The Age Discrimination in Employment Act at 50: When Will It Become a “Real” Civil Rights Statute?

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Introduction

President Lyndon Johnson’s 1967 message to Congress urging enactment of legislation to prohibit discrimination against older workers emphasized that “[h]undreds of thousands not yet old, not yet voluntarily retired, find themselves jobless because of arbitrary age discrimination.”¹ Prior to passage of the Age Discrimination in Employment Act (ADEA or the Act), approximately half of all private-sector job openings explicitly barred applicants over age fifty-five, and one quarter barred those over forty-five.² “Help Wanted” ads could state that only workers under thirty-five need apply, and employers had unbridled authority to retire older workers based solely on age. Not surprisingly, twenty-seven percent of unemployed workers, and forty percent of the long-term unemployed, were forty-five and older.³

The ADEA is a product of the civil rights era. Age was proposed as a protected class under the Civil Rights Act of 1964.⁴ Though not ultimately included, that law directed the Secretary of Labor to study age discrimination and report to Congress.⁵ The ADEA’s enactment in 1967, contemporaneous with the Equal Pay Act of 1963, the Civil Rights

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¹ Lyndon B. Johnson, Special Message to the Congress Proposing Programs for Older Americans, 12 Public Papers of the Presidents 32, 37 (1967) (proposing several legislative measures, including the Age Discrimination in Employment Act (ADEA or the Act)).


³ Lyndon B. Johnson, Aid for the Aged: Message from the President of the United States Transmitting a Review of Measures Taken to Aid the Older Americans and Recommendations for Legislation to Provide Further Aid, H.R. Doc. No. 90-40, at 7 (1967).


Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968, was an integral part of congressional actions to define and protect civil rights in the 1960s. President Johnson viewed the ADEA as a fundamental component of both his civil rights legacy and his efforts to address the significant problems facing older Americans.6

Since the ADEA’s enactment, the employment landscape for older workers has significantly brightened. Congress amended the Act several times, gradually strengthening its protections. Upper age limits on coverage were eliminated,7 banning mandatory retirement for almost all workers.8 Age discrimination in the provision of employee benefits was prohibited, and significant protections were added for older workers asked to waive their rights and claims under the Act as part of a reduction-in-force.9 Yet, much room for improvement remains.

Part I of this Article describes how rampant hiring discrimination, the principal problem the ADEA was intended to address, continues to plague older workers. Part II describes the ADEA’s effectiveness in areas other than hiring. Part III explores one possible explanation for the ADEA’s limited effectiveness—the perception that ageism differs from other forms of discrimination. Finally, Part IV delves into potential improvements to the ADEA that could better achieve its objectives.

I. The ADEA’s Primary Goal of Promoting Hiring Older Workers Is Still Just a Goal

Addressing age discrimination in hiring is the ADEA’s “primary purpose.”10 The Act makes it unlawful to “fail or refuse to hire”11 any individual because of age and prohibits age-related specifications in job postings.12 Today, older workers are the age group least likely to be unemployed13—a testament to the ADEA’s effectiveness. Over the

6. President Johnson also shepherded enactment of Medicare, Medicaid, the Older Americans Act, and improvements to Social Security. See, e.g., Chronology, SOC. SEC. ADMIN, https://www.ssa.gov/history/1960.html (last visited Jan. 18, 2018) (detailing the developments in Medicare, Medicaid, the Older Americans Act, and Social Security during the Johnson administration).
8. Some occupations, such as pilots, certain positions in the military or law enforcement, and state judges in most jurisdictions, still encounter mandatory retirement. Kerry Hannon, Is It Time To Abolish Mandatory Retirement?, FORBES (Aug. 2, 2015, 8:00 AM), https://www.forbes.com/sites/nextavenue/2015/08/02/is-it-time-to-abolish-mandatory-retirement/#28d6a6b540db.
past few decades, older workers have been staying in the workforce longer,\textsuperscript{14} with workers aged sixty-five and older representing the fastest growing age category in the workforce.\textsuperscript{15} Yet, age discrimination in hiring remains ubiquitous, and the ADEA’s goal of alleviating long-term unemployment among older workers remains unrealized.\textsuperscript{16} Older workers still experience far longer periods of unemployment and remain disproportionately represented among the long-term unemployed.\textsuperscript{17} In 2014, “[o]n average, 45 percent of older jobseekers (ages 55 and older) were long-term unemployed (out of work for 27 weeks or more) . . . .”\textsuperscript{18}

Despite the ADEA’s protections, employers continue to engage in covert and indirect discriminatory behavior against older job applicants.\textsuperscript{19} Examples of recruiting and hiring practices that harm older jobseekers include caps on maximum years of experience, recruiting only from college campuses, and requiring job candidates to be “digital natives.”\textsuperscript{20} According to an AARP survey, two-thirds of workers between forty-five and seventy-four have encountered age discrimination in the workplace, with an overwhelming majority describing it as “very or somewhat common” in a variety of professions.\textsuperscript{21} Further, sixty-five

\begin{itemize}
  \item \textsuperscript{16} O’Meara, \textit{supra} note 4, at 22 (“Although the ADEA has become more significant than was ever imagined in 1967, the problem at which it was addressed,” i.e., long-term unemployment among older workers, “has not been alleviated.”).
  \item \textsuperscript{17} The average duration of unemployment of older jobseekers (aged fifty-five and over) reached 54.7 weeks in May 2011, after first exceeding one year in the prior month. The comparable figure for jobseekers under fifty-five was far lower (38.9 weeks). In May 2011, the share of fifty-five and over jobseekers among the long-term unemployed reached 57.8 percent. Rix, \textit{supra} note 13, at 4 tbl.3.
  \item \textsuperscript{20} Giang, \textit{supra} note 19.
  \item \textsuperscript{21} AARP \textit{Research, Staying Ahead of the Curve 2013: The AARP Work and Career Study} 28 (2014).
\end{itemize}
percent of older, unemployed respondents seeking employment believed that age had a negative effect on their job prospects, naming age discrimination as one of the most significant barriers.\(^\text{22}\)

II. The ADEA’s Effectiveness Outside of the Hiring Context

When drafting the ADEA, Congress borrowed language prohibiting other forms of discrimination from Title VII of the Civil Rights Act of 1964\(^\text{23}\) and inserted it verbatim into the ADEA.\(^\text{24}\) This approach should have ensured that age discrimination victims would enjoy rights comparable to other groups, and, for approximately the ADEA’s first thirty years, it mostly did.\(^\text{25}\) In recent years, however, “[i]t has not worked out that way.”\(^\text{26}\)

Instead, the Supreme Court and other federal courts have emphasized differences between the two statutes to diminish the ADEA’s protections and “have repeatedly thrown up barriers to age discrimination suits.”\(^\text{27}\) For example, in Gross v. FBL Financial Services, Inc.,\(^\text{28}\) the Supreme Court held that Congress’s decision to amend Title VII by codifying “mixed-motive” claims, while not similarly amending parallel ADEA provisions, suggested that Congress “acted intentionally,”\(^\text{29}\) and thus that the ADEA does not authorize mixed-motive claims.\(^\text{30}\) By imposing a heightened burden of proof on age discrimination victims, the Court “relegat[ed] [older workers] to second-class status among victims of discrimination.”\(^\text{31}\) Not long after the Supreme Court decided Gross, congressional representatives introduced the Protecting Older Workers Against Discrimination Act (POWADA) to restore the burden of proof and ensure application of the same standards to all employment discrimination claims.\(^\text{32}\)

\(^{22}\) AARP PUB. POLICY INST., Boomers and the Great Recession: Struggling to Recover 21–22, 23 fig. 2-9 (2012).


\(^{24}\) Lorillard v. Pons, 434 U.S. 575, 584 (1978).

\(^{25}\) See, e.g., Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (quoting Lorillard, 434 U.S. at 584) (“This interpretation of Title VII of the Civil Rights Act of 1964 . . . applies with equal force in the context of age discrimination, for the substantive provisions of the ADEA ‘were derived in haec verba from Title VII.’”).


\(^{27}\) Id.

\(^{28}\) 557 U.S. 167 (2009).

\(^{29}\) Id. at 174.

\(^{30}\) Id. at 173–75.


Although POWADA has been introduced in subsequent congressional sessions, it has yet to receive serious consideration.\footnote{33}

Courts have further distinguished the ADEA from Title VII by rejecting the “disparate impact” theory of discrimination for plaintiffs who allege age discrimination in hiring. In 2016, the U.S. Court of Appeals for the Eleventh Circuit, en banc, concluded that the ADEA’s text did not permit disparate impact claims.\footnote{34} The court reasoned that, because section 4(a)(2) of the Act (the provision generally allowing disparate impact claims\footnote{35}) was modeled on section 703(a)(2) of Title VII,\footnote{36} and Congress in 1972 added “applicants for employment” to section 703(a)(2) without amending section 4(a)(2) to include this phrase, Congress must not have intended section 4(a)(2) to protect applicants.\footnote{37} However, a federal district court in California disagreed.\footnote{38} In 2015, a case currently pending in the U.S. Court of Appeals for the Seventh Circuit raised the same issue.\footnote{39}

### III. Efforts to Distinguish Ageism from Other Biases Are Misguided

Court decisions distinguishing age discrimination from other forms of discrimination illustrate a greater social problem. Age discrimination is not denounced with the same vigor as other types of discrimination. As the television talk show host Bill Maher commented: “Ageism is the last acceptable prejudice in America.”\footnote{40} Yet, as Congressman Claude Pepper, a chief proponent and sponsor of the ADEA, noted: “Ageism is as odious as racism or sexism.”\footnote{41} Like racism or sexism, age discrimina-

\footnote{33. Protecting Older Workers Against Discrimination Act, S. 443, 115th Cong. (2017).}
\footnote{34. Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958 (11th Cir. 2016). The Eleventh Circuit reasoned that the text of section 4(a)(2) preceding the word “otherwise” (i.e., the portion describing prohibited practices and including “any individual”) must be construed as a “subset” of the subsequent text. \textit{Id.} at 963. Consequently, the court stated that “section 4(a)(2) protects an individual only if he has a ‘status as an employee,’” \textit{id.}, and that “[a]pplicants who are not employees when alleged discrimination occurs do not have a ‘status as an employee,’” and therefore cannot pursue claims under section 4(a)(2). \textit{Id.} at 964.}
\footnote{35. Smith v. City of Jackson, 544 U.S. 228, 232–33 (2005).}
\footnote{36. Lorillard v. Pons, 434 U.S. 575, 584, 584 n.12 (1978). The Supreme Court explained in \textit{City of Jackson} that Congress’s use of identical language in the ADEA and Title VII shows that it intended the two statutes’ protections to be the same as to (1) whom they protect, and (2) what they protect. \textit{City of Jackson}, 544 U.S. at 233–34.}
\footnote{37. \textit{Villarreal}, 839 F.3d at 978–79.}
\footnote{38. Rabin v. PricewaterhouseCoopers LLP, 236 F. Supp. 3d 1126 (N.D. Cal. 2017).}
\footnote{41. 123 \textit{Cong. Rec.} 27,120 (1977).}
tion segregates on the basis of a characteristic that individuals neither choose nor have the power to change.42

The term “ageism” was coined by Dr. Robert N. Butler in 1969 to describe the “deep and profound prejudice against the elderly which is found to some degree in all of us.”43 He described ageism as:

A process of systematic stereotyping of and discrimination against people because they are old, just as racism and sexism accomplish this with skin color and gender. . . . Ageism allows the younger generations to see older people as different from themselves; thus they subtly cease to identify with their elders as human beings.44

Though the term “ageism” is generally recognized, “[a]lmost half a century later, it’s barely made inroads into public consciousness, not to mention provoke outcry.”45

Secretary of Labor W. Willard Wirtz concluded in his report to Congress preceding enactment of the ADEA that discrimination in the context of age “means something very different . . . from what it means in connection with discrimination involving—for example—race.”46 This seemingly innocuous statement may have initiated the analytical separation of age discrimination from other civil rights issues or, at the very least, exacerbated it. This belief led Secretary Wirtz to conclude, and more significantly, to advise Congress that although it would be “easy” to extend the solutions devised for other forms of discrimination to age discrimination, it would also be “wrong.”47 The ramifications of that recommendation have continued to this day to diminish older workers’ rights profoundly. Viewing age discrimination as less wrong or malevolent than other forms of discrimination caused Congress to devise a separate statutory scheme, rather than to include ageism within Title VII.48 Subsequent legislative efforts, most notably the Civil Rights Act of 1991, worsened the divide by strengthening Title VII and ignoring the ADEA. “This view of age discrimination—if it is indeed generally shared (consciously or otherwise) by judges, juries, EEOC administrators, lawyers, employers and even, perhaps employees—may have

42. HOWARD EGLIT, AGE DISCRIMINATION 1-4 (1986).
43. ROBERT N. BUTLER, WHY SURVIVE?: BEING OLD IN AMERICA 11 (1975).
44. Id. at 12.
45. ASHTON APPLEWHITE, THIS CHAIR ROCKS: A MANIFESTO AGAINST AGEISM 14 (2016).
47. Id. at 1.
48. By contrast, many states did not segregate age from other protected classes in their own anti-discrimination statutes, but instead enacted omnibus civil rights acts that place age on equal footing with other protected traits. See, e.g., Scamman v. Shaw’s Supermarkets, Inc., 157 A.3d 223, 232 (Me. 2017), as corrected (Mar. 23, 2017) (“against the background of prior federal antidiscrimination statutes,’ . . . namely, Title VII and the ADEA—the [Maine] Legislature enacted a unitary antidiscrimination statute that is similar to Title VII but that includes age as a protected characteristic. Unlike Congress, the Maine Legislature did not create a separate statutory scheme specific to age discrimination.”) (internal citation omitted).
significant adverse consequences for the vigor and rigor with which the ADEA is followed and enforced.”

This separation is unjustified. For example, although Secretary Wirtz commented that while, for the most part, age discrimination does not result from “dislike or intolerance” or from “feelings about people entirely unrelated to their ability to do the job,” the same can be said about sex discrimination. Instead, like older workers, women’s workplace struggles stem more from stereotypes and unfounded assumptions about their ability to do the job and the appropriate role for women in our society. Title VII, like the ADEA, intends to ensure employment decisions are based on a person’s actual ability to do a job, rather than on stereotypes. While there may not be agreement over the underlying reason for age discrimination, there is no question that the ADEA has never recovered from the initial casting of ageism as “different” than other types of discrimination. As a consequence, the Act is not perceived as a “real” civil rights statute, but instead, as a second-class protection.

IV. What Needs to Change for the ADEA to Be Respected as a “Real” Civil Rights Statute?

Certain steps must be taken for the ADEA to achieve its broad and remedial purposes to eliminate arbitrary workplace age discrimination and ensure that older employees are judged “based on their ability rather than age.”

A. Ageism Must Be Condemned with the Same Vigor As Directed at Other Forms of Discrimination

Historically, Congress, the courts, and society have viewed age discrimination as less malevolent than race, gender, and other forms of discrimination. Workplace age issues are perceived more as economic issues and not as fundamental civil rights issues. Justice Thurgood Marshall, dissenting in Massachusetts Board of Retirement v.

50. Id.
51. Compare Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (sex-stereotyping remarks can be evidence gender was a motive in an employment decision), with Hazen Paper v. Biggins, 507 U.S. 604, 610 (1993) (“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.”).
54. See Foreman, supra note 31, at 702–03 (lesser protection for age compared to “race, color, religion, sex, or national origin” despite “national commitment to equality.”).
Murgia, an unsuccessful equal protection challenge to a mandatory retirement policy, lamented:

There is simply no reason why a statute that tells able-bodied police officers, ready and willing to work, that they no longer have the right to earn a living in their chosen profession merely because they are 50 years old should be judged by the same minimal standards of rationality that we use to test economic legislation that discriminates against business interests.

Simply put: “Age discrimination is illegal. But when compared with discrimination against racial minorities and women, it is a second-class civil rights issue.” There must be a comprehensive and concerted effort to recognize that age discrimination is as debilitating to workers and as harmful to society as other discrimination.

B. Older Applicants Must Be Able to Bring Disparate Impact Claims

Hiring discrimination is notoriously difficult to challenge because it is hard to detect. Jobseekers lack sufficient information about a company’s hiring processes and the relative qualifications of competitors to suspect potential claims. They may have a “gut feeling” or “hunch” that a decision was based on age, but a “hunch” will not establish discrimination.

Easily detected forms of bias, such as job postings that transparently specify age-related requirements (like maximum years of experience, or that an applicant must be a “digital native”), likely deter applications from older persons. They, nevertheless, commonly go unchallenged as jobseekers focus their time and resources on jobs elsewhere. Only a minuscule number of charges—154 of 20,144 age discrimination charges in fiscal year 2015—alleged unlawful job advertising. Current EEOC regulations governing employment advertisements and pre-employment inquiries are weak and do little to deter improper employer behavior or to protect of older workers’ rights.

This context makes the outcome of the burgeoning controversy over whether section 4(a)(2) of the ADEA permits disparate impact hiring claims so critical. Although the disparate impact theory is

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56. Id. at 322 (Marshall, J., dissenting).
60. See, e.g., 29 C.F.R. §§ 1625.4 & 1625.5 (2017) (stating: “Help wanted notices or advertisements that ask applicants to disclose or state their age do not, in themselves, violate the Act,” and a “request on the part of an employer for information such as Date of Birth or age on an employment application form is not, in itself, a violation of the Act”).
often the best—if not the only—means to challenge such discrimination, 61 employers are seeking to convince courts that job applicants may not bring disparate impact claims under section 4(a)(2) of the ADEA. 62 Clarity that applicants may bring disparate impact claims under section 4(a)(2) is crucial to combat some of the most pernicious hiring practices, such as limits on maximum years of experience and exclusive on-campus recruiting. Without the disparate impact theory to ferret out subtle hiring discrimination, older workers risk extended long-term unemployment.

C. The Gains of the Older Workers Benefit Protection Act Must be Preserved

In 1990, Congress sought to strengthen the ADEA’s protection of older workers by enactment of the Older Workers Benefit Protection Act (OWBPA). 63 The OWBPA “made it harder for companies to cajole employees, upon termination, to give up their ADEA rights—especially in the context of a large-scale group layoff, in which individual employees have little-to-no leverage.” 64 Congress accomplished this goal by commanding that “[a]n individual may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary.” 65 The OWBPA also specified strict requirements that a defendant-employer would have to prove “in a court of competent jurisdiction” for the court to find the waiver enforceable. 66 The Supreme Court later reaffirmed the need to construe the statute strictly and refused to “open the door to an evasion of the statute” because the OWBPA “incorporates no exceptions or qualifications.” 67

Although the OWBPA has helped to ensure that older workers are more informed about rights before signing them away in difficult circumstances, there have been some troubling judicial decisions interpreting such waivers. In McLeod v. General Mills, Inc., 68 the U.S. Court of Appeals for the Eighth Circuit upheld a waiver requiring

61. See Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990 (1988) (“[E]ven if one assumed that . . . discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain.”).
68. 856 F.3d 1160 (8th Cir. 2017).
any dispute over the validity of the release to be resolved through individual arbitration, despite the OWBPA’s clear command that employers must prove waiver validity “in a court of competent jurisdiction.” The issue is emerging in other cases. This litigation will undoubtedly affect the OWBPA’s continued vitality. Will employers be able to evade the OWBPA’s “strict, unqualified statutory stricture on waivers” by inserting a mandatory arbitration provision into a severance agreement? Employers should not be able to evade the OWBPA’s clear command that they “shall” prove in “a court of competent jurisdiction” that a waiver of rights or claims was knowing and voluntary.

In a related development, IBM Corporation instituted a policy making it harder for older laid-off workers to pursue age discrimination claims. The company no longer requests waivers from terminated employees in exchange for severance benefits, relieving IBM of the requirement to disclose the job titles and ages of impacted employees as well as the eligibility factors used to select employees for termination. Instead, the company avoids disclosure by offering severance to impacted employees who agree to individual arbitration. This approach deters lawsuits because it is harder for workers to determine if older workers were targeted.

D. Advocates for Older Workers Must Fight to Confine and Reverse the Damage Done by the Hazen Paper Decision

In *Hazen Paper Co. v. Biggins*, the Supreme Court held that termination of an employee solely to avoid vesting of the employee’s pension did not violate the ADEA. *Hazen Paper* had two adverse consequences for older workers. First, plaintiffs now had to prove that the employer was motivated by “inaccurate or stigmatizing stereotypes” about older workers. Second, it became irrelevant that the employer’s adverse action was based on a factor highly correlated with age.

Writing for the unanimous court in *Hazen Paper*, Justice O’Connor stated:

> It 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’[s] promulgation of the

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70. *Oubre*, 522 U.S. at 427.
72. *Id.*, § 626(f)(1)(H).
74. *Id.*
76. *Id.* at 613.
77. *Id.* at 606.
78. *Id.* at 613.
ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.\(^79\)

Relying on *Hazen Paper*, lower courts began to require proof that employer actions were motivated by such “stigmatizing stereotypes” or unfounded assumptions.\(^80\)

There can be no question that one of the reasons Congress enacted the ADEA was to challenge unproven stereotypes that employers might harbor regarding decreased abilities of older workers.\(^81\) However, there is no basis in the language of the ADEA or its legislative history to restrict its reach only to stereotype-based employment decisions. Section 4(a)(1), which prohibits discrimination in the terms, conditions, and privileges of employment, does not require that discrimination be based on “inaccurate and stigmatizing stereotypes.” Section 4(a)(1) makes it unlawful for an employer to “fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age . . . .”\(^82\) The ADEA’s legislative history, the basis of the dicta regarding stereotypes in *Hazen Paper*, cannot revise and limit the Act’s statutory prohibitions.\(^83\) Doing so thwarts the will of Congress by severely curtailing the ADEA’s broad protections.

In addition, the ADEA’s purposes are broader than just inaccurate and stigmatizing stereotypes. It prohibits arbitrary discrimination to promote the employment of older workers and to help workers and employers find ways to resolve problems arising from the impact of age on employment.\(^84\) In *City of Los Angeles Department of Water & Power v.*

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79. *Id.* at 610.

80. *See, e.g.*, Dilla v. West, 4 F. Supp. 2d 1130, 1142 (M.D. Ala. 1998) (because of “*Hazen Paper*’s broader principle that age discrimination occurs only when ‘the problem of inaccurate and stigmatizing stereotypes’ about older workers are operative,” employer’s policy to hire only air traffic controllers younger than thirty-one was not discriminatory because it was intended to address concerns about retirement-eligible employees leaving); Sperling v. Hoffman-La Roche, 924 F. Supp. 1346, 1390 (D.N.J. 1996) (“In this case, proximity to retirement and eligibility for retirement benefits are correlated with age. However, none of the deposition testimony relied on by plaintiffs suggest that the decisions made by those managers were based on denigrating stereotypes about older workers. Rather, the testimony suggests that the managers were using proximity to retirement and eligibility for retirement benefits as a means to minimize the adverse effect that Operation Turnabout would have on Roche employees.”).

81. EEOC v. Wyoming, 460 U.S. 226, 231 (1983) (“[Age discrimination] was based in large part on stereotypes unsupported by objective fact . . . . Moreover, the available empirical evidence demonstrated that arbitrary age lines were in fact generally unfounded and that, as an overall matter, the performance of older workers was at least as good as that of younger workers.”).


84. 29 U.S.C. § 621(b) (2012) (“It is . . . the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary
Manhart, the Supreme Court held that even the use of accurate and non-stigmatizing stereotypes violated Title VII. Because the prohibitions of the ADEA and Title VII are identical, liability under either statute clearly does not depend on whether inaccurate stereotypes or accurate facts motivate the employer. Indeed, the ADEA prohibits an employer from denying or reducing employee benefits based on age, even though Congress was aware when enacting the ADEA that the cost of providing certain benefits to older workers can be higher than providing the same benefits to younger workers.

Hazen Paper also “rejected the view that factors like seniority and pension status are the statutory ‘equivalents’ of age.” The Court said that an employer does not violate the ADEA merely by relying upon a criterion correlated with age. Nothing in Hazen Paper, however, transforms factors that are defined by age (e.g., retirement eligibility) into age-neutral, legitimate considerations for employment decisions. Hazen Paper held that when an employer bases a decision on a factor that, while “empirically correlated with age,” is nonetheless “analytically distinct” from age, the employer does not necessarily “analytically distinct” the ADEA because the employer could “take account of one while ignoring the other.”

The facts of Hazen Paper provide a clear example of this concept. The employer fired a sixty-two-year-old just a few weeks before his company’s pension plan vested. Vesting required employees to have ten years of experience with the employer. The unanimous Court ruled that because vesting resulted from years of service, not age, termination to prevent vesting did not violate the ADEA. The Court reasoned that “because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily ‘age-based.’"

age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.”)

86. Lorillard v. Pons, 434 U.S. 575, 584 (1978) (“the prohibitions of the ADEA were derived in haec verba from Title VII”).
87. S. REP. No. 90-723, at 14 (1967).
90. Id. at 608.
91. Id. at 611.
92. Id.
93. Id. at 607.
94. Id. at 608.
95. Id. at 617.
96. Id. at 611.
However, Justice O'Connor emphasized limits to the Court’s holding. First, although “there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee’s age,”97 an employer who assumes a correlation between age and another factor and targets employees based on that assumed correlation “engages in age discrimination.”98 In other words, “the ‘correlated’ language in Hazen applies only where the employer’s decision is ‘wholly’ motivated by factors other than age . . . . The key is what the employer supposes about age . . . .”99 Second, Justice O'Connor emphasized that the Court was not considering “the special case where an employee is about to vest in pension benefits as a result of his age, rather than years of service . . . and the employer fires the employee in order to prevent vesting.”100 Rather, the Court’s holding was “simply that an employer does not violate the ADEA just by interfering with an older employee’s pension benefits that would have vested by virtue of the employee’s years of service.”101

After Hazen Paper, numerous lower courts have issued opinions holding that employer decisions based on retirement eligibility when eligibility is defined by age are “nothing less than age discrimination by another name.”102 In EEOC v. Local 350, Plumbers & Pipefitters,103 the defendant union’s policy prohibited retired union members from seeking work through the union’s hiring hall.104 The Ninth Circuit held that age was a “but-for” cause of the plaintiff’s exclusion because the union’s policy, on its face, discriminated because of retirement status, which was itself defined by age.105 Similarly, in Huff v. UARCO, Inc.,106 the Seventh Circuit ruled that requiring retirement-eligible employees terminating employment to accept a payout of pension benefits over time, while offering a lump sum payout option to other retirement-ineligible terminating employees, violated the ADEA. Huff explained:

Because age is an express condition of receiving a benefit, we think that the instant case presents a close approximation of the case Hazen Paper declined to decide . . . . Nothing in Hazen Paper prohibits a finding that UARCO’s expressly age-related policy violates the

97. Id. at 609.
98. Id. at 612–13.
100. Hazen Paper, 507 U.S. at 613.
101. Id.
103. 998 F.2d 641 (9th Cir. 1993).
104. Id. at 643.
105. Id. at 646.
106. 122 F.3d 374 (7th Cir. 1997).
ADEA . . . This is not a case where there is merely a correlation be-
tween age and the denial of a particular benefit. UARCO’s policy
draws an express line between workers over fifty-five and those
under.\footnote{107}

In Johnson v. State of New York,\footnote{108} the state sought to hide behind
Hazen Paper to avoid liability for terminating employees after they
reached the Air National Guard’s (ANG) mandatory retirement age
of sixty.\footnote{109} In rejecting this ploy, the Second Circuit explained:

The State’s reliance on Hazen Paper is unavailing. The flaw in the
State’s argument is that the decision to require dual status, with con-
sequent mandatory retirement at 60 . . . is not merely correlated with
age; unlike Hazen Paper, the employer’s decision here in fact imple-
ments an age-based criterion. Regardless of the State’s reasons for
requiring that certain of its civilian employees maintain ANG mem-
bership, there can be no doubt that Johnson’s age “actually played a
role . . . and had a determinative influence” on the decision to termi-
nate his employment.\footnote{110}

Older workers’ advocates must be vigilant to ensure that Hazen
Paper is not inappropriately applied to restrict the ADEA’s protections
further. Reminding courts when facts present “the special case” left
undecided by Hazen Paper, and refuting attempts to require proof of
stereotypical thinking (or pointing out where such thinking is actually
at work), can produce good results.\footnote{111}

E. The ADEA Should Be Amended to Provide for Compensatory
and Punitive Damages

In the Civil Rights Act of 1991, Congress provided for compensa-
tory and punitive damages under Title VII and the Americans with

\footnotes{107}{Id. at 388.}{108}{49 F.3d 75 (2d Cir. 1995).}{109}{Id. at 79 (“The State . . . insists that its dismissal of Johnson was motivated,
not by age, but by the legitimate reasons underlying the dual status requirement. The
State relies upon Hazen Paper.”).}{110}{Id. at 79–80; see also Erie Cty. Retirees Ass’n v. Cty. of Erie, 220 F.3d 193, 211
(3d Cir. 2000) (employer offered Medicare-eligible retirees health insurance coverage infe-
rior to non-Medicare eligible employees but the age discrimination claim of the Medicare-
eligible retirees was not barred by Hazen Paper because Medicare eligibility is explicitly
age-based, making the case “parallel to the ‘special case’”); Barney v. Haveman, 879
F. Supp. 775, 780 (W.D. Mich. 1995) (clarifying what Hazen Paper did, and did not, decide);
employees based on stated intent to retire “presents issues that Hazen did not address.”).}{111}{See, e.g., Tramp v. Associated Underwriters, Inc., 768 F.3d 793 (8th Cir. 2014)
(claim that employee was terminated because her age affected employer’s health insur-
ance cost included fact issue of what employer supposed about age in making employ-
ment decisions; reasonable jury could conclude employer believed its health care premi-
ums and age were not analytically distinct); Hilde v. City of Eveleth, 777 F.3d 998 (8th Cir. 2015)
(employee was not promoted to police chief; age discrimination claims under
ADEA and Minnesota Human Rights Act survived because city provided no evidence
that commissioners doubted employee’s commitment to the job for any reason but for
his age-based retirement eligibility).}
Disabilities Act, but not under the ADEA. The emotional trauma and injury discrimination inflicted can be as significant for victims of age harassment as it is for those sexually harassed. “Studies have shown that older workers who have been terminated find the resulting loss of self-esteem even more devastating than the loss of income, and the impact is felt not only by the person fired but also by the worker’s entire family.”112 As Justice Marshall observed dissenting in *Murgia*: “Deprived of his status in the community and of the opportunity for meaningful activity, fearful of becoming dependent on others for his support, and lonely in his new-found isolation, the involuntarily retired person is susceptible to physical and emotional ailments as a direct consequence of his enforced idleness.”113

Congress’s failure to provide for compensatory and punitive damages in age discrimination cases implies that older workers do not deserve these remedies. The ADEA’s provision of double liquidated damages for willful violations114 is no substitute because it doubles the amount of back pay awarded, but does not compensate for other types of injuries, such as the emotional toll that age discrimination inflicts.

**Conclusion**

Although age discrimination continues, the legal rights and remedies of older workers would be drastically reduced without the ADEA’s protections. In short, the Act has done some good but needs to do more. The ADEA generally eliminated mandatory retirement and explicit age limits in hiring. It declares rights to be free of age-based harassment and age bias in the provision of benefits, training opportunities, and promotions, among other guarantees. Without the ADEA, older workers would have greater difficulty getting hired and remaining employed. Absent the ADEA, employers could discriminate against older workers with impunity. However, until we acknowledge that ageism is just as unacceptable as other types of discrimination, older workers will remain vulnerable.

In 1997, the ADEA’s thirtieth anniversary, age discrimination scholar Howard C. Eglit commented that Secretary Wirtz might have been correct:

> Ageism is not equivalent, either in its genesis nor its manifestations, to racism. Thus, the eradication of age bias—either generally, or at least in specific settings—is perhaps a more realistic aspiration than is the imminent demise of racist thinking and racist actions. Perhaps in ten, twenty, or thirty years the ADEA will have become

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a legislative artifact—interesting for what it was and what it did, but no longer necessary. Or perhaps not. 115

Unfortunately, twenty years later, the answer is “perhaps not.” The ADEA is still critically important in safeguarding older workers’ rights, yet there is still a long way to go in the fight to eradicate workplace age bias.