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Overqualified, Unqualified or Just Right: Thinking About Age Discrimination and Taggart v. Time

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OVERQUALIFIED, UNQUALIFIED OR JUST RIGHT: THINKING ABOUT AGE DISCRIMINATION AND *TAGGART v. TIME**

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INTRODUCTION

While the nation remains committed to equal opportunity, there is no strong consensus about what equality means. We agree that excluding African-Americans from law school because of their race is impermissible, that requiring only women to take unpaid leaves of absence from their jobs is wrong, and that expecting native Spanish speakers to converse only in English is naive. There is little agreement, however, on the advisability of public high schools for African-American boys only,[1] the wisdom of child care leave just for mothers,[2] or whether racism explains the lack of commercial endorsements for a United States Olympic champion of Japanese descent.[3] Our ambivalent feelings about these and other issues surrounding equality are reflected in many decisions involving anti-discrimination law. *Taggart v. Time*,[4] a recent age discrimination case from the United States Court of Appeals for the Second Circuit, raises the question of discrimination in the employment context, especially how to distinguish employer justifications for certain employment decisions from the claim of age discrimination itself.

Fifty-eight-year-old Thomas Taggart applied for many positions in various Time Inc. ("Time") divisions but never received

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* 924 F.2d 43 (2d Cir. 1991).

** Professor of Law, Indiana University-Bloomington. I wish to thank Patrick Baude, Terry Bethel, Mike Cavosie and Jean Robinson for their comments on various versions of this paper.

[1] *See* Garrett v. Bd. of Educ. of School Dist. of City of Detroit, 775 F. Supp. 1004 (E.D. Mich. 1991).

[2] *See* DEBORAH L. RHODE, JUSTICE AND GENDER (1989); Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986).

[3] *See* Stuart Elliott, *Company News: Breaking the Ice; from Olympic Gold to Advertising, at Last*, N.Y. TIMES, May 15, 1992, at D3.

[4] 924 F.2d 43 (2d Cir. 1991).

an offer of employment. Time explained this result by saying that Taggart was overqualified for some positions and underqualified for others, that his previous supervisor was not totally positive in his evaluation of Taggart, and that he performed poorly at some interviews. After pursuing administrative remedies, Taggart sued Time in federal district court in New York, alleging that Time's failure to hire him was a violation of the Age Discrimination in Employment Act of 1967 ("ADEA").[5] The district court granted Time's motion for summary judgment, noting that Taggart was unqualified for most of the jobs in question and that his stated overqualification for another position was a reasonable business judgment to which the court must defer.[6] The Second Circuit reversed, suggesting that " 'overqualified'. . . . may often be simply a code word for too old."[7]

Taggart v. Time is worthy of comment in this review of Second Circuit decisions for several reasons. First, while the issue of qualifications is often raised in employment discrimination cases, *Taggart* is the first court of appeals decision to grapple with the potentially discriminatory nature of excluding applicants because they are "overqualified" in the age discrimination context.[8] Second, the facts of *Taggart* expose the inadequacies of the well-known analytical framework for individual disparate treatment cases found in *McDonnell Douglas Corp. v. Green*.[9] Third, *Taggart* provides an opportunity to examine a small part of the larger question about the meaning of equality. How do we think about "overqualified" as an attribute and what does it mean in terms of discrimination? Does the conclusion raise an inference of impermissible age discrimination and if so, why? Does it suggest a sensible employer making a reasonable business decision and if so, what happens to the age claim? *Taggart* seems most obviously about claims of intentional discrimination, the core of nondiscrimination laws. The hard question always

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[5] 29 U.S.C. §§ 621-634 (1992).

[6] *Taggart*, 1990 WL 16956, at *4, *9 (S.D.N.Y. Feb. 20, 1990).

[7] 924 F.2d at 44.

[8] The court of appeals' opinion cites two district court opinions, EEOC v. District of Columbia, Dep't of Human Services, 729 F. Supp. 907 (D.D.C. 1990), *vacated*, 925 F.2d 488 (D.C. Cir. 1991), and Vaughn v. Mobil Oil Corp., 708 F. Supp. 595 (S.D.N.Y. 1989). The facts are closest to *Taggart* in the District of Columbia case; the case is different though because, contrary to *Taggart*, the employer did not concede that overqualification was the reason for rejecting the applicant.

[9] 411 U.S. 792 (1973).

has been proof; the interesting question has been what inferences are we willing to make.

This Article reviews the two decisions in *Taggart*. Next it suggests alternative readings of the opinions, considers briefly two similar, more recent, Second Circuit decisions, and finally examines the implications of *Taggart's* holding for future age discrimination cases.

II. THE *TAGGART* DECISIONS

A. *Facts*

In May 1983 Time notified Thomas Taggart and other employees that it intended to dissolve its subsidiary, Preview Subscription Television Inc. ("Preview"). Time also informed the Preview employees of its policy to "make special efforts to assist in finding other Time Inc. jobs" and that a "staff member is entitled to an interview with any department head who has an opening."[10] Taggart, who had been a print production manager at Preview, applied for more than thirty jobs. Time's employment counselors contacted fourteen managers on his behalf. Although Taggart had eight interviews, he ultimately received no job offers.

For the position of editorial production assistant, the interviewer ranked Taggart sixth out of seven. She noted that "I question whether the pressure would affect him. The schedules were no problem with him but [he] mentioned he really didn't have much of a choice. Interpreted by me as unenthusiastic about the job."[11] For another position a different interviewer concluded that Taggart "gave the impression that he did not have the stability to deal well under pressure."[12] For still other positions the district court specified that interviewers concluded that Taggart did not have the "very precise experience" needed and his follow-up letters revealed that he lacked the "attention to detail required in the print production field."[13] Finally, for a print purchaser position at Home Box Office ("HBO"), the interviewer did not consider Taggart to be a good candidate be-

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[10] 1990 WL 16956, at *1.
[11] *Id.* at *4.
[12] *Id.* at *5.
[13] *Id.*

cause "it would not interest or challenge him."[14] The district court emphasized that "the employment counselor warned Taggart before the interview that the position was 'a junior position' and not appropriate."[15]

Taggart alleged that the real reason he was denied employment was his age. He noted that Time hired at least three younger Preview employees in positions for which he applied. He also argued that he was qualified, if not overqualified, for these positions; he maintained that he was "indistinguishable from the chosen candidates except for superior qualifications and a substantial age difference."[16] Finally, he asserted that the interviews were superficial, simply a courtesy mandated by company policy, and that he was never considered on his qualifications and experience.

B. *The District Court* Taggart *Decision*

The district court rejected Taggart's claim with ease and hostility.[17] The court analyzed the facts under the analytical framework applicable to claims of individual disparate treatment first enunciated by the Supreme Court in *McDonnell Douglas v. Green*,[18] a Title VII case.[19] Under *McDonnell Douglas*, the plaintiff has the initial burden of establishing a *prima facie* case of discrimination. In age cases the plaintiff meets this burden by showing that he or she belongs to the protected age

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[14] *Id.* at *4.

[15] *Id.* It is fairly clear from the district court's reiteration of facts that Taggart became increasingly frustrated and angry with his inability to get a job at Time. His interview strategy and personal presentation deteriorated so that by the end of the process, after some 18 months of searching, he probably was no longer a desirable candidate for a position at Time.

[16] *Id.* at *3.

[17] In his brief Taggart complained about age discrimination in four departments. The district court said "[I] will review both those positions which Taggart chooses to discuss and those which he neglects to discuss, because only thus can one discern what Taggart actually did as a job applicant at Time, and thus what the managers at Time perceived. It is, after all, management's perception, and not Taggart's, that is at issue." 1990 WL 16956, at *4 (citing EEOC v. Trans World Airlines, Inc., 544 F. Supp. 1187, 1219 (S.D.N.Y. 1982). But the district court then discussed only the four departments.

[18] 411 U.S. 792 (1973).

[19] Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified at 42 U.S.C. §§ 2000e-2000e-17 (1992)). Claims of age discrimination are analyzed in the same way as Title VII claims. MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW 517 (1988); Lorillard v. Pons, 434 U.S. 575 (1978).

group; that the plaintiff applied for and was qualified for the position sought; that the plaintiff was not hired despite his or her qualifications; and that the position was ultimately filled by a younger person.[20] The plaintiff who meets this burden establishes a mandatory presumption of discrimination,[21] and the burden then shifts to the defendant "to articulate a 'legitimate, nondiscriminatory reason' for its action."[22] If the defendant meets this burden, the presumption drops from the case, but the plaintiff may still prevail by showing that the proffered reasons were not the defendant's true reasons for its action. The plaintiff may do so either "directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[23]

The district court concluded that Taggart failed to state a *prima facie* case of discrimination because he had failed to show either that he was "appropriately qualified for many of the positions or that the evidence raises an inference of discrimination."[24] The district court also stated that "the defendant has satisfied its burden to articulate legitimate, non-age-related reasons for refusing to rehire" Taggart.[25] "Taggart has not" continued the court, "rebutted those legitimate reasons by 'solid circumstantial evidence' showing them to be mere pretexts."[26]

Taggart had contended that summary judgment in favor of the defendant was inappropriate because claims of intentional age discrimination almost always raise factual issues. The rules of civil procedure allow summary judgment only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law."[27] A court must resolve all ambiguities and draw all reasonable inferences in

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[20] 1990 WL 16956, at *2. *See also* Mack A. Player, *Proof of Disparate Treatment Under the Age Discrimination in Employment Act: Variations on a Title VII Theme*, 17 GA. L. REV. 621, 634-44 (1983) (illustrating different approaches to applying *McDonnell Douglas* in age discrimination cases).

[21] Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 n.7 (1981).

[22] Taggart v. Time Inc., No. 87 Civ. 3408, 1990 WL 16956 at *2 (S.D.N.Y Feb. 20, 1990)(citing McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973)).

[23] *Burdine*, 450 U.S. at 256.

[24] 1990 WL 16956, at *9.

[25] *Id.*

[26] *Id.*

[27] FED. R. CIV. P. 56(c).

favor of the nonmoving party. Still, courts grant summary judgments unless the nonmoving party sets "forth specific facts showing that there is a genuine issue for trial."[28] Even when there are factual disputes, a party is entitled to summary judgment if he or she shows that the nonmoving party, when also bearing the burden of proof at trial, does not have sufficient evidence to support an essential element of the latter's claim.[29] In *Taggart* the question was whether a reasonable jury[30] could infer intentional discrimination from the facts as Taggart and Time presented them. The court's grant of summary judgment turned on its finding that, because Time's decision was a reasonable business judgment, a reasonable jury could not find or infer intentional discrimination.[31]

The court agreed with Time that, for some jobs, Taggart was unqualified. With respect to those jobs for which Taggart was found overqualified, for example the print purchaser position with HBO, the court said it was "reasonable for an employer to reject an applicant whose qualifications are excessive, such that the job would fail to challenge him and would most likely encourage him to continue to seek other employment."[32] The court bolstered its conclusion that Time had not discriminated against Taggart on the basis of age with two additional observations: the court noted that Time had originally hired Taggart at the age of fifty-eight[33] and that Taggart acknowl-

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[28] FED. R. CIV. P. 56(e).

[29] Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986); *see also* Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). Lower courts took these 1986 cases as a trilogy to suggest that they should grant more summary judgments than before. For commentary on this view, see Daniel P. Collins, *Summary Judgment and Circumstantial Evidence*, 40 STAN. L. REV. 491 (1988); Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards*, 63 NOTRE DAME L. REV. 770 (1988); D. Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 BROOK. L. REV. 35 (1988).

[30] A major difference between discrimination claims under the ADEA and Title VII is that parties have always been entitled to a jury under the ADEA, 29 U.S.C. § 626(c)(2) (1992), but parties have been entitled to a jury under Title VII only since the passage of the Civil Rights Act of 1991 § 102(c), Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 1981 (1992)).

[31] For a thorough discussion of the effects of summary judgment rules in ADEA cases, see Gale Keane Busemeyer, *Summary Judgment and the ADEA Claimant: Problems and Patterns of Proof*, 21 CONN. L. REV. 99 (1988).

[32] 1990 WL 16956, at *8.

[33] *Id.*

edged "no one at Time ever mentioned his age."[34]

C. *The Second Circuit* Taggart *Decision*

The Second Circuit affirmed the lower court's findings as to the three positions where Taggart was unqualified and accepted the lower court's analytical frameworks for individual disparate treatment cases and summary judgment motions in discrimination cases. But the court of appeals disagreed with the trial court regarding the print purchaser position at HBO, where Time had stated that Taggart was not hired because he was "overqualified."[35] First, the court of appeals rejected Time's argument that "overqualified" can mean "unqualified."[36] Noting that overqualified is defined as having more education, training, or experience than a job calls for, the court of appeals said that it was a fallacy to conclude an overqualified person is an unqualified one.[37]

The court of appeals also explained that in an age discrimination case, overqualified may be simply "a euphemism to mask the real reason for refusal [to hire], namely, [that] in the eyes of the employer the applicant is too old."[38] "How," asked the court, "can a person overqualified by experience and training be turned down for a position given to a younger person deemed better qualified?"[39] The Second Circuit rejected the trial court's conclusion that it was reasonable to exclude an applicant whose qualifications are excessive because the job would not challenge him and therefore he might continue to seek other employment. While acknowledging that this logic might be reasonable when applied to younger employees, the Second Circuit concluded that the trial court's rationale did "not comfortably fit those in the age group the statute protect[ed]."[40] The court observed that an older employee is "quite unlikely to continue to seek other mostly non-existent employment opportunities."[41]

The Second Circuit concluded that "refusing to hire Tag-

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[34] *Id.* at *3.
[35] 924 F.2d 43, 47 (2d Cir. 1991).
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.* at 47-48.
[41] *Id.* at 48.

gart for the sole reason that he was overqualified refutes Time's assertion that it was not discriminating on the basis of age."[42] Because Taggart met the four prongs necessary for establishing a *prima facie* case of age discrimination for the HBO position,[43] a reasonable juror could infer discriminatory motive on the part of Time based on "a finding that the reason proffered was pretextual and unworthy of credence."[44]

III. Analysis

The main problem with both the district and circuit court opinions in *Taggart v. Time* is that the analytical basis of their respective holdings is unclear. While it is obvious that the district court thought the employer had not discriminated on the basis of age, and it is equally clear that the court of appeals was suspicious that it had, the opinions are confusing with respect to the relevance of Taggart's overqualification, Time's justifications and the *McDonnell Douglas*' pretext stage of analysis. Is "overqualified" always a proxy for age? Is rejecting an overqualified candidate inherently reasonable? Is something else going on? The courts' conclusory and incomplete analyses are part of the problem in understanding the implications of *Taggart*. But another part of the problem is the analytical framework itself.

A. *Pretext Analysis*

Taggart's claim was that it was inappropriate for Time to exclude him from consideration for various positions because he was a highly qualified individual. He apparently saw his claim as one of pretext.[45] According to his view, it was unreasonable to reject an applicant whose qualifications were at least sufficient, even if they were excessive. So, "by showing that the employer's proffered explanation is unworthy of credence,"[46] Taggart had shown indirectly that "the proffered reason was not the true reason for the employment decision."[47]

The district court rejected this pretext argument because

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[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] 1990 WL 16956, at *4.
[46] *Burdine*, 450 U.S. at 256.
[47] *Id.*

Taggart had not "rebutted those legitimate reasons by 'solid circumstantial evidence' showing them to be mere pretexts."[48] But once the district court had accepted the reasons as "legitimate," it was unclear what kind of "solid circumstantial" evidence Taggart could offer. The district court disagreed with Taggart's characterization that Time's behavior was unreasonable. Instead, the court accepted Time's rationale that the job would fail to challenge him and that he would thus continue to seek other employment. In contrast, the Second Circuit accepted Taggart's characterization: it is unlikely that an older employee will continue to seek jobs, in part because there are not many job opportunities for an older employee. Therefore, a reasonable employer would not ignore applicants thought to be overqualified. Thus, Time's stated reason was unworthy of belief and must be pretextual.[49]

The court of appeals' analysis was not based on pretext alone. After noting that it was unlikely for an older employee to continue to seek work, the court stated that "refusing to hire Taggart for the sole reason that he was overqualified refutes Time's assertion that it was not discriminating on the basis of age."[50] In effect, the court was saying that Time's argument refuted its own argument that "overqualified" is not age discrimination.

The Second Circuit continued:

> Taggart met the four prongs for presenting a *prima facie* case of age discrimination for the HBO position. This [*prima facie* case] constitutes circumstances from which a reasonable juror could infer discriminatory animus on the part of Time based upon a finding that the reason proffered was pretextual and unworthy of credence.[51]

This reasoning makes it sound as if Taggart's *prima facie* case was also his case for pretext. The court probably meant that there was sufficient evidence for a jury, considering the evidence together, to find a violation of the ADEA.[52]

If the issue in *Taggart* is pretext, however inelegantly phrased, the outcome is a toss-up. The question is whom does

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[48] 1990 WL 16956, at *9.

[49] 924 F.2d 43, 47-48 (2d Cir. 1991).

[50] *Id.* at 48.

[51] *Id.*

[52] 29 U.S.C. §§ 621-634 (1992).

the jury believe. What inferences does the fact finder draw from the evidence? At a minimum, this is a question for the jury in age discrimination cases.

B. *Qualifications and the* McDonnell Douglas *Analysis*

Another way to think about Taggart's claim is to tackle the issue of qualifications for various jobs at Time. Both courts concluded that Taggart was not qualified for most of the jobs.[53] They disagreed, however, about the HBO position. Time admitted "that its sole reason for refusing to hire Taggart for this position was because he was overqualified" but argued that being overqualified meant that Taggart was unqualified.[54] Again, the district court agreed with Time's characterization, concluding that Taggart "failed to state a *prima facie* case of discrimination because he has failed to show . . . [that] he was appropriately qualified for many of the positions."[55] The district court then held that Time "satisfied its burden to articulate legitimate, non-age-related reasons for refusing to rehire" Taggart,[56] suggesting that even if Taggart had met his *prima facie* burden, Time had adequately rebutted it. Not surprisingly, the court of appeals rejected the notion that overqualified means unqualified as a "non sequitur."[57]

The problem with sorting out whether the district court or the Second Circuit has the better view in this linguistic argument is that the analysis is premised on the *McDonnell Douglas* analytical framework. Both courts accepted the utility of *McDonnell Douglas* in deciding claims like that of Taggart.[58] In fact, *Taggart v. Time* is an excellent illustration of the limitations of *McDonnell Douglas*. In *McDonnell Douglas* Percy Green, a black mechanic, was laid off from McDonnell Douglas Corporation. Protesting his discharge and the general hiring practices of the company, Green participated in several unlawful demonstrations against McDonnell Douglas. Several weeks later, when McDonnell Douglas advertised for mechanics, Green ap-

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[53] 1990 WL 16956, at *8; 924 F.2d at 46.
[54] 924 F.2d at 47.
[55] 1990 WL 16956, at *9.
[56] *Id.*
[57] 924 F.2d at 47.
[58] 1990 WL 16956, at *2; 924 F.2d at 46.

plied but was rejected. Green claimed that the corporation refused to hire him because of his race and his persistent involvement in the civil rights movement. The company denied discrimination of any kind, asserting that its failure to hire Green was based upon and justified by his participation in the unlawful conduct against it.[59] In the Supreme Court's first encounter with this kind of case, the Court set out the now well-known analytical framework for individual disparate treatment cases.

To establish a *prima facie* case under *McDonnell Douglas*, the plaintiff must show that "he applied and was qualified for a job for which the employer was seeking applicants."[60] The Court later described the rationale for these elements of the *McDonnell Douglas prima facie* test:

> [*McDonnell Douglas*] does demand that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought. Elimination of these reasons for the refusal to hire is sufficient, absent other explanation, to create an inference that the decision was a discriminatory one.[61]

Much attention was once addressed to the question of whether the inference suggested by *McDonnell Douglas* was reasonable or consistent with Title VII.[62] Whatever the merits of that debate, the specifics of the *McDonnell Douglas* analytical framework are not helpful when the applicant's qualifications are in question. *McDonnell Douglas* asks the wrong questions when the plaintiff wants to argue that the employer's criteria are too high, too biased, or too specific. *McDonnell Douglas* is misleading when the employer wants to support its rejection of an applicant by defending sex or age-specific criteria. Similarly, the four-

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[59] 411 U.S. at 796.

[60] 411 U.S. at 802.

[61] Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977).

[62] *See, e.g.*, Elizabeth Bartholet, *Proof of Discriminatory Intent Under Title VII:* United States Postal Service Board of Governors v. Aikens, 70 CAL. L. REV. 1201 (1982); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Hannah A. Furnish, *Formalistic Solutions to Complex Problems: The Supreme Court's Analysis of Individual Disparate Treatment Cases Under Title VII*, 6 INDUS. REL. L.J. 353 (1984); D. Don Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather Than Intent*, 60 S. CAL. L. REV. 733 (1987).

step *McDonnell Douglas prima facie* case, in which the plaintiff must prove he or she is qualified, should not be followed when the relevant issue is what to make of the assertion that the applicant is *overqualified.*

Rejecting the specific framework of *McDonnell Douglas* does not mean Taggart cannot raise a claim of individual disparate treatment. Nor does rejecting *McDonnell Douglas* mean that the employer cannot define the qualities it seeks in its employees. In *McDonnell Douglas* itself the Court cautioned that its specification of the *prima facie* case was not necessarily applicable in every respect to differing factual situations.[63]

Subsequently, in *Texas Department of Community Affairs v. Burdine*,[64] involving the failure to promote and later discharge of a woman in favor of a man she supervised, the Court said that the allocation of burdens and the creation of a presumption by the establishment of a *prima facie* case was "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination."[65] Finally, in *United States Postal Serv. Bd. of Governors v. Aikens*,[66] where a black male challenged the postal service's failure to promote him, the Court cautioned against reifying the analysis in *McDonnell Douglas* and losing sight of the ultimate issue of whether the employer had intentionally discriminated against the applicant.

In an individual disparate treatment case, the simple purpose of the *prima facie* case is to raise an inference of unlawful discrimination by eliminating common nondiscriminatory reasons for the employer's action.[67] With the plaintiff's burden thus understood, discrimination law allows Taggart to make a claim of individual disparate treatment by showing that he applied for an available position, but was rejected under circumstances that

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[63] 411 U.S. at 802 n.13.

[64] 450 U.S. 248, 255 (1981).

[65] 450 U.S. at 255 n.8.

[66] 460 U.S. 711, 715 (1983). *See also* Bazemore v. Friday, 478 U.S. 385 (1986). In Mesnick v. General Electric Co., 950 F.2d 816 (1st Cir. 1991), the court ruled that the burden-shifting analytical framework in ADEA actions becomes inconsequential once the employee has made a *prima facie* case and the employer has proffered a legitimate, nondiscriminatory justification. At that point, according to the court, the trial court's focus in deciding a summary judgment motion must be on the ultimate issues of pretext and discriminatory animus rather than on the burden-shifting framework.

[67] *See* Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977); Furnco Constr. Co. v. Waters, 438 U.S. 567, 577 (1978).

give rise to an inference of unlawful discrimination. Although the district court recounted the "qualified" language in *McDonnell Douglas*, it hinted at this other possibility when it noted that Taggart had failed to state a *prima facie* case because he had failed to show "that the evidence raises an inference of discrimination."[68]

Similarly, the Second Circuit repeated the well-known test of *McDonnell Douglas* but also talked more generally about inferences of intentional discrimination.[69] If the issue in *Taggart* is inferences, the outcome, like pretext, turns on what inferences we are willing to make and, more importantly in an age discrimination case, whether the judge is willing to let a jury draw such inferences.

C. *Proxies and Age-Based Assumptions*

Yet another way to think about Taggart's claim is that overqualification is a proxy for age and thus impermissible unless justified. At one point in the Second Circuit's opinion, the panel seemed to adopt this view by noting that "[d]enying employment to an older job applicant because he or she has too much experience, training or education is simply to employ a euphemism to mask the real reason for refusal, namely, in the eyes of the employer the applicant is too old."[70] In contrast, the district court is clearly not thinking about this proxy possibility when it reasons "[e]ven if Taggart can show that he was qualified and that a younger individual was hired instead of him, a court cannot infer discriminatory intent so long as the employer can show that its decision was based on an honest evaluation of the candidates' qualifications."[71]

An employer evaluation that relies on an impermissible basis is, even if done in good faith, impermissible. For example, an employer may not refuse to hire women even though it honestly believes that its customers would not respond well to a female employee.[72] The question raised by this third view of Taggart's claim is whether rejecting applicants because they are overquali-

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[68] 1990 WL 16956, at *9.
[69] 924 F.2d at 46.
[70] *Id.* at 47.
[71] 1990 WL 16956, at *8.
[72] Dothard v. Rawlinson, 433 U.S. 321 (1977).

fied reflects age-based assumptions and *is* therefore discriminatory. The district court in *Taggart* concluded that "[i]t is a reasonable business judgment for an employer to decide not to hire a prospective employee because that person would be bored in that job, or would leave upon finding a better job, or both."[73] To the extent this judgment is in fact based on age, it is still impermissible, no matter how reasonable, unless justified in terms of a statutory defense. The district court said that these judgments may not be "second-guessed so long as their reasons were nondiscriminatory."[74]

There is reason to be suspicious about a policy that excludes "overqualified" people. First, employers define "overqualified" primarily in terms of age or in terms of age-related characteristics, such as experience or higher pay. Second is the ease with which an employer may determine an applicant is overqualified by glancing briefly at the job opening and announcing that it is a "junior" position and "not appropriate" for the applicant.[75] What does "not appropriate" mean?[76] The employer says the job "would not interest or challenge him."[77] But interest and challenge are not necessarily ways to measure qualifications. Moreover, there are many jobs that do not interest or challenge employees; employers may not expect or care whether employees are interested or challenged. Just as employers do not choose among candidates on the basis of who needs a job, it is doubtful that employers choose candidates on the basis of whether they would be challenged on the job. If so, employers would choose the most marginally qualified person because he or she would be the most challenged.

The notion that overqualified means unqualified may be shorthand for saying the "super-qualified" person may not be able (or, more likely, willing) to do the job. If overqualified is linked with age, then one should test the "unable" or "unwilling" assumption specifically in terms of the plaintiff. Part of the tradition of employment discrimination laws is to test such assumptions directly.[78] Taking age discrimination seriously re-

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[73] 1990 WL 16956, at *3.

[74] *Id.*

[75] *Id.* at *4.

[76] *Id.*

[77] *Id.*

[78] *See* Nadine Taub, *Keeping Women in Their Place: Stereotyping Per Se as a*

quires asking directly why a particular "overqualified" applicant is unable (or unwilling) to do the job rather than assuming that we know the answer.[79]

There might be other reasons for employers' reliance on the "unable" assumption. Describing jobs as inappropriate without regard to the applicant's ability to do the work suggests a status hierarchy of jobs and a proper stratification of job occupants.[80] The overqualified employee may be able and willing to do the work but the employer may not want the "overqualified" applicant in such a position. Perhaps the employer is worried that the "overqualified" applicant will challenge standard operating procedure. Perhaps the applicant will not be a "team" player. Or perhaps the applicant will have the knowledge to expose problems management would rather ignore. If employers have legitimate work-related concerns, they should test them directly rather than rely on inexact age-based assumptions.

Another reason employers may exclude "overqualified" employees is that other employees may be uncomfortable around them. Again, this concern is premised on a proper stratification of people and jobs. When I entered university teaching, I participated in a university sponsored program for new teachers. The university arranged lunches with groups of eight faculty members from different disciplines who were all new teachers. At my table were an assortment of twenty-five to thirty-five-year-olds and one clearly senior man, by which I mean he was over sixty years old. Everyone assumed he was the university's convener. When he introduced himself as a new teacher, we were all embarrassed. Again, part of the tradition of employment discrimination laws is to ignore co-worker or customer preferences in deciding whether it is reasonable to exclude applicants on the basis of race, gender or age.[81]

Form of Discrimination, 21 B.C. L. REV. 345 (1980); Dothard v. Rawlinson, 433 U.S. 321, 332-33 (1977).

[79] For a subsequent Second Circuit age discrimination case that does so, see Bay v. Times Mirror Magazine, Inc. 936 F.2d 112, 118 (2d Cir. 1991); *see infra* notes 101-09 and accompanying text.

[80] *See* ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION 263 (1977). For a discussion of how these perceptions may explain sex segregation of the job, see Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretation of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1824-39 (1990).

[81] *See, e.g.*, PLAYER, *supra* note 19, at 289; EEOC *Guidelines on Discrimination Be-*

IV. THE IMPLICATIONS OF *TAGGART*

The implications of *Taggart*, like the decisions themselves, are unclear. In part, the problem lies with the opinions' failure to tell us how to think about age and overqualification. Subsequent cases in the Second Circuit have not clarified the analytical picture.

A. Binder v. Long Island Lighting Company

In *Binder v. Long Island Lighting Company*[82] the plaintiff claimed that he was forced to accept early retirement because of his age. While the employer, the Long Island Lighting Company ("LILCO"), conceded that his retirement was involuntary, it denied that age was a factor.[83] Instead, the employer claimed that Binder was let go because his position was eliminated and attempts "to locate other positions" for him at LILCO were unsuccessful.[84] The Vice President for Human Resources said that he was unable to find "another position within the company suitable for someone with Binder's qualifications and experience."[85] Like the employer in *Taggart*, this employer looked for jobs for Binder only "within the salary and grade level Mr. Binder was at and requiring many, if not all, the technical skills he possessed."[86] LILCO worried that if Binder were underemployed he would become frustrated and suffer from low morale.[87] The trial court granted the employer's motion for summary judgment;[88] the court of appeals reversed, relying heavily on its earlier decision in *Taggart v. Time*.[89]

But like its *Taggart* decision, the Second Circuit's opinion in *Binder* is unclear about its theoretical basis. First, the court of appeals concluded that the employer's explanation for not

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cause of Sex, 29 C.F.R. § 1604.2 (a)(1)(iii) (1991) (refusal to hire because of the preferences of coworkers, employers, clients, or customers); Stephen F. Befort, *BFOQ Revisited:* Johnson Controls *Halts the Expansion of the Defense to Intentional Sex Discrimination*, 52 OHIO ST. L.J. 5, 14-15 (1991).

[82] 933 F.2d 187 (2d Cir. 1991).

[83] *Id.* at 191.

[84] *Id.* at 189.

[85] *Id.* at 190.

[86] *Id.*

[87] *Id.*

[88] 1990 WL 137403, at *5 (E.D.N.Y. July 26, 1990).

[89] 933 F.2d 187, 192-93 (2d Cir. 1991).

finding Binder another position in the company because the plaintiff was "overqualified" was insufficient "as a matter of law to rebut Binder's *prima facie* case."[90] This conclusion suggests that the decision implicated age-based assumptions and thus was intentional discrimination based on age. Alternatively, the court of appeals said:

> [A]lthough a trier would be free to conclude that [the employer] was acting out of a genuine desire to avoid placing Binder in a job in which he might be frustrated, exhibit low morale and perform poorly, it would also be free to conclude that this explanation was pretextual.[91]

This language puts the issue as pretext: does the trier of fact believe that the employer's stated reason is unlikely to be true so that age is the more likely explanation for the employer's action? Yet framing the issue in this way neglects the problem that if the employment decision relies on aged-based assumptions, it should not matter that the employer may have had a genuine desire to avoid some other consequence.

The ambiguity in the court of appeals' opinion continues with the following passage:

> The ADEA does not forbid employers from adopting policies against "underemploying" persons in certain positions so long as those policies are adopted in good faith and are applied evenhandedly. However, such policies may also serve as a mask for age discrimination, and the issues of good faith and evenhanded application cannot be resolved on a motion for summary judgment on the present record.[92]

While the danger of "underemploying" may be that it is used selectively or that it is adopted for impermissible motives, the more likely challenge, at least in these cases, is that "underemployment" policies or exclusion of applicants because they are "overqualified" is inevitably tied to age.[93]

This analysis is reminiscent of the doctrinal confusion in

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[90] 933 F.2d at 192.

[91] *Id.* at 193.

[92] *Id.*

[93] Whatever the confusion here, there is even less guidance from the district court. Most of the opinion is written in terms of summary judgment rules and a review of the affidavits to determine whether they contain evidence supporting the plaintiff. There is no acknowledgment of the kind of evidence the court looked for in the affidavits. Moreover, there is no mention of "overqualified" in the lower court opinion but rather only that the decision is based on the view that an employer can eliminate any job it chooses.

many fetal protection cases under Title VII that involved employer policies to exclude all fertile women from certain jobs because of exposure to toxic substances.[94] In *United Auto Workers v. Johnson Controls Inc.*[95] the trial court first addressed the question of what justification standard was applicable rather than the more preliminary question of what discrimination claim the plaintiffs had made. The trial court said that "because of the fetuses' possibility of unknown existence to the mother and the severe risk of harm that may occur if exposed to lead, the fetal protection policy is not facially discriminatory."[96] Similarly, Judge Altimari, in his reluctant concurrence in *Binder*, emphasized that "overqualified" was not a buzzword for "too old" because the employer may have legitimate reasons for declining to employ overqualified individuals.[97] The dissent continued that the court should presume good faith use of "overqualified" unless circumstances give rise to an inference of age discrimination.[98] But the plaintiffs, Taggart and Binder, argued that use of "overqualified" was the very evidence that gave rise to the inference of discrimination.

Another reason it is hard to know what to make of *Taggart* is that the issue seems unlikely to arise very often. In *Taggart* and *Binder* the employers agreed that overqualification was the only reason for their actions.[99] Given these decisions, it is unlikely that employers will continue to ground employment decisions on overqualification or that it will be burdensome to avoid doing so.[100] Employers can ask employees if they want the lower-

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[94] *See* Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984); Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1981) (rejecting defendant's argument that *Burdine* should apply but using disparate impact analysis to test overt gender exclusion); *see also* Mary E. Becker, *From* Muller v. Oregon *to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219 (1986); Wendy W. Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals with Title VII*, 69 GEO. L.J. 641 (1981).

[95] 680 F. Supp. 309 (E.D. Wisc. 1988), *aff'd en banc*, 886 F.2d 871 (7th Cir. 1989), *rev'd*, 111 S. Ct. 1196 (1991).

[96] 680 F. Supp. at 316.

[97] 933 F.2d at 194. If "overqualified" is a buzzword for too old, the fact that the employer may have a legitimate reason is irrelevant unless the "legitimate reason" rises to the level of a statutory defense.

[98] *Id.*

[99] *Taggart*, 924 F.2d 43, 47 (2d Cir. 1991); *Binder*, 933 F.2d at 192.

[100] For a contrary view, see KANTER, *supra* note 80, at 304; *Binder*, 933 F.2d at 194-95 (Altimari, J., dissenting).

paying, lower-status job without presuming to know what the applicants will do. To the extent that applicants are unhappy and do not perform well in their new jobs, employers can terminate them for job-related reasons rather than for age-based assumptions.

B. Bay v. Times Mirror Magazine, Inc.

Early critics of the *Taggart* decision called it "shocking" because observers read the case to hold that an employer commits age discrimination if it refuses to hire, because of overqualification, anyone in the protected group.[101] Another recent decision of the Second Circuit, *Bay v. Times Mirror Magazines, Inc.*,[102] suggests that such a concern may be misplaced. Bay claimed that after Times Mirror Magazines, Inc. ("Times Mirror") purchased *Field & Stream* it deliberately eliminated the magazine's most senior, highly compensated employees, including Bay. Times Mirror restructured the magazines with the inevitable result that the once autonomous publishers of individual magazines, such as Bay of *Field & Stream*, "suddenly found themselves with greatly diminished responsibility, authority, and staff."[103] Before the acquisition Bay had been responsible for virtually all of *Field & Stream*'s business affairs; after the acquisition he had real authority over only advertising.[104]

Bay was fired from his downgraded position, which was then filled by a thirty-five-year-old at a much lower salary.[105] First, Bay claimed that the employer's actions were part of a deliberate effort to replace older, higher paid employees with younger, less costly employees.[106] Second, Bay argued that he was rejected for the downgraded publisher job because he was "overqualified," thus implicating *Taggart*.[107] Times Mirror replied

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[101] William L. Kandel, *"Overqualified" or "Appropriately Qualified": New ADEA Risks*, 17 EMPLOYEE REL. L.J. 287, 304 (1991); Mitchell H. Rubenstein, *Refusal to Hire Overqualified Applicants May Constitute Age Discrimination*, N.Y. L.J., May 17, 1991, at 1.

[102] 936 F.2d 112 (2d Cir. 1991). *Bay* is also interesting because the panel included Judge Michael Mukasey, the district court judge (sitting by designation) in Taggart v. Time, and Judge Ralph Winter, the author of the panel opinion in *Binder*.

[103] *Id.* at 114.

[104] *Id.*

[105] *Id.* at 116.

[106] *Id.*

[107] *Id.* at 118.

that its decisions were based on Bay's resistance to the restructuring program and his stated dissatification with the fact that he had to report through others.[108] The court of appeals affirmed the district court's grant of summary judgment for the employer.[109] Aptly rejecting the analogy to *Taggart*, the Second Circuit concluded that Bay was in fact dissatisfied and not a successful worker because of that dissatisfaction.[110]

CONCLUSION

Seemingly, *Taggart* is a simple case. The decisions attracted public attention because they involved a standard management technique that employers have relied on for years. In employment discrimination law *Taggart* is important because it is the first court of appeals decision to confront the issue of excluding applicants because they are "overqualified." The decisions are also symptomatic of fundamental doctrinal confusion in today's discrimination cases and an illustration of the inherent limitations in the *McDonnell Douglas* analytical framework.

Although *Taggart* confronts the issue of excluding applicants because they are "overqualified," the opinion is ultimately unsatisfying. The issue of qualifications generally and overqualified candidates specifically are important policy questions even apart from age. But the *Taggart* courts do not discuss them. Most striking is the question of paternalism, seen clearly in *Binder* where the employer does not even tell Binder there is no "suitable" job, let alone talk to him about a lower-paying, lower-status job.[111] Also, there is the sense that when employers say a person would not be interested or challenged by a job, the employers are really saying that the person would not be sufficiently enthusiastic or grateful. The consequence of decisions like *Taggart* is that important policy questions are decided indirectly rather than in a focused way.

Taggart is also important because it illustrates situations where the claim of discrimination is mixed up with the justifica-

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[108] *Id.* at 116.

[109] *Id.* at 118.

[110] *Id.* Another way to read *Bay* is as addressing the controversial issue of whether firing high-paid staff is a violation of the ADEA. *See* Graefenhain v. Pabst Brewing Co., 827 F.2d 13 (7th Cir. 1987); Metz v. Transit Mix, 828 F.2d 1202 (7th Cir. 1987).

[111] 933 F.2d 187, 190 (2d Cir. 1991).

tion and where an employer's reason for a particular action should not be translated into an employee qualification. Despite the parallels between the ADEA and Title VII, age discrimination is different from discrimination on the basis of race and gender.[112] Under Title VII consideration of race is never permissible, except under carefully defined affirmative action programs;[113] consideration of gender is generally impermissible, but courts continue to be troubled by differences between men and women or among women themselves and whether Title VII allows employers to take such differences into account.[114] But age, unlike race or gender, is not always irrelevant to employment decisions in the same way. Age is relevant to experience, health, wisdom and longevity. Given the chance, everyone will be in the protected age category, whereas men will never become women and whites will never become blacks. Yet, Congress enacted the ADEA because many employers believed there were good business reasons for eliminating or excluding older workers.[115] Perhaps we need to think anew about discrimination, its evil, and its remedy. Understanding *Taggart* is one small step.

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[112] 29 U.S.C. §§ 621-634 (1992).

[113] United Steelworkers of America v. Weber, 443 U.S. 193 (1979).

[114] *See* Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989); Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

[115] Graefenhain v. Pabst Brewing Co., 827 F.2d 13, 21 n.8 (7th Cir. 1987). *See also* PLAYER, *supra* note 19, at 658. *See generally* EEOC, LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT (1981).