

Discrimination and the aging American workforce: legal analysis and management strategies

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Abstract

Aging is a reality of life and American workforce is aging. Recessionary concerns have increased concerns of layoffs for older workers as they are often the highly paid employees with maximum benefits. The article, therefore, provides an overview of the U.S. Age Discrimination in Employment Act (ADEA) and other age discrimination laws. The article discusses the nature and role of the Equal Employment Opportunity Commission in implementing and enforcing age discrimination law. This article, in particular discloses that the plaintiff employee's legal burden in the U.S. for establishing a successful case of age discrimination against his or her employer is a very challenging one indeed. American multinational corporations, as well as foreign firms operating in the U.S., must be aware of U.S. civil rights law when conducting business in the United States. These firms also must be keenly aware of the important and far-reaching legal extraterritorial rule that a U.S. company that employs U.S. citizens anywhere in the world generally will be subject to a civil rights lawsuit if these employees are discriminated against based on the protected categories.

The main purposes of this article are to provide to leaders and managers practical strategies, tactics, and recommendations to comply with age discrimination laws, to maintain fair employment practices, and how to handle an actual age-based discrimination lawsuit. Detailed recommendations are supplied to managers on how to deal with the ADEA and especially how to avoid legal liability pursuant to this important anti-discrimination statute. Recommendations are also provided on how to deal with and to defend age discrimination lawsuits cases.

Key words: aging, discrimination, management strategies, legal analysis, ADEA.

Introduction

This study examines age discrimination in employment and the legal and practical challenges that managers confront in seeking to establish and maintain a legal and ethical workplace. This article first provides a general introduction to Civil Rights laws in the United States; and then furnishes a detailed legal analysis of age discrimination laws in the United States. Data dealing with the aging of the workforce, the unemployment rates of older workers, as well as the number of age discrimination lawsuits in the United States is furnished. A disparate treatment case is differentiated from a disparate impact case. In the article, direct evidence of age discrimination is distinguished from circumstantial evidence; and evidence of the intent to discriminate is distinguished from inferential evidence of discrimination. The “reasonable factors other than age” defense is distinguished from the “business necessity” defense. The article then presents many detailed recommendations, strategies, tactics, and suggestions for employers and managers to use and employ in order to avoid age discrimination in the workplace and age discrimination lawsuits. The article, finally, offers strategies, tactics, and recommendations to deal effectively with an actual age discrimination lawsuit pursuant to the laws of the United States.

Age Discrimination in Employment – An Overview

The global workforce evidently is becoming older. In the United States, the Bureau of Labor Statistics reported that there are 76.9 million people in the workforce who are age 40 or older (Grossman, 2008). More people are living longer, and working longer – by either choice or, particularly in today’s uncertain economic times, necessity. The increasing age of the workforce, the presence of age bias in society generally, together with the fact that the consequences of unemployment fall more harshly on older people, make the topic of age discrimination in employment a very significant one - legally, ethically, and practically. Moreover, as “older” employees get even older, their pension and health care costs concomitantly increase for their employers, thereby making older employees more “attractive” targets for workforce “downsizing.” Furthermore, not only are older employees disadvantaged in their efforts to retain employment, but also to regain employment when they are discharged from their jobs. Weak economies today also adversely affect older workers more harshly, particularly since, when business is not good, employers may feel compelled to reduce the number of their most “expensive” employees, who are typically their oldest workers. Moreover, in a “tight” economy, older workers are the ones most likely to have a more difficult time to secure a job, let alone a comparable job, after they have been “downsized.” Today, therefore, many older workers are remaining in the workforce; and the projections are that the percentage of older workers in the workforce will expand. In the United States, Sherman (2008) reported on a study by the American Association of Retired Persons that the percentage of people 65 and older who continues to work has grown from 10.8% in 1985 to 16% in 2007. Moreover, for people aged 55 to 64, the numbers have increased from 54.2% in 1985 to 63.8% in 2007. The topic of dealing with older workers in the workforce, particularly as the workforce ages, therefore, emerges as a very important legal subject matter indeed (Mujtaba and Cavico, 2010).

In contrast to intentional age discrimination, covert discrimination can exist against older employees. This form of discrimination appears to be subtler in nature; and consequently human

resource managers should be aware of such subtle forms of discrimination. Further research has revealed that unintentional “code words” often are used during the interview process, such as “we’re looking for go-getters” and people who are “with-it,” to describe desirable employees. Generally, these “buzzwords” seem not to apply to people who are seasoned and experienced, just “old.” However, as will be seen, the phrase “over-qualified” and other such words and phrases may be pretextual code words indicating age discrimination intent. According to Clark (2003), about two thirds of all U.S. companies use performance as at least one factor when deciding whom to lay-off during “tough” economic times. Many firms use the “forced ranking” system since executives like this process because it seems to be the “fairest and easiest way to downsize.” Unfortunately, “older” workers seem to get the “worst of it” as larger portions of them lose their jobs, possibly due to biases and because they earn more income and earn more benefits compared to their younger counterparts.

Age discrimination in the workplace impacts people of all sizes, races, colors, religions, and ethnicities. Yet Segrave (2001) noted that the evidence consistently shows that across time periods and countries, it is clear that age discrimination in employment creates more difficulties, and begins earlier, for women than for men. Such discrimination, which, as evidently will be seen, can be deemed illegal in the United States, can cause many employers and managers heightened anxiety, and also force many of them to court as defendants in age discrimination lawsuits. One of the greatest fears of company officials and individual managers is the likelihood of either being sued for something they have done intentionally or unintentionally, or for something they should have considered doing but did not. It is “no secret” that age-related lawsuits are proliferating; and more recently age related claims have been sharply on the rise due to layoffs, which seem to be targeting older workers. Juries (perhaps overly sympathetic ones) often side with aggrieved employees, even if the evidence is flimsy. Because of these trends, companies and their managers are realizing the need to protect themselves by periodically reviewing workforce diversity and analyzing the workplace for latent signs of discrimination (Administration on Aging, 2003).

United States Anti-Discrimination Law - Generally

The Civil Rights Act of 1964 is the most important civil rights law in the United States. This statute prohibits discrimination by employers, labor organizations, and employment agencies on the basis of race, color, sex, religion, and national origin. Regarding employment, the scope of the statute is very broad, encompassing hiring, apprenticeships, promotion, training, transfer, compensation, and discharge, as well as any other “terms or conditions” and “privileges” of employment. The act applies to both the private and public sectors, including state and local governments and their subdivisions, agencies, and departments. An employer subject to this act is one who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. One of the principal purposes of the act is to eliminate job discrimination in employment (Cavico and Mujtaba, 2008). The focal point of this work is Title VII of the Civil Rights Act, which deals with employment discrimination.

Discrimination, in employment or otherwise, can be direct and overt or indirect and inferential. Typically, there are two types or categories of employment discrimination claims against employers involving the hiring or promotion of employees. The first theory of recovery is called “disparate treatment” which involves an employer who intentionally treats applicants or

employees less favorably than others based on one of the protected classes of color, race, sex, religion, national origin, age, or disability. The discrimination against the employee is willful, intentional and purposeful; and thus the employee needs to show evidence of the employer's specific intent to discriminate. However, intent to discriminate can be inferred. So, for example, when the employee is a member of a protected class, such as a racial minority, and is qualified for a position or promotion, and is rejected by the employer while the position remains open, and the employer continues to seek applicants, then an initial or *prima facie* case of discrimination can be sustained (Cavico and Mujtaba, 2008). The "disparate treatment" doctrine was articulated by the U.S. Supreme Court case of *McDonnell Douglas Corp. v. Green* (1973) and modified by *Community Affairs v. Burdine* (1981) and *St. Mary's Honor Center v. Hicks* (1993). The analysis for a "disparate treatment" claim involves a shifting burden of proof as follows: (1) first the complainant must put forth credible evidence to establish a *prima facie* case of discrimination; (2) then if such evidence is established, the defendant employer must next articulate, through admissible evidence, a legitimate, non-discriminatory explanation reason for its actions; and finally (3) the burden shifts to the plaintiff employee to establish that the employer's proffered reason was merely a pretext to hide discrimination (HR Guide, 2009; Cavico and Mujtaba, 2008; *McDonnell Douglas*, 1973, pp. 802-04; *Burdine*, 1981, pp. 252-56).

The other legal avenue claimants may travel to prove their employment discrimination claims is called "disparate impact," or at times "adverse impact." This legal doctrine does not require proof of an employer's intent to discriminate. Rather, "a superficially neutral employment policy, practice or standard may violate the Civil Rights Act if it has a disproportionate discriminatory impact on a protected class of employees" (Cavico and Mujtaba, 2008, p. 501). Accordingly, "such a practice will be deemed illegal if it has a disproportionate discriminatory impact on a protected class and the employer cannot justify the practice out of business necessity" (Cavico and Mujtaba, p. 501). Disparate impact as a legal doctrine was first solidified in case law by the U.S. Supreme Court case *Griggs v. Duke Power* (1971), where facially neutral but mostly irrelevant pre-employment tests administered by the employer had a disparate impact on African-American applicants. The Court articulated the public purpose of the "disparate impact" doctrine, to wit, to correct past societal wrongs against minorities; and in ruling against the employer, the Court stated: "... It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the *status quo* of prior discriminatory employment practices" (*Griggs*, 1971, pp. 429-430). When explaining the justification for the "disparate impact" theory, the Court stated "...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" (*Griggs*, 1971, p. 433). Twenty years later, the Civil Rights Act of 1991 was enacted, and this important law included a provision codifying the prohibition on disparate impact discrimination articulated in the *Griggs* case. The 1991 statute indicated that "...an employee could prove his/her case by showing that an individual practice or group of practices resulted in a disparate impact on the basis of race, color, religion, sex, or national origin, and that the employer had failed to demonstrate that such a practice was required by business necessity" (Cavico and Mujtaba, 2008, p. 527).

The United States, therefore, certainly has a very well developed corpus of law governing the employer-employee relationship, most notably the Civil Rights Act. For years, however,

there has been significant disagreement in the governmental, legal, and academic communities regarding whether U.S. employment discrimination laws apply abroad; and if so, which laws, and how so. These questions certainly are more than “academic” for U.S. business managers operating in an increasingly competitive global economy. For example, how can a U.S. firm conduct business in a country that actually may legally require discrimination in employment against women or people of a certain religion or national origin, if the U.S. firm is under legal injunction pursuant to U.S. civil rights laws to treat all its employees equally and thereby not to discriminate? The United States today is only one of a small number of countries that afford comprehensive legal protection against discrimination in employment. Furthermore, U.S. federal law and the Equal Employment Opportunity Commission are not the only “players” in the U.S. anti-discrimination “drama”. As a federal system, the states in the United States can have, and do in most cases, comparable bodies of anti-discrimination law as well as regulatory administrative agencies. Also note that in the United States most state anti-discrimination agencies work in conjunction with the Equal Employment Opportunity Commission so discrimination claims can be handled in an efficient and effective manner. In addition, the states may provide greater legal protections than the federal government and federal laws do (Labriola, 2009). There are significant sanctions that confront the foreign as well as the U.S. firm that intentionally violates U.S. anti-discrimination laws, including the payment of monetary damages, the reinstatement of the adversely affected employee, and the payment of attorney’s fees and costs. These legal protections safeguard the employees of “covered” U.S. firms in the U.S. as well as the employees of foreign multinational firms in the U.S. The crucial questions, of course, are whether these important U.S. legal protections extend overseas to safeguard U.S. citizens working abroad for U.S. firms as well as the foreign employees of the U.S. firms in the host country. These questions will be answered in forthcoming sections to this article.

The U.S. Age Discrimination in Employment Act of 1967

A. Background and Overview

The purposes of the Age Discrimination in Employment Act (ADEA) are to promote the employment of older persons based on their ability and not their age, to prohibit arbitrary age discrimination in employment, and to assist employers and employees to find methods to meet the problems arising from the impact of age on employment. The law recognizes the grave problems resulting from age discrimination against older workers, particularly long-term unemployment, as well as the burden that age discrimination places on commerce and the free flow of goods and services. One important objective for the promulgation of the ADEA was the elimination of age discrimination against older job applicants. It was believed that the elimination of age discrimination in employment would reduce long-term unemployment of older workers, thereby diminishing poverty among the elderly (Age Discrimination in Employment Act, 2005).

The ADEA is a federal law which prohibits an employer from failing or refusing to hire a protected individual, or discharging an employee within the protected age category, or otherwise discriminating against such individuals, because of their age regarding compensation and the other terms and conditions of employment. The ADEA specifically makes it an illegal employment practice for an employer to refuse or fail to hire a person, or to discharge an employee, or to otherwise discriminate against any person with respect to compensation, terms,

conditions, or privileges of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training, due to this person's age. Moreover, it is illegal for an employer to limit, segregate, or classify its employees in any way which would deprive a person of employment opportunities or otherwise adversely affect a person's status as an employee because of such person's age. The ADEA applies to employers that have twenty or more employees, including state and local governments and the federal government. The statute also applies to employment agencies and labor organizations. Job applicants are also protected by the statute. The ADEA covers hiring, termination, compensation, as well as other terms and conditions of employment. The term "employee" is defined very broadly under the statute. As one commentator noted, the statute "...does not...define the term 'employee' with specificity. The circular statutory definition – an 'individual employed by any employer' – is broad enough to be almost meaningless without interpretation by regulation or case law" (Labriola, 2009, p. 371). The statute extends protection to public as well as private sector employees; however, the employees or persons in order to be protected must be at least 40 years of age. There is no upper level age limit to the statute's coverage. In 1986, the U.S. Congress removed the upper age limit in the statute, which had been 70, almost entirely. Although the ADEA offers protection only to workers 40 years or older, it must be noted that a number of states in the United States, including Florida, Maine, Alaska, Maryland, and Mississippi, have their own employment discrimination laws that do not specify any age limit. The ADEA defines "employer" as a "person" involved in an industry affecting commerce with twenty or more employees for each working day in each of twenty or more calendar weeks in the current or a preceding calendar year. A "person" is defined as one or more individuals, a partnership, an association, a corporation, or a labor organization, among other entities and relationships. Pursuant to the ADEA, when discrimination is found and there is evidence that the employer has acted in a willful and intentional manner, the aggrieved employee may be awarded "liquidated" damages of double the salary he or she was deprived of due to the discrimination. Moreover, in some states, such as California and Ohio, plaintiff employees who prevail may be awarded potentially much more lucrative "punitive" damages if the employer acted in a bad faith or malicious manner. The ADEA also applies to employment agencies and labor organizations. Note, however, that in 1996, the U.S. Congress amended the ADEA to permit public employers to discriminate on the basis of age in the hiring and mandatory retirement of law enforcement officers and firefighters. Originally the ADEA protected workers aged 40 to 65; then the upper limit was raised; and eventually it was removed; but with no changes to the lower age limit. However, there are many states that have a lower age limit, ranging from age 21 to specifying no age (that is, workers of all ages are protected). As perceptively noted by the American Association of Retired Persons in its 2008 report, "Reassessing the Age Discrimination in Employment Act," "these state laws parallel the current evolution of age discrimination legislation in Europe" (Neumark, 2008, p. 23).

It is important to note that the ADEA does not bar the termination of older employees; rather, the Act only bars discrimination against them. Accordingly, an employer can defend an ADEA lawsuit by establishing that an employment decision was based on reasonable and legitimate non-discriminatory reasons other than age, such as poor performance. Moreover, despite the connection between age and high salary, the ADEA does not automatically prohibit the discharge of a highly paid or compensated employee solely based on financial considerations. Employers thus are allowed to save money by eliminating highly paid positions; however, each employment decision must be handled on an individualized, reasonable, and fair basis; and consequently any "blanket" rules that would adversely affect older employees could trigger an

ADEA lawsuit. Finally, an employer may involuntarily retire an employee who is at least 65 years old and who has been employed during a two year period in a legitimate executive or high level policy-making position, and who is immediately entitled to an enumerated employer-financed pension. As a result of such rules, U.S. firms, pursuant to the influence of U.S. civil rights laws, might move more in the European direction of an expectation of lump sum buyouts for older workers when their jobs end, typically called “early retirement buyouts.”

The Equal Employment Opportunity Commission (EEOC) is a federal government regulatory agency empowered by the United States Congress to make anti-discrimination laws in the form of administrative rules and regulations pursuant to civil rights laws enacted by Congress as well as to administer and enforce civil rights laws, including the ADEA. The EEOC, in December of 2008, enunciated an important ruling regarding health benefits for retirees. The EEOC ruled that employers now can reduce or eliminate health benefits for retirees when they turn 65 years of age and thus become eligible for Medicare. The new policy permits employers to create two classes of retirees, one with more comprehensive health benefits for employees under 65 years, and another class with more limited benefits, or no benefits whatsoever. The rationale for the rule was to assist employers to provide and to continue to provide health benefits to employees. Of course, employers in the U.S. are not required by federal law to provide any health benefits to employees, either active or retired. This new EEOC policy thus establishes another explicit exemption from the ADEA for employers that now can scale back or eliminate benefits for workers over 65 years of age. Moreover, under the rule, employers can, if they choose, provide health benefits only to those retirees who are not yet eligible for Medicare; and retiree health benefits can be changed, reduced, or eliminated when a retiree, former employee, becomes eligible for Medicare. Also, employers now can reduce or eliminate health benefits provided to spouses and dependents of retired employees 65 years of age or older, regardless of whether the benefits for the retiree are changed. The rationale is that active employees and retirees under 65 have a greater need for health benefits since they typically are not eligible for Medicare; and that this new EEOC policy gives employers the flexibility they need to provide such coverage. The United States Court of Appeals for the Third Circuit, in the case of *AARP v. EEOC* (2007), ruled that the Equal Employment Opportunity Commission could implement the exemption to the Age Discrimination in Employment Act, thereby allowing employers to alter, decrease, or eliminate health benefits for retirees who reach the age of Medicare eligibility (Kaczorek, 2008). The EEOC had proposed this exemption after many employers began to eliminate retiree health benefits in order to avoid liability for age discrimination. Although employers are not required to provide retiree health benefits, many older persons in fact rely on this coverage in order to meet their health care needs. Consequently, according to one commentator, by allowing the EEOC to effectively repeal a portion of the ADEA, the appeals court has undermined legislation that protects against age discrimination (Kaczorek, 2008).

B. Job Advertisements and Employment Applications

Although most ADEA claims are brought as wrongful discharge lawsuits, rather than ones based in hiring decisions, there are two age-related hiring problem areas for employers to be concerned with: (1) job notices and advertisements and (2) pre-employment inquiries during the job application process (Age Discrimination in Employment Act, 2005). Regarding the former, as a general rule, the ADEA makes it illegal for an employer to include age preferences,

limitations, or specifications in job notices or advertisements. For example, a help-wanted notice that contains terms and phrases such as “age 25 to 35,” “young,” “college student,” or “recent graduate” will be construed by the EEOC as violations of the ADEA unless an exception applies. The rationale is that the use of such “young” expressions will deter the employment of older persons. Regarding pre-employment inquiries during the application process, the ADEA does not specifically forbid an employer from asking about an applicant’s age or date of birth. The employer actually can state in an advertisement or application for the applicant to state his or her age or date of birth. However, any age-related pre-employment age inquiries will be very closely scrutinized to ensure that the question was made for a legitimate purpose, and not to improperly discriminate against an applicant based on his or her age. The concern with age questions is that they not only might indicate intent to discriminate based on age, but their mere asking may deter older workers from even seeking employment. The employer is also advised to tell the applicant the question regarding his or her age is for a permissible purpose and not one proscribed by the ADEA.

Finally, it is interesting to note the relationship between age claims and appearance-based discrimination claims. Regarding the latter, as noted, it is a general rule of law in the United States that there is not a discrimination claim for appearance discrimination since the appearance is not a protected category under federal civil rights laws. Thus, for a victim of appearance discrimination to prevail, he or she must somehow connect the appearance discrimination to another impermissible form of discrimination, such as race, color, gender, disability, and of course, especially for the purposes herein – age. There is, quite logically, a relationship between appearance and age since physical attributes change with age. Moreover, this relationship is strengthened due to the fact that most people make the assumption that advancing age correlates to a deterioration in physical appearance. Therefore, a claim that a person was not hired due to an aged appearance would not work as a “pure” appearance claim, but might be successful as an age discrimination case if the plaintiff could demonstrate that he or she was not hired because the employer felt that he or she looked “too old” (Mujtaba and Cavico, 2010).

C. Non-Retaliation Provision

The ADEA also has a non-retaliation provision. The statute makes it unlawful for an employer to retaliate against an employee for opposing employment practices that discriminate based on age, or for instituting any age discrimination complaint, testifying, or participating in any manner in an investigation, proceeding, or legal action pursuant to the ADEA. Although the non-retaliation provision in the ADEA applies only to the private sector, the Supreme Court in 2008 ruled that non-retaliation protections in the statute apply also to federal government employees (Age Discrimination in Employment Act, 2005).

The Equal Employment Opportunity Commission

A. Introduction and Overview

The ADEA, as noted, is enforced in the U.S. by the federal government regulatory agency – The Equal Employment Opportunity Commission (EEOC). The EEOC is permitted to bring a lawsuit on behalf of an aggrieved employee, or the aggrieved employee may bring a suit himself or herself for legal or equitable relief. In either case, the ADEA provides the right to a

jury trial. The number of older workers has steadily increased in the United States over the past decade. Similarly, over the past decade, the number of age discrimination claims filed with the EEOC has been increasing too. It also again must be stressed the ADEA is a federal, that is, national law. Since the U.S. is a federal system, it accordingly must be noted that almost all states in the U.S. have some type of anti-discrimination age law – law, moreover, which may provide more protection to an aggrieved employee than the federal law does.

According to EEOC, for the fiscal year 2008, which ended September 30, the agency received the unprecedented number of 95402 workplace discrimination claims, which represented a 15% increase from the previous year; and charges based on age discrimination and retaliation saw the largest annual increases (EEOC Press Release, 2009). To compare, for the 2004 fiscal year, the Commission received 17,837 charges of age discrimination; resolved 15,792 age discrimination charges; and recovered \$60.0 million in monetary benefits for charging parties and other aggrieved individuals (not including monetary benefits obtained through litigation). The Equal Employment Opportunity Commission reports that age discrimination claims are still a major factor; however the percentage of such claims declined in the mid 1990s compared to previous data. However, it did increase again in the turn of the new century. One reason for this decline in the mid-90's is attributed to the over 40 population as being one of the fastest growing demographic segments in the United States. Age discrimination settlements and jury awards are substantially higher than those awarded for race, sex, or disability cases. To illustrate one local example, the Ft. Lauderdale *Sun-Sentinel* newspaper reported in April of 2009 that in Broward County, Florida, for the fiscal year 2008, age discrimination claims filed with the EEOC increased by 21% from the previous year (Pounds, 2009).

The EEOC provides updated information on charges of age discrimination cases that have been filed with them. In March of 2009, the *Wall Street Journal* (Levitz and Shishkin, 2009) reported the most recent discrimination data from the EEOC. The *Journal* reported that age discrimination allegations by employees are at a “record-high,” increasing 29% to 24,600 claims filed for the year ending in September 2008, which was an increase from the 19,103 claims filed in 2007 (Levitz and Shishkin, p. D1). The *Wall Street Journal* also noted that employment discrimination claims overall had increased, now also at a “record high,” totaling 95,402, which represented a 15% increase (Levitz and Shishkin, p. D1). The *Journal* underscored that the “most dramatic” increase in complaints to the EEOC was in the age discrimination category (Levitz and Shishkin, p. D1). Data also was provided by the EEOC in March of 2008. As reported by *HR Magazine*, the agency’s annual report of private sector discrimination charges “painted a disheartening picture” (Grossman, 2008, p. 63). There were 83,000 discrimination claims filed with the EEOC in 2007, which represented the largest one year increase since 1993; and age discrimination charges, which numbered 19,103, had, as characterized by *HR Magazine*, the “dubious distinction” of increasing the fastest, with a caseload 15% greater than the prior year (Grossman, p. 63). However, it should be noted that more than six times the number of people in 2007 complained of race discrimination than age discrimination. *HR Magazine* provided a list of factors contributing to the dramatic rise in age discrimination claims to the EEOC: (1) Greater awareness of the law. (2) An increase in the number of U.S. workers who in fact are protected by the ADEA (50% of the workforce according to the Bureau of Labor Statistics). (3) The percentage of older workers continuing to rise as “baby-boomers” age through their work lives. (4) A faltering economy which is

compelling many employees who had intended to retire to extend their time in the workforce (Grossman, 2008).

However, despite the prominence and power of the EEOC, the agency is constrained by the large caseloads and limited resources, as all government agencies are, but also by delimited legal leverage. It is important to note that as of 2008 the EEOC only had 200 attorneys to service the whole country (Grossman, 2008). The agency, as will be seen in detail in the next section, has the power to investigate and to mediate and conciliate claims, as well as to make critical findings of “reasonable cause” for discrimination and to bring such a case to the courts. Yet the agency does not have the authority to render final legal judgments on the merits of a case or to impose financial or other sanctions on behalf of aggrieved employees. *HR Magazine* (Grossman, 2008) also provided data indicating the number of claims filed with the EEOC, the treatment, and the resolution thereof. In 2007, the EEOC found “reasonable cause” in 629 age discrimination cases; the agency’s general counsel filed 32 lawsuits, with the majority alleging discriminatory discharge. Overall, in 2006, the EEOC filed 383 lawsuits for all types of discrimination claims. Of these, 339 ended in consent decrees or settlements and 11 were resolved by voluntary dismissal; and of the 33 cases actually resolved by court orders, the EEOC prevailed nine times. Regarding age discrimination charges resolved in 2007, 79% were resolved by a finding of no reasonable cause and administrative closure; and 21% resulted in merit resolutions for the complaining employee. Moreover, in 2007, the EEOC found reasonable cause in just 3.9% of the age discrimination cases investigated. In addition, in 2007, 46% of age discrimination claimants were layoff or discharge cases, 15% regarded the “terms and conditions” of employment, 11% were harassment cases, 8% hiring, 7% discipline, 6% promotion, 4% wages, and 3% were demotion. Finally, for all types of discrimination cases in 2007 which were resolved through settlement and conciliation, the EEOC collected \$66.8 million, which represented an average of \$4,140 for every claim filed. One illustration of a settlement of an age discrimination case mentioned by *HR Magazine* was the 2005 Sprint Nextel case, which involved 1,697 former employees who were subject to a lay-off, and which was settled for \$57 million (which, as emphasized by *HR Magazine*, also resulted in the plaintiffs’ attorneys “walking off with a cool \$19.4 million in legal fees”) (Grossman, 2008, p. 70.) On the state level in the United States, the Academy of Management published an article discussing an Ohio State University study of 12,000 age discrimination claims filed with the Ohio Civil Rights Commission from 1988-2003. The study indicated that termination was found to be the most frequent method to base an age discrimination claim (used in 66% of the cases), followed by age harassment (12%) and exclusion from hiring (10%) (Santora and Seaton, 2008, p. 104).

B. Equal Employment Opportunity Commission Procedures

The ADEA allows any person who is aggrieved by a violation of the statute to institute a civil action in any court of competent jurisdiction for any and all legal redress which will effectuate the purposes of the ADEA. Grossman (2008) related the EEOC’s initial, and very practical, procedures regarding the very large number of discrimination claims the agency receives: “...EEOC officials learn to cherry-pick from among the charges, looking for obvious winners, especially those that will have an impact beyond the complainant and, perhaps most important, generate publicity, serving as a deterrent....As complaints flow in, they’re assigned to three baskets: Basket A, which contains potentially high-profile claims and those where discrimination seems apparent; Basket B, which holds claims that could go either way; and

Basket C, which contains claims that don't look promising. When employers receive a charge, they are not told what basket it falls in. For cases in Baskets B and C, the EEOC generally offers parties a chance to settle through mediation" (p. 66).

However, the right of any person to bring such a legal action will be terminated upon the commencement of a legal proceeding by the EEOC to enforce the rights of the employee pursuant to the ADEA. The ADEA specifies that for a legal action brought pursuant to the statute, a party is entitled to a trial by jury on any issue of fact in any lawsuit for the recovery of amounts claimed owing as a result of the alleged violation of the statute. However, no civil action can be commenced by a person pursuant to the ADEA until 60 days after a charge asserting unlawful age discrimination has been filed with the EEOC. Such a charge, moreover, must be filed within 180 days after the alleged unlawful discrimination occurred. In an interesting Supreme Court case in 2008, the Court ruled that if the EEOC makes a mistake in investigating employees' allegations of age discrimination and notifying the employer, the employees nonetheless are still allowed to pursue an age discrimination lawsuit against their employer. In the case at issue, the EEOC failed to notify the accused employer that several of its employees had filed a complaint alleging age discrimination against the employer. When the 60 day period transpired, the employees wanted to sue, but the employer contended that it had not been notified of the charges by the EEOC. The EEOC is legally obligated to notify employers of age discrimination charges since, during the 60 day period before an employee can file a lawsuit, the EEOC is supposed to resolve the dispute informally. In the Supreme Court case, the employees, who were couriers at FedEx, contended that their employer was discriminating against them because of their age when it adopted performance benchmarks that they would find difficult to meet. They consequently asserted that this policy was an attempt to force older workers out of the company before they would be entitled to receive employment benefits, and therefore this policy was in violation of the ADEA. The problem arose when one of the employees filed an informal "questionnaire" with the EEOC together with an affidavit specifying the allegation. Was the questionnaire with the affidavit a technical "charge"? If so, the EEOC had to notify the employer. The company argued that the couriers had no right to bring the lawsuit since the company had not been notified of the legal action and consequently had been denied an opportunity to resolve the dispute by means of informal mediation. "Charge" is not precisely defined in the ADEA; and the employee did not file a formal EEOC "charge of discrimination"; yet the EEOC should have notified the employer of the filing of the questionnaire, and should have commenced an investigation. The Supreme Court, nevertheless, allowed the employees to bring a formal lawsuit against their employer. Actually, regarding the procedural aspects of EEOC, the Supreme Court has articulated that the ADEA has to be "...interpreted in a way that reflects the realities of the individuals who file charges with the EEOC. Specifically, these individuals are, for the most part, (1) unrepresented; (2) lay individuals; (3) not highly educated; and (4) cannot be assumed to have detailed knowledge of the ADEA statutes and regulations" (Schwartz, 2009, p. 692).

The Age Discrimination Lawsuit – Procedural and Substantive Elements

A. Employee's Initial or Prima Facie Case

When the EEOC finds "reasonable cause" it grants the aggrieved party a "right-to-sue" letter which allows the employee to proceed to the federal courts. The agency itself actually may

go to court on behalf of the complaining employee, or the employee may also choose to be represented by private legal counsel. Regardless, in either situation, the *prima facie* case is the required initial case that a plaintiff employee asserting discrimination must establish. Basically, *prima facie* means the presentment of evidence which if left unexplained or not contradicted would establish the facts alleged. Generally, in the context of age discrimination, the plaintiff employee must show that: 1) he or she is in an age class protected by the ADEA; 2) the plaintiff applied for and was qualified for a position or promotion for which the employer was seeking applicants; 3) the plaintiff suffered an adverse employment action, for example, the plaintiff was rejected or demoted despite being qualified, or despite the fact that the plaintiff was performing his or her job at a level that met the employer's legitimate expectations; 4) after the plaintiff's rejection or discharge or demotion, the position remained open and the employer continued to seek applicants from people with the plaintiff's qualifications. These elements if present give rise to an inference of discrimination. The burden of proof and persuasion is on the plaintiff employee to establish the *prima facie* case of discrimination by a preponderance of the evidence. However, based on the Supreme Court case of *O'Connor v. Consolidated Coin Caterers Corp.* (1966), it is not a necessary element to the plaintiff's *prima facie* case for the plaintiff to show that he or she was replaced by a person under 40 years of age, the ADEA minimum age. That is, the fact that one person protected by the ADEA lost out on a job opportunity to another person also protected by the ADEA is irrelevant, so long as the aggrieved party lost out because of age. Of course, as a practical matter, the fact that a person's replacement is substantially younger in age than the person replaced should emerge as a far more reliable indicator of age discrimination.

B. The Disparate Treatment Theory

“Disparate treatment,” as noted, in essence means intentional discrimination. That is, the employer simply treats some employees less favorably than others because of their age (or other protected characteristic). Proof of a discriminatory intent on the part of the employer is critical to a disparate treatment case. The plaintiff employee can demonstrate this intent by means of direct or circumstantial evidence; but the employer's liability hinges on the presence of evidence that age actually motivated the employer's decision. A disparate treatment case will not succeed unless the employee's age actually formed a part to the decision-making process and had a determining affect on the outcome. Of course, if the motivating factor in the employer's decision was some criterion other than the employee's age, then there is no disparate treatment liability (Mujtaba and Cavico, 2010).

C. Direct Evidence

Direct evidence is evidence that clearly and directly indicates the employer's intent to discriminate; that is, such evidence is the proverbial “smoking gun” that directly discloses the employer's discriminatory intent. In building a case, one commentator noted that “...offering direct proof of motive in the form of ageist slurs or other incriminating behavior is a more common approach, and one that is likely to be more effective. Such evidence must, however, be evaluated on a case-by-case...” (Labriola, 2009, p. 380). An example of such direct evidence would be a memo to terminate all older men since they are technologically less knowledgeable and capable and resistant to technological changes. Illustrations would be statements that the

employee is too old for certain work, or too old to make “tough” decisions, that the employee should be spending more time with his or her family, or playing golf or fishing, as well as constant questioning of the employee as to his or her retirement date and/or plans. Concrete examples of actual “ageist” language of a demeaning and derogatory nature that can provide evidence of discriminatory intent include: “that old goat,” “too long on the job,” “old and tired,” and “he had bags under the eyes” (Quirk, 2008). Also evidencing an intent to discriminate are such “young bloods” remarks, such as “We need young blood around here,” “Let’s bring in the young guns” (Quirk, 2008), and the employee “needs special treatment because she is getting old” (Pounds, 2009). In another case, the Second Circuit Court of Appeals found that allegations that two waitresses were repeatedly assigned to less desirable work stations and work shifts than younger wait-staff were sufficient to make out a claim for age discrimination. In the case, the employer made comments to the waitresses to “drop dead,” “retire early,” “take off all that makeup,” and “take off your wig,” thereby giving rise to a claim of age discrimination as well as a hostile work environment (Laluk and Stiller, 2008). In another Second Circuit case, the appeals court further noted that the probative value of the age comments does not depend on how offensive they were. For example, the fact that the supervisor's assertion that the plaintiff employee “was well suited to work with seniors” was not offensive; yet it was indicative of the supervisor's discriminatory intent. The court found that considering the supervisor's remarks in the context of all the evidence, the remarks were legally sufficient to sustain a reasonable inference that the supervisor was motivated by age discrimination in discharging the plaintiff employee (Laluk and Stiller, 2008).

Nevertheless, not every type of age insult will be found actionable by the courts (Labriola, 2009). Consequently, the further the discriminatory memo, remark, or comment is made from the time of discharge, the greater the risk that a court will brand it as a “stray remark,” and thus find it too remote to qualify as direct evidence of discrimination (Labriola, 2009). Similarly, the more ambiguous and general the comment is, or the more the statement can be subject to varying interpretations, there exists less likelihood that a court will declare it direct evidence of age discrimination (Labriola, 2009). Another important factor in determining the viability of a statement as direct evidence of age discrimination is whether the statement was made by a decision-maker or a person with supervisory, managerial, or executive authority in a company or organization.

D. Circumstantial Evidence

Age discrimination is an intentional legal wrong. Since proof of this wrongful intent – discriminatory or otherwise - is notoriously difficult for a plaintiff to obtain, the courts at times permit discriminatory motive to be inferred from the facts of the case. Age bias can thus take the form of broad assumptions about “older” workers that cannot be shown to be supported by the facts. Examples would be oral or written statements that infer age bias, such as comments that older workers are “over qualified” or “computer illiterate” or reflect other negative assumptions. Another example would be when an employer discharges a successful and experienced older worker, and replaces him or her with a person with no or less experience or with different and lesser academic credentials. Other problematical situations would arise from suspicious timing of or even from the fact of differences in treatment, such as better treatment of similarly situated employees not in the protected class. Regarding the differences in treatment, if it is systematic and thus rises to the level of a pattern, or as one court said, a “convincing mosaic,” the inference

of age bias and deliberate discrimination is naturally much stronger. Burden-shifting is an integral part to a circumstantial evidence case. That is, the plaintiff employee must still make out his or her initial or *prima facie* case, and thus raise an inference of discrimination, but one that can then be rebutted. Next, in order to rebut this inference, the defendant employer must show that its policy or practice was based on an appropriate, legitimate, and non-discriminatory business reason (Cavico and Mujtaba, 2009). Examples would be poor performance, resistance to management, and failure to report to new managers or supervisors, or the need to match employees with positions that require a certain knowledge and skill-set.

Yet the courts have made it somewhat easier for plaintiff employees to present circumstantial evidence of age discrimination by ruling that the federal district court judges have the authority to allow what is called “me, too” evidence of age discrimination. Such evidence basically consists of supporting evidence from other employees at a company that they had been discriminated against because of their age. A key factor for a judge to decide whether to admit such evidence is whether the evidence of discrimination by the same or other supervisors or managers is closely related to the plaintiff’s circumstances (Cavico and Mujtaba, 2008).

E. Pretext

In a circumstantial case, when the defendant employer does contend that its rationale was an appropriate, legitimate, and non-discriminatory business one, the plaintiff employee is allowed to show that the proffered reason was really a pretext for discrimination. Pretext means that the employer’s stated reason was fake, phony, a sham, a lie; and not that the employer made a mistake or error in judgment or made a “bad” decision. A pretextual reason is one designed to hide the employer’s true motive, which is an unlawful act of age discrimination. The courts accordingly have allowed the employer’s explanation to be foolish, trivial, or even baseless, so long as the employer honestly believed it. The genuineness of the reason, not its reasonableness is the key. The plaintiff employee bears the burden of showing that the employer’s proffered reason was merely a pretext. The plaintiff employee, however, need not show the pretext beyond all doubt; he or she need not totally discredit the employer’s reasons for acting; rather, he or she must provide sufficient evidence to call into question and to cast doubt on the legitimacy of the employer’s purported reasons for acting. Providing such evidence of pretext allows the plaintiff employee to contend that the reason given by the employer for the discharge or demotion or negative action was something other than the reason given by the employer. The following types of evidence have been used by the courts to enable the plaintiff employee to demonstrate pretext: (1) disparate treatment or prior poor treatment of the plaintiff employee; (2) disturbing procedural irregularities or the failure to follow company policy; (3) use of subjective criteria in making employment decisions; (4) the fact that an individual who was hired or promoted over the plaintiff was obviously not qualified; and (5) the fact that over time the employer has made substantial changes in its proffered reason for the employment decision (Tymkovich, 2008).

However, there are limits as to what a court will accept as evidence of pretext. To illustrate, for many years, attorneys have encouraged employers to publish and widely disseminate written policy statements of their commitment to non-discrimination. Attorneys have argued that the published policies were an important defense tool in any subsequent lawsuit (Corbin and Duvail, 2008). In the case of *Hoard v. CHU2A, Inc. Architecture Engineering Planning* (2007), the Court of Appeals for the Eleventh Circuit addressed the legal relevance of an employer's failure to have a published anti-discrimination policy, and concluded that the

failure did not demonstrate that the employer's stated reason for its adverse employment action was pretextual. In *Hoard*, the plaintiff was an employee who was a fifty-eight year old man. He brought a lawsuit against CHU2A, alleging age discrimination as prohibited by the Age Discrimination in Employment. After an adverse district court decision, the employee, Hoard, argued on appeal that the absence of a published policy by the employer constituted adequate evidence of pretext. The district court entered summary judgment in favor of CHU2A because the court decided that Hoard failed to establish any evidence of pretext to rebut the employer's stated, legitimate, non-discriminatory reason for the adverse employment action taken against him. The appeals court summarily rejected the employee's contention and thus affirmed the district court's decision (Corbin and Duvail, 2008). Nonetheless, it is still very prudent – legally, morally, and practically – for an employer to have a written and communicated anti-discrimination policy.

Once sufficient evidence of pretext is shown, a judge may allow a jury, as finder of fact, to infer that the true reason for the action was improper age discrimination. The failure of the employer to give any reason – foolish or not – for the discharge of an older worker at the time of termination has been construed as evidence that the employer's asserted business reason, for example, allegedly poor performance, which was given much later, was merely a pretext for discrimination. The prudent employer is well advised, therefore, despite a certain management "prevailing opinion" to the contrary, to provide in a direct and unambiguous manner to a terminated employee, even an employee at-will, at the time of discharge, an appropriate business-related reason for the discharge, and to have a written record of the transaction.

F. The Disparate Impact Theory

Disparate impact discrimination, as noted, means unintentional discrimination on the part of the employer. In a disparate impact case, the employer's policies and practices are neutral "on their face" in their treatment of employees, yet they fall more harshly or disproportionately on a protected group of employees; and they cannot be justified by legitimate, reasonable, and non-discriminatory business reasons. The disparate impact theory has long been a widely used and accepted means of establishing illegal discrimination under Title VII of the Civil Rights Act (Mujtaba, Cavico, Edward, and Oskal, 2006).

The Supreme Court in 2005 enunciated a major decision regarding the disparate impact doctrine and age discrimination in employment in the case of *Smith v. City of Jackson, Mississippi* (2005). The decision expanded the protection afforded older workers pursuant to the Age Discrimination and Employment Act. The decision allowed protected workers, over the age of 40 to institute age discrimination lawsuits even evidence is lacking that their employers never purposefully intended to discriminate against the workers on the basis of age. As a result, the decision substantially lessened the legal burden for employees covered by the statute by allowing aggrieved employees to contend in court that a presumably neutral employment practice nonetheless had an adverse or disparate or disproportionately harmful impact on them. However, the Court also allowed the employer to defend such an age discrimination case by interposing that the employer had a legitimate, reasonable, and job-related explanation for the "neutral" employment policy. The Supreme Court case initially was brought by older police officers in Jackson, Mississippi, who argued that a pay-for-performance plan instituted by the city granted substantially larger raises to employees with five or fewer years of tenure, which policy, the officers contended, favored their younger colleagues. The lower courts had dismissed the

lawsuit, ruling that these types of claims were barred by the statute. The U.S. Supreme Court, however, in a 5-3 decision, ruled that the officers were entitled to pursue the age discrimination lawsuit against the city. Justice John Paul Stevens, writing for the majority, stated that the Age Discrimination in Employment Act of 1967 was meant to allow the same type of “disparate impact” legal challenges for older workers that minorities and women can assert pursuant to the Civil Rights Act. Yet Justice Stevens also noted in the decision that the same law does allow employers the legal right to at times treat older workers differently. It is important to note that pursuant to the Civil Rights Act, employers can successfully defend a disparate impact case only by showing the “business necessity” for a neutral but harmful employment policy, which is, it seems, a much more difficult test to meet than the “reasonable” explanation standard of the ADEA. In the Supreme Court *Smith* case, the defendant, City of Jackson, successfully articulated a reasonable factor other than age underlying its pay plan, namely reliance on seniority and rank. The City’s decision to award larger raises to lower level employees in order to bring salaries in line with that of neighboring police forces was found to be a decision based on a “reasonable factors other than age” (RFOA) that was motivated by the city’s legitimate objective of attracting and retaining police officers. Moreover, under the RFOA standard, it was not necessary, the Court ruled, for the City to consider whether the method it adopted was the most reasonable method of achieving its goals (Age Discrimination in Employment Act, 2005).

The Supreme Court’s age discrimination decision emerges as a victory for older workers covered by the ADEA. Such protected workers now do not have to have direct or “smoking gun” evidence of intentional age discrimination in order to file a civil rights lawsuit; rather, all that is required is evidence of disproportionate harmful impact stemming from a neutral age employment policy. Employers, whether U.S. employers or foreign employers doing business in the United States, now must be much more conscious of the consequences of their employment policies on older workers, particularly regarding the criteria used to determine hiring, termination, especially layoffs, as well as pay scales and retirement plan changes. Employers also must be prepared to provide and explain the “reasonable” factors other than age that would justify the employment policy causing the disparate harmful impact on older protected workers. The Court’s *Smith v. City of Jackson (2005)* case thus extended the “disparate impact” Civil Rights Act theory of Title VII to cases instituted under the Age Discrimination in Employment Act of 1967. Now, employees can challenge their employers’ employment practices that have an adverse impact on protected older workers without having to prove that their employers intentionally discriminated against them. As such, the Court thus “opened the door” to plaintiff employees who could not demonstrate that their employees intentionally treated them unfavorably because of their age (Mujtaba and Cavico, 2010).

It is very important to again be aware that a disparate impact case is materially different from a disparate treatment case. In a disparate impact case, the plaintiff employee need not prove an intentional act of discrimination by his or her employer in order to recover. In essence, the plaintiff employee will first have to show that there is a statistical disparity, and that younger and older employees are affected differently by the policy or practice; and then he or she will have to demonstrate that the challenged practice was based on age. In a disparate impact case, moreover, the plaintiff employee cannot establish his or her initial case by pointing to a general policy of the employer that produced the disparate impact; rather, the plaintiff employee must isolate and identify the employer’s specific age-motivated policies or practices that are allegedly responsible for any perceived disparities, and then link them to the disparity. That is, a close “nexus,” or connection, must be established between the specific practice and any observed statistical

significance in order to prove illegal discrimination. It is important to note that in 2009 the U.S. Supreme Court made it even more difficult for a claimant to prove age discrimination. The Court in *Gross v. FBL Financial Services* (2009) ruled that age must be the key factor in the employment determination, as opposed to being a reason for the improper decision. The Court used the old common law, tort, “but for” test as the legal standard in a modern day age discrimination context; that is, the employee must show by a preponderance of the evidence that “but for” the illegal age discrimination the negative employment determination would not have occurred (Legislation, 2009). One commentator (Fleischer, 2009) noted that “this is a higher standard than that imposed on other victims of discrimination who must show that discrimination was a ‘motivating or substantial factor’ in the decision” (p. 7G). Therefore, even if the motivating factor is correlated with age, for example, in making pension plan or health care plan changes or engaging in a reduction-in-force to eliminate high salaries or reduce health care costs, which have a greater adverse impact on older employees, the employer can still avoid liability under the ADEA if the discriminatory age motivation was not the key factor in the decision. The result, according to one commentator (Fleischer, 2009), is that “since many older workers are paid more, they are let go because of their salaries. Proving age was the ‘but for’ reason for termination will be impossible because the employer will be able to point to the salary savings as the real motive” (p. 7G). This Court ruling thus provides further support for the employer because the federal courts have ruled that age and years of service or rank can be deemed to be “analytically distinct”; and consequently the employer can take cognizance of one while ignoring or downplaying the other. In such a case, the plaintiff employee must identify the specific aspects of the plan which in fact caused the disparate impact. Similarly, even though an employee’s deteriorating level of competence may be related to his or her advancing age, the poor performance factor can be deemed reasonable and legitimate. Of course, the employer in such situations then should be able to distinguish these motivating factors, and then to demonstrate that the motivating factor, such as rank or years of service, or a legitimate concern with perceived too high salaries, or poor performance, was in fact the non-age-connected motivating factor and thus a “reasonable” one.

In June of 2009, the U.S. Supreme Court enunciated another very important decision dealing with the potentially discriminatory effects of the “disparate impact” legal doctrine. Although the case was a race-based affirmative action one and not an age case, the decision is still significant for age discrimination claimants. In the case of *Ricci v. DeStefano* (2009), the Court decided by a 5-4 determination that the city of New Haven, Connecticut had discriminated against white firefighters in violation of Title VII of the Civil Rights Act of 1964. The court, in essence, ruled that the municipal governmental employer, the city of New Haven, had “over-corrected” its promotional policies in their attempts to avoid liability under a “disparate impact” theory. This decision will necessitate the re-evaluation of employers’ hiring and promotional policies across the United States and has ramifications for not “merely” for race-based claims. The crux to this important case centered on the operative fact that the city of New Haven, Connecticut discarded the promotion test results for firefighters on which minorities had scored poorly. City officials contended that if the city did not discard the results the minority applicants would have sued the city. In New Haven, in 2003, 58 white firefighters, 23 blacks, and 19 Hispanics took the promotion tests to determine who would qualify as lieutenants and captains. Nineteen qualified for the positions, and thus were eligible for promotion. However, no blacks and only two Hispanics qualified. There were 15 slots to fill. The city’s civil service board refused to certify the results, thereby obviating them and denying the promotions to all who had

earned them. The city explained that it feared a disparate impact lawsuit civil rights lawsuit from the minority candidates. As a result, 17 white candidates and one Hispanic sued, claiming violations of their statutory rights under Title VII of the Civil Rights Act as well as constitutional violations pursuant to the Equal Protection clause. The lead plaintiff was Frank Ricci, who is dyslexic, and who said he studied for 8 to 13 hours a day for the test, and who also said he hired an acquaintance to tape record the study materials. The firefighters lost their case at the federal district court level and in the U.S. Court of Appeals for the Second Circuit. They then appealed to the U.S. Supreme Court, which reversed the lower court decisions.

Justice Anthony Kennedy, writing for the majority, stated that mere fear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions. Specifically, Justice Kennedy stated that there must be "... a strong basis in evidence to believe it [employer] will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action" (Ricci, 2009, p. 47). He further restated the district court's comment that "*the city rejected the test results because too many whites and not enough minorities would be promoted*" (Ricci, 2009, p. 37). Justice Kennedy also wrote: "Without some other justification, this express, race-based decision-making violates Title VII's command that employers cannot take adverse employment actions because of an individual's race" (Ricci, 2009, p. 37). Justice Kennedy generally explained the purpose of Title VII was to promote hiring on the basis of job qualifications rather than on the basis of race or color and its goal was to create a workplace free of discrimination where race was not a barrier to promotion. In the New Haven case, Justice Kennedy criticized the municipality's practice by stating that "the city rejected the test results solely because the higher scoring candidates were white" (Ricci, 2009, p 38). Justice Kennedy noted in his decision a contradiction in Title VII of the Civil Rights Act, promulgated by Congress in 1964, which prohibits intentional discrimination on the basis of race and other protected characteristics, and its 1991 amendment codifying the *Griggs*' "disparate impact" theory of recovery. Justice Kennedy concluded the majority opinion by explaining:

No individual should face workplace discrimination based on race. (The city) thought about promotion qualifications and relevant experience in neutral ways. They were careful to ensure broad racial participation in the design of the test itself and its administration....The process was open and fair. The problem, of course, is that after the tests were completed, the raw racial results became the predominant rationale for the City's refusal to certify the results. The injury arises in part from the high, and justified, expectations of the candidates who participated in the testing process on the terms the City had established for the promotional process. Many of the candidates had studied for months, at considerable personal and financial expenses, and thus the injury caused by the City's reliance on the raw racial statistics at the end of the process was all the more severe (Ricci, 2009, pp. 59-60).

To be clear, the U.S. Supreme Court in the New Haven firefighter decision did not strike down the disparate impact doctrine on statutory or constitutional grounds. The disparate impact doctrine is thus still the "law of the land" for race as well as age and other cases. Rather, the court invalidated the New Haven employment decision of discarding the tests by saying the city had violated Title VII of the Civil Rights Act of 1964. For an employer to throw out a test that

has a disparate impact, the employer must have, said the court, “a strong basis in evidence” that the employer will be sued and lose a disparate impact lawsuit before discarding test results solely based on race. However, an employer will still be allowed to bring in racial considerations and the potential racial impact into the testing process, but now the employer must do so “during the test-design stage,” said Justice Kennedy. In offering some guidance to business managers, Justice Kennedy wrote: “Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race. And when, during the test-design stage, an employer invites comments to ensure the test is fair, that process can provide a common ground for open discussions toward that end” (*Ricci*, 2009, p. 47.).

G. Employer Defenses - Generally

The ADEA affords the employer certain statutory defenses to age discrimination lawsuits. An employer is allowed to take an action otherwise prohibited to comply with the terms of a legitimate employee benefit plan or a *bona fide* seniority system (though generally a seniority system cannot require the involuntary retirement of employees). An employer is also permitted to justify a disciplinary decision or a discharge on grounds of “good cause.” Furthermore, similar to Title VII of the Civil Rights Act, an employer is allowed to discriminate on the basis of age where age is a *bona fide* occupational qualification reasonably necessary to the normal operation of the particular business. Finally, and most significantly, the ADEA provides the employer a defense to an age discrimination lawsuit when the employer can demonstrate that the differentiation is based on “reasonable factors other than age.” Of course, what is a *bona fide* occupational qualification as well as a reasonable factor other than age are difficult exceptions to define, and thus are often determined by the federal courts on a case-by-case basis. The EEOC itself cautions that no precise and unequivocal determinations can be made as to the scope of these defensive provisions. Finally, it should be noted that there is some debate in the legal community as to whether the “reasonable factors other than age” provision in the ADEA is a “safe harbor” provision totally precluding employer liability if applicable, or “merely” an affirmative defense that is provided to employers and, significantly, one that must be affirmatively asserted or lost. To be safe, the employer is well advised to treat the “reasonable factor” defense as an affirmative one. The ADEA also contains defenses for *bona fide* seniority plans and employee benefit plans (Age Discrimination in Employment Act, 2005).

H. The Bona Fide Occupational Qualification Exception (BFOQ)

The employer can also defend an ADEA lawsuit by interposing the *bona fide* occupational qualification doctrine (BFOQ). Pursuant to the BFOQ doctrine, the employer will be obligated to show that the challenged age criteria is reasonably related to the normal operation of the employer’s business, and that there is a factual basis for believing that only employees of a certain age would be able to do the particular job safely or effectively. That is, the employer must demonstrate that all or substantially all persons excluded from the job in question are in fact not qualified due to age. Age certainly can be a relevant factor in certain jobs, and thus rise to the level of a BFOQ, such as in professional sports (Savage, 2008). A job notice or advertisement which specifies or limits age is, illegal pursuant to the ADEA; however, the employer may do so when age is demonstrated to be a valid BFOQ reasonably necessary to the normal operations of

the business. Examples of the BFOQ would include airline pilots, police, firefighters, and bus drivers, as well as others for whom certain physical requirements are a necessity for efficient job performance. It must be underscored that with the BFOQ defense, the employer admits that age was in fact a factor in the decision to fire or to not hire, but the employer possesses a legally justifiable excuse for the need to rely on age. The BFOQ defense is a limited one, however. To prevail, the employer must demonstrate that it had reasonable factual cause to believe that all or substantially all of the older persons would be unable to perform the duties of the job in a safe and efficient manner. If the employer's rationale in interposing the BFOQ is the objective of public safety, the EEOC will require that the employer demonstrate that the challenged age restriction does in fact effectuate that public policy goal, and that no reasonable alternative exists which would better or equally advance the goal with a less discriminatory effect. Courts, moreover, have construed the BFOQ defense narrowly in all civil rights cases, though the mandatory retirement of airline pilots has been upheld. The EEOC itself counsels that the exception will have only limited scope and application (Cavico and Mujtaba, 2009).

I. The Reasonable Factor Other Than Age (RFOA) Defense

The ADEA's significant "reasonable factors other than age" provision allows the employer to defend an age discrimination claim by demonstrating that "reasonable factors other than age" were the reason for the adoption of the employment policy or practice in question. That is, the employer can argue that age did not motivate the decision to fire or to not fire, but that another non-discriminatory reason, such as poor job performance, was the true reason behind its action. When this defense is raised against an individual claiming discriminatory treatment, the burden is on the employer to demonstrate that the "reasonable factors other than age" exist factually. This RFOA test emerges as a much more efficacious defense than the "business necessity" test under the Civil Rights Act. In the latter, the employer must ascertain whether there are other alternative ways for the employer to achieve its objectives without resulting in an adverse impact on a protected class; whereas in the former, the "reasonableness" inquiry does not encompass such a search for alternatives. So long as the "factor" is not improperly age-connected, is reasonable, and advances the employer's goals, such as financial considerations, it will be sufficient as a defense. The employer under the ADEA does not have to search for a less discriminatory alternative or even the "most reasonable" approach; rather "merely" a "reasonable" one will suffice for a defense. Furthermore, "reasonableness" does not encompass the employer's decision being absolutely necessary, or wise, or even a well-considered one – merely reasonable and non-discriminatory. The employer is even allowed to have "mixed motives"; that is, once the employer presents evidence of the "reasonable factors other than age," the employer's policy or practice will be validated legally even if age played a part in the promulgation of the policy or the implementation of the practice. However, in discharge situations, especially in a reduction-in-force, employers nonetheless must be careful of the criteria that they employ to retain and to terminate workers. Reasons and ratings based on specific skills and knowledge will be easier to sustain as objective and fair, but criteria that are subjective such as "flexibility" and "creativity" could be problematical for the employer as such "loose" standards could provide, or could be so construed by a jury as, a pretext for age discrimination (Savage, 2008).

Based on a federal Court of Appeals decision, once the employer interposed this "reasonable factor," the burden of proof was shifted to the plaintiff employee to disprove the

employer's "reasonable factor" contention. However, the Supreme Court, in a 7-1 decision, *Meacham v. Knolls Atomic Power Laboratory* (2008), reversed the appeals court (*Meacham*, 2008). In a technical, procedural, yet very significant, victory for older workers, the Supreme Court placed on employers the burden of proving that a lay-off, reduction-in-force, or other presumably "neutral" job action that adversely impacts older workers was based not on age but on some other "reasonable factor." The case can be deemed a "significant" one because "...it will be costlier and more difficult for employers to defend against age discrimination disparate impact claims" (Schwartz, 2009, p. 691). Nevertheless, age very well can be related to compensation; but if the employer's focus is to reduce or adjust compensation to meet "market demands," and the employer relies on such non-age factors as rank or years of service of compensation level, the employer may be acting reasonably, and accordingly could prevail in sustaining its burden. Moreover, unlike a Title VII case, it will be insufficient for the plaintiff employee to demonstrate that there exists other more reasonable and less discriminatory ways for the employer to achieve the same results. All a court has to do is to decide whether or not the employer's asserted "factor other than age" is a "reasonable" one. Once reasonableness is determined, a court's legal inquiry under this aspect of the ADEA is ended. The RFOA test, therefore, is a considerably lesser legal standard than the "business necessity" test for Title VII of the Civil Rights Act. Consequently, although the *Smith v. City of Jackson* decision on its surface seemed to considerably help employees pursue their age discrimination disparate impact claims, the Supreme Court did so by enunciating a legal standard that makes the successful pursuit of such claims very difficult. Furthermore, the Supreme Court's decision in *Meacham* "...does not diminish the significance of the plaintiff having the burden of identifying the specific employment practice that is alleged to create the disparate impact" (Schwartz, 2009, p. 691).

The Older Workers Benefit Protection Act

The Age Discrimination in Employment Act was amended in 1990 by the Older Workers Benefit Protection Act (OWBPA). In addition to providing additional protection for employees' benefits, the OWBPA also deals with waivers. First, regarding waivers, the ADEA contains specific provisions that enable employees to give up their right to sue pursuant to the statute. Any employee waiver, however, must follow the specific criteria set forth in the 1990 amendment to the ADEA - the Older Workers Benefit Protection Act. OWBPA requires waivers to be knowing and voluntary and thus valid. Several requirements must be present for an employee's waiver of ADEA rights is legal. The waiver must be: (1) in writing and be understandable, (2) specifically refer to ADEA rights or claims, (3) not waive rights or claims that may arise in the future, (4) be in exchange for valuable consideration, (5) advise the person in writing to consult with an attorney before signing the waiver, and (6) provide the person with at least 21 days to consider the agreement, and at least seven days to revoke the agreement after signing it. Even though an employee may have validly waived his or her rights under the ADEA, such a waiver will not adversely affect the EEOC's rights under the statute. Second, regarding benefits, the OWBPA amended the ADEA to specifically forbid employers from denying benefits to older employees. However, in limited situations, an employer may be allowed to reduce benefits based on its employees' age, so long as the cost of providing the reduced benefits to older employees is the same as the cost of furnishing benefits to younger persons (Age Discrimination in Employment Act, 2005).

The Extraterritorial Effect of U.S. Employment Law

The globalization of the world's economy has resulted in employers assigning increasing larger numbers of employees to international assignments. One initial issue that results from such globalization is the responsibility of multinational companies that operate in the United States. The general rule of law in such a case is that U.S. civil rights laws apply to multinationals operating in the U.S. or its territories to the same extent as U.S. employers. Employees are covered regardless of their citizenship or work authorization. Employees who work in the U.S. are protected by U.S. law whether they work for a U.S. or foreign employer. The exception arises when the foreign employer is covered by an international treaty, convention, or other agreement that limits the full applicability of U.S. anti-discrimination employment law, for example, by allowing the foreign company to prefer its nationals over others for certain positions. Another important, and more problematical, employment discrimination issue concerns the rights of workers who are employed by a U.S. employer or by a foreign employer in a workplace in a foreign country. The difficult issue is whether the extensive U.S. legal protections afforded to employees in the U.S. carry overseas. This legal question typically is regarded as an issue of the "extraterritoriality" of U.S. law. A U.S. company that is "going global" thus must be prepared to face the legal as well as practical implications of establishing operations overseas, in particular the challenging situation when a company finds itself torn between obeying U.S. law and complying with the law of the host country (Cavico and Mujtaba, 2008).

The early, leading Supreme Court case ruling on the extraterritoriality of U.S. law was not an employment discrimination case, but rather dealt with federal anti-trust law. In *American Banana Company v. United Fruit Company* (*American Banana Company v. United Fruit Company*, 1909), although both parties to the dispute were U.S. citizens, the alleged violation of the Sherman Anti-Trust Act occurred in Panama. The Court unanimously ruled at the time that the Sherman Act did not apply to acts occurring beyond the borders of the U.S. Moreover, a majority of the court expressed reservations concerning even extending a statute extraterritorially. Another concern, raised by Justice Holmes writing for the majority, was that extending a statute extraterritorially would contravene the fundamental sovereignty principle of international law. *American Banana Company* consequently set forth the general rule governing extraterritorial jurisdiction; that is, a very strong presumption exists against the extraterritorial application of U.S. law. This presumption, furthermore, can be overcome only in exceptional instances.

The Age Discrimination in Employment Act protects U.S. citizens working overseas for a U.S. controlled foreign employer (*Morelli v. Cedel*, 1998). The ADEA provides that the prohibitions of the Act shall not apply where the employer is a foreign person not controlled by an U.S. employer; *Morelli v. Cedel*, 1998). "At a minimum," declared one court, "...the ADEA does not apply to the foreign operations of foreign employers – unless there is an American employer behind the scenes" (*Morelli v. Cedel*, 1998). The ADEA, therefore, does not apply to a foreign corporation operating outside the U.S. even when the foreign firm employs U.S. citizens unless a U.S. company controls the foreign corporation. Regarding the important "control" issue, the aforementioned four critical factors are specified in the Act; and thus are used by the courts in ADEA cases to determine control: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control of the employer and the corporation. The purpose of the statutory "control" element, according to one

court, is to protect the principle of sovereignty; that is, “no nation has the right to impose its labor standards on another country.” The Act, however, does protect employees working in the U.S. for a domestic branch of a foreign company. An exception to extra-territoriality also exists if the application of the Age Discrimination in Employment Act would violate the law of the other country where the workplace is located. This principle, as noted, termed the “foreign laws” or “foreign compulsion” defense, means that a U.S. employer will not be legally liable if compliance with the ADEA would cause the employer to violate the laws of the nation where the workplace is located. In one aforementioned ADEA case, the U.S. Court of Appeals for the District of Columbia ruled that where the U.S. law would cause a U.S. company to violate a foreign collective bargaining agreement, which technically could be argued as not equating to a “law,” the foreign compulsion defense applied (*Mahoney v. RFEIRL*, 1995).

An employer in the United States whether a domestic or an international one must be aware of U.S. anti-discrimination employment law, such the ADEA, as well as the extra-territorial application of U.S. civil rights laws. At some point, everyone is going to be protected by the ADEA since everyone gets older, regardless of race, national origin, or gender. The all-encompassing nature of the ADEA distinguishes that law from all other anti-discrimination statutes. The class of protected people is very broad (Sherman, 2008). Yet the global business person must also be concerned with other legal jurisdictions’ anti-discrimination law. Such an examination, though naturally important, is beyond the scope of this study, which has focused on U.S. law and the extraterritorial effect of U.S. law.

Management Strategies, Tactics, and Recommendations

Due to the aging of the workforce, civil rights laws, particularly the ADEA, must be increasingly concerned with inducing the greater employment of older workers. This point was forcefully made in an American Association of Retired Persons report, called Reassessing the Age Discrimination in Employment Act (Neumark, 2008). The AARP first noted that the focus of the Equal Employment Opportunity Commission’s (EEOC) enforcement efforts has been placed on terminations, and concomitantly there has been a “lack of activity related to hiring” (Neumark, 2008, p. viii). The AARP cited the EEOC data from 2006 which indicated that 40% of ADEA discrimination charges received by the Commission dealt with termination or lay-off determinations, but only 8.4% concerned hiring. Moreover, regarding age discrimination cases actually brought to court by the EEOC, termination and lay-off cases were 65% of the total compared to 23% for hiring cases (Neumark, 2008, p. viii). The AARP believes that for workers aged 65 and older, “...a sizeable share of the higher employment among these individuals is likely to come not from continued employment in long-term careers, but rather from part-time or shorter-term jobs, perhaps with subsequent employers, in the form of what sometimes has been labeled ‘partial retirement’ or ‘bridge jobs’” (Neumark, 2008, p. viii). Accordingly, as more workers over the age of 65 look for work, particularly “bridge jobs,” after leaving their full-time careers, “...then the focus of ADEA enforcement efforts on terminations might not serve the nation as well as going forward. Instead, it might become relatively more important to figure out how to ensure that age discrimination also does not deter the hiring of older individuals after leaving long-term, full-time work” (Neumark, 2008, p. viii). Any hindrances to hiring as well as impediments to filing hiring discrimination claims thus emerge as important legal and practical issues. Therefore, concludes the AARP, “policymakers may want to think about how the ADEA

might be modified to provide more protection against age discrimination in hiring” (Neumark, 2008, p. viii).

An “older worker,” as noted, according to the laws in the United States, is a worker that is 40 years of age or older. Unfortunately, there have been many firms that have shown patterns of discrimination against “older workers” in the United States’ work environment, especially when it comes to hiring. The AARP in its 2008 report, *Reassessing the Age Discrimination in Employment Act*, commented on the disparity of ADEA hiring cases compared to termination ones:

The relative paucity of hiring cases compared to discharge or layoff cases could reflect the actual nature of the types of discrimination being experienced. But it also may reflect consequences of the legal framework set up to pursue age discrimination claims. First, hiring cases are more difficult to prove because it is more difficult to identify a class of affected workers. In contrast, in discharge or layoff cases the class typically consists of a group of workers employed (or previously employed) at a firm. Second, damages may be considerably higher in discharge or layoff cases, since workers lost jobs (and for older workers the job may have been relatively high paying) and there is evidence of difficulties in finding a new job....In addition, there can be substantial lost pension wealth accruals. In contrast, damages in a hiring case may be quite small, because an individual not hired by one employer has a reasonable expectation of being hired later by another employer (Neumark, 2008, pp. 9-10).

The Age Discrimination in Employment Act in the United States presents leaders and managers with many challenges. Although the U.S. Supreme Court has ruled that the disparate impact theory now extends to age discrimination lawsuits, it is very important for the employer to realize that the theory is much narrower under the ADEA than pursuant to Title VII of the Civil Rights Act. The narrowness of the disparate impact theory in the age context means that the coverage of the statute – and the employer’s potential liability therein – is much more limited in age discrimination employment cases. In particular, the “reasonable factor other than age” (RFOA) provision in the law means that certain employment criteria and practices that are legitimate and routinely used by employers very well could be legal despite their adverse impact on older employees as a group. The RFOA test, moreover, further narrows the application of the ADEA. For other civil rights lawsuits, the employer must ascertain whether there were other alternative ways for the employer to achieve its objectives without resulting in an adverse impact on a protected class. Yet due to the RFOA doctrine, the required “reasonableness” inquiry does not obligate the employer to render such a search for alternatives (*Age Discrimination in Employment Act*, 2005).

An employer confronted with an ADEA disparate impact age discrimination lawsuit, in order to sustain a defense, must produce credible and relevant evidence that the challenged employment policy or practice was based on reasonable factor(s) other than age. Moreover, this “factor,” so long as it is reasonable and not age-related and advances the employer’s goals, need not be absolutely necessary. The ADEA’s RFOA test is not the “business necessity” test of Title VII of the Civil Rights Act. Furthermore, the employer does not have to search for the “most reasonable” approach. All that is required is a “reasonable” rationale for the action; and evidence that the employer relied on this non-age-related reasonable factor; and accordingly only

“unreasonableness” will engender the employer’s liability. Relying in some circumstances on rank, seniority, or years of service when making decisions may be in fact reasonable regardless of their relationship to age. Actually, there are many factors – age-related but arguably sufficiently distinct – that an employer could utilize as reasonable ones. Examples encompass: recruiting concerns, such as attracting or keeping technically and computer knowledgeable and capable employees; reputation concerns, such as honoring commitments to hire recent graduates or to recruit and hire at particular schools; budgeting concerns, such as reducing payroll costs by eliminating higher salary positions or off-shoring and outsourcing; performance concerns, such as making decisions based on performance or review ratings, evaluations, or needed useful skills; and dealing with the ramifications of mergers and other fundamental corporate change and restructuring, such as workforce reductions, lay-offs, reductions-in-force, and downsizing. What the employer cannot do is to use these rationales as a subterfuge to pull off the wholesale elimination of its older workers. Such a ploy would make the factor age-related and unreasonable and consequently illegal. Yet once the separation from age is achieved and reasonableness is determined, the employer prevails. The Supreme Court in the *Smith v. City of Jackson* case recognized that there may exist in employment certain quite necessary and legitimate job requirements and classifications that may have a greater adverse impact on older employees than younger ones. Such a “reasonableness” standard emerges as a very “employer friendly” one.

In an ADEA pretext case, the employer should be well aware that the plaintiff employee can bolster his or her case by demonstrating that the employer did not reveal the reason for the discharge, demotion, or negative job action to the employee until after the age discrimination claim was filed. Similarly, the plaintiff employee may be able to show that the reason for his or her discharge changed between the time of discharge and the filing of the age discrimination claim. In the aforementioned situations, the plaintiff employee’s attorney surely will argue that the employer’s reasons are fake and merely an afterthought to justify the illegal discriminatory treatment of the employee. As a result, a judge may permit the jury, as fact-finder, to determine whether the employer’s belated reasons were true or false. In order to avoid such a legally untenable consequence, the employer should directly tell the employee at the time it takes the adverse action of the true, and appropriate, reason for it. If an employer is dissatisfied with an employee’s work performance, it should expressly specify the sub-par performance as well as the problems it is causing; and do so in a clear and direct communication to the employee and “for the record.” Once the criticism of the employee’s performance is placed in the official company record, the employer will have a document in its favor to use in the investigation and pre-trial stage of a lawsuit as well as to argue in court later as evidence of “reasonable factors other than age” for the adverse personnel decision. The employer must be aware that discrimination lawsuits often arise because an aggrieved employee does not feel that the employer possessed the relevant business factual justification to support the adverse action against the employee (Age Discrimination in Employment Act, 2005).

Establishing employment factors, therefore, which are legitimate and reasonable as well as analytically distinct from age, is the key management strategy to avoid legal liability pursuant to the ADEA. Thus, as with so much of the law – common law and statutory – the employer must strive for reasonableness in its actions. Even if an employee is an employee at-will and thus can be discharged for any reason (except an illegal reason, of course, such as age discrimination), and without any notice or explanation necessary, the wise employer is well counseled to first give, in a direct, clear, and unequivocal manner, to the employee the reasons for his or her discharge or job sanction; second, to make sure that the employer has the “hard” evidence to

support the reasons, and third to give the employee an opportunity to be heard and to present any defense or excuse he or she may have. Even though it is not legally necessary to afford contractual or collective bargaining agreement “just cause” or “good cause” to a terminated or sanctioned employee, such fair treatment may be construed as morally and ethically mandated “due process” by the employee, his or her fellow workers, and perhaps later by a jury. Employers must realize that the typical employment law case is a factually intensive one. Accordingly, regardless of the legal “technicalities” involved, perhaps in the employer’s favor, the astute employer surely must realize that the plaintiff employee’s attorney will always attempt to claim that the employee was factually treated in an unfair and unethical matter; and such an accusation of immoral conduct by the employer can be very persuasive to a lay jury. Take the example of a long-term, older employee who was not properly monitored, not given warnings of poor performance, not coached or mentored to improve his or her performance, not even communicated with, who then was terminated for poor performance and replaced by a much younger employee, and who was then not given a fair chance to defend himself or herself. In such a scenario, if the employee’s performance was in fact inadequate, the employer very well may have a technical legal defense, but the equities of the case very well could rest in the employee’s favor, and ultimately before a perhaps sympathetic jury. A jury may be so offended by the employer’s legal, but unethical conduct toward the employee that the jury may disregard the judge’s instructions to focus on the “legalities” of the case and rather concentrate on the morality of the employer’s actions. A jury will respect the fact that the employer communicated with the employee, tried to mentor and coach the employee, allowed the employee to defend him or herself, and gave the employee a “second chance.” And not only does an unethical employer have to worry about a sympathetic jury; judges are also human too; and may not like the “ethics” of the employer regardless of the legalities. Judges, regardless of their political persuasion or personal predilections, will not tolerate, and be very skeptical of, an employer who cannot or will not justify its actions, or does not even have records of personnel activity. As such, there is enough suppleness in the rules of procedure and evidence for a judge to undermine the employer’s defense, perhaps by excluding exculpatory evidence on inadmissibility grounds.

Statistical analysis can be employed as a tool to avoid age discrimination lawsuits, especially disparate impact claims based on age. Birk (2008) provided detailed guidance and recommendations on the use of statistical analysis to avoid disparate impact lawsuits based on age in the context of a reduction-in-force (RIF). When an employer is contemplating the lay-off of workers due to business reasons, the employer must be aware of the potential of disparate impact claims based on age by employees who are over the age of forty. It is possible that companies may be “targeting” older employees in certain lay-offs since older workers are generally the highest paid and have the most expensive benefits (Levitz and Shishkin, 2009, p. D1). Birk accordingly urges employers to use statistical analysis, not after litigation has begun, but before the RIF, in order to ascertain the risk of age discrimination claims. Says Birk: “If the employer’s statistical self-analysis uncovers disparities between the proposed impact of the RIF on protected older workers versus that of younger workers, the company is able to proactively make changes in its RIF decision to avoid such an impact” (Birk, 2008, p. 5). As discussed extensively in the disparate impact section, in order to establish an initial disparate impact case, the plaintiff employee must demonstrate an employment policy or practice that has a disparate, that is, negative or adverse, impact on employees protected by the ADEA than on younger workers.

A statistical analysis will test the statistical significance of any disparity in the lay-off or termination of younger v. older workers. Then, “if the observed number of terminations is statistically significant from what would have been expected randomly, statistical evidence of disparate impact discrimination may be established” (Birk, 2008, p. 5). A critical question to be answered is exactly what is a “statistically significant finding”? According to Birk, in such an employment disparate impact age case, “...experts will generally require either a statistical significance measure of 1 percent to 5 percent in order to show a correlation with age. These numbers, while not hard-and-fast, have generally been accepted by courts in disparate impact cases. When dealing with large samples, many courts have found that if the difference between the expected value and the observed number is greater than two or three standard deviations, most experts would find the results not likely to have been random. Theoretically, the higher the number of standard deviations associated with a particular result, the less likely that a random and nonbiased selection process would have generated the result in the absence of discrimination” (Birk, 2008, p. 5). Birk recommends that the statistical analysis be conducted by experts, because even though the comparison of younger v. older workers appears simple, “the calculations and factors to be considered are complex” and also “the failure to do a proper analysis will negate the value of the analysis as a legal challenge” (Birk, 2008, p. 6). She also recommends that “regression analysis” be used. Regression analysis is “a method of statistical analysis in which the relationship between two or more variables is examined to determine if there is an association between the variables” (Birk, 2008, p. 6). The objective of such an analysis is to ascertain “...the possibility of disparate impact based on age in a RIF situation (by) determining if there was a correlation between the employees being laid off and their age” (Birk, 2008, p. 6). It is important to point out, asserts Birk, that such an analysis “does not determine if employees were actually laid off because of their age, but rather whether it is likely that such a result would have happened by chance” (Birk, 2008, p. 7). The underlying data, declares Birk, will be the “key” to analyzing the RIF and its consequences. As such, data for each employee to be laid-off and considered to be laid-off must be carefully collected, collated, and analyzed. Concomitantly, the criteria for choosing the employees to be laid-off must be clearly ascertained. In order to develop these criteria, the employer must have a “clear understanding” of the business and economic rationales for the RIF, for example, restructuring or reorganizing, centralizing or outsourcing functions or services, upgrading services thereby requiring a more educated and skilled workforce, or closing certain plants or locations completely (Birk, 2008). The proper grouping of employees emerges as another important element to the analysis, for example, comparing blue-collar employees to be laid-off to the blue-collar labor pool, and similarly comparing white-collar workers (Birk, 2008). Geographic boundaries as well as time periods for the RIF must also be considered (Birk, 2008). Prior to the RIF, after grouping the employees in an appropriate manner, the employees must be evaluated on objective, age neutral, criteria to determine which employees will be subject to the RIF. Assuming that age neutral criteria were used, and nonetheless there is still a disparate impact based on age produced by the RIF, then, as discussed extensively in the legal analysis, the employer must be prepared to show to a court that “reasonable factors other than age” were used, and carefully, objectively, and fairly used, in order to effectuate the RIF. Such use of statistical analysis, counsels Birk, is “a proactive and valuable preventative step to limit an employer’s risk of age-related litigation as a result of that RIF” and thus a “wise decision economically” and “an important human resource management tool” too (Birk, 2008, p. 8).

Labriola (2009) supplied the following “general common-sense guidelines that can minimize a firm’s risk of litigation” (p. 383): (1) Put Everything in Writing – “Your defense against an age-discrimination claim will be bolstered by your ability to back up your assertions in black-and-white. Document everything you do during potentially litigious actions and be able to demonstrate in your writing that your corporate culture does not foster an attitude of discrimination. Implement formal anti-discrimination policies and take steps to ensure that they are enforced in accordance with state and federal law” (Labriola, 2009, p. 384). (2) Educate Your People – “Mandate sensitivity training for managers and supervisors, and schedule sessions for new hires as soon as possible. Don’t merely try to avoid litigation. Strive to create an educated atmosphere of reasonable accommodation to the special needs of older workers where supervisors are comfortable offering employees options like flexible scheduling, part-time workloads...” (Labriola, 2009, pp. 383-84). (3) Terminate with Skill – “Don’t simply fire an aging employee on pretext the first time she makes a mistake. If you concoct a phony reason for a discharge..., you’ll pay a steep price when the truth comes out at trial. Harassing a worker into quitting does not improve your position; it merely changes the cause of action to unlawful constructive notice” (Labriola, 2009, pp. 384-85). (4) Think Strategically – “Justify a decision to demote or discharge with a paper trail of escalating disciplinary responses to earlier infractions. Craft non-discriminatory performance standards and retirement guidelines that show your actions to be fair and objective” (Labriola, 2009, p. 385). (5) Respond with Grace – “Pay attention when a worker accuses you or one of your employees of discrimination. Respond promptly and let the aggrieved employee know that you take the charge seriously and plan to right the situation before it winds up in court....Most importantly, do not even think about retaliating. If the worker has no case, a jury will figure that out. But no matter how solid your position, if you try to strong-arm an employee, you will wind up on the wrong side of the gavel” (Labriola, 2009, pp. 385-86).

Grossman (2008) offered the following practical points and suggestions to deal with potential and actual age discrimination lawsuits pursuant to U.S. law: (1) Employers should be practical and compassionate. Employers should offer “face-serving” severances tied to attorney approved releases that “ease non-performing workers out the door.” Be aware that most people are willing to sign a release if they get some type of financial “package” as an incentive. (2) Bind employees, especially “high-powered” executives and “star performers,” to binding arbitration clauses in their employment contracts. (3) Note that complaints of age discrimination typically involve hiring, treatment at work, or termination. Discharge cases account for more than one-half of the cases brought to the EEOC; and they are the cases most likely to move beyond the agency into the court system. (4) To preclude a lawsuit for discriminatory hiring, the employer must be able to show that a more qualified person was hired. (5) In a disparate or adverse impact discrimination lawsuit, the employer must be able to show that the reason for its job action was a reasonable and legitimate business one and was not discriminatory (Grossman, 2008).

Grossman (2009) also provided additional general, practical advice on how to “defuse” discrimination legal claims, to wit: (1) Protect your information, for example, by conducting your own investigation pursuant to the direction of an attorney. (2) Gather facts quickly, particularly since as time moves on, employees can leave the company and documents can get lost or mislaid; and collect everything such as personnel files, disciplinary records, and pay records. (3) Do not “cut corners,” that is, make sure you secure all documents and review them thoroughly, and also interview all relevant personnel; and do not make a conclusion after only talking to one or two people or reviewing one or two documents. The goal is to conduct a very

thorough investigation, one which perhaps will reveal any weaknesses in your case (4) Document interviews, keep record of them, and retain them in the investigative file. Also ask employees to write up what they saw or heard regarding the situation, and ask them to sign or initial their statements (but do not “ask too hard” and if they refuse to sign or initial merely make a note of that on the file). (5) Do not “demonize” the discrimination claimant, as resentment may impair one’s judgment in analyzing and fairly resolving the case. (6) Check out mediation, which the EEOC typically encourages, and which may save the employer time and money in the long-run; yet only seek to mediate if one is truly open to settling. (7) Respond fully to EEOC charges, which is required by the EEOC within 60 days; and, although the EEOC only requires a position statement, it is better, as well as expected by the agency, to provide a fuller explanation with supporting documentation. Such a course of conduct also indicates to the federal agency that you are cooperating fully. (8) Do not treat the EEOC like the “enemy”; that is, do not argue with or contest the claim at the investigative stage when the agency is “merely” requesting information. (9) Put the company’s interests first; that is, determine your chances of prevailing, ascertain the costs of proceeding if the case is not settled, determine the impact on the company’s reputation if the case continues, and ascertain what the effect on the other employees will be if the case continues. Accordingly, “the answers may yield a business decision that opts for fighting to the finish. Or they may point to the practicality of cutting your losses” (Grossman, 2009, p. 51).

Santora and Seaton (2008) furnished good “common sense” advice to managers; that is, “managers must realize that older workers will not just sit idly by and accept age discrimination; they will file age discrimination lawsuits; and they will win” (p. 104). All the aforementioned advice can substantially reduce a company’s or organization’s risk of age discrimination litigation.

The very recent *Ricci v. DeStefano* (2009) disparate impact case, although a race-based one is still a precedent, and as such presents new challenges to managers, especially in the area of testing of older workers. Testing as well as educational and performance requirements can certainly cause legal problems for employers. Generally, “...it is not unlawful for the employer to hire or promote employees on the basis of results of professionally developed ability tests provided that the tests are not designed to be used in a discriminatory fashion” (Cavico and Mujtaba, 2008, p. 503). However, it is essential for the employer to demonstrate that “...the tests or educational requirements are predictors of, or significantly related to, important elements of work behavior and successful job performance” (Cavico and Mujtaba, 2008, pp. 503-04). Moreover, “...even if there is a showing that the tests are job-related, the courts will require that the employer use other different tests that have less of a discriminatory impact” (Cavico and Mujtaba, 2008, p. 504). The *Ricci* decision has surely complicated matters. The response to the court’s ruling from employment law attorneys and human resources managers has been varied and contradictory. The decision will certainly have an impact. Yet what impact will it have? Tuna, *et al.* (2009) stated that “uncertainty” has now been produced in the area of tests for employment and promotion (p. B1). Greenhouse (2009) stated that the decision puts employers in a “damned if they do, and damned if they don’t situation” (p. A13)! Plainly, the new tests enunciated by the Court will make it much more difficult for employers to discard test results once they are administered, even if the tests have a disparate impact, and, as such, produce a disproportionately negative impact on members of a given racial group or protected category, such as older workers. Employers should carefully review their tests to be sure they are free of bias and are job-related. However, if tests or hiring, promotion, or layoff criteria are revised, especially after the fact if there is a disparate impact, to favor of or to protect minorities or other

protected groups, then employers risk being sued for reverse discrimination as was the case with the city of New Haven situation. Consequently, employers may abandon testing altogether. Or, conversely, they may use them more broadly.

Moreover, although the case dealt with a public sector employer, particularly those who use civil service exams, the legal standards announced by the court apply to all employers, including private sector employers; and the decision also applies not just to tests but to any type of policies, procedures, and standards used to evaluate, rank, and sort current and potential employees. Furthermore, the decision stands as a precedent not just for race-based cases but any type of disparate action claim. In the private sector tests for hiring and promotion are most commonly used by retailers, manufacturers, telecommunication firms, and businesses with large sales forces (Tuna, *et al.*, 2009, p. B1). Employers, if they are concerned about the makeup of their supervisory ranks, then they must think very carefully about what type of test they are going to use at the “front end” (Doyle, 2009, p. 3A). They also must make sure that the tests, and for that matter their whole employment selection process, are neutral, objective, and fair. The goal is for employers to make their selection criteria “bulletproof” (Greenhouse, 2009, p. A13). Of course, this might make employers very cautious in using tests, which could include personality tests, honesty tests, computer skills, and physical fitness and co-ordination tests.

On the other extreme, some employers in order to avoid litigation may abandon tests completely in favor of other methods of selection and promotion, such as assessment centers, where applicants are evaluated in simulated real-life situations to see how they would handle them. Supporters of these assessment centers say they are better vehicles to measure communication and leadership skills as well as to ascertain an applicant’s ability to handle emergencies. The Supreme Court decision, at the least, should motivate employers to re-evaluate what additional tools and processes are available to them in selecting and promoting employees. Outside experts and agencies should also see an increase in business as employers seek to independently validate tests. Consequently, the employment situation after this Supreme Court decision is “unsettling” and “muddled” (Bravin and Sataline, 2009, p. A1). Yet some things seem evident; that is, the Supreme Court decision will lead to more worry, work, and difficulty for employers, engender more litigation, and consequently cause more expense and costs for employers. It now appears that the already “fine line” that human resource professionals must traverse in the hiring and promotion of employees has just become narrower due to the New Haven decision. Therefore, it may be prudent for management to enlist the participation of all possible stakeholders in creating any contemplated written test so as to fall under the “safe harbor” announced by Justice Kennedy when he suggested that such racial preferences be addressed “during the test-design stage.” Thus, by empowering the various stakeholders in this “test-design” stage, and by soliciting all participants’ views during the “test-design” stage, management may be able to craft a written exam that is sensitive to minority, women, and older applicants and candidates as well as one that is acceptable to all parties. Trying to parcel the written test results after the fact, in a perhaps well-meaning attempt to avoid liability under the old *Griggs* and the Civil Rights Act of 1991 “disparate impact” standard, will only hasten the fall down the “slippery slope” into a legal liability quagmire and a concomitant public relations fiasco. That is the seminal meaning of the *Ricci v. DeStefano* decision.

Legal complexity also naturally results from the globalization of business – in the employment field and otherwise. Foreign firms as well as U.S. ones consequently must be keenly aware of U.S. law; and also U.S. firms must be aware of not only foreign law, but also the extraterritoriality of U.S. laws. The employer’s fundamental objectives, of course, are to obey the

law, avoid getting sued and going to court, but if sued in court to prevail. U.S. anti-discrimination employment laws clearly protect U.S. citizens working for U.S. employers, no matter where the workplace is located. The Civil Rights Act, the ADA, and the ADEA now have been amended to include protection for U.S. employees working overseas for U.S. firms. Thus Title VII, the Americans with Disabilities Act, and the ADEA currently are coextensive in their extraterritorial effect. These acts accordingly have a very broad extraterritorial reach, encompassing not only U.S. firms doing business in the U.S. and overseas, but also U.S. controlled firms. A crucial issue, therefore, is whether a foreign firm is sufficiently controlled by a U.S. firm. Yet it is essential to emphasize that the courts consistently have held that only U.S. citizens are protected; and thus only a U.S. citizen may properly institute a discrimination lawsuit under Title VII of the Civil Rights Act and the ADEA based on employment decisions made at a foreign workplace by a U.S. employer or by a foreign employer controlled by a U.S. multinational firm. Therefore, resident aliens and foreign nationals working overseas for U.S. companies are excluded from the protections of the Civil Rights Act as well as the ADEA. A “simple” solution to the extraterritoriality problem examined herein might be to apply U.S. employment discrimination laws to any company incorporated in the U.S., regardless of where its employment operations take place. Yet, this “answer” is not feasible due to the very strong presumption in U.S. law against the extraterritorial application of U.S. law, which typically is predicated on concerns about sovereignty, comity, and jurisdiction. This presumption is overcome only in exceptional instances. Legally, and most significantly, the distinct possibility exists of different global business practices and employment standards, as well as different degrees of legal protection, for U.S. employees and non-U.S. employees working for the same international business firm and in the same workplace. Failure to be cognizant of U.S. employment discrimination law, including its extra-territorial aspects, as well as the labor law of the host country, will result in increased exposure to legal liability for the multinational firm. Consequently, the manager of the multinational firm must ensure to the extent possible that the firm complies with both U.S. anti-discrimination employment law as well as the employment law of the host country.

Summary and Conclusion

This article examined the laws of age discrimination in the United States and in a global context. The article, therefore, provided a detailed explication of the U.S. Age Discrimination in Employment Act (ADEA) and other age discrimination laws. The article also discussed the nature and role of the Equal Employment Opportunity Commission in implementing and enforcing age discrimination law. The purposes of this statute were to promote the employment of older persons predicated on their capabilities and not their age, to prohibit arbitrary age discrimination in employment, as well as to assist employers and employees to find approaches to solve problems stemming from the impact of age on employment. This article, in particular disclosed that the plaintiff employee’s legal burden in the U.S. for establishing a successful case of age discrimination against his or her employer is a very challenging one indeed. Moreover, if the employee is suing under a disparate impact theory, he or she will be faced with the reality that the employer defendant need only produce evidence of “reasonable factors other than age” to justify, and thereby to sustain legally its employment policy or practice. United States multinational business firms, as well as foreign firms operating in the U.S., first obviously must be aware of U.S. civil rights law when conducting business in the United States. These firms also

must be keenly aware of the important and far-reaching legal extraterritorial rule that a U.S. company that employs U.S. citizens anywhere in the world generally will be subject to a civil rights lawsuit if these employees are discriminated against based on the protected categories.

One “theme” to this work is that the prudent and wise employers and managers are well-advised to be cognizant of the ADEA as well as other important civil rights anti-discrimination statutes. The purposes of this article, moreover, were to provide to leaders and managers practical strategies, tactics, and recommendations to comply with age discrimination laws, to maintain fair employment practices, and how to handle an actual age-based discrimination lawsuit. Detailed recommendations were supplied to managers on how to deal with the ADEA and especially how to avoid legal liability pursuant to this important anti-discrimination statute. Recommendations were also provided on how to deal with and to defend age discrimination lawsuits pursuant to the ADEA. Finally, recommendations were offered to employers and managers on how to avoid discriminatory practices – based on age and otherwise – in the workplace. The authors hope that the information and insights provided will be helpful to managers and employers who seek to attain a legal and ethical, fair and equitable, efficient and effective, and value-maximizing workplace.

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