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Cleary v. United States Lines, Inc.: The Protections of the ADEA Held Not to Apply to American Citizens Employed Abroad

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Cleary v. United States Lines, Inc.: The Protections of the ADEA Held Not to Apply to American Citizens Employed Abroad

In response to public concern over the existence of arbitrary discrimination in employment because of age,[1] Congress enacted the Age Discrimination in Employment Act of 1967 (ADEA).[2] The purpose of the statute is "to promote employment of older persons based on their ability rather than age."[3] Whether the ADEA applies extraterritorially has been much debated. In *Cleary v. United States Lines, Inc.*,[4] a case of first impression, the United States District Court for New Jersey held that American citizens working abroad for United States companies are not within the ADEA's protected class.[5] While the court in *Cleary* recognized substantive similarities between the ADEA and Title VII of the Civil Rights Act of 1964,[6] which has been held to apply extraterritorially,[7] it concluded that these similarities did not compel extraterritorial application of the ADEA.[8] Rather, the court noted that the ADEA incorporates the enforcement scheme of the Fair Labor Standards Act of 1938

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[1] *See* HOUSE COMM. ON EDUCATION AND LABOR, THE OLDER AMERICAN WORKER—AGE DISCRIMINATION IN EMPLOYMENT, H.R. Rep. 805, 90th Cong., 1st Sess. 2 (1967); *Age Discrimination in Employment: Hearings on Age Discrimination Bills Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 22 (1967); U.S. DEP'T OF LABOR REPORT TO THE CONGRESS ON AGE DISCRIMINATION IN EMPLOYMENT UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964: RESEARCH MATERIALS 67-69 (1965). *See also* Note, *Age Discrimination in Employment: The Problems of the Older Worker*, 41 N.Y.U. L. REV. 383, 384-88 (1966).

[2] Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, §§ 2-15, 81 Stat. 602-07 (1967) (codified as amended at 29 U.S.C. §§ 621-634 (1976 & Supp. V 1981).

[3] 29 U.S.C. § 621(b) (1976 & Supp. V 1981). *See generally* Annot., 24 A.L.R. Fed. 808 (1975).

[4] 555 F. Supp. 1251 (D.N.J. 1983).

[5] *Id.* at 1263.

[6] 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. V 1981). "With a few minor exceptions, the prohibitions of [the ADEA] are in terms identical to those of the Civil Rights Act of 1964 except that age has been substituted for 'race, color, religion, sex, or national origin.'" Hodgson v. First Fed. Savings & Loan Ass'n, 455 F.2d 818, 820 (5th Cir. 1972). *See infra* notes 37 & 74 and accompanying text. One major procedural difference between Title VII and the ADEA is that class actions are available in the former, but not the latter. *See* Sims v. Parke Davis & Co., 334 F. Supp. 774, 780-81 (E.D. Mich.), *aff'd per curiam*, 453 F.2d 1259 (6th Cir. 1971), *cert. denied*, 405 U.S. 978 (1972).

[7] Bryant v. International Schools Serv., Inc., 502 F. Supp. 472 (D.N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1982); Love v. Pullman, 13 Fair Empl. Prac. Cas. (BNA) 423 (D. Colo. July 21, 1976). *See infra* note 41 and accompanying text.

[8] 555 F. Supp. at 1261-62.

(FLSA),[9] and held that, like the FLSA, the ADEA does not apply extraterritorially.[10]

The dispute in *Cleary* began in 1979 when Francis Cleary, a sixty-four year old American citizen employed in London by United States Lines Operations, Inc. (Operations)[11] was terminated by Operations. At the time of his discharge, Cleary entered into a termination agreement with Operations which provided for severance pay and moving expenses. A dispute arose as to Cleary's rights under this agreement and he retained solicitors to file a complaint with the London Industrial Tribunal. While the London dispute was being settled, Cleary filed an age discrimination claim with the Equal Employment Opportunity Commission (EEOC).[12] The EEOC's attempts at conciliation failed and, at the EEOC's suggestion, Cleary filed a complaint with the New Jersey Division of Civil Rights.[13] The Civil Rights Division declined to exercise jurisdiction, however, on the ground that Cleary was not an inhabitant of New Jersey.[14] On June 9, 1981, Cleary filed a complaint in the federal district court in New Jersey, alleging violations of the ADEA.[15]

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[9] 29 U.S.C. §§ 201-19 (1976 & Supp. V 1981). The ADEA incorporates by reference §§ 211(b), 216 and 217 of the FLSA. *See* 29 U.S.C. § 626(b) (1976 & Supp. V 1981). The FLSA establishes employment requirements relating to minimum wages, overtime compensation, child labor and equal pay for the sexes. One of the considerations for the choice of FLSA incorporation into the ADEA was administrative convenience. It was believed that granting ADEA enforcement authority to the Department of Labor, rather than the Equal Employment Opportunity Commission (EEOC), was necessary since the EEOC was overburdened with the processing of Title VII complaints. *See* 113 CONG. REC. 31254 (1967) (remarks of Sen. Javits, co-sponsor of the Senate version of the bill). In 1979, this ADEA enforcement authority was transferred from the Department of Labor to the EEOC, Reorg. Plan No. 1 of 1978, 3 C.F.R. § 321 (1978), *reprinted in* 5 U.S.C.A. app. at 161 (West Supp. 1983). *See infra* note 82 and accompanying text. *See generally* Donahue, *Procedural Aspects of the Age Discrimination in Employment Act of 1967*, 36 U. PITT. L. REV. 914 (1974-1975).

[10] 555 F. Supp. at 1260. Two federal district courts have since endorsed the reasoning in *Cleary* and have held that the ADEA does not apply to American citizens working in foreign countries. *See* Pfeiffer v. Wrigley Co., 573 F. Supp. 458 (N.D. Ill. 1983); Zahourek v. Arthur Young & Co., 576 F. Supp. 1453 (D. Colo. 1983).

[11] Operations was a New York corporation with its principal place of business in London. It was owned by the other defendant, United States Lines (USL), a Delaware corporation with its principal place of business in New Jersey. Since 1956, Cleary had been employed in Europe by either USL or one of its subsidiaries. 555 F. Supp. at 1253.

[12] The Equal Employment Opportunity Commission (EEOC) is the agency vested with broad investigative and litigative authority under the ADEA. The EEOC has the power to make investigations and to require the keeping of records in accordance with the powers and procedures provided in §§ 209 and 211 of the Fair Labor Standards Act (FLSA). *See* 29 C.F.R. § 1626 (1983).

[13] The evidence in Cleary's case appeared to be sufficient to support the inference that a discriminatory act had occurred. The record revealed, for instance, that Cleary's past performance had been adjudged "above satisfactory;" he had received recent notice of a transfer to New Jersey; and he had received several salary increases and bonuses. 555 F. Supp. at 1254.

[14] USL moved its headquarters from New Jersey to New York between the time of filing the charge and Cleary's termination. *Id.* at 1255-56. Cleary's complaint with the New York State Division on Human Rights was dismissed because the statute of limitations had run. *Id.* at 1256. The ADEA requires referral to state agencies where available. 29 U.S.C. § 633(b) (1976 & Supp. V 1981).

[15] Cleary's complaint sought to have his severance pay supplemented with one year's cost of living allowance, further compensation for relocation, allowance for home leave, interest,

In response to Cleary's ADEA allegations, Operations moved for summary judgment, arguing first that since Cleary had sued Operations in England, he had effectively admitted that his employment rights were governed by English law, and, therefore, his suit in federal court was barred by the doctrine of election of remedies.[16] The court cursorily dismissed this argument, reasoning that Cleary's age discrimination claim asserted different rights than those he had asserted in England, where he had alleged that Operations had failed to comply with the minimum notice requirements of the English Employment Protection Act.[17]

Operations also claimed that summary judgment was appropriate because the ADEA does not apply to citizens employed beyond United States borders, and, therefore, Cleary lacked standing to sue.[18] Addressing the issue of the extraterritorial applicability of the ADEA, the court stated that it was bound by the principle enunciated in *Blackmer v. United States*,[19] where the Supreme Court held that a statute shall be construed to apply only within the territorial jurisdiction of the United States absent evidence of a contrary legislative intent.[20] The *Cleary* court remarked that this rule is based upon the presumption that Congress is primarily concerned with domestic matters.[21]

Applying the *Blackmer* principle, the *Cleary* court failed to find any evidence of a congressional intention that the ADEA apply extraterritorially.[22] The court based its conclusion upon several specific findings. First, the court reasoned that the use of the word "commerce" in the ADEA[23] did not necessarily indicate a legislative intent to apply the ADEA everywhere that industry tends to affect United States commerce. The court noted that the FLSA, which expressly states that it is not to be applied extraterritorially, contains the same expansive definition of

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costs, attorney's fees, liquidated damages and "such other relief as the court may deem appropriate." 555 F. Supp. at 1256.

[16] The doctrine of election of remedies prohibits a party, in asserting his rights, from occupying inconsistent positions "in relation to the facts which form the basis of his respective remedies." Abdallah v. Abdallah, 359 F.2d 170, 174 (3d Cir. 1966).

[17] English Employment Protection Act, 1975, ch. 71.

[18] Operations argued that even if Cleary's discharge occurred in America, Cleary did not have any rights under a statute that precluded coverage of citizens working abroad. 555 F. Supp. at 1263.

[19] 284 U.S. 421 (1932) (upholding the contempt conviction of a United States citizen residing in France who failed to respond to a subpoena requiring him to appear as a witness at a criminal trial).

[20] *Id.* at 437.

[21] 555 F. Supp. at 1257. *See also* Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949).

[22] 555 F. Supp. at 1262-63.

[23] Cleary had argued that the substantive rights created by the ADEA are held by all American citizens within the reach of the Commerce Clause. In § 630(g) of the ADEA, Congress broadly defined "commerce" to include "trade . . . among the several states; *or between a State and any place outside thereof*." 29 U.S.C. § 630(g) (1976 & Supp. V 1981) (emphasis added). The congressional statement of findings and purpose of the ADEA states in part: "[T]he existence in industries affecting commerce of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce." *Id.* § 621(a)(4) (1976 & Supp. V 1981).

"commerce."[24]

Second, the court relied on the Supreme Court's decision in *Lorillard v. Pons*[25] to support its finding that the FLSA is the proper statutory analog to the ADEA. In *Lorillard*, the Court held that jury trials are available to litigants under the ADEA because the ADEA incorporated provisions of the FLSA which provided for such a right.[26] The decision in *Lorillard* was based on the presumption that Congress knows the interpretation that has been given to a prior statute when it incorporates the prior statute into a new statutory scheme.[27] Similarly, the *Cleary* court concluded that Congress intended that the courts' interpretation of the FLSA's limited applicability also apply to the ADEA.[28]

Third, although the court sympathized with Cleary's argument that unlike the FLSA, the extraterritorial application of the ADEA would not cause dislocations in a foreign country's economy, it concluded that it was not at liberty to overturn Congress' clear intention that the ADEA apply only within United States boundaries.[29] The court found that this intent was evidenced by the ADEA's incorporation of the FLSA's enforcement mechanism.[30] This intent was further demonstrated by the fact that the EEOC, the agency charged with the enforcement of the ADEA, was not empowered to function extraterritorially.[31] The court also noted that if Congress had wanted to exclude portions of the FLSA

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[24] Likewise, in § 203(b) of the FLSA, Congress defined "commerce" as "trade . . . among the several States; *or between any State and any place outside thereof*." 29 U.S.C. § 203(b) (1976 & Supp. V 1981) (emphasis added). The congressional statement of findings and purpose of the FLSA states in part: "[T]he existence, in industries engaged in commerce . . . of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers . . . burdens commerce and the free flow of goods in commerce." *Id.* § 202(a) (1976 & Supp. V 1981). *But cf.* Opinion Letter of Wage-Hour Administrator, 8 LAB. REL. REP. (BNA) 401:5209 (Aug. 7, 1968) (commenting that firms engaged in international commerce may qualify as employers under the ADEA).

[25] 434 U.S. 575 (1978).

[26] *Id.* at 581. *See infra* text accompanying notes 67-70.

[27] *Id.* at 580-81. *See also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n.8 (1975).

[28] 555 F. Supp. at 1259.

[29] *Id.*

[30] Section 626(b) of the ADEA states: "The provisions of this chapter shall be enforced in accordance with the powers, remedies and procedures provided in Sections 211(b), 216 (except for subsection (a) thereof), and 217 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 211(b), 216, 217)), and subsection (c) of this section)." 29 U.S.C. § 626(b) (1976 & Supp. V 1981). Section 216(d) of the FLSA refers to § 213(f), the provision that prohibits extraterritorial application of the FLSA. Section 213(f) of the FLSA states:

> The provisions of Sections 206, 207, 211 and 212 (29 U.S.C. §§ 206, 207, 211, 212) shall not apply to any employee whose services during the workweek are performed in a workplace within a foreign country or within territory under the jurisdiction of the United States other than the following: a State of the United States; the District of Columbia; Puerto Rico; the Virgin Islands; Outer Continental Shelf Lands defined in the Outer Continental Shelf Lands Act (Ch. 345, 67 Stat. 462) [43 U.S.C. §§ 1331-43]; American Samoa; Guam; Wake Island; Eniwetok Atoll; Kwajalein Atoll; Johnston Island; and the Canal Zone.

Id. § 213(f).

[31] Section 626(d) of the ADEA requires the EEOC, upon receiving a complaint, to promptly seek to eliminate any unlawful practice by informal methods of conciliation, conference and persuasion. *Id.* § 626(d).

from being incorporated into the ADEA, it would have done so.[32]

Fourth, the court was not impressed with Cleary's reliance on the Supreme Court's decision in *Vermilya-Brown Co. v. Connell*,[33] that the the FLSA applied to work performed on foreign land leased to the United States.[34] The *Cleary* court noted that Congress explicitly repudiated *Connell* in 1957, when it amended the FLSA to restrict its application to the territorial jurisdiction of the United States.[35]

Finally, the ADEA's incorporation of the FLSA's procedural enforcement scheme also evidenced Congress' intent to restrict the scope of the ADEA's substantive rights.[36] The court arrived at this conclusion in spite of its recognition that the substantive rights of the ADEA closely parallel those of Title VII,[37] and that the two statutes share the goal of

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[32] 555 F. Supp. at 1259. For example, Congress expressly declined to incorporate the criminal penalties established for violations of the FLSA into the ADEA. Section 629 of the ADEA establishes criminal penalties for interference with the performance of an authorized representative of the Secretary when he is engaged in the performance of his duties under the Act. *Cf.* 29 U.S.C. § 216(a) (1976 & Supp. V 1981).

[33] 335 U.S. 377 (1948) (holding that Congress intended in its use of "possession" to have the FLSA apply to employer-employee relations in foreign territory under lease for military bases).

[34] *Id.* at 382.

[35] 29 U.S.C. § 213(f) (1976 & Supp. V 1981). Restriction of FLSA applicability was viewed as necessary to avoid raising "delicate questions of international relations," and to eliminate the uncertainty involved in determining FLSA coverage because of the divergent scope of rights given to the United States under treaties and executive agreements with foreign governments. 1957 U.S. CODE CONG. & AD. NEWS 1756, 1757.

[36] 555 F. Supp. at 1258, 1261.

[37] *Compare* 29 U.S.C. § 623 (1976 & Supp. V 1981) (ADEA) *with* 42 U.S.C. § 2000e-2 (1976 & Supp. V 1981) (Title VII). *See supra* note 6 and accompanying text. The ADEA's legislative history indicates that a number of Congressmen felt the ADEA should simply be an extension of Title VII protection to older workers. *See Age Discrimination in Employment: Hearings on Age Discrimination Bills Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 22, 35 (1967) (statement by Sen. Murphy); *id.* at 29 (statement by Sen. Smathers). For arguments for and against the amending of Title VII, see Edwards & McConnell, *The Future of the ADEA: Pressure Builds to Abolish Mandatory Retirement*, in A.B.A. COMM. ON LEGAL PROBLEMS OF THE ELDERLY, ADEA: A SYMPOSIUM HANDBOOK FOR LAWYERS AND PERSONNEL PRACTITIONERS 404-08 (1983). The advantages of including age in Title VII include:

1) EEOC's overall administration could be more efficient and economical;
2) Class action litigation would be more easily utilized;
3) Discrimination in employee benefits would be disallowed;
4) The number of employees covered by age discrimination prohibitions would increase;
5) Enforcement jurisdiction would be less ambiguous;
6) Temporary relief would be more easily obtained.

Disadvantages of repealing the ADEA include:

1) EEOC would be unable to file suit against state and local governments;
2) Jury trials would be unavailable;
3) Damage awards could be reduced;
4) EEOC would lose the authority to do self-initiated age discrimination investigations;
5) Charging parties would lose the right to anonymity;
6) ADEA case law could be nullified;
7) Discharging non-meritorious charges would be more difficult.

Id.

"the elimination of discrimination in the workplace."[38] While acknowledging the strong substantive parallels between the ADEA and Title VII, the court declined to apply the negative inference argument, which some courts have used to apply Title VII extraterritorially, to the ADEA.[39] According to this argument, the Title VII provision that it "shall not apply to an employer with respect to the employment of *aliens* outside any State"[40] compels the negative inference that Congress must have intended Title VII to extend to American *citizens* employed outside of the country.[41]

Refusing to apply the negative inference argument to the ADEA, the court in *Cleary* concluded:

> [T]he one provision of Title VII, from which a negative inference can be drawn in favor of applying the act extraterritorially, is noticeably absent from the ADEA. The only reasonable conclusion that can be drawn from the absence of this provision is that Congress did not intend the ADEA to apply abroad.[42]

The court buttressed its conclusion with examples of legislation containing specific extraterritorial provisions,[43] and with the principle that American labor laws are generally construed to apply only within United States borders.[44]

Having found that Cleary lacked standing to sue, the court granted Operations' motion for summary judgment. Although the court felt constrained to follow what it perceived to be Congress' intent that the ADEA not apply extraterritorially, it questioned the wisdom of Congress' policy decision, and proceeded to point out difficulties with restricting the extraterritorial application of the ADEA.[45] First, in so limiting the scope of the ADEA, Congress invited "unscrupulous employers" to circumvent the statute's protections by transferring older employees to for-

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[38] Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979) (holding that ADEA plaintiffs are required to resort to appropriate state proceedings in deferral states before bringing suit under the ADEA since the ADEA's construction should follow that of Title VII, which requires deferral).

[39] 555 F. Supp. at 1261-62. *See infra* note 41 and accompanying text.

[40] 42 U.S.C. § 2000e-1 (1976 & Supp. V 1981) (emphasis supplied).

[41] *See, e.g.*, Bryant v. International Schools Serv., Inc., 502 F. Supp. 472 (D.N.J. 1980) (holding that Title VII applied to an American corporation operating schools in Iran), *rev'd on other grounds*, 675 F.2d 562 (3rd Cir. 1982); Love v. Pullman, 13 Fair Empl. Prac. Cas. (BNA) 423 (D. Colo. July 21, 1976) (holding that Title VII protected American porters employed in Canada). *Cf.* Fernandez v. Wynn Oil Co., 20 Fair Empl. Prac. Cas. (BNA) 1162 (C.D. Cal. July 30, 1979) (court ruled on merits of case involving allegedly discriminatory employment qualifications applied to women seeking work in Latin America and Southeast Asia).

[42] 555 F. Supp. at 1261-62.

[43] *Id.* at 1262. The court cited the relevant provisions in the Defense Base Act, 42 U.S.C. § 1651 (1976), and the War Hazards Compensation Act, *id.* § 1701(a) (1976).

[44] 555 F. Supp. at 1262-63. *E.g.*, Benz v. Compania Naviera Hidalgo, 353 U.S. 138 (1957) (National Labor Relations Act does not apply to foreign boat in United States port); Foley Bros., Inc. v. Filardo, 336 U.S. 281 (1949) (Eight Hour Law does not apply abroad); GTE Automatic Elec., Inc., 226 NLRB Dec. (CCH) 1222 (1976) (NLRA does not apply abroad); 29 U.S.C. § 213(f) (1976) (FLSA statutorily restricted); 29 U.S.C. § 653(a) (1976) (Occupational Safety and Health Act statutorily restricted).

[45] 555 F. Supp. at 1263. *See infra* notes 106-08 and accompanying text.

eign branches as a "subterfuge" for terminating their services on account of age.[46] Second, prohibiting the extraterritorial application of the ADEA created uncertainty as to "when the employee is deprived of the protection of the age discrimination statute."[47] These difficulties prompted the court to opine that "[t]here is no valid policy reason why this country's laws against age discrimination should not apply to American citizens employed by American companies abroad."[48] Nevertheless, the court stated that it was not at liberty to "substitute its views as to what Congress should have done for what Congress actually has done."[49]

Before the decision in *Cleary*, commentators and courts had adopted a variety of interpretations of the scope of the application of the ADEA. These different interpretations were engendered by the fact that the ADEA, while substantively similar to Title VII,[50] incorporates the enforcement scheme of the FLSA.[51] Faced with the ADEA's hybrid character,[52] one commentator concluded that "a covered employer is governed by the ADEA's terms as to any of his acts which occur in the United States even though their principal effect may be outside the

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[46] *Id.* *See infra* note 110 and accompanying text.

[47] 555 F. Supp. at 1263.

[48] *Id.*

[49] *Id.*

[50] The ADEA's substantive similarity to Title VII has created confusion as to Title VII's relevance in interpreting similar provisions of the ADEA. *E.g.*, Smith v. Farah Mfg. Co., 650 F.2d 64, 67 (5th Cir. 1981) (noting that age discrimination is qualitatively different from race or sex discrimination); Loeb v. Textron, Inc., 600 F.2d 1003, 1015 (1st Cir. 1979) (applying Title VII standards and methods of proof in ADEA action); Holliday v. Ketchum, MacLeod & Grove, Inc., 584 F.2d 1221 (3d Cir. 1978) (overruling Goger v. H.K. Porter Co., Inc., 492 F.2d 13 (3d Cir. 1974), by disavowing *Goger's* reliance on an analogy to Title VII procedure, to hold that the ADEA does not require prior resort to state agency procedures); Laugesen v. Anaconda Co., 510 F.2d 307, 312-13 (6th Cir. 1975) (stating that *automatic* application to ADEA actions of the *McDonnell-Douglas* Title VII guidelines for a prima facie discrimination case is inappropriate); Murphy v. American Motor Sales Corp., 410 F. Supp. 1403, 1405 (N.D. Ga. 1976) (noting distinctions between Title VII and ADEA with regard to equitable and legal remedies and availability of jury trials), *modified on other grounds*, 570 F.2d 1226 (5th Cir. 1978). For discussions of the question of Title VII case law's relevance to burden of proof standards in ADEA cases, see Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380 (1976); Rosenblum & Biles, *The Aging of Age Discrimination—Evolving ADEA Interpretations and Employee Relations Policies*, 8 EMPLOYEE REL. L.J. 22 (1982). Reasons for the reluctance to analogize Title VII case law to the ADEA are further discussed in S. AGID, FAIR EMPLOYMENT LITIGATION: PROVING AND DEFENDING A TITLE VII CASE 214 (1979). *See also* Lake, *Age Discrimination in Employment Act: A Review of the Substantive Requirements*, in A.B.A. COMM. ON LEGAL PROBLEMS OF THE ELDERLY, ADEA: A SYMPOSIUM HANDBOOK FOR LAWYERS AND PERSONNEL PRACTITIONERS 36 (1983) (noting a distinction between discrimination based on immutable characteristics of certain groups (such as race and sex), which Title VII seeks to prevent, and discrimination based on relative differences between all persons, which the ADEA seeks to prevent). *Cf.* U.S. Dep't of Labor, Report to the Congress on Age Discrimination in Employment Under Section 715 of the Civil Rights Act of 1964: Research Materials 67-69 (1965) (age discrimination is based on erroneous assumptions about the effects of age on ability rather than prejudice based on dislike or intolerance).

[51] *See supra* notes 9 & 30 and accompanying text.

[52] *See* Note, *supra* note 50 (stating that although Congress might have amended Title VII, the ADEA was established as an independent statutory scheme incorporating the enforcement procedures of the FLSA, and courts should avoid applying Title VII precedent automatically in ADEA actions).

United States as, for example, where employees are hired in the United States for overseas work."[53] By contrast, in *Osborne v. United Technologies Corp.*,[54] a United States company's office in Germany was excused from the ADEA's notice posting requirement, because the ADEA had an "extremely limited" extraterritorial effect.[55] The *Osborne* court noted the federal regulations stated that the prohibitions outlined in the ADEA "are considered to apply only to performance of the described discriminatory acts in places over which the United States has sovereignty, territorial jurisdiction, or legislative control."[56]

In contrast to the confusion over the extraterritorial application of the ADEA, courts have consistently held that Title VII applies extraterritorially. In *Love v. Pullman*,[57] for example, American citizens working as porters in Canada were held to be protected by Title VII. The court based its holding on the language in Title VII that exempts "*aliens outside any State*"[58] from its coverage. Since aliens employed outside of any state were expressly excluded, the court reasoned by negative implication that Congress must have intended to protect non-aliens (i.e. American citizens) outside of any state.[59] In 1980, the federal district court in New Jersey, in *Bryant v. International Schools Services, Inc.*,[60] reaffirmed the negative implication reasoning of *Love*.[61]

The ADEA's hybrid nature has prompted courts to look to both the FLSA and Title VII in interpreting its provisions. Because the ADEA explicitly incorporates the FLSA's enforcement scheme,[62] courts often

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[53] Opinion Letter of Wage-Hour Administrator, 8 LAB. REL. REP. (BNA), 401:5217 (Sept. 24, 1968). *Cf.* Opinion Letter of Wage-Hour Administrator, 8 LAB. REL. REP. (BNA) 401:5233 (Dec. 29, 1970) (stating that an employee of the American subsidiary of a foreign company with total foreign and domestic employment of more than the statutory number of employees is entitled to the protection of the ADEA where its terms and provisions otherwise apply); 29 C.F.R. § 860.20 (1979) (interpretative bulletin finding that the ADEA's scope covers discriminatory activities within United States territories, even though the activities are related to employment outside such territories). *See also* Freed & Dowell, *The Age Discrimination in Employment Act of 1967*, 6 CLEARINGHOUSE REV. 196, 202 (1972) ("The courts may be expected to adopt established Title VII principles in applying the Act, thereby broadening and liberalizing its scope.").

[54] 16 Fair Empl. Prac. Cas. (BNA) 586 (D. Conn., Mar. 3, 1977).

[55] *Id.* at 588.

[56] *See* 29 C.F.R. § 860.20 (1983). However, § 860.20 also states: "Activities within such geographical areas which are discriminatory against protected individuals or employees are within the scope of the Act even though related to employment outside of such geographical areas." *Id. See also supra* note 53.

[57] 13 Fair Empl. Prac. Cas. (BNA) 423 (D. Colo. July 21, 1976).

[58] 29 U.S.C. § 2000e-1 (1976 & Supp. V 1981). *See supra* text accompanying note 40.

[59] 13 Fair Empl. Prac. Cas. (BNA) at 426 n.4. The court cited as additional support for extending Title VII's application, the extraterritorial application of the United States antitrust laws. *E.g.*, Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962).

[60] 502 F. Supp. 472 (D.N.J. 1980).

[61] *Id.* at 482-83. Endorsing *Love's* reasoning, the *Bryant* court declined to adopt the employer's other arguments against applying Title VII extraterritorially. The employer had argued Title VII did not apply extraterritorially because (1) it does not contain explicit language affirmatively extending its application beyond United States borders, (2) other labor laws have been narrowly construed to preclude extraterritorial application, and (3) extension would be unwarranted given the nature of international affairs. *Id.* at 481-2.

[62] *See supra* notes 9 & 30 and accompanying text.

look to the FLSA to interpret the ADEA's procedural provisions. For instance, courts have emphasized the ADEA's incorporation of section 216 of the FLSA[63] to decide the availability of ADEA class actions,[64] the recovery of attorney's fees,[65] and the scope of remedies[66] available to an ADEA plaintiff.

In *Lorillard v. Pons*,[67] the Supreme Court also found that the ADEA's incorporation of certain FLSA procedural provisions indicated Congress' intent that ADEA plaintiffs are entitled to jury trials. The Court based its decision on two factors. First, the ADEA's incorporation of the FLSA's procedure suggested that Congress intended to grant a jury trial right in ADEA actions because "[l]ong before Congress enacted the ADEA, it was well established that there was a right to a jury trial in private actions pursuant to the FLSA."[68] Second, and unrelated to the FLSA, the Court found that the language in section 626 of the ADEA,[69] which authorized the granting of "legal or equitable relief," strongly suggested that Congress intended to permit jury trials.[70]

Other courts, however, have declined to rely on the FLSA in interpreting the procedural provisions of the ADEA. Instead, some courts have looked to Title VII to determine matters such as plaintiffs opting into ADEA class actions[71] and the availability of pain and suffering

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63 29 U.S.C. § 216 (1976 & Supp. V 1981) codifies the enforcement provisions of the FLSA. The section lists regulations concerning fines, damages, attorneys' fees, payment of wages and compensation, waiver of claims and limitation of actions.

64 Price v. Maryland Casualty Co., 561 F.2d 609 (5th Cir. 1977) (stating that complaint brought under ADEA may be maintained as class action only for those members who "opt in," pursuant to 216(b) of FLSA); La Chappelle v. Owens-Illinois, Inc., 513 F.2d 286 (5th Cir. 1975) (stating that no person can become a plaintiff in ADEA action unless he has given his written, filed consent; there are no ADEA procedures whereby class members are given the opportunity to opt out as in Rule 23 of the Federal Rules of Civil Procedure).

65 Monroe v. Penn-Dixie Cement Corp., 335 F. Supp. 231 (D. Ga. 1971) (holding that successful plaintiffs in ADEA suits are entitled to attorney's fees on the basis of the reference to § 216 of FLSA, which provides for the recovery of attorney's fees and costs).

66 Platt v. Burroughs Corp. 424 F. Supp. 1329 (D. Pa. 1976) (concluding that the ADEA limits monetary recovery to lost wages on the basis of incorporation of FLSA provisions restricting damages to "unpaid minimum wages and unpaid overtime compensation"); Combes v. Griffin Television, Inc., 421 F. Supp. 841 (D. Okla. 1976) (enactment of § 11 of the Portal-to-Portal Act, which effectively amended FLSA in providing more flexibility with regard to liquidated damages, gave the court in an ADEA action discretion to avoid the harsh remedy of absolute imposition of liquidated damages in the full amount of back pay and benefits).

67 434 U.S. 575 (1978).

68 *Id.* at 580.

69 29 U.S.C. § 626(c) states in part: "Any person aggrieved may bring a civil action in any court of competent jurisdiction for *such legal or equitable relief* as will effectuate the purposes of this chapter." *Id.* (emphasis added).

70 *Id.* at 583.

71 Burgett v. Cudahy Co., 361 F. Supp. 617 (D. Kan. 1973) (holding that failure of three class plaintiffs to individually comply with ADEA notice requirement did not prevent them from joining in a representative suit brought on their behalf as "similarly situated" employees, court drew analogy to Title VII, under which class actions have been held to be maintainable pursuant to Rule 23 of the Federal Rules of Civil Procedure); Blankenship v. Ralston Purina Co., 62 F.R.D. 35 (D. Ga. 1973) (holding that the filing of consent by members of class in ADEA suit, pursuant to § 216 of the FLSA, was not required, court remarked on distinct purposes of the ADEA and FLSA; the FLSA being designed primarily to correct poor working

damages in ADEA suits.[72] Furthermore, the Supreme Court has relied on the similarity of Title VII's enforcement scheme for federal employees to hold that they were not entitled to a jury trial in ADEA actions.[73]

Likewise, federal courts frequently look to Title VII to resolve questions of interpretation of the substantive provisions of the ADEA. These courts look to Title VII because the substantive guarantees of the ADEA and Title VII are almost identical,[74] and because the ADEA's legislative history indicates that it draws from the guarantees of Title VII.[75] For example, courts interpreting the ADEA examine the language and precedent of Title VII to determine the standard for a *prima facie* case,[76] to evaluate motions for a directed verdict,[77] and to resolve disputes relating to notice and time limitations.[78] Federal courts have also endorsed the application to ADEA cases of the "shifting burden" analysis, developed by the Supreme Court in the context of racial discrimination under Title VII.[79] Furthermore, courts have looked to the construction of the term "employer" in Title VII cases for guidance in construing the same term in the ADEA.[80] Finally, courts have applied Title VII precedent to de-

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conditions, while the ADEA was directed against discriminatory hiring and promotion practices; court also noted that a literal application of FLSA § 216 would preclude a person who never became an employee because of age discrimination from bringing an action).

[72] Rogers v. Exxon Research and Engineering Co., 404 F. Supp. 324 (D.N.J. 1975), *vacated on other grounds*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978) (awarding pain and suffering damages to ADEA plaintiff, court reasoned that although the FLSA incorporated procedure limits monetary recovery to out-of-pocket loss, the ADEA, like Title VII, is a statutory tort and the court may employ a wide range of legal and equitable remedies under § 626(b)).

[73] Lehman v. Nakshian, 453 U.S. 156 (1981) (holding that § 633(a), which amended the ADEA to extend coverage to federal employees did not grant jury trial rights to federal plaintiffs because Congress did not incorporate the FLSA enforcement scheme into § 633(a), but rather patterned the enforcement mechanism for federal employees after Title VII's relevant sections). The *Nakshian* court distinguished this case from *Lorillard* because unlike the provisions in *Lorillard*, the ADEA's provisions affecting federal employees did not explicitly incorporate the FLSA provisions. The dissenters, however, contended that the majority misread *Lorillard*. They argued that *Lorillard's* holding was based primarily on the language of the ADEA and not on its incorporation of the FLSA.

[74] *Compare* 29 U.S.C. § 623 (1976 & Supp. V 1981) *with* 42 U.S.C. § 2000e-2 (1976 & Supp. V 1981). *See also supra* note 6 and accompanying text.

[75] *See* 1967 U.S. CODE CONG. & AD. NEWS 2213.

[76] *E.g.*, Marshall v. Sun Oil Co., 605 F.2d 1331 (5th Cir. 1979); Wilson v. Sealtest Foods, Inc., 501 F.2d 84 (5th Cir. 1974). The prima facie elements are: (1) membership in a protected class, (2) qualification to perform the job, and (3) rejection in favor of a person outside the class. *See* Lopatka, *A 1977 Primer on the Federal Regulation of Employment Discrimination*, 1977 U. ILL. L. F. 69, 156 (1977).

[77] *E.g.*, Laugesen v. Anaconda Co., 510 F.2d 307, 311-12 (6th Cir. 1975).

[78] *E.g.*, Davis v. Calgon, 627 F.2d 674 (3d Cir. 1980), *cert. denied*, 449 U.S. 1101 (1981); Reich v. Dow Badische Co., 575 F.2d 363, 367 (2d Cir.), *cert. denied*, 439 U.S. 1006 (1978).

[79] *E.g.*, Lovelace v. Sherwin-Williams Co., 681 F.2d 230 (4th Cir. 1982); Grant v. Gannett Co., Inc., 538 F. Supp. 686 (D. Del. 1982). The "shifting burden analysis" set forth in *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973), refers to the order and allocation of proof in a discrimination suit. Upon plaintiff's establishment of a prima facie case, the burden of production shifts to defendant to "articulate" some legitimate, nondiscriminatory reason for plaintiff's rejection; plaintiff is then afforded opportunity to rebut by showing that the "articulated" reason is pretextual.

[80] *E.g.*, Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715 (S.D.N.Y.), *aff'd in part, rev'd in*

termine the validity of a bona fide occupational qualification defense under the ADEA.[81]

Even more persuasive of the importance of Title VII to the ADEA is the position taken by the EEOC, the agency charged with enforcement of both Title VII and the ADEA.[82] The EEOC has indicated that it will endeavor to interpret the ADEA in a manner consistent with Title VII.[83] The EEOC also takes the position that the disparate impact doctrine,[84] frequently applied in Title VII cases, also applies to the ADEA.[85]

In light of the compelling substantive similarities between Title VII and the ADEA, the *Cleary* court placed undue reliance on the technical similarities between the ADEA and the FLSA,[86] and on the principle that, absent evidence of contrary congressional intent, United States laws apply only within United States borders.[87] This approach ignores the widely-recognized mandate to construe remedial, humanitarian legislation liberally in order to effectuate its congressional purpose.[88] The ADEA is essentially a remedial statute, designed to provide compensatory relief for age discrimination victims,[89] and *Cleary's* emphasis on the

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part, mem., 608 F.2d 1369 (2d Cir. 1978). In *Marshall*, the court found that the appropriate standard for determining whether nominally separate corporations are to be considered a single employer for ADEA actions was the standard applied in Title VII cases, namely, whether they comprise an integrated enterprise.

[81] *E.g.*, Aaron v. Davis, 414 F. Supp. 453 (E.D. Ark. 1976) (holding that city failed to show bona fide occupational qualification in action brought by fire chiefs challenging their mandatory retirement at age 62).

[82] Reorg. Plan No. 1 of 1978, 3 C.F.R. § 321 (1978), *reprinted in* 5 U.S.C.A. app. at 161 (West Supp. 1983), transferred the enforcement functions under the ADEA from the Department of Labor to the EEOC, effective July 1, 1979.

[83] See the preamble to the EEOC's proposed procedural regulations under the ADEA, 46 Fed. Reg. 9970 (1981), and the preamble to the EEOC's proposed substantive interpretations under the ADEA, 44 Fed. Reg. 68,858 (1979). *But cf.* Williams, *EEOC's ADEA Enforcement Policies and Procedures*, in A.B.A. COMM. ON LEGAL PROBLEMS OF THE ELDERLY, ADEA: A SYMPOSIUM HANDBOOK FOR LAWYERS AND PERSONNEL PRACTITIONERS, 114 (1983) (commenting that the EEOC's power to make investigations and to require the keeping of records is in accordance with the powers, remedies and procedures provided in sections 211(b) and (c) and 217 of the FLSA).

[84] Under Title VII, it is well established that a neutral employment criterion that has a disparate impact on minorities or women violates the law unless the employer can meet the heavy burden of showing that the policy is justified by business necessity. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[85] *See* 29 C.F.R. § 1625.7(d) (1983). *E.g.*, Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981) (school board's policy of hiring only teachers with less than a specified number of years of experience had a disparate impact on older persons).

[86] *See supra* notes 9 & 30 and accompanying text.

[87] Blackmer v. United States, 284 U.S. 421 (1932).

[88] *E.g.*, Holliday v. Ketchum, MacLeod & Grove, Inc., 584 F.2d 1221 (3d Cir. 1978) (holding that ADEA enforcement does not require state deferral). *See also supra* note 50; Dartt v. Shell Oil Co., 539 F.2d 1256 (10th Cir. 1976), *aff'd mem.*, 434 U.S. 99 (1977) (relaxing ADEA notice of intent to sue requirements); Hall v. United States, 436 F. Supp. 505 (D. Minn. 1977) (holding that an ADEA plaintiff is not required to pursue an administrative action before filing suit under the ADEA).

[89] *See* EEOC v. Elrod, 674 F.2d 601 (7th Cir. 1982) (holding that the 1978 amendments to the ADEA, extending protection of the Act to federal, state and local government employees, is constitutional exercise of congressional power under the Fourteenth Amendment, since that amendment provides for equal protection, which is essential to an ADEA claim).

technical connections between the ADEA and the FLSA frustrates this mandate.

The ADEA and the FLSA, though technically similar, are essentially different types of legislation. "[A]ge discrimination and the failure to provide minimum working conditions cause different kinds of harm and affect different classes of people."[90] This essential difference is reflected in many aspects of the two statutes. For instance, the FLSA covers only "employees,"[91] while the ADEA extends to "any person aggrieved."[92] Similarly, the enforcement mechanisms of the two statutes differ. The ADEA, unlike the FLSA, relies heavily on voluntary settlement machinery.[93] Finally, the extraterritorial application of the ADEA, unlike the FLSA, would not raise the specter of wage dislocations in foreign countries.[94]

The *Cleary* court's failure to recognize the essential difference between the ADEA and the FLSA is evidenced by its undue reliance on the Supreme Court's decision in *Lorillard v. Pons*.[95] The Court in *Lorillard* held that jury trials were available to ADEA litigants because the ADEA incorporated provisions of the FLSA that provided for such a right.[96] The court in *Cleary* relied upon *Lorillard* to justify analogizing the scope of the FLSA to that of the ADEA. *Lorillard*, however, dealt primarily with a procedural right and was principally based on the fact that § 626(b) of the ADEA, which specifically referred to "legal" relief, strongly implied the authorization of jury trials.[97] Thus, in *Lorillard* the right to a jury trial was more than merely cross-referenced; it could be implied from the language of the ADEA. Section 213(f) of the FLSA, however, is only incorporated into the ADEA by cross reference.[98]

Furthermore, the *Cleary* court neglected to note that the *Lorillard* Court, while ruling on a procedural matter, had commented on the im-

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[90] Almond, *Jury Trial Rights Under the ADEA and FLSA*, 44 U. CHI. L. REV. 365, 382 (1977).

[91] *See* 29 U.S.C. § 206(a) (1976 & Supp. V 1981).

[92] *See* 29 U.S.C. § 626(c) (1976 & Supp. V 1981). For example, the typical FLSA plaintiff is an employee suing his employer for unpaid minimum wages or overtime, while an ADEA plaintiff might be one of several persons denied a job because of age.

[93] *See* Almond, *supra* note 90, at 383.

[94] *See* 1957 U.S. CODE CONG. & AD. NEWS 1756, 1756-57, which discusses the FLSA amendment that prohibits extraterritorial application:

> The application of labor standards, designed to apply to a United States economy, to overseas areas is usually inconsistent with local conditions of employment, the level of the local economy, the productivity and skills of the indigenous workers, and is contrary to the best interests of the United States and the foreign areas.

Id.

[95] 434 U.S. 575 (1978).

[96] *Id.* at 584-85.

[97] *Id.* at 583. *See also* Lehman v. Nakshian, 453 U.S. 156, 173-74 (1981) (Brennan, J., dissenting) (noting that an important basis for the *Lorillard* decision was the "legal or equitable relief" language in § 626 of the ADEA). *See generally* Minton, *Right to Jury Trial Under the ADEA*, 43 MO. L. REV. 250, 255 (1978).

[98] *See supra* note 30 and accompanying text.

portant substantive similarity between the ADEA and Title VII.[99] The *Lorillard* Court chose, however, to look to the FLSA in deciding the procedural question of whether a right to a jury trial existed, because of the procedural similarities between the ADEA and the FLSA.[100] It is clear, therefore, that Title VII is the more appropriate analog to the ADEA when the *substantive* question of the right to a remedy for a discrimination grievance is at issue.

In light of the overwhelming use of Title VII precedent in ADEA cases, the *Cleary* court's dismissal of two cases that extended Title VII's protections to American citizens employed abroad invites criticism. In *Bryant v. International Schools Services, Inc.*[101] and *Love v. Pullman*,[102] federal courts examined the language of Title VII and concluded, by negative inference, that Congress intended Title VII to protect citizens employed beyond United States borders. The court in *Cleary* rejected *Bryant* and *Love* on the ground that the language of Title VII that was examined by those courts was absent from the ADEA.[103] The *Cleary* analysis is misguided.[104] The courts in *Bryant* and *Love* did not attribute any particular significance to the Title VII language that they were construing; rather, they merely carried out their mandate to liberally construe remedial legislation.[105] Therefore, *Cleary's* emphasis on the fact that this language of Title VII is absent from the ADEA was unjustified.

The *Cleary* decision also ignores two important policy considerations. First, by raising more questions than it answers, the decision ignores the importance of being able to determine with some degree of certainty the scope of the ADEA. One question left unanswered is whether the statute, as construed in *Cleary*, offers complete, partial, or no protection to a worker who spends only a part of his workweek inside the country.[106] Another is whether the ADEA applies with respect to older persons who apply for overseas positions with American firms, only to be rejected because of age.[107] Furthermore, it remains unclear whether workers who are transferred temporarily to foreign countries will be pro-

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[99] 434 U.S. at 584.

[100] *Id.*

[101] 502 F. Supp. 472 (D.N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1982). *See supra* text accompanying notes 57-61.

[102] 13 Fair Empl. Prac. Cas. (BNA) 423 (D. Colo. July 21, 1976). *See supra* text accompanying notes 57-61.

[103] 555 F. Supp. at 1263.

[104] The *Cleary* analysis is no less misguided because two federal district courts, following *Cleary*, have held the ADEA to be applicable only within United States territories. *See* Pfeiffer v. Wrigley Co., 573 F. Supp. 458 (N.D. Ill. 1983); Zahourek v. Arthur Young & Co., 576 F. Supp. 1453 (D. Colo. 1983). The discussions in both cases do not extend beyond the arguments raised in *Cleary*.

[105] *See supra* notes 88-89 and accompanying text.

[106] *Cf.* Wirtz v. Healy, 227 F. Supp. 123 (N.D. Ill. 1964) (holding the FLSA § 213(f) exemption inapplicable to tour escort of travel agency who, during particular workweek performs services both in workplace within United States and in workplace in foreign country; tour escort is entitled to benefits of FLSA for entire week).

[107] 555 F. Supp. at 1263.

hibited from claiming the protection of the Act while on assignment.[108]

Second, the *Cleary* court's decision frustrates the policy of insuring the comprehensive coverage of remedial legislation.[109] As the court recognized, its decision permits employers to circumvent the ADEA by transferring older employees abroad as a subterfuge for terminating their services.[110] Thus, it leaves "a large void" in the attempt to rid society of age discrimination.[111] By vastly curtailing the scope of the ADEA's protections, the court in *Cleary* thwarted Congress' ongoing effort to eliminate age discrimination in American society. Congress' desire to expand the ADEA's protections is reflected by three important amendments to the ADEA. In 1978, Congress amended the ADEA to include federal employees.[112] In that year, Congress also raised the upper age limit of the ADEA's protections to seventy[113] and prohibited mandatory retirement for persons between the ages of sixty-five and seventy.[114]

As the foregoing analysis demonstrates, the *Cleary* court erred in failing to extend the coverage of the ADEA extraterritorially. First, the court placed too much emphasis upon the technical similarities between the enforcement mechanisms of the ADEA and the FLSA. The court failed to recognize the essential difference between the two statutes; the FLSA is a regulatory statute and the ADEA is remedial. Second, and more important, the court failed to fully appreciate the importance of the substantive similarities between Title VII and the ADEA. As other federal courts and the EEOC have recognized, the similarity of the guarantees of these two remedial statutes requires that Title VII be examined when interpreting the ADEA.

Had the *Cleary* court analogized to Title VII, instead of to the FLSA, it would have found that the ADEA applies extraterritorially, and Cleary could have prosecuted his age discrimination claim. This result would have been in accord with the well-recognized policy of construing remedial legislation liberally and would have furthered Congress' goal of insuring that the ADEA's coverage is comprehensive.

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[108] *Id.*

[109] For a discussion of the problem of the ADEA's incomplete coverage, see Edwards & McConnell, *The Future of the ADEA: Pressure Builds to Abolish Mandatory Retirement*, in A.B.A. COMM. ON LEGAL PROBLEMS OF THE ELDERLY, ADEA: A SYMPOSIUM HANDBOOK FOR LAWYERS AND PERSONNEL PRACTITIONERS 386-90 (1983).

[110] *See supra* note 46 and accompanying text.

[111] 555 F. Supp. at 1263. *See also* STAFF OF SENATE COMM. ON AGING, 93RD CONG., 1ST SESS., IMPROVING THE AGE DISCRIMINATION LAW, A WORKING PAPER, 13-14, (Comm. Print 1973); Reed, *The First Ten Years of the ADEA*, 4 OHIO N.U.L. REV. 748 (1977).

[112] 29 U.S.C. § 633(a) (Supp. V 1981) *as amended* by Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 3(a), 92 Stat. 189.

[113] 29 U.S.C. § 631(a) (Supp. V 1981) *as amended* by Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 3(a), 92 Stat. 189.

[114] 29 U.S.C. § 631(c) (Supp. V 1981) *as amended* by Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 3(a), 92 Stat. 189.