

Age Discrimination in the American Workplace: Legal Analysis and Recommendations for Employers and Employees

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Abstract

Aging is a reality of life since the global workforce is getting older. The article first discusses the challenges confronting older workers in today's work environment, particularly the presence of negative age stereotypes and ageist prejudice and bias towards older workers, frequently resulting in age discrimination in employment. The authors relate the results of a cross-cultural age and cultural values survey regarding perceptions of older workers and the prevalence of age discrimination. The article then provides an overview of the key civil rights statute in the U.S. prohibiting age discrimination - the Age Discrimination in Employment Act (ADEA) - as well as a discussion of the nature and role of the federal regulatory agency in the U.S. - the Equal Employment Opportunity Commission - in implementing and enforcing age discrimination law. A succinct comparison of U.S. age discrimination law to the law of the European Community is also supplied. Principal purposes of this article are to provide to employers, business leaders, and managers practical strategies and recommendations to comply with age discrimination laws, to maintain fair employment practices, and to show how to handle an actual age-based discrimination lawsuit. 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. Suggestions are also provided on how to deal with and to defend age discrimination lawsuit cases. Furthermore, suggestions are offered to the business community on how to view older workers as an opportunity and to utilize them in a beneficial fashion for the firm or organization. Another major purpose of this article is to provide older workers – whether current employees or job applicants – suggestions on how to keep and secure employment in a technologically advanced but recessionary economy.

Keywords: Aging, ageist, stereotype, discrimination, employment, disparate treatment, disparate impact, older workers, management strategies, civil rights, ADEA, EEOC.

I. Introduction and Background

The global workforce is growing older; and concomitantly so are the challenges confronting older workers. One very difficult challenge is to deal with negative perceptions and stereotypes regarding older workers and job applicants, frequently resulting in discrimination in the workplace. Illustrations of these “ageist” stereotypes can be gleaned from comments by respondents to a cross-cultural survey on age and cultural values conducted by the authors for their book, *The Aging Workforce: Challenges and Opportunities for Human Resource Professionals* (2010). The cross-cultural survey and the results derived from the survey will be discussed in the next section of this article. However, a few “qualitative” comments from the respondents regarding perceptions of older workers and the presence of age discrimination, though, of course anecdotal, are instructive, to wit:

- “People are stepping into a new world and the new world starts with new technology. The older workers are not always familiar or are less familiar with (technology), which delays the process of accepting new systems with new technology. This is one of the main reasons for age discrimination.”
- “The older you are the lesser you are ‘worth’ in the corporate American culture.”
- “Sales/business favors youngsters with more energy and enthusiasm....”
- “Sometimes you see that (older workers) are useless in their job or in today’s language they are not computerized.”
- “We had a few people (older guys) in our office and they were very intelligent but were really slow which sometimes makes you crazy.”
- “Younger people will be preferred due to less cost and their ability to adjust themselves to new developments...and for this reason age discrimination cannot be avoided...”
- “Some older workers are not open to change....”
- “Age discrimination against ‘older workers’ is rampant in this country (United States).”
- “Younger workers feel that older workers should quit active employment and give them a chance on the social mobility ladder.”
- “Older workers perceive that they will not be hired for new employment because they are too old. I’ve had people say they cannot leave this organization because they are too old to obtain employment elsewhere.”
- “I think, in general, older workers are discriminated against, particularly when seeking a position.”
- “I certainly have heard of issues that older workers have had with employers who replace them with younger, less expensive workers.”
- “I feel that older workers should have a set age to retire and adhere to it, instead of ‘clogging up’ the system and hindering younger employees from entering to higher positions.”
- “When you reach a certain age of about 65, I think it’s time for you to retire.”
- “I find that older workers are stuck in the past and not open for change.”
- “Older workers may perhaps give less productivity....”
- “When it comes to the older workers, I think that when they reach age 55 years, should consider retirement.”
- “I never heard of age discrimination until I came to this country, the USA.”
- “Older workers are at times lazy and try to use their age as a way of manipulating young workers and have the young workers doing their jobs.”

- “I find that older workers do sometimes display certain mindsets that cause them to respond slowly to changes and to be less open to the ideas posited by younger workers.”
- “Younger workers are frequently more receptive to training and other opportunities that older workers disdain.”
- “Older people feel threatened that employers would prefer to employ some younger workers with degrees, because they may be willing to accept less salary than they would.”
- “Employers are of the opinion that ‘older workers’ are somewhat set in their work habits; which if they are not good habits, it is more difficult for them to break out of than ‘younger workers.’”
- “Some jobs prefer younger and attractive persons....”
- “Newer companies appear to have a preference for younger employees.”
- “Some companies...will not hire you because you are perceived to being too expensive from a health insurance perspective.”
- “Managers...prefer to work with ‘younger workers’ because they are seen as more productive and more ‘coachable’” (Mujtaba and Cavico, 2010, pp. 112-121).

The preceding comments adduced from the authors’ survey give credence to the proposition that negative perceptions and harmful stereotypes do afflict older people in today’s workforce. Moreover, these prejudices can result in age discrimination in employment. As the global workforce becomes older, these deleterious consequences for older workers will be intensified and exacerbated.

In the United States, Holliday (2010, p. 1) reported that the U.S. Senate Special Committee on Aging reported that between the years 2010 and 2030, the elderly, that is people age 65 and over, will comprise an estimated 21.8% of the total population. The U.S. Bureau of Labor Statistics (BLS) is the main government agency that provides the statistics and statistical analysis for labor and employment. For the category of “older workers” the most recent BLS data is from 2008 (U.S. Bureau of Labor Statistics, 2012). The BLS indicated that in the United States between 1977 and 2007, employment of workers 65 years of age and over increased 101%, compared to a smaller increase of 59% for total employment (age 16 and over). The number of employed men 65 and over increased 75%; however, the employment of women 65 years of age and over rose substantially to 147%. Furthermore, although the percentage of workers 75 years of age and older is very small (0.8% of the employed in 2007), this category had the most dramatic increase, rising 172% between 1977 and 2007 (U.S. Bureau of Labor Statistics, 2012). The BLS also noted that between 1977 and 2007, the age 65 and older civilian non-institutional population (excluding people in nursing homes) increased about 60% while the civilian non-institutional population age 16 and over increased 46% (U.S. Bureau of Labor Statistics, 2012). So employment of people 65 and over doubled while employment for everyone 16 and over increased by less than 60% (U.S. Bureau of Labor Statistics, 2012). The BLS, therefore, concludes that a larger portion of people aged 65 and over is remaining or returning to the workforce (which consists of working and looking for work). Another interesting BLS statistic is that in 2007 older workers with less than a high school education accounted for 13% of that group’s employment (down from 21% in 1997), compared to 9% for younger workers.. Moreover, in 2007, 31% of workers 65 and over had a bachelor’s degree or higher, compared to 34.4% of workers aged 25-64. The BLS also reported that there are 76.9 million people in the workforce who are age 40 or older (Grossman, 2008). The BLS asks: “Is this graying of the workforce expected to continue?” The very revealing answer is:

Definitely, BLS data show that the total labor force is projected to increase by 8.5% during the period 2006-2016, but when analyzed by age categories, very different trends emerge. The number of workers in the youngest group, age 16-24, is projected to decline during the period while the number of workers age 25-54 will rise only slightly. In sharp contrast, workers age 55-64 are expected to climb by 36.5%. But the most dramatic growth is projected for the two

largest groups. The number of workers between the ages of 65 and 74 and those aged 75 and up is predicted to soar by more than 80%. By 2016, workers age 65 and over are expected to account for 6.1% of the total labor force, up sharply from their 2006 share of 3.6% (U.S. Bureau of Labor Statistics, *Older Workers: BSL Spotlight on Statistics*, 2012).

Evidently, 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.

II. Cross Cultural Comparison

In order to obtain information on people’s attitudes, perceptions, and expectations of older workers, and the prevalence of age discrimination in the workplace, as well as the awareness of legal, moral, and cultural norms pertaining to age discrimination, the authors created a survey instrument – an *Age and Cultural Values Questionnaire* – and conducted a cross-cultural survey focusing on attitudes to older workers in the workplace and the presence of age discrimination (Mujtaba and Cavico, 2010). While it is beyond the scope of this article to present all the findings and implications of the survey (all of which can be found in the authors’ aforementioned 2010 book, *The Aging Workforce: Challenges and Opportunities for Human Resource Professionals*), we present some salient findings and the conclusions drawn from these findings, which should be informative and educational. The survey generated data as well as qualitative comments from respondents in several countries – Afghanistan, Turkey, Jamaica, Bahamas, Thailand, and the United States. The comments were solicited to indicate the qualitative aspect of what people think with regard to age in their cultures and particularly how they perceive older workers and age discrimination practices in the workplace. The respondents came from a diverse group of professionals, educators, corporate trainers, public and private sector employees, contractors, students, as well as colleagues and friends of the authors. The results in a “nutshell” revealed that the respondents believed that age discrimination in employment was legally as well as morally wrong, not only personally but also viewed as wrong in their respective societies; nonetheless, age discrimination against older workers was widespread in their countries. And the main reasons given by the respondents to explain such discrimination were the perceptions that older workers are not technologically adept and are often resistant to change.

Our findings indicate that there exist certain negative stereotypes regarding older workers, and that these stereotypes can lead to bias and prejudice against older workers, resulting in discrimination in employment. These negative stereotypes which hinder older workers from staying in, and re-entering, the workforce include the following:

- Older workers are more costly and expensive, particularly regarding benefits.
- Older workers will not stay long in their jobs, especially if they pay less.
- Older workers have lower capabilities in performance, especially from a technological standpoint.
- Older workers are “set in their ways” and thus resistant to change.

- Older workers are not flexible and adaptable.
- Older workers require more training, particularly from a technological standpoint.
- Older workers are more difficult to train and resist training.
- Older workers need more technological training, especially more costly “hands-on” training.
- Older workers are “coasting,” that is, waiting for retirement.
- Older workers are not interested in new technology and management techniques.

Accordingly, there appears to be a great deal of discrimination in the workplace against older employees based on their age and negative stereotypes regarding their age; and thus the seminal issues arise as to the legality of such discrimination, and in particular the key issues as to the legal redress available to older, aggrieved older employees and job applicants, as well as the practicality of achieving legal success. Age discrimination in employment can be direct and overt or, in greater likelihood, as well as problematically, covert, subtle, indirect and inferential. Both categories of discrimination will be discussed in this article.

III. Age Discrimination in Employment Law in the United States

Age discrimination entails treating an employee or job applicant less favorably because of his or her age. In the United States the most important civil rights statute regarding age discrimination is the Age Discrimination in Employment Act (ADEA) of 1967, which is a federal statute prohibiting employment based on age. The ADEA prohibits discrimination against people who are over the age of 40 years (EEOC, Age Discrimination, 2012). 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 (Cavico and Mujtaba, 2011; Mujtaba and Cavico, 2010; Holliday, 2010). 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, particularly inaccurate and stigmatizing age stereotypes, would reduce long-term unemployment of older workers, thereby diminishing poverty among the elderly (Cavico and Mujtaba, 2011; Holliday, 2010).

The ADEA is a federal law, that is, national law, in the United States, 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, apprenticeships, training, job notices and advertisements due to a person's age (EEOC, Age Discrimination, 2012; EEOC, Age Discrimination, Facts About Age Discrimination, 2012; Cavico and Mujtaba, 2011; Mujtaba, 2010; Mujtaba and Cavico, 2010; Holliday, 2010). Moreover, it is unlawful under the ADEA to harass a person because of his or her age. Harassment can consist of offensive remarks about a person's age, but not teasing, off-hand comments, or isolated incidents that are not very serious; yet if the conduct is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment determination, such as a discharge, then the conduct is illegal (EEOC, Age Discrimination, 2012). It is also illegal for an employer to retaliate against a person for opposing discriminatory employment practices based on age, for filing an age discrimination complaint, or for testifying, or for participating in any way in an investigation, proceeding, or

litigation under the ADEA (EEOC, Age Discrimination, Facts About Age Discrimination, 2012; Holliday, 2010; Wood, Wood, Wood, and Asbury, 2010). The ADEA applies to employers who have 20 or more employees, including state and local governments, the federal government, employment agencies, and labor unions (EEOC, Age Discrimination, Facts About Age Discrimination, 2012). 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 “guidelines” pursuant to civil rights laws enacted by Congress as well as to administer and enforce civil rights laws, including the ADEA (Cavico and Mujtaba, 2011; Holliday, 2010).

IV. The Equal Employment Opportunity Commission

The ADEA 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 that ADEA is a federal, that is, national law. Since the United States 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 (EEOC, Age Discrimination, 2012; Cavico and Mujtaba, 2011; Mujtaba and Cavico, 2010; Lahey, 2008). To illustrate, 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 (Tinkham, 2010). Furthermore, 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 in the United 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). Data from the Equal Employment Opportunity Commission (EEOC) reveals the prevalence of age discrimination lawsuits and the monetary benefits obtained by the agency (though it should be noted that the EEOC’s data does not include monetary benefits obtained by litigation). Pursuant to all civil rights laws that the EEOC enforces, the agency in 1997 received 80,680 complaints of discrimination; and by 2010 that number had increased to 99,992. Again pursuant to all statutes, the agency in 1997 obtained \$176.7 million for employees, and by 2010 had obtained \$319.4 million for employees. Specifically regarding the Age Discrimination in Employment Act (ADEA), in 1997 the agency received 15,785 complaints of age discrimination, by 2010 that number had grown to 23,264, and by 2011 was 23,465 (EEOC, Statistics, 2012). Also regarding the ADEA, in 1997 the agency obtained \$44.3 million for employees and by 2010 that number had more than doubled to \$93.6 million, and in 2011 had increased to \$95.2 million (EEOC, Statistics, 2012). Reflecting on the percentage of elderly in U.S. society and the workforce, as well as the U.S. and global economy, Holliday (2010, p. 1) concludes that: “The issue of older Americans in the workforce is heightened because of the current downturn in the U.S. economy. Prospective employees are seeking a limited number of jobs. Employers are cutting available jobs. These pressures can provide the kindling for age discrimination in the workplace.” And, based on the preceding EEOC complaint and compensation statistics that “kindling” has burst into flames!

V. 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 (EEOC, Facts About Age Discrimination, Regulations Related to Age Discrimination, 2012). 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 (Mujtaba and Cavico, 2010). However, based on the U.S. 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,” 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). The Supreme Court has ruled that proof of a discriminatory intent or motivation on the part of the employer is critical to a disparate treatment age discrimination case (*Kentucky Retirement Systems*, 2008; *Hazen Paper Company*, 1993; Holliday, 2010; Wood, Wood, Wood, and Asbury, 2010). 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 predominant part to the decision-making process and had a determining effect on the outcome. Of course, if the motivating factor in the employer’s decision was some criterion other than the employee’s age, such as years of service or higher compensation levels (though related to age), then there is no disparate treatment liability since the difference in treatment was not actually motivated by age (though some older workers might be disadvantaged by the decision) (Cavico and Mujtaba, 2011; Mujtaba and Cavico, 2010; Holliday, 2010). In the case of pre-employment inquiries, the ADEA does not specifically forbid an employer from asking about an applicant’s age or date of birth. Nonetheless, because the EEOC believes that such inquiries will deter older workers from applying for employment positions or may indicate a possible intent to discriminate based on age, the agency states that requests for age information will be “closely scrutinized” to be sure that the inquiry was made for a lawful, non-discriminatory

purpose (Age Discrimination, Facts About Age Discrimination, Pre-Employment Inquiries, 2012).

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 (Cavico and Mujtaba, 2011).

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 little or less experience or with lesser academic credentials. Other problematic 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 (Cavico and Mujtaba, 2011).

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, 2011). 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. Burden-shifting typically arises in a discrimination case when the plaintiff is utilizing the disparate treatment legal theory. That is, the plaintiff, the allegedly aggrieved employee, is arguing that his or her employer intentionally discriminated against him or her because of a protected characteristic, such as age pursuant to the Age Discrimination in Employment Act. In order to sustain his or her initial burden of proof, the plaintiff must introduce evidence that the employer intended to discriminate against the employee, who thereby suffered an adverse employment action, due to the employee's age or race or other protected characteristic. The evidence the employee can offer can be direct evidence of discrimination, such as an express comment indicating a bias against older workers, or circumstantial, such as a comment that an employee is "over-qualified" which can be the basis of an inference of a discriminatory animus. Once the plaintiff establishes this initial or *prima facie* case, the burden then shifts to the employer to present a legitimate and bona fide, non-discriminatory reason for the adverse employment action. Next, if the employer can meet this burden, then the burden shifts back to the plaintiff employee to demonstrate that the purportedly legitimate reason offered by the employer is in fact fake and a mere pretext for an underlying discriminatory motive (Cavico and Mujtaba, 2011; Mujtaba and Cavico, 2010; Wood, Wood, Wood, and Asbury, 2010; Mahajan, 2007).

In contrast to intentional age discrimination or a direct evidence case, covert discrimination also can exist against older employees. This form of discrimination appears to be subtler in nature; and consequently applicants, employees, as well as 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" (Cavico and Mujtaba, 2011; Mujtaba and Cavico, 2010). 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 (Mujtaba, Cavico, Edward, and Oskal, 2006).

Yet the courts in the United States 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, 2011; Mujtaba and Cavico, 2010; Wood, Wood, Wood, and Asbury, 2010).

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 (Cavico and Mujtaba, 2011; Mujtaba and Cavico, 2010). 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 (Cavico and Mujtaba, 2011; Mujtaba and Cavico, 2010). 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).

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 (Cavico and Mujtaba, 2011; Mujtaba and Cavico, 2010). 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 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 (Muffler, Cavico, and Mujtaba, 2010; Holliday, 2010; Wood, Wood, Wood, and Asbury, 2010). Specifically regarding the ADEA, the EEOC states that an employment policy or practice, though applying to everyone regardless of age, nevertheless can be illegal if it has a negative impact on applicants or employees over the age of 40 and the policy or practice is not based on a "reasonable factor other than age" (RFOA) (EEOC, Age Discrimination,

2012). The ROFA standard emerges as a very important employer defense in a disparate impact age discrimination lawsuit.

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 (Horan, 2009; Bently, 2006/2007). 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 is 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 “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.

It is very important to 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 (Cavico and Mujtaba, 2011; Muffler, Cavico, and Mujtaba, 2010; Mujtaba and Cavico, 2010). 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 (Gross, 2009; 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 healthcare plan changes or engaging in a reduction-in-force to eliminate high salaries or reduce healthcare 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 (Gross, 2009). The result, according to 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 (Cavico and Mujtaba, 2011; Mujtaba and Cavico, 2010).

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” (Cavico and Mujtaba, 2011). 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 (Mujtaba and Cavico, 2010). 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.

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 (Holliday, 2010). 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 illustrate, the EEOC states that a job notice or advertisement can specify an age but only in the "rare circumstances" where age is demonstrated to be a BFOQ reasonably necessary to the normal operations of the business (EEOC, Facts About Age Discrimination, Job Notices and Advertisements, 2012). As such, 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 (Cavico and Mujtaba, 2008). For example, 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; yet in an age context the mandatory retirement of airline pilots has been upheld; but age was not deemed to be a BFOQ for the position of flight engineer (*Trans World Airlines, Inc.*, 1985; Holliday, 2010). The EEOC, as noted, counsels that the exception will have only limited scope and application.

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

The ADEA's significant "reasonable factors other than age" (RFOA) provision (EEOC, Age Discrimination, Facts About Age Discrimination, 2012) 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 (Holliday, 2010; Wood, Wood, Wood, and Asbury, 2010). 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 (Wood, Wood, Wood, and Asbury, 2010). 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 problematic 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).

VI. Age Discrimination Law in the European Community

The increasing age of the workforce and the employment rate of older workers are issues of great concern in Europe. Bisom-Rapp, Frazer, and Sargeant (2011, pp. 76-77) indicate:

“There is in the E.U. a steep fall in the employment rate after the age of fifty and the level of employment for those over sixty-five is very low. For the E.U. as a whole, approximately 85 percent of men and 70 percent of women are in employment at age fifty. By the age of sixty-nine for men and sixty-six for women, these figures fall to less than 10 percent....Demographic age is accelerating. As the baby-boom generation retires, the EU’s active population will start to shrink from 2013/2014. The number of people over age 60 is now increasing twice as fast as it did before 2007 – by about two million every year compared to one year previously.” Referring to the United Kingdom, Bisom-Rapp, Frazer, and Sargeant (2011, p. 81) declare that “older workers suffer from stereotyping and age discrimination.”

Age discrimination in European Community (EC) is prohibited principally by the European Directive against Discrimination, which prohibits discrimination on several grounds, and the decisions of the Court of Justice of the European Union (CJEU), which applies the Directive (Stump, 2010). However, classifications in employment based on age as well as differences in treatment based on age may be permissible under certain circumstances (Stump, 2010). Initially, it should be noted that age in the EC is not regarded as a “suspect ground” for discrimination as would be race (Stump, 2010). Similarly, in the U.S. when the government is classifying people based on their age, age is not regarded as a “suspect category,” as opposed to race, thereby requiring in the latter case of racial classifications and discrimination the more advanced and intensive level of legal examination – “strict scrutiny” – as well as the much more demanding standard of a “compelling government interest” to sustain the racial discrimination; whereas age classification “only” require an intermediate level of scrutiny by the courts (Cavico and Mujtaba, 2008). In Europe, pursuant to Article 6 and Recital 25 of the Directive, differences in treatment based on age will not constitute illegal discrimination if the differences are justified by objective and reasonable goals, including legitimate employment policies, and are deemed to be appropriate and necessary to achieving those aims (Suk, 2012; Stump, 2010). To illustrate the Directive’s application, Stump (2010, pp. 55-56) points to CJEU cases involving German national law that have upheld a maximum recruitment age of 30 for firefighters directly involved in firefighting on grounds of the proper functioning of a fire department, as well as an age limit for the practice of the medical profession, dentistry in the case before the court, based on protecting the health of the patients.

In Europe, as in the U.S., age discrimination legal liability can be predicated on disparate treatment, which requires evidence of discriminatory intent (Besson, 2012). Europe also has a form of “indirect” discrimination which appears to approximate the U.S. disparate impact theory (Linos, 2010). As explained by Besson (2012, p. 169): “Evidence of ‘the disproportionately prejudicial effect on a particular group’ now suffices to presume indirect discrimination. This may be provided by undisputed official statistical evidence....Further...once statistical evidence has been supplied, the indirect discrimination is regarded as established and the State has to provide an objective and proportional justification for the discrimination rather than evidence of an absence of discriminatory intent.”

One distinct difference between European and U.S. age discrimination law involves the subject of mandatory retirement. In the U.S. mandatory retirement is as a general rule illegal (and with few and very limited exceptions) (Mujtaba and Cavico, 2010); but in Europe national mandatory retirement schemes based on the age of employees have been deemed to

be compatible with anti-discrimination law (De Burca, 2012; Suk, 2012; Bisom-Rapp, Frazer, and Sargeant, 2011; Linos, 2010). Suk (2012, p. 93) relates that Recital 13 in the EU Directive on equality in employment explicitly states that “this Directive shall be without prejudice to national provisions laying down retirement ages.” Moreover, Suk (2012, p. 94) and Linos (2010, p. 165) point to a leading case – a Spanish case, where the European Court of Justice held that a collective bargaining agreement with a provision that when an employee reached the age of 65 the employee must retire. Suk (2012, p. 94) explains that the rationale for the decision was that in a time of high employment the Spanish law authorizing the collective bargaining agreement was part of a national policy to provide more employment opportunities, greater access to employment, and “better distribution of work between generations.” Linos (2010, pp. 165-66) concurs, adding that public policy grounds of encouraging recruitment and promotion have been deemed to constitute legitimate aims of social policy, and thus “objectively justified.” Suk (2012, pp. 95-96) also notes that in Europe “mandatory retirement is not construed as a significant burden for older workers, in light of the existence of national legislation providing for adequate pensions....So construed, mandatory retirement is a social policy that promotes equal dignity, even though it does so by limiting the choice of those who are willing and able to work indefinitely.” Similarly, Bisom-Rapp, Frazer, and Sargeant (2011, p. 87) note that the decisions of the European Court of Justice upholding mandatory retirement take “into account the fact that persons are entitled to financial compensation by the way of a retirement pension at the end of their working life, as provided for by the national legislation..., the level of which cannot be regarded as unreasonable.” In comparing the situations of older workers in the U.S. and Europe, Bisom-Rapp, Frazer, and Sargeant (2011, p. 114) contend that “the U.S. falls short in pursuing for older workers three decent work objectives: employment promotion, social protection, and fundamental rights in the form of eliminating age discrimination....Many American older workers, who in addition to dwindling job security and weakened age bias protection, cope with declining retirement security and an insufficient system of employment compensation.”

VII. Recommendations for Employers

Due to the aging of the workforce as well as the prevalence of negative stereotypes impeding employment for older workers, the enforcement of civil rights laws, particularly the ADEA, is increasingly concerned with inducing the greater employment of older workers and preventing discrimination against them. Moreover, the AARP declares that “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, it appears there have been many firms and organizations that have shown patterns of discrimination against “older workers” in the United States’ work environment, as well as globally, and especially when it comes to hiring.

The Age Discrimination in Employment Act in the United States presents employers, business 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 (Cavico and Mujtaba, 2011). 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 (Cavico and Mujtaba, 2011). 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 (Cavico and Mujtaba, 2011; Wood, Wood, Wood, and Asbury, 2010). 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 (Cavico and Mujtaba, 2011; Wood, Wood, Wood, and Asbury). 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 (Cavico and Mujtaba, 2011). 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.

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. 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 applied, 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).

Regarding words and phrases that could demonstrate an inferential intent to discriminate, such as the word “slow,” as in the case where the worker is discharged or demoted for being too “slow” on the job, Wood, Wood, Wood, and Asbury (2010) have some very good advice for the employer:

“If an employee suffers an adverse job action because he/she is ‘slow,’ an employee may have a difficult time making a case of discrimination if the workplace is a production workplace and accurate records are kept of an employee’s speed during the production process. However, in another workplace where speed at production cannot be accurately measured and the employee suffers an adverse job reaction because he/she is ‘slow,’ such action may be improper stereotyping. In such a case, an employee may simply assert that being ‘slow’ is merely aged based stereotyping and the burden of proof will shift to the employer to prove that his decision was based on reasonable factors other than age. Obviously, such hypotheticals produce no easy answers. Employers, employees, and their counsel would be wise to scrutinize any subjective criteria that are used to justify an adverse job action for an older worker and should anticipate that they may be required to prove that the factor was justified as not age related” (p. 403).

In addition to the preceding very practical recommendations for employers as to how to avoid the “negative” of legal liability for age discrimination, the authors contend that employers also should take a more “holistic” and “positive” proactive approach when it comes to hiring and retaining older workers. Most importantly, the authors assert that it is in the long-term self-interest of the employer to do so. Fundamentally, older workers and older job applicants should be viewed as a business opportunity for employers and not as a risk, a challenge, or a liability (Mujtaba and Cavico, 2010). Accordingly, employers should engage older workers with jobs and within the company and thus make the workplace more “age friendly.” Some steps that the employer can take include the following:

- Employers can and must avoid age discrimination in the workplace – directly or covertly – as well as age stereotyping.
- Target and recruit older workers.
- Show an appreciation of and display a welcoming-back attitude to older workers, especially workers returning to the workforce.
- Provide specialized and customized training for older workers; make sure it is the “right” type of training, for example, one-on-one and hands-on, and at the “right” pace, a moderate and measured pace.
- Provide customized benefits, such as paying for Medicare supplemental policies for workers over 65.
- Provide specialized financial advice to older workers.
- Utilize part-time, reduced, and flexible schedules; use older workers as independent contractors; have phased-in retirements.
- Provide assistive technology to help older workers do their jobs, for example, volume controls and magnifiers.
- Provide educational benefits for older workers to complete degrees, obtain executive education, and to secure certifications.
- Use older workers as coaches and mentors, mediators and conciliators, educators, and as leaders.
- Provide “...carefully prepared job descriptions with measurable expectations and regular, honest evaluations” (Wood, Wood, Wood, and Asbury, 2010, p. 405; Mujtaba and Cavico, 2010).

By following the preceding suggestions, older workers naturally will benefit. Yet the authors also firmly believe that employers in the long-run will benefit too. Wood, Wood, Wood, and Asbury (2010) also have some very good and thoughtful advice for employers:

“Unfortunately, human beings are not equal in the aging process. While pediatricians can mark out a predictable development link for the very young, there is no such line that demarks the decline of the elderly. Individual genetics, lifestyle choices, and life experience simply cause people to age differently....These differences may be more marked in different types of jobs. Some aging employees will experience no decline in proficiency; others will experience substantial decline as they age. These differences make it imperative that employers that have not done so previously prepare objective job descriptions, productivity expectations, and productivity measures” (p. 403).

As the workforce grows older, and as more and more “older” workers stay and reenter the workplace, employers must expect that age stereotyping, age bias, and age discrimination issues will arise. Consequently, it is paramount that employers have clear and specific policies and procedures to prohibit and combat age discrimination and age stereotyping, that these policies and procedures be communicated to all employees and applicants, and that these policies be enforced in a fair, efficient, and effective manner.

VIII. Recommendations for Employees

The ADEA has been promulgated to protect older workers from age discrimination in employment. However, sustaining a disparate treatment case is very difficult since the aggrieved older worker must provide evidence of an actual intent or motivation to discriminate on the part of the employer. As stated by Holliday (2010, p. 26): “An elderly plaintiff who experiences age discrimination has a substantial friend in the ADEA. However, what could have been a hulking presence has been diminished through judicial interpretation. In particular, the Supreme Court’s demand for evidence of actual motivation to discriminate based on age in disparate treatment case is problematic.” Moreover, the “reasonable factor other than age” defense for employers presents an additional legal hurdle for employees. This is clearly explained by Wood, Wood, Wood, and Asbury (2010):

“The practical implications of the Court’s decision in *Smith* have resulted in limited gains for claimants seeking to assert disparate-impact claims under the ADEA. While the Court decision recognizes that disparate-impact claims are cognizable under the ADEA, the narrow scope the Court placed on disparate-impact claims makes the chances of bringing a successful disparate-impact claim under the ADEA unlikely. Critically, even if an employee can prove that an employer’s decision resulted in a prohibited impact, if the employer’s decision was based on a ‘reasonable factor other than age’ the employer need only show a business justification for making decisions based on that ‘reasonable factor.’...As a result, the Court’s decision, which at first glance appears to favor employees because it recognizes a disparate-impact claim under the ADEA, may at second and more careful glance turn out to favor employers because the ‘reasonable factor other than age’ provision makes the case winnable for employers” (p. 397).

Nevertheless, despite these legal and practical hurdles older workers should look for statements, phrases, and words that might be able to demonstrate an intent and motive – direct or indirect – to discriminate on the basis of age. Some of this probative evidentiary terminology could be the following:

- “too long on the job”
- “too old and tired”
- “should retire early”
- “should go fishing; play golf”
- “needs to spend more time with family”
- “too old for high-tech work”
- “computer illiterate”
- “too old to make ‘tough’ decisions”

- “old and needs special treatment”
- “not a ‘go-getter’”
- “not ‘with it’”
- “need ‘young bloods’”
- “need ‘young guns’”
- “over-qualified”
- “works well with seniors”
- “slow” (Mujtaba and Cavico, 2010; Wood, Wood, Wood, and Asbury, 2010).

The preceding statements could provide evidence of direct or inferential discriminatory treatment so at least to shift the burden of proof to the employer to come up with a reasonable factor other than age for the employment determination. Moreover, one must note that the phrases “over qualified” and “works well with seniors” are not necessarily offensive to older worker, but nonetheless they may supply an inference of age bias.

Stereotypes, prejudice, bias, and discrimination sadly may be the “lot” of some older workers today; and as has been pointed out, it may be difficult legally, particularly from an evidentiary standpoint, for an older job applicant to claim he or she was discriminated against due to age, or for an older worker to claim that he or she was discharged due to age. Yet older workers should not take a passive “victim” attitude; rather, the authors assert that they should, and must, take some responsibility for their employment situation. Most importantly, older workers seeking employment need to demonstrate to current as well as prospective employers that they can materially contribute to and add value to the organization, and that their past accomplishments are a good and reliable indication of their performance; and thus older workers will add value to the firm and commensurate value for the salary and benefits that they seek. Older workers and job applicants, therefore, have a responsibility to convince employers that they are productive and can remain productive. Older workers also must demonstrate to employers that they are loyal, possess sound judgment and even temperament, and exhibit respect for others; and accordingly they will be good role models for younger workers (Mujtaba and Cavico, 2010). Accordingly, the authors offer the following points that older workers should make to employers to “offset” any negative stereotypes:

- Older workers are knowledgeable and skillful and thus can provide critical skills, particularly in times of shortages of certain skills.
- Older workers have a strong work ethic.
- Older workers have less turnover and absenteeism; older workers are less likely to quit, miss work, or be late.
- Older workers are dependable, loyal, committed, reliable, and stable.
- Older workers work “smarter,” “harder,” and longer and thus are more productive.
- Older workers are committed to quality.
- Older workers possess experience, maturity, and wisdom.
- Older workers have superior communication skills as well as interpersonal skills.
- Older workers are “good listeners”; and can have a “calming influence” and conciliatory effect in the workplace.
- Older workers can serve as coaches and mentors – formally or informally – as well as managers and supervisors.
- Older workers can mediate and resolve conflict in the workplace.
- Older workers can be leaders (Mujtaba and Cavico, 2010).

Of course, one must be realistic; and as such older workers may not be able to completely eliminate biases and the attendant age discrimination in the workplace; yet nevertheless they can make the aforementioned points as well as take certain other steps to make sure they are not the victims of negative stereotypes and prejudice based on their age. Based on the authors’

research as well as a review of the academic and “popular” literature, they offer the following suggestions to older workers to be, and to remain, successful in the workplace, to wit:

- Market one’s education, knowledge, and skills, and do so with pride.
- Show the employer that you are willing to learn new skills, techniques, and knowledge.
- Update your knowledge, education, and skills, particularly computer skills, and reflect that development on one’s resume or CV.
- Go back to school. Get a degree, an advanced degree, or a certification.
- Focus on what employers currently need; be flexible; and “retool” yourself accordingly, if necessary.
- Maintain and develop further professional, alumni, and community networks; get connected physically as well as “virtually” by obtaining a computer and a “smart” cell phone, learning basic technological skills, securing an email address, and joining online networking and social media sites, such as LinkedIn and Facebook.
- Seek assistance from senior citizens groups, such as AARP, support groups, employment offices, community, school, and university career centers, and professional associations; use online job services geared for older workers.
- Do not ignore, avoid, or be embarrassed by one’s age; rather, highlight it in the sense that one has a great deal of experience, that one is a very mature person, that one will be a loyal and dedicated employee, and that one will be sensitive and responsive to customer, client, and co-worker needs; and thus that one will be a very valuable employee; but do not brag about your experiences and achievements.
- Demonstrate one’s online and technological capabilities, for example, by having a “virtual” CV or resume with multi-media, video, and “click-on” components, or building a “professional profile” on social media.
- Engage in “net-working” with one’s former colleagues, co-workers, and classmates; and do so on “social media.”
- Be realistic as to one’s employment prospects, particularly in a “tight” economy; get one’s “foot in the door” and network and build up from there.
- Do not distract oneself or undermine oneself by suspicions of bias, prejudice, and discriminatory treatment; rather, always maintain a positive and confident attitude as well as a professional demeanor.
- Most profoundly, avoid inactivity, depression, and defeatism. Re-invent yourself! Rejuvenate yourself! Persistence pays off! Do something! (Mujtaba and Cavico, 2010)

Admittedly, there are formidable challenges confronting older workers, especially in today’s recessionary global economy, but by being proactive as well as positive, older workers can keep and find suitable and rewarding employment. Yes, life is not always “fair,” and the “right” thing is not always done, and consequently one may be victimized by wrongdoing; but one must have and maintain a positive outlook and assiduously seek out, hope for, work towards, and expect “the best.”

IX. Summary

This article examined the challenges confronting older workers in today’s global economy, particularly the prevalence of negative stereotypes about and bias and prejudice toward older workers, which frequently results in discrimination in employment. This article examined the laws of age discrimination in the United States and provided a detailed explication of the U.S. Age Discrimination in Employment Act (ADEA). The article also discussed the nature and role of the Equal Employment Opportunity Commission in implementing and enforcing age discrimination laws in the United States. 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 creative approaches to solve problems stemming from the impact of age on employment. This article, in particular, disclosed that the older worker'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. Evidence of wrongful intent is critical. Moreover, if the older worker 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. Older workers recognize the existence and prevalence of negative stereotypes and resulting discrimination against older workers and job applicants; and they also must be cognizant of the difficulties in the law in sustaining an age discrimination lawsuit in the United States. Accordingly, one "theme" to this article is that older persons must empower themselves by continually learning useful, as well as the most up-to-date, knowledge, skills, and techniques, especially of a technological and managerial nature. Older workers must then present themselves, and for that matter assert themselves, as experienced, mature, wise, and dependable employees, who can make significant valuable contributions to a company or organization, and not "just" as stable, committed, loyal, and productive employees, but more fully as teachers, advisors, conciliators, coaches, and mentors in the workplace. The older worker thus must override and extirpate any negative stereotyping and age bias, and convince the employer that to hire the older worker is in the egoistic, long-term, self-interest of the employer.

United States multinational business firms, as well as foreign firms operating in the U.S., 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 employing 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 (Kim, 2010). Accordingly, another "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. Moreover, the article also emphasized and demonstrated to employers how to view and utilize older workers, certainly not as a liability or a problem, but rather as a beneficial opportunity and means for success of the organization. The authors hope that the information, insights, and suggestions provided will be helpful to managers and employers who rightly seek to attain a legal and ethical, fair and equitable, efficient and effective, and value-maximizing workplace, as well as older workers who want to be part of that workplace and to have enriching, fulfilling, productive, and meaningful lives.

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