THE ADEA AT 50: STILL UP TO THE JOB?

By Michael C. Subit

The Age Discrimination in Employment Act (“ADEA”) turns 50 this year. Were it a person and had it turned 50 in 1967, many people then would have wondered if it was showing signs of age. In 2017 most of us feel a 50 year-old is in the prime of life. That is precisely the challenge for the ADEA today. The statute came into being at a time when the place of the older worker was quite different than it is today due in large part to medical advances and economic changes. Partly because of its design and partly due to judicial doctrine, the ADEA neither adequately protects employees from arbitrary discrimination based on age nor adequately preserves the opportunities of older employees in the workplace. While people who live in states with strong fair employment laws can rely on those, at a national level there is a need for statutory reform and/or judicial reinterpretation, neither of which is going to happen soon.

ADEA: A Different Statutory Pedigree.

Congress enacted Title VII of the Civil Rights Act in 1964. “Congress chose not to include age discrimination within discrimination forbidden by Title VII of the Civil Rights Act of 1964 being aware that there were legitimate reasons as well as invidious ones for making employment decisions based on age.” General Dynamics, Inc. v. Cline, 540 U.S. 581, 587 (2004) (internal citation omitted). Congress instead commissioned a Secretary of Labor study, which led to the Wirtz Report. Id. The Secretary of Labor called for federal legislation but “he placed his recommendations against the background of common experience that the potential cost of employing someone rises with age, so the older an employee is, the greater the inducement to prefer a younger substitute.” When Congress finally wrote the ADEA in 1967, it
used the Fair Labor Standards Act (“FLSA”) of 1938 as the remedial model rather than Title VII. Why is not entirely clear.

Therefore, like the FLSA, but unlike Title VII, the ADEA provides for the possibility of double economic damages (albeit with a higher standard than the FLSA). The ADEA doesn’t provide for compensatory or punitive damages. There are no opt-out class actions under the ADEA. A group of employees claiming age discrimination under federal law must use an opt-in collective action just like under the FLSA. On the other hand, the ADEA provided for jury trials long before Title VII did. The substantive prohibitions of the ADEA, however, “were derived in haec verba from Title VII.” Lorillard, Inc. v. Pons, 434 U.S. 575, 584 (1978). As under Title VII, an ADEA plaintiff must file an administrative charge with the EEOC before proceeding to court. The relationship between the EEOC and a state fair employment practices agency is governed by the concept of “referral” rather than “deferral” as is the case with Title VII. That means in an ADEA case the plaintiff can file in court 60 days after filing an EEOC charge and need not wait 180 days for the EEOC to process the charge as in Title VII cases. Originally the ADEA had both a minimum (40) and a maximum (70) age threshold. The former limit remains. Except in a few industries, the latter is long gone.

_Hazen Paper: When Age Discrimination Isn’t._

Age discrimination is usually the first suspected unlawful motive when it comes to reductions in force or other lay-offs. This is because there is at least a perceived, and sometimes a real, correlation between an employee’s age and his or her economic value to the employer going forward. A cold, cost-benefit analysis will often lead employers to conclude that older employees who have served the company for decades should be laid off while younger ones are retained. From a lay-person’s perspective, such employment decisions are age discrimination.
Legally, they are not. In *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), the employer had fired a 62 year-old employee who was a few weeks short of retirement. The employer gave a pretextual reason for its actions. A jury found that the employer had violated the ADEA and ERISA, and awarded liquidated damages for a willful violation of the ADEA. The district court granted a JNOV to the employer with respect to the willfulness issue, but otherwise affirmed. The First Circuit reversed the JNOV and reinstated the verdict.

The Supreme Court granted certiorari on whether the ADEA had been violated. The Supreme Court unanimously held that the ADEA prohibited disparate treatment only on the basis of age and not on the basis of factors that correlate with age, such as pension status or seniority. The Court reasoned as follows: “a disparate treatment claim cannot succeed unless the employee’s protected trait actually played a role in that process and had a determinative influence on the outcome.” *Id.* at 610.

The Court recognized that “[i]t is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age . . . . Congress’ promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.” *Id.* The Court went on to note that “the available empirical evidence demonstrates that arbitrary age lines were in fact unfounded and that, as an overall matter, the performance of older workers was at least as good as that of younger workers. Thus, the ADEA commands that employers are to evaluate their older employees on their merits and not their age. The employer cannot rely on age as a proxy for an employee’s remaining characteristics, such as productivity, but must instead focus on those factors directly.” *Id.* at 611 (internal alterations, quotations, and citations omitted).
Although some circuits had decided that seniority based employment decisions violated the ADEA, the Court held that “an employee’s age is analytically distinct from his years of service.” *Id.* The Court also held that firing an employee because he was close to retirement status did not necessarily amount to disparate treatment on the basis of age. “The prohibited stereotype (“Older employees are likely to be ____”) would not have figured into the decision, and the attendant stigma would not ensue. The decision would not be the result of an inaccurate and denigrating generalization about age, but would rather represent an *accurate* judgment about the employee—that he is ‘close to vesting.’” *Id.* at 612 (emphasis in original).

*Hazen Paper* did not close the door entirely to age discrimination claims based on pension status. The Court recognized that an employer might treat pension status as a proxy for age and unlawfully base an employment decision on its correlation of the two. *Id.* at 612-13. The Court also stated that a pension system where the benefits vested as a result of age, rather than years of service to the employer, might present a different case. *Id.* at 613.

The Court was technically correct that pension status/seniority and age are not the same things. There are some older employees with low seniority because their current jobs are a second career, or because they had stayed home for many years to raise children. If an employee starts working for a company right out of high-school, he or she can reach 20 years of service before becoming an ADEA-covered employee at age 40. But in the real world, most of the time, age, seniority, and retirement are directly linked. Older employees generally have more seniority than younger workers and more senior employees are generally older. It is not a coincidence that we call older people “senior citizens.”

Furthermore, the Court’s assertion that the ADEA is primarily concerned with decisions made on empirically baseless stereotypes is at least debatable. One can read the Act’s
prohibitions a good deal more liberally. See TWA, Inc. v. Thurston, 469 U.S. 111, 120 (1985) ("The ADEA broadly prohibits arbitrary discrimination in the workplace based on age" (quoting Lorillard v. Pons, 434 U.S. 575, 577 (1978))). Adverse employment decisions based purely on the number of years an employee has worked for an employer are pretty arbitrary. In general, tenure in office is rewarded, not punished.

The upshot of Hazen Paper is that as long as the employer acts on objectively quantifiable metrics, such as productivity, seniority, and cost, to make an employment decision about an older employee, the plaintiff is going to have a tough time showing disparate treatment. The burden may be even greater in reduction-in-force situations unless the statistical disparities between those retained and those removed are blatant. No one would consider an employer’s greater cost as a legitimate basis to terminate an employee who becomes pregnant or suffers a disabling medical condition. The law treats such actions as discrimination. With respect to more senior employees, the law offers no such protections.

**Special Hurdles Courts Have Erected for ADEA Cases.**

**The Prima Facie Case**

The Supreme Court has never decided whether the McDonnell Douglas framework applies to ADEA claims. But the Court has always assumed that it does. In O’Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996), the Supreme Court held that replacement by someone outside of the protected class was not an element of the prima facie case. “Because the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class.” Id. at 313. Some courts have applied this analysis with a
vengeance. See, e.g., Girten v. McRentals, 337 F.3d 979, 981 (8th Cir. 2003) (stating that replacement of 62 year-old by 53 year-old may be insufficient); Radue v. Kimberly-Clark Corp., 219 F.3d 612, 619 (7th Cir. 2000) (termination of 53 year-old while retaining 46 year-old and 44 year-old, without more, insufficient); Dunaway v. Int’l Bhd. of Teamsters, 310 F.3d 758, 767 (D.C. Cir. 2002) (replacement of employee by other 7 years younger insufficient without more).

The prematurely grey 60 year-old who loses his job to the unusually vibrant 56 year-old has no age discrimination claim whatsoever in most courts. Why should this be? As Hazen Paper has largely turned age discrimination cases into cases about stereotypes regarding older workers, the actual chronological ages between the plaintiff and her replacement shouldn’t be dispositive. If an employer perceives an employee who is only a couple of years younger (or potentially even the same age or older) than the plaintiff as much “younger,” and takes an adverse action because of those perceptions, the employer has acted on the basis of ageist stereotypes. But the plaintiff in this situation can’t satisfy a prima facie case under the ADEA.

In a Title VII disparate treatment case, proof of discrimination because of race, national origin, sex, or religion is sufficient for the plaintiff to prevail. In disability cases, a plaintiff must prove discrimination against a qualified individual with a disability. But in age discrimination cases, federal law requires the plaintiff to be 40 before she is even in the protected class. The 39 year-old video game designer who is terminated in favor of the 22 year-old because the employer thinks the latter will relate better to the people who play video games simply has no claim. In such a case the employer has used the employee’s age, or a stereotype about the employee’s age, to deny the employee a job in favor of a younger worker. The ADEA, however, gives no remedy.
Why No Reverse Discrimination ADEA Cases?

In General Dynamics, Inc. v. Cline, 540 U.S. 581 (2004), the Supreme Court addressed the question whether the ADEA “also prohibits favoring the old over the young.” Id. at 584. The Court said “no” by a 6-3 margin. Justice Souter’s majority opinion first looked to the social and legislative history of the ADEA. The majority determined that not only did Congress not intend to provide a remedy to victims of youth discrimination, Congress did not even think youth discrimination was a problem. Id. at 587-591. “If Congress had been worrying about protecting the younger against the older, it would not likely have ignored everyone under 40.” Id. at 591. “The enemy of 40 is 30, not 50.” Id. “Thus, the 40-year threshold makes sense as identifying a class requiring protection against preference for their juniors, not as defining a class that might be threatened by favoritism towards seniors.” Id. at 591-92.

The word “age” in the ADEA does not always refer to “older age.” The majority rejected the “presumption of uniform usage” because “age” is a word that “has several commonly understood meanings among which a speaker can alternate in the course of ordinary conversation without being confused or getting confusing.” Id. at 595-96. With respect to the ADEA, “social history emphatically reveals an understanding of age discrimination against the old, and the statutory reference to age discrimination in this idiomatic sense is confirmed by the legislative history.” Id. at 596. The majority reached this conclusion despite the fact that one of the ADEA’s principal sponsors thought the prohibition against age discrimination went both ways. Id. at 598-99. Moreover, the EEOC had taken the view that age discrimination went both ways ever since it had assumed enforcement of the statute from the DOL in 1981. Id. at 599-600. The majority ruled the text of ADEA was unambiguously to the contrary. Id. at 600.
Justice Scalia dissented on the grounds that the ADEA was ambiguous and the EEOC’s interpretation was reasonable. *Id.* at 601-02. Justice Thomas, joined by Justice Kennedy, read the plain language of the ADEA to prohibit discrimination because of a person’s age, not older age. *Id.* at 602-03. The dissent noted that the Court had never relied on “social history” to limit the reach of a non-discrimination statute. *Id.* at 607-08. The dissent reviewed the “social history” of the Civil Rights Act of 1964 and noted that there was no intent to protect White Americans from reverse discrimination. *Id.* at 608-11. That didn’t stop the Court from finding discrimination against Whites within the statutory language in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976). Social history would not have made same-sex sexual harassment actionable. *Cf. Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75 (1998). “It is abundantly clear, then, that the Court’s new approach to antidiscrimination statutes would lead us far astray from well-settled principles of statutory interpretation.” 540 U.S. at 612.

Justice Thomas’s critique of the majority’s use of “social history” to restrict the reach of the ADEA was well-founded. The majority’s response that, unlike “age,” “race” and “sex” did not have narrow social meanings when Congress enacted Title VII, *id.* at 592 n.5, is not persuasive. Nevertheless, Congress’s restriction of the ADEA’s coverage to those over 40 justifies the majority’s interpretation of the statute. There are, however, many state laws that do not restrict the protection against age discrimination to those over 40. In such jurisdictions, workers of all ages should have a much easier time arguing they are protected against arbitrary discrimination on the basis of age.

**Stray Remarks**

The central factual dispute in most disparate treatment discrimination cases is whether the employer acted with an unlawful motivation. For over 20 years courts have improperly excluded
probative evidence of discriminatory intent by labeling the statements as “stray remarks.” Courts have articulated various formulations of the stray remarks doctrine. In its most restrictive incarnation, the doctrine precludes admission of biased statements unless they are (1) uttered by a decisionmaker for, (2) around the time of, and (3) in reference to, the adverse action that is the subject of the plaintiff’s discrimination action. *E.g.*, *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 655 (5th Cir. 1996); *Hall v. Giant Food, Inc.*, 175 F.3d 1074, 1079-80 (D.C. Cir. 1999); *Hill v. Lockheed Martin Logistics Mgt., Inc.*, 354 F.3d 277, 283, 292 (4th Cir. 2004).

The stray remarks doctrine is applied most often in age discrimination cases. Rarely is the expression of racist or sexist prejudices on the part of a decisionmaker dismissed as merely “stray remarks.” The Ninth Circuit has directly conflicting case law on the admissibility of ageist and sexist comments. In *Nesbit v. Pepsico, Inc.*, 994 F.2d 703, 705 (9th Cir. 1993), a supervisor's comment that “[w]e don't necessarily like grey hair” was deemed weak circumstantial evidence of discriminatory animus on the basis of age because it was uttered in an ambivalent manner and was not tied directly to the employee's termination. In *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1438-39 (9th Cir. 1990), a hiring executive's comment that he chose “a bright, intelligent, knowledgeable young man” over the plaintiff was dismissed as merely a stray remark and insufficient by itself to establish age discrimination. On the other hand, in *Dominguez-Curry v. Nevada Transp. Dep’t*, 424 F.3d 1027, 1038 (9th Cir. 2005), a case involving sex discrimination, the court held that where “a decisionmaker makes a discriminatory remark against a member of the plaintiff's class [women], a reasonable fact finder may conclude that discriminatory animus played a role in the challenged decision.” *See also Mayes v. WinCo Holdings*, 846 F.3d 1274, 1281-82 (9th Cir. 2017) (refusing to exclude as a “stray remark” supervisor’s indicating a preference for men in different job classification than at issue in case).
Why this distinction? The answer may lie in a societal perception that the expression of ageism in the workplace is just not as reprehensible as the expression of other forms of prejudices. Ageism is still socially acceptable in a way that racism and sexism are not. Perhaps for this reason some courts exclude evidence that clearly meets the test for relevance under the Rules of Evidence. The stray remarks doctrine has no textual support in the Rules of Evidence. It is a categorical evidentiary filter that courts have invented to disregard otherwise admissible evidence. The Supreme Court has never endorsed the stray remarks doctrine. The Justices have repeatedly repudiated other “special” employment doctrines such as the direct evidence requirement (Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003)); heightened pleading standards (Swierkiewicz v. Sorema, NA, 534 U.S. 506 (2002)); and categorical rules limits on the admission of so-called “me too” other supervisor evidence (Sprint/United Management Co. v. Mendelsohn, 552 U.S. 379 (2007)). I strongly suspect that the Justices will also disavow the stray remarks doctrine to the extent it excludes evidence otherwise admissible under the Federal Rules.

The California Supreme Court unanimously abolished the stray remarks doctrine in Reid v. Google, Inc., 50 Cal. 4th 512, 25 P.3d 988 (2010). The Washington Supreme Court followed suit in Scrivener v. Clark College, 181 Wn.2d 439, 450 n.3, 334 P.3d 541 (2014), relying on Reid. In the California case, Google had asked for a ruling that courts should “disregard discriminatory comments by co-workers and nondecisionmakers, or comments unrelated to the employment decision to ensure that unmeritorious cases principally supported by such remarks are disposed of before trial.” Reid, 50 Cal. 4th at 538 (internal quotations omitted). The California Supreme Court instead held that such remarks should be considered in conjunction with all the evidence in the case. Id. at 541. The Justices recognized that strict application of the stray remarks doctrine would result in a court’s categorical exclusion of relevant evidence. Id. at
539. “Although stray remarks may not have strong probative value when viewed in isolation, they may corroborate direct evidence of discrimination or gain significance in conjunction with other circumstantial evidence.” *Id.* at 541. “A stray remark alone may not create a triable issue of discrimination . . . [b]ut when combined with other evidence of pretext, an otherwise stray remark may create an ensemble that is sufficient to defeat summary judgment.” *Id.* at 541-42 (internal quotations and citations omitted).

**Because, Because, Because**

The U.S. Supreme Court granted certiorari in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), to decide whether direct evidence was necessary to obtain a mixed-motives jury instruction in an ADEA case. Instead, five Justices held that a mixed-motives instruction is simply not available in an ADEA case, period. *Id.* at 169. Justice Thomas held that *Price Waterhouse v. Hopkins* was limited to Title VII, and Congress’ failure to amend the ADEA as part of the Civil Rights Act of 1991 showed that Congress did not believe mixed-motives should apply to the ADEA. *Id.* at 174-75. The majority held that in an ADEA case a plaintiff must prove that age was “the but-for cause of the employer’s actions.” *Id.* at 176. The majority all but held that the Court would decide *Price Waterhouse* differently if the case had come before the current Justices.

Justice Stevens wrote on behalf of the four dissenters. He accused the majority of disregarding precedent and judicial activism. He argued that since the “because of” statutory language in the ADEA is exactly the same as what the Title VII statutory language was at the time of the *Price Waterhouse* decision, *Price Waterhouse’s* construction of “because of” should apply to ADEA claims. *Id.* at 182-83. The dissenters would have held that Justice White’s opinion in *Price Waterhouse* was controlling, not Justice O’Connor’s, and that there never has
been a direct-evidence requirement. *Id.* at 188-89. The dissenters would have applied *Desert Palace v. Costa* to the ADEA. Three Justices also joined a separate dissent on the fallacy of attempting to prove “but-for causation.” Justice Breyer endorsed a uniform standard under which a plaintiff would establish an unlawful consideration was “a motivating factor” and the defendant would have the burden of showing it would have taken the same action in any event. *Id.* at 190-91.

The distinction the majority drew with *Price Waterhouse* is logically and linguistically untenable. Putting that aside, it is hard to understand why anyone would create a legal system where the causation standard for age cases is higher than for race, sex, national origin, religion and possibly disability cases. Congress could have extended the Civil Rights Act of 1991 to the ADEA, but it didn’t. Once again, this time for reasons that are a combination of accident and intent, federal age discrimination claims have received the short end of the stick.

**Why Would Anyone Bring an ADEA Disparate Impact Claim?**

*Hazen Paper* involved only a claim of disparate treatment. The Court expressly declined to rule on whether a claim for disparate impact even existed under the ADEA. 507 U.S. at 610. The Court finally answered that question 12 years later in *Smith v. City of Jackson, Mississippi*, 544 U.S. 228 (2005). Over three dissenters, a five-Justice majority of the Court held that disparate impact cases were cognizable under the ADEA. 544 U.S. at 233-240 (plurality opinion); 544 U.S. at 243-247 (Scalia, J., concurring in the result). However, the majority held ADEA disparate impact cases were narrower than ones under Title VII for two reasons. 544 U.S. at 240. First, the ADEA has a provision that states that it shall not be unlawful for an employer to take otherwise prohibited action where the differentiation is based on “reasonable factors other than age.” 29 U.S.C. § 623(f) (the “RFOA”). Second, the 1991 Civil Rights Act
did not modify with respect to the ADEA the Court’s prior narrowing of disparate impact cases in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

The bottom line is that there is no employer liability for disparate impact discrimination under the ADEA, as long as the non-age factors the employer used to make the decisions having the disparate impact were “reasonable.” *City of Jackson*, 544 U.S. at 239. Under Title VII, the employer must prove “business necessity” to defeat a showing of disparate impact, which is a much higher standard.

*City of Jackson* did not decide whether it was the employer or the employee who had the burden of proof with respect to the RFOA. The Court resolved that issue in *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84 (2008). The Justices unanimously held that the employer has the burden of production and persuasion on that score, and that the RFOA functions as an affirmative defense. *Id.* at 91-93. This was consistent with Supreme Court precedent dating back to *Thurston*, which had described the RFOA as one of five affirmative defenses set forth in the ADEA. 469 U.S. at 122. (The others are bona fide occupational qualification (“BFOQ”), bona fide seniority system, bona fide employee benefit plan, and “good cause.”) An employer must prove that a non-age factor that causes a disparate impact because of age was reasonable.

But reasonableness is a very low standard. Even the EEOC’s creative effort to make “reasonable” under the RFOA analysis into a tort calculus opens the nearly-shut door only a teeny bit wider. 29 C.F.R. § 1625.7. *City of Jackson* holds that an employer’s use of seniority to make an employment decision is “unquestionably reasonable.” So while disparate impact cases exist in theory under the ADEA, plaintiffs’ lawyers would be unwise to bring one. In most cases, an employer will be able to show that whatever criteria it used was “reasonable” despite their demonstrable adverse impacts on older workers.
The Eleventh Circuit has held that applicants cannot bring disparate impact cases under the ADEA. *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958 (11th Cir. 2016) (en banc). *Contra Rabin v. PricewaterhouseCoopers LLP*, No. 16-cv-02276-JLT (N.D. Cal. Feb. 17, 2017). If the Eleventh Circuit’s ruling is upheld, that will mean the vehicle of ADEA disparate impact litigation, already of limited utility, will be even less efficacious.

**So Happy to Work in The Evergreen State.**

There is no inherent reason why age cases have a different framework than other discrimination cases. In my home state of Washington, plaintiffs with an age discrimination claim have most of the same rights and remedies as other discrimination plaintiffs. They can bring opt-out class actions under Rule 23. All discrimination claims in Washington have the same causation standard: The illegal reason must be “a substantial motivating factor,” not necessarily a “but-for” cause of the employer’s adverse action. Disparate impact age cases do not have a different statutory standard under Washington law.

A plaintiff in a state such as Washington with a more favorable state discrimination law can take advantage of the few advantages of the ADEA by filing claims under both state and federal law. If a plaintiff wants to be, or because of diversity jurisdiction must be, in federal court, then he or she can obtain both compensatory and liquidated damages. The plaintiff will still have to meet the higher hurdles of the ADEA to obtain the double damages. The higher earnings of older workers and the emotional loss of a long-held job make age discrimination cases particularly high damages cases. If an ADEA plaintiff can get past the gate-keeper judge, he/she has a good shot with the jury. But many ADEA plaintiffs are stopped well-short.

In sum, the ADEA at 50 is not the vibrant anti-discrimination weapon it ought to be. There aren’t many reasons to expect a revitalization any time soon.