matter of law. . . ."[159]

Other federal courts rejected the age-proxy doctrine.[160] The Supreme Court granted *certiorari* in *Hazen* to resolve a circuit split and determine "whether an employer violates the ADEA by acting on the basis of a factor, such as an employee's pension status or seniority, that is empirically correlated with age."[161] In *Hazen*, the Court provided that clarification. While explicitly recognizing disparate treatment, it also narrowed the scope of the age proxy doctrine.

Finally, after almost forty years and considerable discussion and debate on the issue in scholarly circles,[162] the Supreme Court, in 2005, recognized

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154. *See, e.g.*, Dace v. ACF Industries, Inc., 722 F.2d 374, 378 (8th Cir. 1983) ("[D]iscrimination on the basis of factors, like seniority, that invariably would have a disparate impact on older employees, is improper under the ADEA.").

155. *See, e.g.*, EEOC v. Borden's, Inc., 724 F.2d 1390, 1393 (9th Cir. 1984).

156. *See, e.g.*, EEOC v. Local 350, Plumbers & Pipefitters, 998 F.2d 641, 646 (9th Cir. 1992); Reichman v. Bonsignore, Brignati, & Mazzota P.C., 818 F.2d 278, 280–81 (2d Cir. 1987); EEOC v. Balt. & Ohio R.R., 632 F.2d 1107, 1110 (4th Cir. 1980), *cert. denied,* 454 U.S. 825 (1981).

157. Finnegan v. Trans World Airlines, Inc., 967 F.2d 1161, 1163 (7th Cir. 1992).

158. Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980), *cert. denied,* 451 U.S. 945 (1981) (disparate impact case). The policy was based on a school district salary scale that required salary increases for teachers with more than five years of experience. *Id.* at 1030. In a dissent to the denial of *certiorari*, Justice Rehnquist observed that most teachers under the age of forty had more than five years of experience. "The policy under attack in this case, however, makes no reference to age. For budgetary reasons, a school board simply adopted a policy to hire teachers with fewer years of experience." *Geller*, 451 U.S. at 947.

159. *Geller*, 635 F.2d at 1033.

160. *See, e.g.*, Williams v. Gen. Motors Corp., 656 F.2d 120, 130 n.17 (5th Cir. 1981) ("[S]eniority and age discrimination are unrelated."), *cert. denied,* 455 U.S. 943 (1982).

161. Hazen Paper Co. v. Biggins, 507 U.S. 604, 608 (1993).

162. *See, e.g.,* Evan H. Pontz, *What a Difference ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C. L. REV. 267 (1995); Donald R. Stacy, *A Case Against Extending the Adverse Impact Doctrine to ADEA,* 10 EMP. REL. L.J. 437 (1985); Pamela S. Krop, Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 STAN. L. REV. 837 (1982) (advocating against adoption of disparate impact under ADEA); Steven J. Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLA. L. REV. 229 (1990) (advocating adoption of disparate impact under ADEA); Peter H. Harris, *Age Discrimination, Wages, and Economics: What Judicial Standard?,* 13 HARV. J. L. & PUB. POL'Y. 715 (1990) (advocating adoption of disparate impact under ADEA); Marla Ziegler, Comment, *Disparate Impact Analysis and the Age Discrimination in Employment Act*, 68 MINN. L. REV. 1038 (1984) (advocating adoption of disparate impact under ADEA).

disparate impact claims in *Smith v. City of Jackson, Mississippi*.[163] The Court based its decision on the basis of Section 4(a)(2), which provides that "[i]t shall be unlawful for an employer to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age[.]"[164]

The Court in *Smith* observed that "the language of that provision in the ADEA is identical to that found in § 703(a)(2). . . ."[165] The Court thus held that "[o]ur unanimous interpretation of § 703(a)(2) of Title VII in *Griggs* is therefore a precedent of compelling importance."[166] In particular, the Court observed that Section 4(a)(2) prohibits actions that would "otherwise adversely affect" an employee's status.[167] "Thus, the text focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer."[168] In *Griggs*, the Court interpreted the identical language in Section 703(a)(2) to recognize disparate impact claims under Title VII.

The Court cautioned, however, that although the identical language of Section 4(a)(2) of ADEA and Section 703(a)(2) of Title VII recognized disparate impact claims, the scope of the prohibition on unintentional discrimination under the ADEA was narrower than that under Title VII.[169] First, unlike Title VII, the ADEA includes an RFOA exception to age discrimination in employment.[170] "Congress' decision to limit the coverage of the ADEA by including the RFOA provision is consistent with the fact that age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment."[171]

Finally, the Court explained that in disparate impact cases, the claimant is "responsible for isolating and identifying the *specific* employment practices that are allegedly responsible for any observed statistical disparities."[172]

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163. Smith v. City of Jackson, Miss., 544 U.S. 228, 232 (2005). The U.S. Court of Appeals for the Ninth Circuit had adopted disparate impact twenty years earlier. EEOC v. Borden's, Inc., 724 F.2d 1390, 1394 (9th Cir. 1984) ("[T]he similar language, structure, and purpose of Title VII and the ADEA, as well as the similarity of the analytic problems posed in interpreting the two statutes, has led us to adopt disparate impact in cases under the ADEA.").

164. 29 U.S.C. § 623(a)(2).

165. *Smith*, 544 U.S. at 233.

166. *Id.* at 234.

167. *Id.* at 233.

168. *Id.* at 236 (original emphasis).

169. Smith v. City of Jackson, Miss., 544 U.S. 228, 236 n.7 (2005).

170. 29 U.S.C. § 623(f)(1).

171. *Smith*, 544 U.S.at 240.

172. *Id.* at 241 (quoting Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656 (1989) (original emphasis).

In a disparate treatment case under the ADEA, like such a case under Title VII, a plaintiff must demonstrate intent to discriminate with either direct or circumstantial evidence.[173] And like a Title VII case, in the absence of direct evidence, a plaintiff must demonstrate intent to discriminate with circumstantial evidence under the burden-shifting method set forth in *McDonnell Douglas*.[174] To prove unintentional discrimination in a disparate impact case, a plaintiff in an ADEA case, like a plaintiff in a Title VII case, must provide a statistical analysis that demonstrates the impact of the unlawful employment practice on the class of individuals protected by the ADEA.[175]

Finally, a plaintiff in an ADEA lawsuit can file a "pattern-or-practice" claim that alleges a pattern or practice of employment discrimination.[176] "Mixed-motives" claims under the ADEA, however, are unavailable.[177]

Although Title VII and the ADEA are similar with respect to causes of action and burdens of proof in civil actions, the statutes differ with respect to remedies. Title VII authorizes the court in a civil action to provide injunctive relief as well as "such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate."[178] In addition, in cases of intentional discrimination, Section 1981a authorizes compensatory and punitive damages.[179]

Under the ADEA, in a civil action commenced by an aggrieved individual, "the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment [and] reinstatement or promotion. . . ."[180]

Prior to *City of Jackson*, some scholars had expressed doubt that disparate impact was available under the ADEA because the Civil Rights Act of 1991 had clarified the proof required for disparate impact claims under Title VII but had not similarly clarified the proof required for disparate

173. Geiger v. Tower Auto, 579 F.3d 614, 620 (6th Cir. 2009).

174. *Contra* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 175 n.2. (2009) ("[The Supreme] Court has not definitively decided whether the evidentiary framework of *McDonnell Douglas* . . . utilized in Title VII cases is appropriate in the ADEA context."). Most federal courts of appeals, however, have utilized *McDonnell Douglas* in ADEA cases. *See, e.g.*, Soto-Feliciano v. Villa Cofresi Hotels, Inc., 779 F.3d 19 (1st Cir. 2015); Smith v. City of Allentown, 589 F.3d 684 (3d Cir. 2009); Jackson v. Cal-Western Packaging Corp., 602 F.3d 374 (5th Cir. 2010); Jones v. Oklahoma City Pub. Schs., 617 F.3d 1273 (10th Cir. 2010).

175. Johnson, *supra* note 129, at 11–12.

176. *See, e.g.*, Int'l Broth. of Teamsters v. United States, 431 U.S. 324, 360 (1977).

177. *Contra Gross*, 557 U.S. at 169–70, 175.

178. 42 U.S.C. § 2000e-5(g)(1).

179. *Id.* § 1981a(a)(1).

180. 29 U.S.C. § 626(b).

impact claims under the ADEA.[181] One scholar predicted that "[b]ecause Congress failed to apply the disparate impact provisions of the 1991 Civil Rights Act to the ADEA, the Supreme Court may be poised to go one step further than *Hazen Paper* and expressly rule that the ADEA does not countenance a disparate impact cause of action."[182]

C. Legal Challenges To Job Advertisements Under Title VII

Most of the jurisprudence on employment discrimination under Title VII is derived from claims of disparate treatment under Section 703(a)(1) or claims of disparate impact under Section 703(a)(2). Similarly, most of the jurisprudence on age-based employment discrimination under the ADEA is derived from claims of disparate treatment Section 4(a)(1) or claims of disparate impact under Section 4(a)(2).

By comparison, there is little jurisprudence under Section 704(b) of Title VII. The statute put an end to sex-based discrimination in newspaper want ads sixty years ago. But until quite recently—with the dramatic shift from newspaper want ads to online job ads—Section 704(b) has not given rise to much civil litigation. There is almost no jurisprudence under Section 4(e).

There is little legal precedent under Section 704(b) of Title VII and even less legal precedent under Section 4(e) of the ADEA. Job advertisements that expressed explicit sex and race preferences were commonplace sixty years ago.[183] Following the enactment of Title VII and the ADEA, however, "[e]mployers also stopped stating discriminatory preferences explicitly in their job ads . . . [and] the provisions forbidding discriminatory ads were largely forgotten in the following decades. Instead, litigants overwhelmingly focused on challenging adverse employment actions . . . under the disparate treatment and disparate impact theories of liability."[184]

EEOC regulations implementing Title VII include Guidelines on Discrimination Because of Sex,[185] Guidelines on Discrimination Because of

181. *See generally,* Brendan Sweeney, *Downsizing the Age Discrimination in Employment Act: The Availability of Disparate Impact Liability*, 41 VILLANOVA L.R. 1527, 1549–52 (1996).

182. Johnson, *supra* note 129, at 5.

183. *See generally*, Pauline T. Kim & Sharion Scott, *Discrimination in Online Employment Recruiting*, 63 ST. LOUIS UNIV. L.J. 93 (2018).

184. *Id.* at 102.

185. 29 C.F.R. § 1604 (2017).

Religion,[186] and Guidelines on Discrimination Because of National Origin.[187] There are no guidelines on discrimination because of race or color.[188] Neither the religion guidelines nor the national origin guidelines address job advertisements.[189] The sex guidelines, however, implement the prohibition in Title VII on job advertisements that express a preference, limitation, specification, or discrimination based on sex unless there is a BFOQ. Specifically, "[t]he placement of an advertisement in columns classified by publishers on the basis of sex, such as columns headed 'Male' or 'Female,' will be considered an expression of a preference, limitation, specification, or discrimination based on sex."[190] Moreover, the EEOC "believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly."[191]

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186. *Id.* § 1605 (2022). In particular, the guidelines implement the requirement in Title VII to accommodate the religious practices of employees and prospective employees. *Id.* § 1605.2. Under Title VII, it is unlawful to fail to provide reasonable accommodation for the religious practices of an employee or prospective employee unless the accommodation would result in undue hardship. *See* 42 U.S.C. § 2000e(j) (definition of religion); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 74 (1977) ("The intent and effect of this definition was to make it an unlawful employment practice under § 703(a)(1) for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees.").

187. 29 C.F.R. § 1606 (2016). The guidelines provide that "[i]t is not an unlawful employment practice to deny employment opportunities to any individual who does not fulfill the national security requirements stated in section 703(g) of title VII." *Id.* § 1606.3. *See* 42 U.S.C. § 2000e-2(g) (noting when an employer may fail to hire a person for national security purposes). The guidelines also provide that "[t]he exception stated in section 703(e) of title VII, that national origin may be a bona fide occupational qualification, shall be strictly construed." 29 C.F.R. § 1606.4. *See* 42 U.S.C. § 2000e-2(e) ("Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . .").

188. *See* 29 C.F.R. §§ 1600–91 (noting that the code does not have a section regarding race and color).

189. *See id.* §§ 1605–06 (lacking provision on job advertisements).

190. *Id.* § 1604.5. The guidelines were issued on April 5, 1972. 37 Fed. Reg. 6835, 6837 (1972). The guidelines were the third set of sex guidelines issued by the EEOC. The first set of guidelines were issued on December 2, 1965. 30 Fed. Reg. 14,925, 14,926 (1965). Those guidelines allowed the use of columns headed "Jobs of Interest – Male" and "Jobs of Interest – Female" if job advertisements under those headings stated that the jobs were open to males and females. *Id.* at 14,928. The 1965 guidelines were challenged in court. Am. Newspaper Publishers Ass'n v. Alexander, 294 F. Supp. 1100 (D.D.C. 1968). The case, which was dismissed without prejudice in 1970, "had no utility insofar as enforcement of Section 704(b) was concerned. It must be noted that great public confusion still exists with regard to the scope and significance of this litigation." Elizabeth Boyer, *Help-Wanted Advertising—Everywoman's Barrier*, 23 HASTINGS L.J. 221, 225 (1971). The second set of guidelines were issued on April 28, 1966. 31 Fed. Reg. 6401, 6414 (1966). Those guidelines also allowed the use of columns headed "Male" and "Female" but drew a distinction between the content of job advertisements, which were written by employers, and the headings that were utilized by newspapers. *Id.* at 6414.

191. 29 C.F.R. § 1604.2(a).

The legal challenges to job ads under Section 704(b) of Title VII have addressed preferences, limitations, specifications, and discrimination based on sex. In *Brush v. San Francisco Newspaper Printing Co.*, the plaintiff challenged under Section 704(b) of Title VII the use of "Help Wanted, Men" and "Help Wanted, Women" headings in the want ads published by three San Francisco newspapers when sex was not a BFOQ.[192]

The plaintiff stated that she was interested in a job that was listed under the "Help Wanted, Men" heading although sex was not a BFOQ for the job; that she was discouraged from applying for the job "due to the inference" that a woman would not be hired for the job; and that she would have applied for the job had the job advertisement not been placed under the "Help Wanted, Men" heading.[193]

The plaintiff argued that a newspaper was, for purposes of Section 704(b), an employment agency and thus could not print or publish a job ad indicating any preference, limitation, specification, or discrimination based on sex.[194] The court disagreed that the term "employment agency" in the statute included newspapers.[195]

Citing the legislative history of the statute,[196] the court concluded that "we are convinced that the legislative history in the pending case shows that the term 'employment agency' was used in its ordinary sense rather than in such a broad sense as would include newspapers."[197] Notwithstanding the holding in *Brush*, Section 704(b), as a practical matter, put an end to the practice of newspaper want ads segregated into opportunities for men and opportunities for women.

In *Hailes v. United Air Lines*, a male filed a lawsuit alleging that United had violated Section 704(b) when it placed a job advertisement for stewardesses under a "Help Wanted—Females" heading in a newspaper.[198] No corresponding advertisement had been placed in the "Help Wanted—Male" column.[199] "Hailes never applied for the job of stewardess

192. Brush v. S. F. Newspaper Printing Co., 315 F. Supp. 577, 578–79 (N.D. Cal. 1970), *aff'd*, 469 F.2d 89 (9th Cir. 1972).

193. *Id.* at 579.

194. *Id.* at 580.

195. *Id.* at 582.

196. *See, e.g.*, *id.* (citing H.R. REP. NO. 914, 88TH CONG., 1ST SESS. 28 (1963) ("The prohibitions of this section do not require newspapers and other publications to exercise any control or supervision over, or to do any screening of, the advertisements or notices published by them."); 110 CONG. REC. 7213 (April 4, 1964) ("[I]t should be noted that the prohibition does not extend to the newspaper or other publications printing the advertisement. It runs solely to the sponsoring firm or organization.")).

197. *Brush*, 315 F. Supp. at 582.

198. Hailes v. United Air Lines, 464 F.2d 1006, 1007 (5th Cir. 1972).

199. *Id.* at 1008.

(or cabin attendant), nor did he communicate in any way with United."[200] The complaint was dismissed without written opinion for lack of subject matter jurisdiction and for failure to state a claim.[201]

On appeal, the Fifth Circuit first held that Hailes was "aggrieved" within the meaning of Section 706 of Title VII and thus had stated a justiciable claim.[202] United had argued that, because Hailes had never applied for employment in response to the job ad, he was not aggrieved.[203] The court disagreed. Section 704(b), the court observed, prohibits job ads that "effectively inhibit members of the opposite sex from seeking employment."[204] Hailes would not have been inhibited from seeking employment had he applied for employment:

> The very appearance at an employer's offices of one who had read the discriminatory ad but nevertheless continued to seek the job, would demonstrate that the reader was not deterred by this unlawful practice and therefore not aggrieved. Thus, if we were to hold that Hailes cannot challenge this advertisement, then nobody could ever complain of this practice which Congress has so directly proscribed.[205]

The court, however, "refuse[d] to rule that a mere casual reader of an advertisement that violates this section may bring suit."[206] "To be aggrieved under this subsection a person must be able to demonstrate that he has a real, present interest in the type of employment advertised. In addition, that person must be able to show he was effectively deterred by the improper ad from applying for such employment."[207]

Finally, the court rejected United's argument that it could not have violated Section 704(b) because its job advertisement declared that it was an equal opportunity employer.[208] "[T]he tendentious selection of the feminine term, 'stewardesses,' and the placing of the ad in the 'Help Wanted—Female' column without a corresponding ad in the 'Help Wanted—Male' column so plainly indicates a preference for females it cannot be neutralized by the self-conferred title of 'Equal Opportunity Employer.'"[209]

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200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. Hailes v. United Air Lines, 464 F.2d 1006, 1008 (5th Cir. 1972).
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.* at 1008–09.
209. *Id.* at 1009.

The opinion in *Hailes*, although quite short, established an important precedent for legal challenges to job ads under Title VII as well as under the ADEA. Lawsuits under Section 7(d) "require a showing of actual interference with a person's employment opportunities. The *Hailes* case demonstrates that such interference need not be physical; it may operate in subtle, psychological ways to deter job seekers."[210]

Finally, in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,[211] the Supreme Court reviewed a First Amendment challenge to a City of Pittsburg ordinance that—like Section 704(b)—prohibited job ads placed in sex-designated columns.[212] The Court held that the use of sex-designated columns was commercial speech not protected by the First Amendment.[213]

The ordinance prohibited job ads that discriminated on the basis of sex and made it unlawful to aid in the publication of such advertisements.[214] In October 1969, the National Organization of Women filed a complaint with the Pittsburg Commission on Human Relations alleging that the Pittsburg Press Company was aiding in the publication of prohibited job ads because it placed those ads in male or female columns even though sex was not a BFOQ.[215]

Following a hearing, the commission issued a decision and order which concluded that Pittsburg Press had aided in the publication of prohibited job ads because it maintained a "sex-designated classification system."[216] The commission issued a cease and desist order and mandated a classification system with no reference to sex.[217] The Pennsylvania Court of Common Pleas affirmed the commission order, but the Commonwealth Court narrowed the mandate to exclude job ads not subject to the ordinance, for example, those placed by religious or charitable organizations.[218] The Pennsylvania Supreme Court denied review, and the U.S. Supreme Court granted *certiorari* "to

210. Peter W. Kerman, *Sex Discrimination in Help Wanted Advertising*, 15 SANTA CLARA L.R. 183, 193 (1974).

211. Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels., 413 U.S. 376 (1973).

212. *Id.* at 385.

213. *Id.* at 388.

214. *Id.* at 378. The prohibition was inapplicable to advertisements for jobs for which sex was a BFOQ. *Id*. The provision that made it unlawful to aid in the publication of such advertisements distinguished the ordinance from Section 704(b), which is applicable to, *inter alia*, employers, labor organizations, and employment agencies but not to, *e.g.*, newspapers that aid in the publications of prohibited job advertisements. Brush v. S.F. Newspaper Printing Co., 315 F. Supp. 577, 582 (N.D. Cal. 1970), *aff'd*, 469 F.2d 89 (9th Cir. 1972).

215. Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels., 413 U.S. 376, 379 (1973).

216. *Id.* at 380.

217. *Id.*

218. *Id.*

decide whether, as Pittsburgh Press contends, the modified order violates the First Amendment by restricting its editorial judgment."[219]

Before the Court, the commission argued that it can regulate the Pittsburg Press because the job ads constitute "commercial speech" unprotected by the First Amendment.[220] Tracing the commercial speech doctrine to *Valentine v. Chrestensen*,[221] the Court explained that it is "clear that the Constitution imposes no such restraint on government as respects purely commercial advertising."[222] The Court then concluded that "[t]he advertisements are thus classic examples of commercial speech."[223]

The legal challenges to segregated want ads under Title VII were based on the recognition that "women who are qualified to perform jobs listed under male help-wanted headings are effectively barred and discouraged from applying for such jobs."[224] Commenting on the sex guidelines issued by the EEOC in 1966, Congresswoman Martha A. Griffiths stated that "[t]he inevitable consequence of putting the ad in the 'male'—or 'female'—column is to cut off at the outset any further reading of the ads under that label by persons of the other sex."[225]

Section 704(b) put an end to newspaper want ads segregated into opportunities for men and those for women.[226] The Title VII provision also has been used to challenge the "gross statistical disparities" in want ads.[227] Specifically, it has been used to challenge the publication of want ads in newspapers that circulate in predominantly white neighborhoods but not in predominantly African American neighborhoods.[228]

In *United States v. City of Warren*, The U.S. Department of Justice challenged an employment recruiting practice of the City of Warren, Michigan.[229] Prior to 1986, Warren published job advertisements for

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219. *Id.* at 381.

220. *Id.* at 384.

221. Valentine v. Chrestensen 316 U.S. 52, 54 (1942).

222. Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels., 413 U.S 376, 384 (1973) (quoting *Valentine*, 316 U.S. at 54).

223. *Pittsburgh Press Co*., 413 U.S at 385.

224. Boyer, *supra* note 191, at 227.

225. 112 CONG. REC. 13,691 (1966).

226. *See* Nicholas Pedriana & Amanda Abraham, *Now You See Them, Now You Don't: The Legal Field and Newspaper Desegregation of Sex-Segregated Help Wanted Ads 1965–75*, 31 L. & SOC. INQUIRY 905, 911 (2006).

227. *See* United States v. City of Warren, Mich., 138 F.3d 1083, 1089 (6th Cir. 1998).

228. *Id.*

229. *Id.* at 1088. The Department of Justice also challenged a legal requirement that job applicants for municipal employment reside in Warren for one year prior to applying for employment. That residency requirement was struck down in United States v. City of Warren, Mich., 759 F. Supp. 355, 356, 368 (E.D. Mich. 1991). The District Court held that the residency requirement had a disparate impact on African American job applicants and thus was unlawful under Title VII. *Id*. at 368.

municipal employment— apart from police and fire department positions, in three newspapers that circulated in Macomb County, whose resident civilian workforce (in 1980) was 1.3% African American.[230] It did not publish those advertisements in newspapers that circulated in the adjoining Detroit metropolitan area, whose resident civilian workforce was 59.7% African American.[231]

After October 1986, Warren began to publish advertisements for police and fire department positions in Detroit newspapers.[232] "This broadened recruitment effort significantly impacted the racial composition of the applicant pool. For example, the 1987 recruitments for police and firefighter positions attracted fifty [B]lack applicants as compared to the single [B]lack applicant from the previous recruiting season."[233]

On the basis of this statistical evidence, the U.S. District Court for the Eastern District of Michigan ruled in 1992 that Warren's pre-1986 refusal to advertise in Detroit newspapers had a disparate impact on African American job applicants.[234] The court limited its ruling, however, to job applicants for police and fire department positions.[235] With respect to other municipal employment, the court held that the government failed to show that Warren's pre-1986 refusal to advertise in Detroit newspapers had a disparate impact on African American job applicants.[236]

The Sixth Circuit reversed,[237] holding that, if Warren's targeted advertising had a disparate impact on police and firefighter recruiting, and if its targeted advertising was for police and firefighter recruiting as well as for other municipal recruiting, then its targeted advertising had a disparate impact on other municipal recruiting.[238]

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230. United States v. City of Warren, Mich., 138 F.3d 1083, 1088 (6th Cir. 1998).

231. *Id.*

232. *Id.* at n.1.

233. *Id.* at 1088.

234. United States v. City of Warren, 1992 WL 509994 (E.D. Mich. Aug. 12, 1992); *City of Warren*, 138 F.3d at 1089.

235. United States v. City of Warren, 138 F.3d 1083, 1089–90 (6th Cir. 1998). The court did issue an injunction, however, requiring Warren henceforth to publish job advertisements for other municipal employment in Detroit newspapers. *Id.*

236. *Id.* at 1088–89. The U.S. had performed no statistical analysis of applicant pools for other municipal employment prior to 1986 because the targeted advertising may have acted in conjunction with the residency requirement to deter African American job applicants. *Id.* at 1092.

237. "[W]e believe that the district court clearly erred in finding that the United States failed to establish racial discrimination based on disparate impact in violation of Title VII for municipal positions other than police and firefighter." *Id*. at 1091.

238. United States v. City of Warren, 138 F.3d 1083, 1092–93 (6th Cir. 1998). In addition, although the targeted advertising may have acted in conjunction with the residency requirement to deter African American job applicants, "the United States' inability to isolate the specific reason for the dearth of Black applicants was not fatal to its claim." *Id.* at 1092. Finally, the "concurrence" of the targeted advertising the residency requirement made a statistical analysis of applicant pools for other municipal employment prior to 1986 "unattainable." *Id.* at 1093.

Significantly, the U.S. did not allege a violation of Section 704(b) of Title VII *per se*.[239] Instead, the complaint alleged that the recruiting practices of Warren had a disparate impact on African Americans.[240]

Want ads in newspapers, of course, have gone the way of the typewriter. Today, job ads are posted online, either on employer websites or social media platforms like Facebook and LinkedIn. Yet, targeted distribution of job advertisements is also possible through those social media platforms.

D. Legal Challenges To Job Advertisements Under the ADEA

If there is little legal precedent under Section 704(b) of Title VII, then there is even less legal precedent under Section 4(e) of the ADEA. This paucity of relevant precedent nonetheless is instructive.

Before the ADEA was transferred from the Department of Labor to the EEOC,[241] the Department filed a lawsuit against an employment agency that had advertised for "college students," "girls," and "boys" to work for the agency itself (and not an agency client).[242] The court granted a motion to dismiss because, in 1975, the ADEA was applicable to employers with twenty-five or more employees,[243] and there was no allegation that the employment agency had met that jurisdictional threshold.[244]

That ruling itself would have sufficed to have the complaint dismissed. Yet the court provided a seemingly gratuitous critique and rejection of the ADEA prohibition on job ads that indicate a preference for young people:

> The purpose of the Act was to prevent persons aged 40 to 65 from having their careers cut off by unreasonable prejudice. It was not intended to prevent their children and grand-children from ever getting started. There is nothing in the Act that authorizes the Secretary of Labor to prohibit employers from encouraging young

239. *Id.* at 1088–89.

240. *Id.*

241. Prior to October 1, 1979, the Department of Labor administered the ADEA. Pursuant to Reorganization Plan No. 1 of 1978 and Executive Order No. 12,144, the administration of the ADEA was transferred to the EEOC. Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19,807 (May 9, 1978); Exec. Order No. 12,144, 44 Fed. Reg. 37,193 (June 22, 1979).

242. Brennan v. Paragon Emp. Agency, Inc., 356 F. Supp. 286, 287–88 (S.D.N.Y. 1973).

243. *Id.* at 288. For purposes of the ADEA, an "employer" is defined to mean a person engaged in commerce with twenty or more employees. 29 U.S.C. § 630(b). Prior to 1974, the definition required twenty-five or more employees. The definition was amended by Section 28(a)(1) of the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55, 74 (1974).

244. *Brennan*, 356 F. Supp. at 288.

> persons whether or not in college to turn from idleness to useful endeavor. I find such encouragement to be in the public interest. . . .[245]

The court also held that, to the extent that its opinion was inconsistent with 29 C.F.R. § 860.92(b), the Department regulation on which 29 C.F.R. § 1625.4 is based, the court would ignore the Department regulation because it was an interpretive rule and not a legislative rule as well as "wholly lacking in reasonableness. . . ."[246]

Just two years later, however, in *Hodgson v. Approved Personnel Serv., Inc.*,[247] the U.S. Court of Appeals for the Fourth Circuit took a more enlightened view and held that job ads seeking job applicants who were "recent graduates" violated the ADEA.[248] "Most 'recent graduates' are composed of young people. When the term is used with a specific job, it violates the [ADEA] since it is not merely informational to the job seeker[,] but operates to discourage the older job hunter from seeking that particular job and denies them an actual job opportunity."[249]

The next reported decision under Section 4(e) of the ADEA did not appear for another two decades. In *Boyd v. City of Wilmington*,[250] the plaintiff filed an ADEA lawsuit against Wilmington under Section 4(a)(1).[251] Utilizing the burden-shifting method set forth in *McDonnell Douglas*,[252] however, the plaintiff argued that the reason given for the rejection of his job application was a pretext because, *inter alia*, the job advertisement to which he responded violated Section 4(e).[253]

The job advertisement sought a personnel analyst and stated that "[c]andidates for MPA [Master of Public Administration] or MSIR [Master of Science in Industrial Relations] are preferred."[254] The plaintiff applied for the position but was not selected for an interview.[255] The court found that he presented a *prima facie* case of age discrimination under Section 4(a)(1),[256] but that Wilmington provided a legitimate reason for the rejection of the plaintiff's job application.[257]

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245. *Id.* at 288–89.

246. *Id.* at 289.

247. Hodgson v. Approved Pers. Serv., Inc., 529 F.2d 760 (4th Cir. 1975).

248. *Id.* at 766.

249. *Id.*

250. Boyd v. City of Wilmington, 943 F. Supp. 585 (E.D.N.C. 1996).

251. *Id.* at 587.

252. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801–03 (1973).

253. *Boyd*, 943 F. Supp. at 589–90.

254. *Id.* at 587.

255. Boyd was sixty-one when he applied for the position. Wilmington hired a job applicant who was twenty-three. *Id.*

256. Boyd v. City of Wilmington, 943 F. Supp. 585, 588 (E.D.N.C. 1996).

257. *Id.* at 588–89.

Under *McDonnell Douglas*, "the production burden shifts back to Boyd. To survive summary judgment, he must demonstrate that the City's justifications were mere pretext to engage in age discrimination."[258] The plaintiff argued that the reason for the rejection of his job application was a pretext because, *inter alia*, the job advertisement violated Section 4(e).[259]

The court observed that Section 4(e) of the ADEA "has garnered minimal discussion in the federal courts" but that "[d]espite the paucity of judicial comment, the Fourth Circuit has issued a lone opinion directly evaluating an advertisement under § 623(e)."[260] The court then summarized *Hodgson* and distinguished the unlawful job ad in that case from the job ad placed by Wilmington.[261] "Interpreting the advertisement as a whole, the court does not perceive the 'connotations of youth' denounced in *Hodgson* and forbidden by the ADEA."[262]

The court stated that "[a]lthough this case confronts a facet of the ADEA which, to this point, has received limited judicial explication, the court finds that the City's advertisement does not infringe the protections embodied in [Section 4(e)]."[263] Thus the court concluded that the plaintiff had failed to establish that the reason Wilmington gave for the rejection of his job application was a pretext.[264] The court granted Wilmington's motion for summary judgment.[265]

The EEOC has brought two lawsuits under Section 4(e). Neither, however, resulted in useful precedent under that ADEA provision. In the first, *EEOC v. State of Arizona*,[266] the Commission sought an injunction to prohibit the publication of job ads by Arizona, which ads sought job applicants who graduated from college within the last year.[267] In a reported

258. *Id.* at 589 (citing Tex. Dept. of Cmty. Affs. v. Burdine, 450 U.S. 248, 252–53 (1981).

259. *Boyd*, 943 F. Supp. at 588–89. The plaintiff made four arguments that the reasons were pretextual but "only Boyd's claim that the advertisement discriminates against older workers warrants attention." *Id.* at 590.

260. *Id.* at 590.

261. Boyd v. City of Wilmington, 943 F. Supp. 585, 590–91 (E.D.N.C. 1996). First, the term "candidate" is not among the prohibited terms in 29 C.F.R. § 1625.4(a). *Id.* at 590–91. Second, "viewed in the context of the complete announcement, the use of the word 'candidates' does not evince an intent to discriminate against older applicants." *Id.* at 591. Finally, in contrast to a preference for a particular age group, the job advertisement in job set forth minimum qualifications for the position. *Id.*

262. *Id.* at 591.

263. *Id.* at 592.

264. Boyd v. City of Wilmington, 943 F. Supp. 585, 592 (E.D.N.C. 1996).

265. *Id.*

266. EEOC v. State of Arizona, 824 F. Supp. 898 (D. Ariz. 1991).

267. *Id.* at 899–900.

decision, the court denied a motion to dismiss the complaint.[268] The lawsuit was later settled.[269]

In the second, *EEOC v. Marion Motel Associates*,[270] the court ruled on post-trial motions in a lawsuit filed by EEOC on behalf of four employees of a motel.[271] Two employees were terminated after the manager placed an "unlawful advertisement" in a local newspaper that sought "young, energetic persons[.]"[272] With respect to those two employees, a jury found that the defendant had engaged in willful age discrimination.[273] The court denied the defendant's motions for judgment notwithstanding a verdict and a new trial.[274]

Like unlawful preferences that violate Section 704(b) of Title VII, unlawful preferences that violate Section 4(e) of the ADEA are also possible through targeted distribution of job ads. Moreover, this unlawful practice seems to have accompanied the recent dramatic shift from newspaper want ads to algorithm-driven online job ads.

In July 2019, the EEOC issued Determination Letters to several corporations: Capital One Financial Corporation, Drive Time Automotive Group, Inc., Edward T. Jones & Company, L.P., Enterprise Holdings, Inc., Nebraska Furniture Mart, Inc. ("Nebraska"), Renewal by Anderson, LLC ("Renewal"), and Sandhills Publishing Company ("Sandhills"). In each Determination Letter, issued pursuant to 29 C.F.R. § 1601.21,[275] the EEOC found reasonable cause "to believe that [the respondent in the Determination Letter] violated the ADEA by advertising on a social media platform and limiting the audience for the advertisement to younger applicants."[276] Each letter invited the employer to engage in conciliation to resolve the alleged violation of the ADEA.

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268. *Id.* at 903.

269. Consent Decree and Judgment, EEOC v. State of Arizona, 824 F. Supp. 898 (No. 2:91-CV-00328) (1991).

270. EEOC v. Marion Motel Assocs., 763 F. Supp. 1338 (W.D.N.C. 1991).

271. *Id.* at 1339.

272. *Id.* at 1340.

273. *Id.* at 1339

274. *Id.* at 1341.

275. 29 C.F.R. § 1601.21.

276. *See*, Capital One Financial Corporation, Charge No. 570-2018-01036 (EEOC July 5, 2019); Drive Time Automotive Group, Inc., Charge No. 570-2018-02351 (EEOC July 5, 2019); Edward D. Jones & Co., L.P., Charge No. 570-2018-02352 (EEOC July 5, 2019); Enterprise Holdings, Inc., Charge No. 570-2018-01060 (EEOC July 5, 2019). The Determinations Letters to Nebraska, Renewal, and Sandhills also found reasonable cause to believe that the respondents violated Title VII by limiting the audience for their advertisements to male applicants. *See*, Nebraska Furniture Mart, Inc., Charge No. 570-2018-03517 (EEOC July 5, 2019); Renewal by Anderson, LLC, Charge No. 570-2018-03520 (EEOC July 5, 2019); Sandhills Publishing Company, Charge No. 570-2018-03524 (EEOC July 3, 2019).

Similarly, in *Communication Workers of America v. T-Mobile U.S., Inc.,* the plaintiffs in a class action alleged that T-Mobile and Amazon targeted job ads on Facebook to exclude prospective job applicants over the age of forty.[277] The fifth amended complaint, filed on June 10, 2020,[278] included a claim under Section 4(e).[279]

The amended complaint alleges that the defendants "excluded older workers from receiving employment and recruiting ads on Facebook, and thus denied them the opportunity to learn about, apply for, compete for, and obtain thousands of open jobs at each company, including open positions they were genuinely interested in and qualified for."[280] "T-Mobile and Amazon have eliminated the chance of older workers viewing employment advertisements on Facebook by specifically targeting their ads to younger workers via Facebook's customizable ad platform."[281] For example, T-Mobile targeted a job advertisement specifically to individuals in the eighteen to thirty-eight-year-old age bracket.[282]

The amended complaint explains how paid advertising, including job advertising, is placed on Facebook and how Facebook can target that advertising based on age.[283] The complaint also observes that, in November

277. Commc'n Workers of Am. v. T- Mobile U.S., Inc., No. 17-CV-07232-BLF, 2020 WL 1233924, at *1–2 (N.D. Cal. March 13, 2020).

278. Fifth Amended Class and Collective Action Complaint, Commc'n Workers of Am. v. T-Mobile U.S., Inc., No. 17-CV-07232-BLF, 2020 WL 1233924 (2020) (No. 5:17-CV-07232) [hereinafter Fifth Amended Complaint].

279. *Id.* at ¶¶ 176–88. The four-count complaint also included claims under California Fair Employment and Housing Act, ¶¶ 189–200; the District of Columbia Human Rights Act, ¶¶ 201–12; and the Ohio Fair Employment Practices Law, ¶¶ 213–24. In Opiotennione v. Facebook, Inc., No. 19-CV-07185-JSC, 2020 WL 5877667, at*1 (N.D. Cal. Oct. 02, 2020), the plaintiff alleged that Facebook targeted job ads to exclude prospective job applicants on the basis of age and gender. The complaint was filed under several California civil rights statutes, the District of Columbia Civil Rights Act, and the District of Columbia Consumer Protections and Procedures Act. *Id.* at *2–4. A magistrate found that the complaint failed to support a plausible inference that the plaintiff suffered an injury in fact and dismissed the complaint without prejudice for lack of standing. *Id.* at *5. Thereafter the plaintiff filed a notice of dismissal. Notice of Dismissal, Opiotennione v. Facebook, Inc., No. 19-CV-07185-JSC, 2020 WL 5877667 (2020) (No. 19-CV-07185).

280. Fifth Amended Complaint, *supra* note 281, at ¶ 1.

281. *Id.*

282. *Id.* at. ¶ 3.

283. *See generally* Fifth Amended Complaint at ¶¶ 72–117, Commc'n Workers of Am. v. T-Mobile U.S., Inc., No. 17-CV-07232-BLF, 2020 WL 1233924 (2020) (No. 5:17-CV-07232). In 2017, Facebook earned over $40 billion from paid advertising. *Id.* ¶¶ 72–74. "From its inception, Facebook has been a powerful tool for advertisers because it allows advertisers to target very specific populations with their ads." *Id.* ¶ 75. Facebook collects data on the age of its users and utilizes that data to target job advertisements. *See id.* ¶¶ 82–88. In placing paid job advertisements, employers select the age of the Facebook users who will receive the advertisements. *Id.* ¶¶ 89–96. Advertisements can also be targeted to users who have identified themselves on Facebook as, for example, "Millennials" or "Young and Hip." *Id.* ¶¶ 97–105. "Facebook encourages advertisers . . . to use age to narrow the target audience of their advertisements." Fifth Amended Complaint at ¶¶ E, 106–14, Commc'n Workers of Am. v. T- Mobile U.S., Inc., No. 17-CV-07232-BLF, 2020 WL

2016, the public interest organization ProPublica revealed that Facebook allowed job (and real estate) advertisements to be targeted to exclude African Americans, Asian Americans, and Hispanic Americans.[284]

The amended complaint argues that T-Mobile and Amazon have utilized Facebook to exclude millions of older workers from receiving job ads.[285] "Defendants have routinely used Facebook's ad platform to exclude older workers from receiving employment ads, primarily by selecting an age range for the ad population that excludes older workers." [286] The amended complaint claims that this practice violates Section 4(e) of the ADEA.[287]

The complaint raised interesting and troubling questions about the lawfulness under the ADEA of targeted distribution of online job ads. In January 2021, however, the court approved the voluntary dismissal of the complaint with prejudice.[288]

III. INDIRECT CHALLENGES TO "EXPERIENCE RANGES"

A. Kleber

The court in *Boyd* observed that Section 4(e) of the ADEA "has garnered minimal discussion in the federal courts."[289] This paucity of discussion can be attributed in part to the fact that some challenges to unlawful job ads were filed not under Section 4(e) but under Section 4(a) of the ADEA as either a disparate treatment claim or a disparate impact claim.

For example, in *Kleber v. CareFusion Corp.*, the plaintiff challenged an experience range (or experience cap) in a job ad not under Section 4(e) of the ADEA but under Section 4(a)(2).[290] In a *per curiam* decision, the U.S. Court of Appeals for the Seventh Circuit dismissed the plaintiff's civil action because Section 4(a)(2) protects employees from age discrimination in

1233924 (2020) (No. 5:17-CV-07232). T-Mobile and Amazon indicate to Facebook that they want to reach young people through their job ads. *Id.* ¶¶ 115–17, 121.

284. *Id.* ¶ 19. *See generally* Julia Angwin & Terry Parris Jr., *Facebook Lets Advertisers Exclude Users by Race*, PROPUBLICA (Oct. 28, 2016, 1:00PM), https://www.propublica.org/article/facebook-lets-advertisers-exclude-users-by-race [https://perma.cc/6X44-8TE7].

285. Fifth Amended Complaint, *supra* note 281, ¶¶ 118–50.

286. *Id.* at ¶ 118.

287. *Id.* at ¶¶ 176–88.

288. Order Approving Voluntary Dismissal, Commc'n Workers of Am. v. T- Mobile U.S., Inc., No. 17-CV-07232-BLF, 2020 WL 1233924 (2020) (No. 5:17-CV-07232).

289. Boyd v. City of Wilmington, 943 F. Supp. 585, 590 (E.D.N.C. 1996).

290. Kleber v. CareFusion Corp., 914 F.3d 480, 481 (7th Cir. 2019), *cert. denied*, 140 S. Ct. 306 (2019).

employment.[291] The plaintiff was not an employee but a job applicant.[292] His challenge to the experience range might have been successful had he filed his civil action under Section 4(e). Kleber, an attorney, applied for a position with CareFusion in 2014, which in a job advertisement sought an attorney with "3 to 7 years (no more than 7 years) of relevant legal experience."[293] Kleber was fifty-eight years old and had more than seven years of relevant experience.[294] CareFusion did not hire Kleber but hired a job applicant who was twenty-nine years old.[295]

Kleber filed a civil action against CareFusion under Section 4(a)(1) and 4(a)(2) of the ADEA.[296] The civil action included claims for disparate treatment and disparate impact.[297] The U.S. District Court for the Northern District of Illinois dismissed the disparate impact claim under Section 4(a)(2), which, the court held, protects employees but not job applicants.[298] It denied the motion to dismiss the disparate treatment claim;[299] however, Kleber thereafter voluntarily dismissed this claim.[300]

On appeal, a three-judge panel of the U.S. Court of Appeals for the Seventh Circuit reversed and held that a job applicant can file a disparate impact claim under Section (4)(a)(2).[301] The court's holding demonstrated the belief that this was "the better reading of the statutory text. It is also more consistent with the purpose of the Act and nearly fifty years of case law interpreting the ADEA and similar language in other employment discrimination statutes."[302]

The court observed that "[t]he seven-year experience cap is at the heart of this lawsuit."[303] It held that Section 4(a)(2) protects job applicants because

291. *Id.* at 488.

292. *Id.* at 481–82.

293. *Id.* at 482.

294. *Id.*

295. *Id.*

296. Kleber v. CareFusion Corp., No. 15-cv-1994, 2015 WL 7423778, at *1–2 (N.D. Ill. Nov. 23, 2015).

297. *Id.* at *1.

298. *Id.* at *5 ("Accordingly, because Section 623(a)(2) does not authorize disparate impact claims premised on an alleged failure to hire, Kleber's disparate impact claim (Count I) fails as a matter of law.") To dismiss the claim, the court relied on EEOC v. Francis W. Parker School, 41 F.3d 1073, 1077 (7th Cir. 1994).

299. *Id*. at *2 (CareFusion sought dismissal of the disparate treatment claim "because failing to hire an overqualified applicant does not constitute age discrimination."); *see, e.g*., Sembos v. Philips Components, 376 F.3d 696, 701 n.4 (7th Cir. 2004). The court held, however, that experience could be a proxy for age. *Kleber*, No. 15-cv-1994, at *3.

300. Kleber v. CareFusion Corp., 888 F.3d 868, 872 (7th Cir. 2018), *rev'd en banc*, 914 F.3d 480 (7th Cir. 2019), *cert. denied*, 140 S. Ct. 306 (2019).

301. *Kleber*, 888 F.3d at 870–71.

302. *Id.* at 870.

303. *Id.* at 871.

the provision refers to "any individual" and not just to employees.[304] The court also "[l]ook[ed] beyond the text of paragraph (a)(2) at the larger context of the ADEA as a whole, as well as the Supreme Court's interpretation of identical language in Title VII. . . ."[305] In *Griggs*,[306] the Supreme Court held that Section 703(a)(2) applies to job applicants as well as employees.[307] According to the court, the Supreme Court also applied *Griggs* to Section 4(a)(2) of the ADEA.[308] Other federal courts, however, held that job applicants could not bring disparate impact claims.[309]

The court characterized the distinction in Section 4(a)(2) between employees and job applicants as arbitrary.[310] It also characterized its interpretation of the provision as consistent with congressional intent.[311] "A central goal—arguably *the* most central goal—of the statute was to prevent age discrimination *in hiring*."[312]

In an *en banc* decision, however, the Seventh Circuit affirmed the district court.[313] The eight-page opinion was followed by two separate dissents totaling twenty pages. The court held that "the plain language of § 4(a)(2) makes clear that Congress, while protecting employees from disparate impact age discrimination, did not extend that same protection to outside job applicants."[314]

The court based its decision on, first, the plain language of Section 4(a)(2), which provides that "[i]t shall be unlawful for an employer to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age[.]"[315] The reference to "any individual" notwithstanding, "[t]his language plainly demonstrates that the requisite impact must befall an individual with 'status as an employee.'"[316]

Second, the court compared Section 4(a)(2) with Section 4(a)(1), which provides that "[i]t shall be unlawful for an employer to fail to refuse to hire

304. *Id.* at 872–74.
305. *Id.* at 874.
306. Griggs v. Duke Power Co., 401 U.S. 424 (1971).
307. *Id.* at 430–31.
308. Smith v. City of Jackson, Miss., 544 U.S. 228, 233–38 (2005).
309. Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 961 (11th Cir. 2016).
310. Kleber v. CareFusion Corp., 888 F.3d 868, 874–76 (7th Cir. 2018).
311. *Id.* at 876–79.
312. *Id.* at 878 (original emphasis).
313. Kleber v. CareFusion Corp., 914 F.3d 480, 481 (7th Cir. 2019).
314. *Id.*
315. 29 U.S.C. § 623(a)(2).
316. *Kleber*, 914 F.3d at 482. "Reading § 4(a)(2) in its entirety shows that Congress employed the term 'any individual' as a shorthand reference to someone with 'status as an employee.'" *Id.* at 483.

or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age[.]"[317] The court observed that "a side-by-side comparison of § 4(a)(1) with § 4(a)(2) shows that the language in the former plainly covering applicants is conspicuously absent from the latter."[318] "In the end, the plain language of § 4(a)(2) leaves room for only one interpretation: Congress authorized only employees to bring disparate impact claims."[319]

Kleber argued that *Griggs* mandated an interpretation of Section 4(a)(2) that permits job applicants to pursue disparate impact claims.[320] In *Griggs*, the Supreme Court recognized that Section 703(a)(2) of Title VII prohibited unintentional employment discrimination.[321] Yet *Griggs* concerned employees and not job applicants.[322] Moreover, in 1972, Congress amended Section 703(a)(2) to include job applicants.[323] It made no such amendment to Section 4(a)(2). "Congress's choice to add 'applicants' to § 703(a)(2) of Title VII but not to amend § 4(a)(2) of the ADEA in the same way is meaningful."[324]

Finally, Kleber argued that Section 4(a)(2) should be interpreted "against the backdrop of Congress's clear purpose of broadly prohibiting age discrimination."[325] The court declined to interpret the provision in the same way. "Our responsibility is to interpret § 4(a)(2) as it stands" and to "remain faithful to the provision's plain meaning."[326]

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317. 29 U.S.C. § 623(a)(1). The prohibition of employment discrimination on the basis of age is also applicable to employment agencies and labor organizations. *Id.* §§ 623(b)–(c). Under Section 15, the prohibition also is applicable to the federal government. *Id.* § 633a. Section 15 was added by the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(b)(2), 88 Stat. 55, 74 (1974). The language of Section 15, however, differs from the language of Section 4(a). Under Section 15, "[a]ll personnel actions affecting employees *or applicants for employment* who are at least 40 years of age . . . in executive agencies . . . shall be made free from any discrimination based on age." *Id.* § 633a(a) (emphasis added). Under Section 15, therefore, the prohibition protects employees as well as job applicants.

318. Kleber v. CareFusion Corp., 914 F.3d 480, 484 (7th Cir. 2019). Similarly, Section 4(c)(2) applies to "an applicant for employment." 29 U.S.C. § 623(c)(2). Finally, Section 4(d) applies to "applicants for employment." *Id.* § 623(d). "Each of these provisions distinguishes between employees and applicants. It is implausible that Congress intended no such distinction in § 4(a)(2), however, and instead used the term employees to cover both employees and applicants." *Kleber*, 914 F.3d at 484.

319. *Kleber*, 914 F.3d at 485.

320. *Id.* at 485–87.

321. Griggs v. Duke Power Co., 401 U.S. 424, 430–31 (1971).

322. *Kleber*, 914 F.3d at 485 ("Nowhere in *Griggs* did the Court state that its holding extended to job applicants.").

323. Equal Emp't Opportunity Act of 1972, Pub. L. No. 92-261, § 8(a), 86 Stat. 103, 109 (1972).

324. Kleber v. CareFusion Corp., 914 F.3d 480, 486 (7th Cir. 2019).

325. *Id.* at 487.

326. *Id.* at 488.

"The seven-year experience cap [was] at the heart of [the *Kleber*] lawsuit."[327] Yet, the district court was never able to address the lawfulness of the experience range under the ADEA because the disparate impact claim was dismissed under Rule 12(b)(6). Other courts, on the other hand, have addressed that legal issue. Moreover, the EEOC has issued guidance on the issue.

B. Gedos v. Dettelbach

In *Gedos v. Dettelbach*,[328] the U.S. District Court for the Northern District of Ohio granted the defendant's motion for summary judgment on a disparate treatment claim that, like the complaint in *Kleber*, indirectly challenged an experience range in a job ad issued by the U.S. Attorney's Office.

The plaintiff had filed a job application in response to an ad that required applicants to "have between 3-8 years post-bar admission experience."[329] The plaintiff later was advised that his job application was rejected because he had too much experience.[330] Thereafter, the defendant canceled the advertised position and issued a new job application that did not include an experience range.[331] The plaintiff once again submitted a job application but was not selected for the position.[332]

The plaintiff filed a complaint under Section 15 of the ADEA.[333] The complaint made no mention of Section 4(e) and included neither a disparate treatment claim nor a disparate impact claim *per se*.[334] The court nonetheless applied the disparate treatment doctrine.[335] It found no direct evidence of age discrimination,[336] and, by utilizing the burden-shifting method set forth in *McDonnell Douglas*,[337] concluded that there was no circumstantial evidence of age discrimination.

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327. Kleber v. CareFusion Corp., 888 F.3d 868, 871 (7th Cir. 2018).

328. Gedos v. Dettelbach, No. 1:09 CV 2728, 2011 U.S Dist. LEXIS 13679 (N.D. Ohio Feb. 11, 2011).

329. *Id.* at *1.

330. *Id.* at *2.

331. *Id.*

332. *Id.*

333. Complaint at *1, Gedos v. Dettelbach, 2009 U.S. Dist. Ct. Pleadings LEXIS 54638 (2009) (No. 1:09 CV 2728).

334. *Id.* at *1–2.

335. *See* Gedos v. Dettlebach, No. 1:09 CV 2728, 2011 U.S. Dist. LEXIS 13679, at *5–6 (N.D. Ohio 2011).

336. *Id.* at *7.

337. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801–03 (1973).

> Surely there is a correlation between the number of years of post-bar experience and age, but the defendants' use of post-bar experience as a hiring criterion does not amount to a violation under the ADEA. "[T]he ADEA prohibits only actions *actually motivated* by age and does not constrain an employer who acts on the basis of other factors—pension status, seniority, wage rate—that are empirically correlated with age." *Lyon v. Ohio Educ. Ass'n and Professional Staff Union*, 53 F.3d 135, 139 (6th Cir. 1995) (citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604 . . . (1993)). Therefore, by basing their rejection of Mr. Gedos on his number of years of post-bar experience, the defendants have advanced a legitimate, nondiscriminatory reason for not hiring him.[338]

Defendant also had argued that the age discrimination claim was moot because the second job ad did not include an experience range. The court rejected this argument. "The Court need not belabor the merits of the defendants' mootness argument, because 'it is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'"[339]

C. DeBuhr v. Olds Products Company

In *DeBuhr v. Olds Products Company*,[340] the plaintiff did not directly challenge an experience range in a job ad under Section 4(e) but used the experience range as circumstantial evidence of intent to discriminate in an ADEA lawsuit that challenged his termination. The U.S. District Court for the Northern District of Illinois held that the experience range, in conjunction with statements made by the defendant, provided sufficient circumstantial evidence of intent to discriminate, allowing the plaintiff's claim to survive a motion for summary judgment.

In *DeBuhr*, the plaintiff alleged that his employment was terminated due to his age. Utilizing the burden-shifting method set forth in *McDonnell Douglas*,[341] the plaintiff provided circumstantial evidence of intent to discriminate, which included, *inter alia*, a job advertisement for his replacement that sought an individual with "between 5 and 10 years'

338. *Gedos*, 2011 U.S. Dist. LEXIS 13679, at *10.

339. *Id.* at *5 (citing Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 190 (2000).

340. DeBuhr v. Olds Prods. Co., No. 95-C-1462, 1996 WL 277644 (N.D. Ill. 1996).

341. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801–03 (1973).

experience."[342] "Although this advertisement does not alone directly support a claim for intentional discrimination, viewing this in light of the other statements made by [the defendant] it adds to the circumstantial evidence from which discriminatory intent might be inferred."[343]

IV. EEOC GUIDANCE ON EXPERIENCE RANGES

A. Section 632 Of The EEOC Compliance Manual

There is no reported decision under Section 4(e) of the ADEA on a challenge to an experience range that "deter[ed] the employment of [an] older individual" in violation of Section 1625.4(a). In *Kleber*, the plaintiff indirectly challenged an experience cap under Section 4(a)(2) of the statute. In *Gedes*, the plaintiff challenged an experience cap under neither Section 4(e) nor Section 4(a). And in *DeBuhr*, the plaintiff offered an experience range as proof of intent in a wrongful termination claim under the ADEA.

Moreover, there is a dearth of guidance from the EEOC on the lawfulness under Section 4(e) of the ADEA and under Section 1625.4(a) of the EEOC regulations of experience ranges in job advertisements. Indeed, there appears to be no current official EEOC guidance on the lawfulness under Section 4(e) of the ADEA and under Section 1625.4(a) of the EEOC regulations of experience ranges in job advertisements. Nonetheless, there are some indications that, in the past, the EEOC took the view that experience ranges could deter job applicants in violation of 29 C.F.R. § 1625.4.

Chapter 2 of the EEOC Compliance Manual addresses Threshold Issues.[344] Chapter 2 "provides guidance and instructions for investigating and analyzing coverage, timeliness, and other threshold issues that are generally addressed when a[n employment discrimination] charge is first filed with the EEOC."[345] The threshold issues include Cognizable Claims,[346] Covered

342. *DeBuhr*, 1996 WL 277644, at *3.

343. *Id.* at *3 n.4.

344. U.S. EQUAL EMP. OPPORTUNITY COMM'N, COMPLIANCE MANUAL, CHAPTER 2, THRESHOLD ISSUES, https://www.eeoc.gov/policy/docs/threshold.html#2-II-B-7 [https://perma.cc/3QVQ-YBMS].

345. *Id.*

346. Under Section 2-II, Cognizable Claims, claims can be filed under Title VII, the ADEA, the Americans With Disabilities Act of 1990, 42 U.S.C. § 12101; and the Equal Pay Act of 1963, 29 U.S.C. § 206(d). *Id.*

Parties,[347] Timeliness,[348] Standing,[349] and Preclusion Based on a Prior State or Federal Court Decision.[350]

Section 2-II, Cognizable Claims, includes Covered Issues, *e.g.*, employment decisions and employment practices, harassment, reasonable accommodation (for religious beliefs and disabilities), employment referral practices, labor organization practices, job training program practices, and advertisement and recruitment. Section 2-II.B.7, Advertising and Recruitment, is just three sentences, however, and simply quotes Section 1625.4 of the EEOC regulations:

> Title VII, the ADEA, and the ADA prohibit discrimination based on race, color, national origin, sex, religion, age, or disability in advertisements and recruitment related to employment, referral for employment, or apprenticeships or other training. Advertisements also may not contain terms or phrases that would deter members of a particular class from applying. For example, a help-wanted advertisement that uses terms such as "young," "college student," or "recent college graduate" may deter individuals 40 or over from applying, and therefore would violate the ADEA.[351]

For a detailed discussion of the topic, however, Section 2-II.B.7 refers to Section 632, *Violations Involving Advertising, Recordkeeping or Posting of Notice*, of the EEOC Compliance Manual, Volume II (BNA).

Section 632 includes an Introduction (Section 632.1), a discussion of Employment Opportunity Advertising (632.2), a discussion of Recordkeeping (632.3), and a discussion of Notices To be Posted (632.4). Section 632.2(d), Guidelines on Employment Opportunities Advertising, addresses both Title VII and the ADEA. Section 632.2(d)(2) explains that the EEOC "has provided its interpretation of the ADEA's prohibition of

347. Section 2-III, Covered Parties, includes Covered Individuals, *e.g.*, employees, former employees, job training program applicants and participants, and non-citizens, as well as Covered Entities, *e.g.*, employers, employment agencies, and labor organizations. *Id.*

348. Section 2-IV, Timeliness, addresses deadlines for charges filed with the EEOC as well as deadlines for filing civil actions. It also discusses deadline extensions. *Id.*

349. Under Section 2-V, charges can be filed by aggrieved persons, on behalf of aggrieved persons, or by the EEOC itself. *Id.*

350. Section 2-VI discusses claims preclusion and issue preclusion. U.S. EQUAL EMP. OPPORTUNITY COMM'N, COMPLIANCE MANUAL, CHAPTER 2, THRESHOLD ISSUES, https://www.eeoc.gov/policy/docs/threshold.html#2-II-B-7 [https://perma.cc/3QVQ-YBMS].

351. *Id.*

discriminatory advertising at 29 C.F.R. § 1625.4."[352] The manual then quotes Section 1625.4(a).[353]

The quoted regulation is then followed by two examples of job ads that would run afoul of that regulation. The second example addresses, *inter alia*, experience ranges:

> R places ads in newspapers containing a requirement that the applicant have two to four years of experience; or describing the career opportunity as an "excellent first job"; or referring to the position as "junior secretary or "junior executive". [sic] R argues that these phrases only describe the nature of the job and do not exclude applicants in the protected age group. However, the EOS should determine whether individuals in the protected age group were denied employment because they had more than four years of relevant experience (hence "overqualified"), or because the individual had prior work experience, or did not meet the image of "junior". [sic] If so, this would be evidence of a § 4(e) violation—that R intended the ad to limit applications on the basis of age—and also evidence of a possible recruitment and hiring violation as well. . . .[354]

Thus, the EEOC has considered the lawfulness of experience ranges under Section 4(e) and has concluded that they could deter job applicants in violation of 29 C.F.R. § 1625.4.

Section 632 was rescinded in 2019 because some EEOC "guidance documents have become outdated because they were limited to narrow fact patterns *that now rarely, if ever, arise*."[355]

> [Section 632] addresses issues concerning discriminatory advertising, recordkeeping requirements, and requirements to post notices. *Many of the issues are well-established and rarely arise today, such as the applicability of Title VII to job advertisements limited to persons of specific genders, or summarizes the contents of existing regulations*. At least one example applies a standard under the ADEA that is no longer correct – [sic] that the ADEA prohibits discrimination on the basis of age against relatively younger persons who are within the

352. *Violations Involving Advertising, Recordkeeping, or Posting of Notice*, 2 EEOC COMPL. MAN. (BNA), § 632(d)(2), at 632–35 (1987).

353. *Id.*

354. *Id.* (referencing Section 632.2(d) at 632–35).

355. *Rescinded Guidance and Technical Assistance* , U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/guidance/rescinded-guidance-and-technical-assistance [https://perma.cc/3JPR-XM6N] (last visited Nov. 18, 2021) (emphasis added).

> ADEA's protected age group. The section also references charge procedures that no longer apply. Rescinded December 2019.[356]

It is not clear if the EEOC today would conclude that experience ranges under Section 4(e) could deter job applicants in violation of 29 C.F.R. § 1625.4. Nor is it clear that the EEOC rescinded Section 632 because today it would not conclude that experience ranges are unlawful under the ADEA and the regulations thereunder. What is clear is that, in the past, the EEOC has considered the lawfulness of experience ranges and has concluded that they could deter job applicants. Although rescinded, Section 632 thus provides some indication that the EEOC today might conclude that experience ranges are unlawful.

B. DeVito EEOC Complaint

In addition to Section 632, there are other indications that the EEOC might conclude today that experience ranges are unlawful under Section 1625.4. In 2009, the EEOC analyzed an experience range that was challenged in a complaint filed with the EEOC by Ralph DeVito. Following an investigation into the complaint, the Commission issued a Notice of Right to Sue.[357] A subsequent civil action filed by DeVito that challenged the experience range was settled and never resulted in a reported decision. Yet the EEOC issuance of a Notice of Right to Sue could be an indication that the Commission did not disagree with the complainant's contention that the experience range was unlawful under the ADEA.

In or around August 2009, DeVito, who was fifty-eight years old and unemployed, read two job ads published online by Infosys Technologies, Ltd.[358] The first advertisement prescribed a "maximum experience" requirement of fifteen years.[359] The second advertisement prescribed a

356. *Id.* (emphasis added).

357. A Notice is not a prerequisite to a civil action under the ADEA. *See* 29 U.S.C. § 626(d)(1)("No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission."). In contrast, a Notice of Right to Sue is a prerequisite to a civil action under Title VII. 42 U.S.C. § 2000e-5(f)(1)("If . . . the Commission has not filed a civil action . . . the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought. . . ."). "Thus, the ADEA plaintiff can sue in court even if the EEOC has not yet completed its investigation or attempts at conciliation." Hodge v. N.Y. Coll. of Podiatric Med., 157 F.3d 164, 168 (2d Cir. 1998). An individual, however, can request a Notice of Right to Sue from the EEOC. 29 C.F.R. § 1601.28(a).

358. Complaint at ¶¶ 7–8, 11, Ralph DeVito v. Infosys Tech., Ltd., No. 2:11:CV-01025-WJM-MF, 2011 WL 12863618 (D.N.J. Feb. 23, 2011) (No. 2:11:CV-01025-WJM-MF).

359. *Id.* ¶ 12.

"maximum experience" requirement of twenty-five years.[360] DeVito had over twenty-five years of experience but otherwise met the requirements for the positions in the two job ads.[361]

DeVito applied for both positions but was not hired "because he did not satisfy the 'maximum experience' requirements" in those ads.[362] According to the complaint filed in the subsequent civil action, "Infosys failed and refused to hire DeVito for the Infosys positions because of his age."[363]

In or around November 2009, DeVito filed an age discrimination complaint with the EEOC against Infosys.[364] The complaint "challenged the 'maximum experience' requirements" in the two Infosys job advertisements.[365] "After conducting a thorough investigation and providing Infosys with a full opportunity to justify the 'maximum experience' requirements, the EEOC concluded that DeVito had suffered age discrimination and sent him a Notice of Right to Sue." [366]

On February 23, 2011, DeVito filed a lawsuit against Infosys under the ADEA.[367] The civil complaint alleged a violation of the ADEA relative to the two job ads posted online by Infosys.[368] Specifically, the civil complaint alleged that the "maximum experience" requirements in the two job ads "constituted an unlawful limitation, specification, or discrimination as to age—*i.e.*, a *de facto* age limit—because they were more likely to eliminate applicants who were age forty (40) or older."[369]

The DeVito lawsuit was settled and never resulted in a reported decision. Yet the EEOC issuance of a Notice of Right to Sue is an indication that the Commission may have agreed with DeVito that the experience ranges were unlawful under the ADEA.

C. EEOC v. Barrister Referrals, Ltd.

Finally, in 1994, the EEOC itself filed a lawsuit in federal court in New York to enjoin the use of experience ranges in job advertisements for

360. *Id.* ¶ 13.
361. *Id.* ¶¶ 14–15.
362. *Id.* ¶ 17.
363. *Id.* ¶ 21.
364. Complaint at ¶ 23, Ralph DeVito v. Infosys Tech., Ltd., No. 2:11:CV-01025-WJM-MF, 2011 WL 12863618 (D.N.J. Feb. 23, 2011) (No. 2:11:CV-01025-WJM-MF).
365. *Id.*
366. *Id.* ¶ 24.
367. *See id.* at *1.
368. *Id.* ¶¶ 25–27.
369. *Id.* ¶ 18.

employment with New York City law firms.[370] The lawsuit, *EEOC v. Barrister Referrals, Ltd.*,[371] was filed after an EEOC investigation into New York City law firms that used experience ranges in their job ads for associates.[372] In the course of the investigation, the EEOC explained its concerns. "'We have no problem with ads that say a minimum amount of experience is required,' said James Lee, the EEOC regional attorney in New York. 'But these ads imply that if you have too much experience, you should look elsewhere.'"[373] "[A] former EEOC commissioner also understands the agency's concern. 'The staff has always been skeptical of an overqualified defense, which comes up often in discrimination cases,' he said."[374]

Thus, "[t]he EEOC also has investigated whether advertisements by law firms seeking to hire associates may be discriminatory insofar as the ads make reference to maximum years of experience, i.e., three years, for example. . . ."[375] And in 1994, it filed a complaint in federal court against Barrister Referrals, Ltd., of New York City, in which complaint the EEOC alleged, *inter alia*, that the recruitment firm "placed job advertisements which contained language limiting applicants based on their . . . years of experience" and "that Barrister's practices with respect to . . . advertisements had a chilling effect on applicants and potential applicants based on age. . . ."[376]

Discovery in the Barrister lawsuit proceeded for several years before a consent decree was entered in February 1998.[377] In the decree, Barrister admitted no liability with respect to the allegations in the complaint.[378] Yet Barrister agreed to not engage in practices that violate, *inter alia*, Section 1625.4 and to not "place job advertisements containing language which limits applicants and potential applicants based on their . . . age[.]"[379] Thereafter, law firms were advised that they should "be wary of using

370. *See* EEOC v. Barrister Referrals, Ltd., No. 94-cv-4833, 1997 WL 370782 (S.D.N.Y. filed July 1, 1994); *see also* Mark Hansen, *EEOC Probes Law Firm Hiring: Agency suspects some job ads discourage older candidates*, 79 A.B.A. J., Sept. 1993, at 16 (recounting the details of *Barrister Referrals*).

371. *See Barrister Referrals*, No. 94-cv-4833.

372. *See, e.g.*, Hansen, *supra* note 374.

373. *Id*.

374. *Id*.

375. 1 HOWARD C. EGLIT, AGE DISCRIMINATION, § 4:34 at 4-151 n.7 (Thomson Reuters 2d ed. 2017).

376. Consent Decree at *1, EEOC v. Barrister Referrals, Ltd., No. 94-cv-4833, 1997 WL 370782 (S.D.N.Y. filed July 1, 1994), (No. 94-cv-4833).

377. *See id*.

378. *Id*. at *2.

379. *Id*. at *4.

language in job advertisements that suggest[s] . . . applicants have 'no more than' a certain number of years experience [sic]."[380]

Barrister established no legal precedent. Yet it is apparent that in 1994, the EEOC considered the lawfulness of experience ranges and concluded that they could deter job applicants in violation of Section 4(e) of the ADEA and 29 C.F.R. § 1625.4.[381]

V. EXPERIENCE RANGES ARE UNLAWFUL

A. Reasonable Person Standard Under Title VII And The ADEA

There is precious little precedent on the lawfulness of experience ranges under the ADEA. In fact, there is no reported decision under Section 4(e) of the ADEA on a challenge to an experience range that "deter[ed] the employment of [an] older individual" in violation of Section 1625.4(a).

To determine if experience ranges are unlawful under Section 1625.4(a) and the ADEA, one must first determine if a reasonable person would interpret the phrase "three to six years of experience" as an experience range that seeks job applicants with no more than six years of experience.[382]

Second, one must determine if a reasonable person would be deterred by the phrase "three to six years of experience" from seeking employment, much in the same way that a woman would be deterred from seeking employment in response to a job ad that sought "Help Wanted—Males."

The reasonable person standard is grounded in Title VII jurisprudence as well as in ADEA jurisprudence. For example, Title VII prohibits sexual harassment in the workplace.[383] In 1980, the EEOC amended its Guidelines on Discrimination Because of Sex to include a prohibition on workplace harassment:[384]

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's

380. Cheryl L. Anderson & Leonard Gross, *Discrimination Claims Against Law Firms: Managing Attorney-Employees From Hiring to Firing*, 43 TEX. TECH L.R. 515, 522 (2011).

381. *See supra* Part IV.

382. *See Violations Involving Advertising, Recordkeeping, or Posting of Notice*, *supra* note 356, at 632–35.

383. *See generally* 29 C.F.R. § 1604.11.

384. 45 Fed. Reg. 74,677 (Nov. 10, 1980).

> employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[385]

The Supreme Court upheld the regulation on workplace harassment in *Meritor Savings v. Vinson*.[386]

To implement the prohibition on workplace harassment, the courts have adopted a reasonable person standard to judge if behavior is unlawful sexual harassment or behavior that may be insensitive and rude but not unlawful.[387] In *Meritor*, the Court held that sexual harassment that is so "severe or pervasive" that it in effect "'alter[s] the conditions of [the victim's] employment and create[s] an abusive working environment'" violates Title VII.[388] But to be "actionable under the statute, a sexually objectionable environment must be both objectively and subjectively offensive, one that a *reasonable person* would find hostile or abusive, and one that the victim in fact did perceive to be so."[389] To assess if a reasonable person would find offensive behavior unlawful, the Court "directed courts to determine whether an environment is sufficiently hostile or abusive by 'looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'"[390]

The Court has emphasized that Title VII does not prohibit "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex."[391] "'[S]imple teasing,' offhand comments, and isolated incidents (unless extremely serious)" are not unlawful under Title VII, which standard ensures that the statute does not become a "general civility code."[392] The standard also will "filter out complaints attacking 'the ordinary tribulations of the workplace, such as the

385. 29 C.F.R. § 1604.11(a).

386. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 73 (1986).

387. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

388. *Vinson*, 477 U.S. at 60 (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

389. Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998) (citing *Harris*, 510 U.S. at 21–22) (emphasis added).

390. *Faragher*, 524 U.S. at 787–88(quoting *Harris*, 510 U.S. at 23).

391. *Id*. at 788 (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998)).

392. *Id*. (citing *Oncale*, 523 U.S. at 80–82).

sporadic use of abusive language, gender-related jokes, and occasional teasing.'"[393]

This reasonable person standard is used to determine if behavior is unlawful race-based harassment or behavior that may be insensitive and rude but not unlawful.[394]

The ADEA similarly prohibits workplace harassment based on age. There is no specific regulation under the ADEA similar to 29 C.F.R. § 1604.11 under Title VII, but the EEOC has stated that "[h]arassment is a form of employment discrimination that violates Title VII of the Civil Rights Act of 1964, [and] the Age Discrimination in Employment Act of 1967. . . ."[395] "Harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a *reasonable person* would consider intimidating, hostile, or abusive."[396] Finally, "[p]etty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality. To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to *reasonable people*."[397]

The Supreme Court has not yet ruled on age-related harassment under the ADEA. Yet several courts have recognized a cause of action for harassment under the statute and have adopted a reasonable person standard to judge if behavior is unlawful workplace harassment or behavior that may be insensitive and rude but not unlawful. For example, in *Dediol v. Best Chevrolet, Inc.*,[398] the Fifth Circuit held that, to prove unlawful harassment, the behavior must have "created an objectively intimidating, hostile, or offensive work environment[.]"[399] Moreover, the behavior must have been both objectively and subjectively offensive. "This means that not only must a plaintiff perceive the environment to be hostile, but it must appear hostile

393. *Faragher*, 524 U.S. at 788 (quoting 1 B. LINDEMANN & D. KADUE, EMPLOYMENT DISCRIMINATION LAW 175 (1st ed. 1992)).

394. *See, e.g.*, Rogers v. EEOC, 454 F. 2d 234, 238 (5th Cir. 1971) ("[M]ere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" not unlawful under Title VII); 1 B. LINDEMANN & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 349, nn.36–37 (3d ed. 1996) ("[D]iscourtesy or rudeness should not be confused with racial harassment" and "a lack of racial sensitivity does not, alone, amount to actionable harassment.") (quoted in *Faragher*, 524 U.S. at 787).

395. *Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/harassment [https://perma.cc/8Z3K-JRQ6] (last visited Apr. 18, 2022).

396. *Id*. (emphasis added).

397. *Id*. (emphasis added).

398. Deidol v. Best Chevrolet, Inc., 655 F.3d 435 (5th Cir. 2011).

399. *Id*. at 442 (citing Crawford v. Medina Gen. Hosp., 96 F.3d 830, 834–35 (6th Cir. 1996)).

or abusive to a *reasonable person*."[400] And a "mere[] . . . offensive utterance" is not harassment.[401]

Similarly, the Seventh Circuit has recognized claims for harassment under the ADEA but in *Racicot v. Wal-Mart Stores, Inc.* decided that "isolated comments about . . . age were neither severe or pervasive enough to create an objectively hostile work environment."[402] "[T]he statements made [about age] . . . are examples of boorish behavior but not actionable age harassment."[403] A similar conclusion was reached by the Sixth Circuit in *Crawford v. Medina General Hospital*.[404] "Saying '[o]ld people should be seen and not heard' is certainly rude, but it is not enough to create a hostile working environment. . . ."[405]

B. Reasonable Interpretation Of Experience Range

The reasonable person standard is grounded in Title VII jurisprudence as well as in ADEA jurisprudence.[406] So how would a reasonable person interpret the phrase "three-to-six years of experience" in a job ad? Merriam-Webster defines a "range" as "the difference between the least and greatest values of an attribute. . . ."[407] By definition, therefore, an experience range would reflect the least amount of experience and the greatest amount of experience sought by the employer. Based on this dictionary definition, a reasonable person would interpret the term "three to six years of experience" to mean a minimum of three years—and a maximum of six years—of experience.

This common-sense interpretation is consistent with a reasonable interpretation of, for example, prison sentences for criminal convictions, which include a minimum prison sentence and a maximum prison sentence. The U.S. Sentencing Guidelines, for example, establish sentencing policies

400. *Id.* at 441 (citing EEOC v. WC&M Enters., 496 F.3d 393, 399 (5th Cir. 2007)) (emphasis added).

401. *Id.* (citing *WC&M Enters*., 496 F.3d at 399).

402. Racicot v. Wal-Mart Stores, Inc., 414 F.3d 675, 678 (7th Cir. 2005) (citing Bennington v. Caterpillar, Inc., 275 F.3d 654, 660 (7th Cir. 2001)).

403. *Id.*

404. Crawford v. Medina Gen. Hosp., 96 F.3d 830 (6th Cir. 1996).

405. *Id.* at 836.The court also concluded that "there was hostility and abusiveness in this working environment, but the evidence suggests that the atmosphere stemmed from a simple clash of personalities." *Id.*

406. *See supra* Part V.A.

407. *Range*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/range#:~:text=2%20%3A%20to%20roam%20over%20or,age%20from%207%20to%2013 [https://perma.cc/M4LS-7VU7] (last visited Apr. 18, 2022).

and practices for the federal criminal justice system.[408] Promulgated by the U.S. Sentencing Commission pursuant to the Sentencing Reform Act of 1984,[409] the Guidelines propose appropriate sentences for federal crimes.[410] The proposed sentences provide a minimum prison term and a maximum prison term,[411] within which range a judge may impose a specific sentence based on the characteristics of the crime as well as the characteristics of the criminal, *e.g.*, past criminal conduct.

The Sentencing Table in the Guidelines, for example, provides for a sentence of eighteen to twenty-four months for some crimes committed by some criminals.[412] It is universally understood that this guideline means a minimum of eighteen months and a maximum of twenty-four months. It does not mean a minimum of eighteen to twenty-four months and a maximum that is left unspecified.

Similarly, job advertisements often include experience ranges as well as salary ranges. An advertisement may require "3-6 years of experience" and provide for a salary of "$150,000–$200,000." A reasonable person would interpret that salary range as a minimum of $150,000 and a maximum of $200,000, depending on experience. A reasonable person would not interpret that range as a minimum salary of $150,000–200,000 and a maximum salary that is left unspecified.

Indeed, the concept of a "minimum range" is itself an oxymoron. If a job requires a minimum of three-to-six years of experience, then it would require six years of experience, and three, four, or five years of experience would be inadequate.

C. Reasonably Deterred By Experience Range

To determine if experience ranges are unlawful under Section 1625.4(a) and the ADEA, once one determines if a reasonable person would interpret the phrase "three to six years of experience" as an experience range that seeks job applicants with no more than six years of experience, then one must next determine if a reasonable person would be deterred by the phrase "three to

408. *See generally* U.S. Sent'g Guidelines Manual § 1A1.1 (U.S. Sent'g Comm'n 2021), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2021/GLMFull.pdf [https://perma.cc/8W9N-9G8P].

409. 28 U.S.C. § 994(a). The Sentencing Reform Act of 1984 is Title II of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984).

410. The Guidelines are not mandatory, and the courts have the discretion to depart from their proposed sentences. *See*, 18 U.S.C. § 3553(b).

411. The range must be narrow. *See id.* § 994(b)(2) "[T]he maximum of the range . . . shall not exceed the minimum of that range by more than the greater of 25 percent or six months. . . ."

412. U.S. Sent'g Guidelines Manual § 5A (U.S. Sent'g Comm'n 2021).

six years of experience" from seeking employment, much in the same way that a woman would be deterred from seeking employment in response to a job advertisement that sought "Help Wanted—Males."

To be sure, the legal standard for unlawfulness under Section 1625.4(a) is whether a reasonable person would be deterred, not whether the experience range has a disparate impact on job applicants over the age of forty. The disparate impact standard has been adopted by the Supreme Court to determine the lawfulness of an employment practice under Section 4(a)(2) of the ADEA. It has not been adopted under Section 4(e) or its implementing regulation, Section 1625.4(a).

According to the EEOC, an experience range may deter the employment of job applicants within the protected class of the ADEA.[413] This interpretation is supported by the Notice of Right to Sue that the EEOC issued for Ralph DeVito. It is also supported by the complaint the EEOC filed with the U.S. District Court for the Southern District of New York in *EEOC v. Barrister Referrals, Ltd.* [414]

A reasonable person would interpret the phrase "three to six years of experience" to mean a minimum of three years and a maximum of six years of experience. And a reasonable person more than six years of experience would be deterred from seeking employment in response to a job ad that sought applicants with three to six years of experience. But this reasonable person standard must be accompanied by a determination that a prospective job applicant who alleges that she was deterred by an experience range from seeking employment has standing to pursue a claim under Section 1625.4(a). In this regard, the precedent established in *Hailes*[415] is instructive.

In *Hailes*, the plaintiff never applied for a job in response to a want ad for stewardesses under a "Help Wanted—Male" heading in a newspaper. In his lawsuit against the airline that placed the want ad, the plaintiff alleged a violation of Section 704(b) of Title VII. The Fifth Circuit first held that Hailes was "aggrieved" and thus had stated a justiciable claim.[416] Section 704(b), the court observed, prohibits job advertisements that "effectively inhibit members of the opposite sex from seeking employment. . . ."[417] Hailes would not have been inhibited from seeking employment had he applied for employment.[418]

413. *See supra* notes 358–60 and accompanying text.

414. Consent Decree at *4, EEOC v. Barrister Referrals, Ltd., No. 94-cv-4833, 1997 WL 370782 (S.D.N.Y. filed July 1, 1994), (No. 94-cv-4833).

415. Hailes v. United Air Lines, 464 F.2d 1006, 1006 (5th Cir. 1972).

416. *Id.* at 1008.

417. *Id.*

418. *See id.*

The court, however, "refuse[d] to rule that a mere casual reader of an advertisement that violates this section may bring suit."[419] "To be aggrieved under this subsection a person must be able to demonstrate that he has *a real, present interest* in the type of employment advertised. In addition, that person must be able to show he was effectively deterred by the improper ad from applying for such employment."[420]

Thus, in *DeVito*, although the EEOC appeared to agree that experience ranges are unlawful under the ADEA, DeVito would not have had standing under *Hailes* to bring his lawsuit because he was not deterred from seeking employment; he applied for the jobs notwithstanding the experience ranges.

A claim that a prospective job applicant was deterred from seeking employment might be dismissed for failure to apply for the job.[421] Yet the Supreme Court has held that, under Title VII, a failure to apply is not a *per se* bar to relief under the statute. In *International Brotherhood of Teamsters v. United States*,[422] the Court observed that "[t]he effects of and the injuries suffered from discriminatory employment practices are not always confined to those who were expressly denied a requested employment opportunity."[423] Adopting the futile gesture doctrine under Title VII, the Court held that "[w]hen a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application."[424] The Court concluded that "[t]he denial of Title VII relief on the ground that the claimant had not formally applied for the job could exclude from the Act's coverage the victims of the most entrenched forms of discrimination."[425]

Consistent with the Court's holding that a failure to apply is not a *per se* bar to relief under Title VII, *Hailes* indicates that the claim will not be dismissed for failure to apply if the prospective job applicant has "a real, present interest in the type of employment advertised" in the job advertisement that is unlawful under Section 4(e) of the ADEA.

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419. *Id.*

420. *Id.* (emphasis added).

421. "Historically, unless the applicant applied for the position, he or she was not entitled to relief." Jaydon McDonald, *Girls Rule, Boys Drool . . . and Must Apply: An Analysis of the Eighth Circuit's Perplexing Approach to a Failure-to-Apply Case in* EEOC v. Audrain Health Care, Inc., 756 F.3d 1083 (8th Cir. 2014), 94 NEB. L. R. 193, 198 (2015).

422. Int'l Broth. of Teamsters v. United States, 431 U.S. 324 (1977).

423. *Id.* at 365.

424. *Id.* at 365–66. The Court observed that several federal courts of appeal have held that a non-applicant for a job can be a victim of discrimination who is entitled to relief under Title VII. *Id.* at 367 (citing Acha v. Beame, 531 F.2d 648, 656 (2d Cir. 1976); Hairston v. McLean Trucking Co., 520 F.2d 226, 231–33 (4th Cir. 1975); Bing v. Roadway Express, Inc., 485 F.2d 441, 451 (5th Cir. 1973); United States v. N. L. Indus., Inc., 479 F.2d 354, 369 (8th Cir. 1973)).

425. *Int'l Broth. of Teamsters*, 431 U.S. at 367.

CONCLUSION—PROPOSED AMENDMENT TO 29 C.F.R. § 1625.4

Experience ranges are unlawful under 29 C.F.R. § 1625.4(a) because they deter prospective job applicants from seeking employment. A reasonable person would interpret a requirement that a job applicant have, for example, three to six years of experience to mean that an applicant must have a minimum of three years and a maximum of six years of experience. A prospective applicant with more than six years of experience will be "overqualified" and thus ineligible for employment.

In addition, a reasonable person with more than six years of experience would be deterred from seeking employment in response to a job ad that included such a requirement. Generally, prospective job applicants over the age of forty have more than six years of experience assuming, for example, that an applicant did not change careers after she reached the age of forty.

The regulations that implement the ADEA should reflect the legal conclusion that experience ranges deter prospective job applicants over the age of forty from seeking employment. Specifically, Section 1625.4(a) should be amended to include experience ranges in the list of terms and phrases that deter prospective job applicants over the age of forty from seeking employment.