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Stacey Crawshaw-Lewis

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Abstract: Congress passed the Age Discrimination in Employment Act (ADEA) to prohibit discrimination against older workers. The legislative history of the ADEA shows that Congress recognized that this discrimination most commonly stemmed from inaccurate stereotypes about the older worker. A review of ADEA cases decided between 1984 and 1995 demonstrates the frequent incidence of cases in which older workers allegedly were fired or not hired because of the higher salaries typically earned by these relatively experienced workers. This review also reveals that, applying an unduly mechanical version of the *McDonnell Douglas/Burdine* test, courts did not effectively identify (1) employment actions purportedly based on salary where salary served as a pretext for age animus and (2) actions in fact based on salary but infected with illegal age stereotyping. This Comment proposes adapting the *McDonnell Douglas/Burdine* test to more accurately evaluate these cases.

Older workers face discrimination as applicants and as employees.[1] This discrimination stems from age stereotypes and, less typically, from animus.[2] Persistent stereotypes discount the productivity and competence of older workers.[3] Studies show that older workers are, however, at least as productive as younger workers.[4] Moreover, aging affects individual

1. *See* U.S. Dep't of Labor, *Report of the Secretary of Labor: Labor Market Problems of Older Workers* (noting difficulties involved in measuring age discrimination but concluding that existence of age discrimination is accepted), in *Growing Old in America* 257, 270–73 (Beth B. Hess & Elizabeth W. Markson eds., 1991); Benson Rosen & Thomas H. Jerdee, *Older Employees: New Roles for Valued Resources* 35–36 (1985) (finding that managers consistently rated otherwise identical older and younger workers differently). The number of ADEA charges filed with the EEOC also provides some measure of the incidence of age discrimination. U.S. Gen. Accounting Office, *EEOC's Expanding Workload: Increases in Age Discrimination and Other Charges Call for a New Approach* 10 (1994) (reporting that the EEOC received 19,880 ADEA charges in 1993).

2. *See* U.S. Dep't of Labor, *The Older American Worker: Age Discrimination in Employment* 5 (1965) [hereinafter *Secretary's Report*], *reprinted in* EEOC, *Legislative History of the Age Discrimination in Employment Act* 19, 22 (1981) [hereinafter *Legislative History*].

3. V. Jane Knox et al., *The Age Group Evaluation and Description (AGED) Inventory: A New Instrument for Assessing Stereotypes of and Attitudes Towards Age Groups*, 40 Int'l J. Aging & Hum. Dev. 31, 35, 44 (1995) (proposing new assessment tool to measure attitudes and stereotypes about age and reporting that perceived vitality and positiveness decrease with age); Mary E. Kite & Blair T. Johnson, *Attitudes Towards Older and Younger Adults: A Meta-Analysis*, 3 Psychol. & Aging 233, 240 (1988) (finding relatively negative attitudes, particularly concerning competence, toward older workers).

4. Glenn M. McEvoy & Wayne F. Cascio, *Cumulative Evidence of the Relationship Between Employee Age and Job Performance*, 74 J. Applied Psychol. 11, 14 (1989) (concluding age and job performance generally unrelated); David A. Waldman & Bruce J. Avolio, *A Meta-Analysis of Age Differences in Job Performance*, 71 J. Applied Psychol. 33, 36 (1986) (finding widespread belief that productivity declines with age unsupported by objective evidence). More-objective productivity

employees differently.[5] Congress passed the Age Discrimination in Employment Act (ADEA)[6] in 1967 to bar employment decisions based either on animus or these stereotypes.[7]

Employment decisions based on the relatively high salaries of older workers may mask employer animus towards older workers or involve stereotypical assumptions about the productivity of older workers. A review of ADEA cases decided between 1984 and 1995 demonstrates the striking number of cases in which an older worker allegedly was fired or not hired because of salary concerns.[8] In most of these cases, however, the district court dismissed the claim on summary judgment. This result has been particularly evident since the U.S. Supreme Court's decision in *Hazen Paper Co. v. Biggins*.[9]

In *Biggins*, a unanimous Court both strengthened and weakened the basis for age discrimination claims based on salary. The Court strengthened these claims by explicitly recognizing the ADEA's concern with age stereotyping.[10] But, by finding age and seniority analytically distinct, the Court made age discrimination claims based on salary more difficult to prove insofar as these claims depend on the link between age and seniority and then between

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indices show performance may increase with age (perhaps as a result of increases in experience and judgment) whereas indices based on supervisory ratings show a small decline in performance with age, perhaps reflecting rater bias. *Id.*

5. AARP, *Valuing Older Workers: A Study of Costs and Productivity* 34 (1995) (reporting that job performance at all ages varies by individual more than by age group); Waldman & Avolio, *supra* note 4, at 37 (concluding that chronological age cannot account for significant differences between individual's job performance).

6. Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621–634 (1994)). For a detailed discussion of the provisions of the ADEA, see *infra* notes 18–23 and accompanying text.

7. *See* 29 U.S.C. § 621(b) (requiring that employers "promote employment of older persons based on their ability rather than age"); 113 Cong. Rec. 34,747 (remarks of Rep. Dent) ("The bill recognizes two distinct types of unfair discrimination based on age: First, the discrimination which is the result of misunderstanding of the relationship of age to usefulness; and second, the discrimination which is a result of a deliberate disregard of a worker's value solely because of age."); *see also* Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993) (stating that Congress passed ADEA due to concern "that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes").

8. *See infra* note 95. For clarity, this Comment focuses on actions based on salary although salary or wage is just one component of worker compensation. U.S. Dept. of Labor, *Employer Costs for Employee Compensation: March 1993*, 45 Compensation & Working Conditions 1 (1993). Salary or wage is the largest component of compensation, representing 71.3% of total compensation. *Id.* at 21.

9. 507 U.S. 604 (1993).

10. *Id.* at 610–11.

seniority and salary. The Court held that termination based on pension status, at least where this status depended on years of service and not directly on age, was not necessarily age-based and instructed lower courts to look for evidence that age actually motivated the decision.[11]

To determine whether age "actually" motivated a decision purportedly based on salary, courts overwhelmingly have used the *McDonnell Douglas*[12]*/Burdine*[13] test. Applying an unduly mechanical version of this test, however, courts have not rigorously reviewed employment actions based on salary for evidence of animus or stereotyping. For example, by failing to inquire whether employers considered wage reductions instead of termination, whether the employer took other cost-savings steps affecting younger workers, or whether the determination that the plaintiff's salary was excessive conflicted with the employer's prior evaluations, courts did not adequately explore whether the salary justification was pretext for animus. Moreover, courts did not explicitly consider whether stereotypical assumptions about the productivity of older workers infected the employment decision. Specifically, courts did not require evidence that the employer considered salary in the context of the individual worker's productivity. Because decisions based on salary disproportionately target older workers and because salary decisions are inherently vulnerable to age stereotyping, courts should require more of employers who act on the basis of salary.

Part I of this Comment introduces the ADEA and describes the traditional doctrinal approach to employment actions based on salary. Part II reviews the cases, noting changes since *Biggins*. Part III analyzes cases decided between 1984 and 1995 by employer motivation, type of action, and procedural disposition. Part IV proposes adapting the *McDonnell Douglas/Burdine* test to better determine whether an employment decision based on salary masks animus or age stereotyping.

11. *Id.* at 611–12.

12. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

13. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252–53 (1981).

I. PROVING DISCRIMINATION UNDER THE ADEA

A. The ADEA and Its Ties to Title VII

The ADEA developed in the wake of Title VII of the Civil Rights Act of 1964 (Title VII).[14] During the floor debates preceding adoption of Title VII, House and Senate members attempted, unsuccessfully, to include a prohibition against age discrimination in the landmark civil rights statute.[15] Instead, Congress directed the Secretary of Labor to prepare a fact-finding study on the effects of such discrimination in employment.[16] Based on this study, Congress passed the ADEA in 1967.[17]

The ADEA includes some unique features. First, while the ADEA mirrors Title VII in its prohibitions,[18] the ADEA balances these prohibitions with numerous exceptions.[19] Potentially the most powerful of these exceptions allows employers to take actions affecting older workers if the action is based on "reasonable factors other than age."[20] Second, the purposes of the ADEA reflect Congress' concerns about stereotyping that discount the productivity of older workers.[21] Finally, Congress recognized that the cost of employment benefits increases as employees age.[22] Worried that these accelerating costs would dissuade employers from hiring older applicants, Congress allowed employers to

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14. *See infra* notes 15–18 and accompanying text.

15. 110 Cong. Rec. 2596–99, 9911–13, 13490–92 (1964), reprinted in *Legislative History, supra* note 2, at 5–14.

16. Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 287, 316 (superseded by the Equal Employment Opportunity Act of 1972, Pub L. No. 92-261 § 10, 86 Stat. 111, 132).

17. Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621–634 (1994)).

18. *Compare* 29 U.S.C. § 623(a) *with* 42 U.S.C. § 2000e-2(a).

19. 29 U.S.C. § 623(f). The ADEA exempts decisions based on age where age is a "bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of the particular business." § 623(f)(1). Moreover, the ADEA protects good-cause discharges and disciplinary actions, bona fide seniority systems, and benefit plans. § 623(f)(2)–(3).

20. § 623(f)(1).

21. *See Secretary's Report, supra* note 2, at 5 (concluding that age discrimination existed but stemmed from stereotypes about older workers rather than from animus or intolerance), reprinted in *Legislative History, supra* note 2, at 22; 113 Cong. Rec. 34,742 (remarks of Rep. Burke) ("[Age discrimination] arises . . . because of assumptions that are made about the effects of age on performance"), reprinted in *Legislative History, supra* note 2, at 153.

22. *See* Terrence P. Collingsworth, Comment, *The Cost Defense Under the Age Discrimination in Employment Act*, 1982 Duke L.J. 580, 584–93 (discussing ADEA legislative history regarding cost issues).

consider the higher costs of older workers when crafting benefit packages.[23] Thus, Congress recognized the reasonable concerns of employers, the fact that age discrimination arises from inaccurate stereotyping, and some of the costs associated with older workers.

B. *Proving Claims of Disparate Treatment and Disparate Impact Under the ADEA*

Because of the similarities between Title VII and the ADEA, it is not surprising that courts have used Title VII tools to examine ADEA cases.[24] To examine cases of disparate treatment[25] under either statute, courts look first for direct evidence of intent to discriminate.[26] When such evidence is unavailable, courts use the *McDonnell Douglas*[27]/*Burdine*[28] burden shifting test to determine, by inference, whether intentional discrimination has occurred.[29] Cases involving

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23. 29 U.S.C. § 623(f)(2)(B) (allowing employers "to observe the terms of a bona fide employee benefit plan where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker").

24. *See, e.g.*, Lorillard v. Pons, 434 U.S. 575, 584 (1978) ("There are important similarities between the two statutes, to be sure, both in their aims—the elimination of discrimination from the workplace—and in their substantive prohibitions. In fact, the prohibitions of the ADEA were derived in haec verba from Title VII.").

25. "Disparate treatment occurs when an employee is treated less favorably simply because of race, color, sex, national origin, or in our case, age. This is the most obvious form of discrimination. To be successful on this type of claim, proof of discriminatory motive is critical." EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1076 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 2577 (1995)

26. TWA v. Thurston, 469 U.S. 111, 121 (1985).

27. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (establishing three-step, burden shifting test to evaluate circumstantial evidence of intentional discrimination).

28. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252–53 (1981) (clarifying that second step of *McDonnell Douglas* test shifts burden of production to defendant to articulate legitimate, non-discriminatory reason for adverse employment action).

29. *See* Tice v. Lampert Yards, Inc., 761 F.2d 1210, 1212 (7th Cir. 1985) ("The vast majority of cases that have discussed the appropriate burdens and standards for action under the ADEA have adopted the analysis set forth in *McDonnell Douglas Corp. v. Green*, a race discrimination case.") (citation omitted); Laugesen v. Anaconda Co., 510 F.2d 307, 311–13 (6th Cir. 1975) (noting similarity between Title VII and ADEA and applying *McDonnell Douglas* framework to ADEA case but cautioning that framework should not be applied automatically without regard for differences between statutes).

The U.S. Supreme Court recently noted:

> In assessing claims of age discrimination brought under the ADEA, [lower courts have] applied some variant of the basic evidentiary framework set forth in *McDonnell Douglas*. We have never had occasion to decide whether that application of the Title VII rule to the ADEA context is correct, but since the parties do not contest that point, we shall assume it."

employment actions based on salary are typically analyzed using this test.[30] The three-part test begins when the plaintiff meets the required prima facie elements,[31] eliminating the most likely non-discriminatory reasons for the adverse employment action.[32] The burden of production then shifts to the defendant to offer a legitimate, non-discriminatory reason for the action.[33] Finally, the plaintiff has an opportunity to demonstrate that the employer's proffered reason is pretextual, either by offering additional evidence of discriminatory intent or by demonstrating that the proffered reason is false.[34] If the plaintiff meets this burden, the court may, but is not required to, find for the plaintiff as a matter of law.[35]

Although the vast majority of plaintiffs presenting age discrimination claims based on salary charge disparate treatment,[36] some plaintiffs have argued successfully that facially neutral policies with a "disparate impact" on older workers violate the ADEA.[37]

Disparate impact is the result of more subtle practices, which on their face are neutral in their treatment of different groups but which in fact fall more harshly on one group than another. No proof of discriminatory motive is necessary, but if the practice is found to be justified by business necessity, the claim will fail.[38]

O'Connor v. Consolidated Coin Caterers, 116 S. Ct. 1307 (1996).

30. *See, e.g.*, Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1122 (7th Cir. 1994); Denison v. Swaco Geolograph Co., 941 F.2d 1416, 1421–22 (10th Cir. 1991).

31. *Burdine*, 450 U.S. at 253–54; *McDonnell Douglas*, 411 U.S. at 802.

32. For example, a prima facie demonstration that the plaintiff was qualified for the position shows, at least preliminarily, that the plaintiff was not rejected because he or she was unqualified. *McDonnell Douglas*, 411 U.S. at 802.

33. *Id.* This burden has been a major battleground in employment discrimination law. *Compare* Wards Cove Packing v. Atonio, 490 U.S. 642 (1989) *with* Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074 (codified as amended at 42 U.S.C. § 2000e-2(k)).

34. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507–08(1993); *Burdine*, 450 U.S. at 256; *McDonnell Douglas*, 411 U.S. at 804–05.

35. *Hicks*, 509 U.S. at 511; *see* Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 Mich. L. Rev. 2229 (1995).

36. Because salary correlates with age, most courts analyze employment actions based on salary as "disparate treatment" cases based on age, not as cases involving facially neutral polices and practices that have a "disparate impact" on older workers. Steven J. Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 Fla. L. Rev. 229, 272–73 (1990); *infra* note 97 and accompanying text.

37. *See, e.g.*, Houghton v. SIPCO, Inc., 38 F.3d 953, 958–59 (8th Cir. 1994); Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981).

38. EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1076 (7th. Cir. 1994), *cert. denied*, 115 S. Ct. 2577 (1995). The theory originated in Griggs v. Duke Power Co., 401 U.S. 424 (1971), a Title VII case, and was codified as an amendment to Title VII by the Civil Rights Act of 1991 (CRA), Pub. L.

The U.S. Supreme Court never has decided whether the ADEA covers disparate impact claims.[39] Recently, circuit courts have doubted or denied the applicability of the disparate impact theory under the ADEA.[40]

II. A REVIEW OF THE CASE LAW

*A. Pre-*Biggins *Case Law of Employment Actions Based on Salary*

What roles can the costs associated with employing older workers play under each of these theories?[41] Typically, economic considerations drive an employer's decision to increase or reduce its work force.[42] In general, the ADEA allows these cost-based decisions.[43] After first deciding to add to or cut its workforce, an employer must then select in a non-discriminatory manner which particular individuals to hire or fire.[44]

No. 102-166, § 105, 105 Stat. 1071, 1074 (codified as amended at 42 U.S.C. § 2000e-2(k)). For a thorough review of the impact of the CRA on the ADEA, see Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog That Didn't Bark*, 39 Wayne L. Rev. 1093 (1993).

39. Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993). The academic community has hotly debated whether disparate impact claims are cognizable under the ADEA. *Compare* Pamela S. Krop, Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan. L. Rev. 837 (1982) (arguing that disparate impact theory is inapplicable under ADEA) *and* Evan H. Pontz, Comment, *What a Difference ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C. L. Rev. 267 (1995) (same) *with* Marla Ziegler, Note, *Disparate Impact Analysis and the Age Discrimination in Employment Act*, 68 Minn. L. Rev. 1038 (1984) (arguing that disparate impact claims are cognizable under ADEA).

40. *See, e.g.* Ellis v. United Airlines, 73 F.3d 999, 1009 (10th Cir. 1996); DiBiase v. SmithKline Beecham Corp, 48 F.3d 719, 731 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 306 (1995).

41. *See* Collingsworth, *supra* note 22, at 581 (stating that ADEA cases involving costs are contradictory); Note, *The Cost of Growing Old: Business Necessity and the Age Discrimination in Employment Act*, 88 Yale L.J. 565, 574–87 (1979) (reviewing cases decided before 1979 and noting disagreement regarding whether higher "direct" costs of older workers constitute legitimate grounds for discharge).

42. Michael Useem, *Business Restructuring and the Aging Workforce* (discussing weight of economic factors, such as business downturns, in downsizing decisions), in *Aging and Competition: Rebuilding the U.S. Workforce* 33, 35–38 (James A. Auerbach & Joyce C. Welsh eds., 1994).

43. *See, e.g.*, Leichihman v. Pickwick Int'l, 814 F.2d 1263 (8th Cir.), *cert. denied*, 484 U.S. 855 (1987); Mauter v. Hardy Corp., 825 F.2d 1554 (11th Cir. 1987); Chappell v. GTE Prods., 803 F.2d 261 (6th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987).

44. *See, e.g.*, Tice v. Lampert Yards, Inc., 761 F.2d 1210 (7th Cir. 1985). The defendant's millshop was a losing financial proposition, so the defendant fired Tice, the employee who did the majority of the millshop's work. *Id.* at 1216–17 & n.11. The employer's financial distress was real, and Tice's termination was consistent with this distress. *Id.*; *see also* Franci v. Avco Corp., 538 F. Supp. 250, 259 (D. Conn. 1982) ("The ADEA does not preclude a business decision such as defendant's; it does preclude, however, using age as a criterion in realizing that legitimate business goal.").

At this second stage, decisions based on cost considerations are problematic because of the unique manner in which an individual's protected status under the ADEA may correlate with his or her employment costs, such as salary.[45]

Prior to *Hazen Paper Co. v. Biggins*,[46] successful plaintiffs presented some or all of the following evidence that an employment action based on salary implicated the ADEA: an actual correlation between age and salary,[47] a cost motive,[48] and a link between this cost motive and the employment action.[49] Also, if an employer considered the average cost of older workers rather than the cost of a particular worker, this differentiation ran afoul of regulations and the anti-stereotyping intent of the ADEA.[50]

A number of prominent cases allowed claims based on these general rules. In 1980, in *Geller v. Markham*,[51] the Second Circuit affirmed a jury verdict for the plaintiff, finding that the school board's policy of hiring only teachers with limited experience to save salary costs violated the ADEA under both disparate treatment and disparate impact theories.[52] The court cited regulations prohibiting classification of older workers on the basis of their higher average cost.[53] The court reasoned that the school district's policy operated to classify and exclude older workers

45. *See* U.S. Bureau of the Census, *How Much We Earn—Factors that Make a Difference*, 17 Stat. Brief 1 (1995) (discussing correlation between age and earnings); Phillip L. Rones, *Employment, Earnings and Unemployment Characteristics of Older Workers* (finding that career peak earnings generally maintained until age of 65, when age group aggregates fall because older workers work less), in *The Older Worker* 21, 36 (Michael E. Borus et al. eds., 1988); *cf.* Boyd Black, *Age and Earnings* (reviewing relationship between age and salary in Britain), in *A Portrait of Pay, 1970–1982*, at 274 (Mary B. Gregory & Andrew W.J. Thomson eds., 1990).

46. 507 U.S. 604 (1993).

47. *See, e.g.* Marshall v. Arlene Knitwear, 454 F. Supp. 715 (E.D.N.Y. 1978) (finding that economic savings in form of salary and unpaid pension benefits were insufficient justifications to terminate plaintiff, because these savings were "directly" related to plaintiff's age). Marshall's salary was higher than the salary of her younger coworkers because she had received more seniority raises over her longer tenure with the company. *Id.* at 728.

48. *See, e.g.*, Metz v. Transit Mix, Inc., 828 F.2d 1202, 1208 (7th Cir. 1987).

49. *Id.*

50. *See, e.g.*, Mastie v. Great Lakes Steel, 424 F. Supp. 1299, 1319 (E.D. Mich. 1976) (concluding that ADEA regulations permitted "an employer to consider employment costs where such consideration is predicated upon an individual as opposed to a general assessment that the older worker's cost of employment is greater than for other workers").

51. 635 F.2d 1027 (2d Cir. 1980).

52. *Id.* at 1034–35. The plaintiff was a 55 year-old teacher hired for a position, but shortly thereafter replaced by a younger woman with less experience who qualified for a lower salary. *Id.* at 1029–30.

53. *Id.* at 1033.

because of their higher cost as a group.[54] The court then found, based on the same reasoning, that the defendant's cost justification failed to defeat the plaintiff's disparate treatment claim.[55]

In another early case, *Leftwich v. Harris-Stowe State College*,[56] the Eighth Circuit found that a college's faculty selection plan based on tenure status conflicted with the purposes of the ADEA.[57] To save costs, the college reserved a position for a non-tenured professor, eventually selecting a non-tenured professor who scored lower in the hiring evaluation than the plaintiff.[58] Because of the close relationship between tenure status and age, the court concluded that the plain intent and effect of the defendant's practice were to eliminate older workers who had built up, through years of satisfactory service, higher salaries than their younger counterparts.[59] As in *Geller*, the court referred to administrative guidelines barring classifications based on the average cost of older workers as a group.[60] The *Leftwich* court cited *Geller* for the proposition that the economic savings realized by discharging older workers do not justify such an action under the ADEA.[61]

The leading case disallowing a termination based on the plaintiff's "excessive" salary was *Metz v. Transit Mix, Inc.*[62] The *Metz* court concluded that allowing Transit Mix to replace Metz based on the higher cost of employing him would defeat the anti-discrimination intent of the statute.[63] The *Metz* court limited its holding to the particular facts of the case, stressing that the plaintiff's salary depended directly on years of service and that the defendant did not offer to reduce the plaintiff's salary.[64] The court found that the defendant's desire to save costs was not a permissible, nondiscriminatory reason to replace the plaintiff with a

54. *Id.* at 1034.

55. *Id.*

56. 702 F.2d 686 (8th Cir. 1983).

57. *Id.* at 691.

58. *Id.* at 689. The Board of Regents' education consultant told the plaintiff that he was a "victim of tenure density." *Id.* at 690.

59. *Id.* at 691.

60. *Id.* at 691–92.

61. *Id.* at 692.

62. 828 F.2d 1202 (7th Cir. 1987).

63. *Id.* at 1205–06; *see also* Graefenhain v. Pabst Brewing Co. 827 F.2d 13, 21 (7th Cir. 1987) (finding defendant's alleged reason—economic cutbacks—pretextual where defendant refused plaintiff's offer to take another, lower paying job).

64. 828 F.2d at 1203–04.

younger, lower-paid employee.[65] The court noted that employers set salary levels, at least in the short run and within the parameters of the competitive market.[66] Thus, "[t]hrough its control over productivity per wage dollar, the management would effectively decide who could be terminated as its employees reach a relatively advanced age."[67]

Following *Metz*, courts entertained claims of age discrimination based on salary.[68] Courts required evidence of the correlation between age and salary.[69] For example, in *Holt v. Gamewell Corp.*,[70] the plaintiff failed to show that his salary was based on his age. The court noted that "the record before us belies [the Plaintiff's age-based] explanation for the level of his salary. It was primarily the result of promotions, merit raises based on his excellent evaluations, and his occupying a managerial position."[71] Courts also required that plaintiffs demonstrate that salary indeed motivated the employment decision.[72]

Although prominent cases allowed claims of age discrimination based on salary, not all courts have found such claims viable. The Fifth Circuit has refused to allow plaintiffs to rely on the link between age and seniority to find age discrimination and thus has been unreceptive to claims of age discrimination based on salary (where the older worker's salary is relatively high due to years of experience).[73] Other courts have

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65. *Id.* at 1204.

66. *Id.*

67. *Id.* at 1210.

68. *See, e.g.*, Gelof v. Papineau, 648 F. Supp. 912 (D. Del. 1986) (finding for older worker fired because his salary exceeded that available in defendant's reorganized budget and citing *Geller*, *Leftwich*, *Arlene Knitwear*, and other leading cases for proposition that salary discrimination is age discrimination), *vacated in part*, 829 F.2d 452 (3d Cir. 1987); Wing v. Iowa Lutheran Hosp., 426 N.W.2d 175, 180 (Iowa Ct. App. 1988) (citing *Leftwich* for proposition that "[e]conomic savings derived from discharging older employees cannot serve as a legitimate justification under the ADEA").

69. *See, e.g.*, Gray v. York Newspapers, 957 F.2d 1070, 1087 (3d Cir. 1992) (dismissing plaintiff's salary-based argument because replacement worker with less seniority was not significantly younger than plaintiff).

70. 797 F.2d 36 (1st Cir. 1986).

71. *Id.* at 38.

72. *See* Denison v. Swaco Geolograph Co., 941 F.2d 1416, 1421–22 (10th Cir. 1991) (affirming jury verdict based on evidence that employer considered cost of older workers in choosing which workers to retain); Branson v. Price River Coal, 627 F. Supp. 1324 (D. Utah 1986) (noting inconclusive figures regarding cost savings realized by discharging older workers and concluding that theory based on these savings mere speculation), *aff'd*, 853 F.2d 768 (10th Cir. 1988).

73. *See* Hamilton v. Grocers Supply, 986 F.2d 97, 99 (5th Cir. 1993) (declining to follow *Metz*), *cert. denied*, 114 S. Ct. 77 (1993); Amburgey v. Corhart Refractories Corp., 936 F.2d 805 (5th Cir. 1991) (affirming summary judgment for defendant and finding plaintiff's assertions that he was fired on basis of his seniority irrelevant to age discrimination claim); Williams v. General Motors, 656

shown similar discomfort with such claims.[74] Thus, despite the prominence of cases such as *Metz*, *Leftwich*, and *Geller*, plaintiffs charging age discrimination based on salary have encountered a decidedly mixed reception. The U.S. Supreme Court has not resolved this split but considered the closely related issue of employment actions based on pension status in *Biggins*.

B. Hazen Paper Co. v. Biggins[75]

Before the U.S. Supreme Court considered whether an employment action based on pension status violated the ADEA in *Biggins*,[76] lower courts generally held that firing workers based on pension status would violate the statute.[77] Writing for the majority, Justice O'Connor reiterated that Congress passed the ADEA to protect older workers from adverse employment action on the basis of inaccurate and stigmatizing stereotypes and that "[i]t is the very essence of age discrimination for an employee to be fired because the employer believes that productivity and competence decline with old age."[78] Reasoning that age and pension status are analytically distinct, Justice O'Connor found, however, that the action was not necessarily age-based[79] and that liability depended on whether age "actually" motivated the employment decision.[80] For example, employers using an age-correlated characteristic to "target" older employees, employers dually motivated by age and the correlated

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F.2d 120, 130 n.17 (5th Cir. Unit B 1981) ("Seniority and age discrimination are unrelated."), *cert. denied*, 455 U.S. 943 (1982).

74. *See* EEOC v. Chrysler Corp., 733 F.2d 1183 (6th Cir. 1984) (allowing cost justifications that meet two-part test that considers necessity of drastic cost reductions and less detrimental, alternative measures); Murray v. Sears, Roebuck & Co., 722 F. Supp. 1500, 1505 (N.D. Ohio 1989) (finding defendant's "desire to save $10 per in salary for the . . . position is clearly a sound business reason," and stating that "natural aging process in any work force" prevents all but limited inference from fact of replacement by younger, cheaper worker). *But see* Lenz v. Erdmann Corp., 773 F.2d 62 (6th Cir. 1985) (reversing summary judgment on evidence that employer in financial difficulty attempted to terminate older, higher paid employees and other evidence of pretext).

75. 507 U.S. 604 (1993).

76. *Id.* at 610.

77. *See* Reyher v. Champion Int'l, 975 F.2d 483, 487 (8th Cir. 1992) (holding that jury could reasonably infer that plaintiff's demotion was motivated by employer's discriminatory desire to reduce pension costs by firing and demoting older workers); White v. Westinghouse Elec., 862 F.2d 56, 62 (3d Cir. 1988) (reversing summary judgment for employer and remanding case to consider whether Westinghouse timed discharge to avoid paying additional pension benefits).

78. *Biggins*, 507 U.S. at 610.

79. Specifically, the action at issue was a termination based on pension status calculated according to years of service. *Id.* at 611.

80. *Id.*

factor, and employers acting on the basis of factors that depend directly upon age, violate the ADEA.[81] Thus, *Biggins* instructed that decisions infected by age stereotyping violated the ADEA and that decisions based on factors that correlated with age may be, but are not necessarily, age-based.

C. *Post*-Biggins *Cases*

Although *Biggins* concerned employment actions based on pension status, lower courts have applied its holding to actions based on other factors that correlate with age, such as salary.[82] In *Anderson v. Baxter Healthcare Corp.*,[83] the Seventh Circuit concluded that *Biggins* vindicated the dissent in *Metz*, which had contended that "wage discrimination is age discrimination only when wage depends directly on age, so that the use for one is a pretext for the other; high covariance is not sufficient."[84] In a companion decision, *EEOC v. Francis W. Parker School*,[85] the Seventh Circuit also extended the reach of *Biggins* to disallow a disparate impact claim based on salary.[86] The *Parker School* decision presented a particularly sharp contrast to the earlier *Metz* decision. While the *Metz* court found that the fact that the defendant did not offer a reduced salary undermined the validity of its salary rationale,[87] the *Parker School* court ignored the fact that the defendant declined the plaintiff's offer to work for a lower salary.[88]

Other post-*Biggins* cases have demonstrated increased resistance to claims of age discrimination based on salary.[89] For example, in

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81. *Id.*

82. *See infra* notes 83–94 and accompanying text.

83. 13 F.3d 1120 (7th Cir. 1994).

84. *Id.* at 1126 (quoting Metz v. Transit Mix, Inc., 828 F.2d 1202, 1212 (7th Cir. 1987) (Easterbrook, J., dissenting)).

85. 41 F.3d 1073 (7th Cir. 1994).

86. *Id.* at 1076 (rejecting plaintiff's age discrimination claims based on theories of both disparate treatment and disparate impact). The court cited *Biggins*, finding the Supreme Court's reasoning applicable to disparate impact cases, too. *Id.* at 1076–78.

87. *See supra* note 64 and accompanying text.

88. 41 F.3d at 1078 (Cudahy, J., dissenting).

89. *See* Bialas v. Greyhound Lines, 59 F.3d 759, 763 (8th Cir. 1995) (affirming summary judgment for defendant and holding that evidence that defendant terminated plaintiff to save salary costs does not support inference of age discrimination); Woroski v. Nashua Corp., 31 F.3d 105, 110 n.2 (2d Cir. 1994) ("The ADEA does not prohibit an employer from acting out of concern for excessive costs, even if they arise from age-related facts—such as that employees with long seniority command a higher salary . . . ."); Tipsword v. Oglivy & Mather, Inc., 918 F. Supp. 217 (N.D. Ill. 1996) (granting defendant's motion for summary judgment and finding that defendant's desire to

Pagliarini v. General Instrument Corp.,[90] a First Circuit lower court announced a new, post-*Biggins* rule.[91] The court found that the replacement was of roughly the same age as the plaintiff, so age and salary were not correlated; but the court stated that even if the replacement worker was younger and lower paid this would do nothing to advance the plaintiff's case.[92] Citing *Biggins*, the court concluded that because age and compensation level are analytically distinct, evidence that the decision was based on compensation level is not evidence of discrimination.[93] Likewise, another lower court stated that "firing . . . an employee to save salary costs resulting from seniority . . . does not violate the ADEA" as a matter of law.[94]

III. ANALYSIS OF AGE DISCRIMINATION CASES BY TYPE OF CLAIM, PROCEDURAL DISPOSITION, AND EMPLOYER MOTIVE

A. Typically Plaintiffs Charged Disparate Treatment After a Discharge Allegedly Based on Salary

A surprisingly large number of age discrimination decisions include arguments or evidence that the employment action was based on salary concerns. Sixty-six age discrimination cases reported between 1984 and 1995 include evidence of, or arguments that, the higher salary of older workers, wholly or in part, resulted in the adverse employment action at issue.[95] The sheer number of cases involving highly paid older workers

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save relatively high salary costs of the plaintiff whose responsibilities could be handled by subordinates sufficient). *But see* Radabaugh v. Zip Feed Mills, 997 F.2d 444, 449 (8th Cir. 1993) (holding that plaintiff presented sufficient evidence to allow reasonable fact finder to find that age discrimination motivated decision to discharge plaintiff rather than younger, lower paid employee).

90. 855 F. Supp. 459 (D. Mass.), *aff'd*, 37 F.3d 1484 (1st Cir. 1994).

91. *Id.* at 462.

92. *Id.*

93. *Id.*

94. Shibursky v. IBM, 820 F. Supp. 1169, 1177 (D. Minn. 1993); *accord* Slathar v. Sather Trucking Corp., 78 F.3d 415, 418 (8th Cir. 1996); Phillips v. Lehigh Valley Ass'n of Rehabilitation Ctrs., 66 Fair Empl. Prac. Cas. (BNA) 1676, 1680 (E.D. Pa. 1995) (stating that, as matter of law, the ADEA precludes claims based on salary since *Biggins* disaffirmed *Metz*).

95. Early v. Bankers Life & Casualty, 65 F.3d 170 (7th Cir. 1995); Woroski v. Nashua Corp., 31 F.3d 105 (2d Cir. 1994); Bolton v. Scrivner, Inc., 36 F.3d 939 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1104 (1995); Serben v. Inter-City Mfg., 36 F.3d 765 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1402 (1995); Phelps v. Yale Security, Inc., 986 F.2d 1020 (6th Cir.), *cert. denied*, 114 S. Ct. 175

(1993); DiCola v. Swissre Holding, 996 F.2d 30 (2d Cir. 1993); Radabaugh v. Zip Feed Mills, 997 F.2d 444 (8th Cir. 1993); Doyne v. Union Elec., 953 F.2d 447 (8th Cir. 1992); Gray v. York Newspapers, 957 F.2d 1070 (3d Cir. 1992); EEOC v. Clay Printing Co., 955 F.2d 936 (4th Cir. 1992); Bay v. Times Mirror Magazine, 936 F.2d 112 (2d Cir. 1991); Rivas v. Federacion de Asociaciones Pecurarias, 929 F.2d 814 (1st Cir. 1991); Denison v. Swaco Geolograph Co., 941 F.2d 1416 (10th Cir. 1991); Baker v. Sears, Roebuck & Co., 903 F.2d 1515 (11th Cir. 1990); Montana v. First Fed. Sav. & Loan, 869 F.2d 100 (2d Cir. 1989); Walker v. St. Anthony's Medical Ctr., 881 F.2d 554 (8th Cir. 1989); EEOC v. Atlantic Community Sch. Dist., 879 F.2d 434 (8th Cir. 1989); Bruno v. W.B. Saunders Co., 882 F.2d 760 (3d Cir. 1989), *cert. denied*, 493 U.S. 1062 (1990); EEOC v. Sperry Corp., 852 F.2d 503 (10th Cir. 1988); Gilliam v. Armtex, Inc., 820 F.2d 1387 (4th Cir. 1987); Reynolds v. C.L.P. Corp., 812 F.2d 671 (11th Cir. 1987); Bhaya v. Westinghouse Elec., 832 F.2d 258 (3d Cir. 1987), *cert. denied*, 488 U.S. 1004 (1989); Gray v. New England Tel. & Tel., 792 F.2d 251 (1st Cir. 1986); Bonura v. Chase Manhattan Bank, 795 F.2d 276 (2d Cir. 1986); Holt v. Gamewell Corp., 797 F.2d 36 (1st Cir. 1986); Tice v. Lampert Yards, Inc., 761 F.2d 1210 (7th Cir. 1985); Holley v. Sanyo Mfg., 771 F.2d 1161 (8th Cir. 1985); Lenz v. Erdmann Corp., 773 F.2d 62 (6th Cir. 1985); La Montagne v. American Convenience Prod., 750 F.2d 1405 (7th Cir. 1984); Phillips v. Lehigh Valley Ass'n of Rehabilitation Ctrs., 66 Fair Empl. Prac. Cas. (BNA) 1676 (E.D. Pa. 1995); Armbruster v. Unisys Corp., 62 Fair Empl. Prac. Cas. (BNA) 395 (E.D. Pa. 1993), *rev'd*, 32 F.3d 768 (3d Cir. 1994); Nabat v. Aetna Casualty & Sur., 64 Fair Empl. Prac. Cas. (BNA) 1774 (N.D. Ill 1993), *aff'd*, 45 F.3d 432 (7th Cir. 1995); EEOC v. Francis W. Parker Sch., 61 Fair Empl. Prac. Cas. (BNA) 967 (N.D. Ill 1993), *aff'd*, 41 F.3d 1073 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 2577 (1995), Schibursky v. IBM, 820 F. Supp. 1169 (D. Minn. 1993); Meeker v. Unisys Corp., 65 Fair Empl. Prac. Cas. (BNA) 950 (N.D. Ga. 1993), *vacated and appeal dismissed*, 65 Fair Empl. Prac. Cas. (BNA) 1344 (11th Cir. 1994); EEOC v. MCI Int'l Inc., 829 F. Supp. 1438 (D.N.J. 1993); Goldman v. First Nat'l Bank, 59 Fair Empl. Prac. Cas. (BNA) 204 (D. Mass. 1992), *aff'd*, 985 F.2d 1113 (1st Cir. 1993); Nerenstone v. Barr, 784 F. Supp. 912 (D.D.C. 1992); Frankina v. First Nat'l Bank, 801 F. Supp. 875 (D. Mass. 1992), *aff'd*, 991 F.2d 786 (1st Cir. 1993); Florkowski v. First Pa. Bank, 57 Fair Empl. Prac. Cas. (BNA) 1536 (E.D. Pa. 1991); Pagliarini v. General Instrument Corp., 855 F. Supp. 459 (D. Mass. 1991); Whitten v. Farmland Indus., 759 F. Supp. 1522 (D. Kan. 1991); Nelson v. Kennicott Bros., 58 Fair Empl. Prac. Cas. (BNA) 187 (E.D. Wis. 1990), *aff'd*, 951 F.2d 352 (7th Cir. 1991); Bedow v. Valley Nat'l Bank, 755 F. Supp. 276 (D. Ariz. 1989); Murray v. Sears, Roebuck & Co., 722 F. Supp. 1500 (N.D. Ohio 1989); Kilgore v. Sears, Roebuck & Co., 722 F. Supp. 1535 (N.D. Ill 1989); Buttell v. American Podiatric Medical Ass'n, 700 F. Supp. 592 (D.D.C. 1988); Diamantopulos v. Brookside Corp., 683 F. Supp. 322 (D. Conn. 1988); Wilson v. Popp Yarn Corp., 680 F. Supp. 208 (W.D.N.C. 1988); Latimore v. President, 669 F. Supp. 1345 (W.D.N.C. 1987), *aff'd in part*, 856 F.2d 186 (4th Cir. 1988); Poklitar v. CBS, 652 F. Supp. 1023 (S.D.N.Y. 1987); Schweizer v. Strippit/Di-Arco-Houdaille, 44 Fair Empl. Prac. Cas. (BNA) 1894 (W.D.N.Y. 1987); Kaczor v. City of Buffalo, 657 F. Supp. 441 (W.D.N.Y. 1987); Long v. First Family Fin. Servs., 677 F. Supp. 1226 (S.D. Ga. 1987); Branson v. Price River Coal Co., 627 F. Supp. 1324 (D. Utah 1986); Metz v. Transit Mix Inc., 646 F. Supp. 286 (N.D. Ind. 1986), *rev'd*, 828 F.2d 1202 (7th Cir. 1987); Gelof v. Papineau, 648 F. Supp. 912 (D. Del. 1986); Husbands v. Econo Therm Energy Sys., 650 F. Supp. 294 (D. Minn. 1986); Graefenhain v. Pabst Brewing Co., 620 F. Supp. 696 (E.D. Wis. 1985), *rev'd*, 827 F.2d 13 (7th Cir. 1987); Chipollini v. Spencer Gifts, Inc., 613 F. Supp. 1156 (D.N.J. 1985), *rev'd*, 814 F.2d 893 (3d Cir.), *cert. dismissed*, 483 U.S. 1052 (1987); Mantione v. Ted Bates Advertising, 38 Fair Empl. Prac. Cas. (BNA) 1457 (S.D.N.Y. 1985); Garig v. N.L. Indus., Inc., 671 F. Supp. 1460 (S.D. Tex. 1985), *aff'd*, 792 F.2d 1120 (5th Cir. 1986); Cope v. McPherson, 594 F. Supp. 171 (D.D.C. 1984), *aff'd*, 781 F.2d 207 (D.C. Cir. 1986); Bernstein v. Consolidated Foods, 622 F. Supp. 1096 (N.D. Ill. 1984); Lombardo v. Columbia Dentoform Corp., 36 Fair Empl. Prac. Cas. (BNA) 869 (S.D.N.Y. 1984); Pfeifer v. Lever Bros., 693 F. Supp. 358 (D. Md. 1987), *aff'd*, 850 F.2d 689 (4th Cir. 1988).

All cases reported in the Fair Employment Practice (BNA) volumes 35–66 were reviewed. Cases decided by a U.S. district or circuit court in which either the plaintiff or the defendant introduced

who alleged that they were fired or not hired because of their salary argue for close examination of the issue. Either the problem is pervasive or plaintiffs widely share a misconception about the basis for their adverse employment action.

These sixty-six decisions typically involved a discharge action scrutinized for evidence of intentional discrimination. Eighty-two percent of the plaintiffs alleged discriminatory discharges, seventeen percent charged discrimination based on failure to hire or rehire, and the remainder charged other discriminatory practices.[96] Almost all of the

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evidence of, or argued that, an older worker was subjected to an adverse employment action because of salary concerns were included in the count. Cases decided by state courts were not included.

96. The following 54 cases involved terminations: Early v. Bankers Life & Casualty, 65 F.3d 170 (7th Cir. 1995); Woroski v. Nashua Corp., 31 F.3d 105 (2d Cir. 1994); Serben v. Inter-City Mfg., 36 F.3d 765 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1402 (1995); Bolton v. Scrivner, Inc., 36 F.3d 939 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1104 (1995); Radabaugh v. Zip Feed Mills, 997 F.2d 444 (8th Cir. 1993); Phelps v. Yale Security, Inc., 986 F.2d 1020 (6th Cir.), *cert. denied*, 114 S. Ct. 175 (1993); DiCola v. Swissre Holding, 996 F.2d 30 (2d Cir. 1993); EEOC v. Clay Printing Co., 955 F.2d 936 (4th Cir. 1992); Doyne v. Union Elec., 953 F.2d 447 (8th Cir. 1992); Gray v. York Newspapers, 957 F.2d 1070 (3d Cir. 1992); Bay v. Times Mirror Magazine, 936 F.2d 112 (2d Cir. 1991); Denison v. Swaco Geolograph Co., 941 F.2d 1416 (10th Cir. 1991); Montana v. First Fed. Sav. & Loan, 869 F.2d 100 (2d Cir. 1989); Walker v. St. Anthony's Medical Ctr., 881 F.2d 554 (8th Cir. 1989); EEOC v. Sperry Corp., 852 F.2d 503 (10th Cir. 1988); Bhaya v. Westinghouse Elec., 832 F.2d 258 (3d Cir. 1987), *cert. denied*, 488 U.S. 1004 (1989); Gilliam v. Armtex, Inc., 820 F.2d 1387 (4th Cir. 1987); Reynolds v. C.L.P. Corp., 812 F.2d 671 (11th Cir. 1987); Gray v. New England Tel. & Tel., 792 F.2d 251 (1st Cir. 1986); Holt v. Gamewell Corp., 797 F.2d 36 (1st Cir. 1986); Bonura v. Chase Manhattan Bank, 795 F.2d 276 (2d Cir. 1986); Holley v. Sanyo Mfg., 771 F.2d 1161 (8th Cir. 1985); Lenz v. Erdmann Corp., 773 F.2d 62 (6th Cir. 1985); Tice v. Lampert Yards, Inc., 761 F.2d 1210 (7th Cir. 1985); La Montagne v. American Convenience Prod., 750 F.2d 1405 (7th Cir. 1984); Phillips v. Lehigh Valley Ass'n of Rehabilitation Ctrs., 66 Fair Empl. Prac. Cas. (BNA) 1676 (E.D. Pa. 1995); Schibursky v. IBM, 820 F. Supp. 1169 (D. Minn. 1993); EEOC v. MCI Int'l Inc., 829 F. Supp. 1438 (D.N.J. 1993); Meeker v. Unisys Corp., 65 Fair Empl. Prac. Cas. (BNA) 950 (N.D. Ga. 1993), *vacated and appeal dismissed*, 65 Fair Empl. Prac. Cas. (BNA) 1344 (11th Cir. 1994); Nabat v. Aetna Casualty & Sur., 64 Fair Empl. Prac. Cas. (BNA) 1774 (N.D. Ill 1993), *aff'd*, 45 F.3d 432 (7th Cir. 1995); Armbruster v. Unisys Corp., 62 Fair Empl. Prac. Cas. (BNA) 395 (E.D. Pa. 1993), *rev'd*, 32 F.3d 768 (3d Cir. 1994); Frankina v. First Nat'l Bank, 801 F. Supp. 875 (D. Mass. 1992), *aff'd*, 991 F.2d 786 (1st Cir. 1993); Goldman v. First Nat'l Bank, 59 Fair Empl. Prac. Cas. (BNA) 204 (D. Mass. 1992), *aff'd*, 985 F.2d 1113 (1st Cir. 1993); Pagliarini v. General Instrument Corp., 855 F. Supp. 459 (D. Mass. 1991); Nelson v. Kennicott Bros., 58 Fair Empl. Prac. Cas. (BNA) 187 (E.D. Wis. 1990), *aff'd*, 951 F.2d 352 (7th Cir. 1991); Bedow v. Valley Nat'l Bank, 755 F. Supp. 276 (D. Ariz. 1989); Kilgore v. Sears, Roebuck & Co., 722 F. Supp. 1535 (N.D. Ill 1989); Buttell v. American Podiatric Medical Ass'n, 700 F. Supp. 592 (D.D.C. 1988); Wilson v. Popp Yarn Corp., 680 F. Supp. 208 (W.D.N.C. 1988); Poklitar v. CBS, 652 F. Supp. 1023 (S.D.N.Y. 1987); Long v. First Family Fin. Servs., 677 F. Supp. 1226 (S.D. Ga. 1987); Schweizer v. Strippit/Di-Arco-Houdaille, 44 Fair Empl. Prac. Cas. (BNA) 1894 (W.D.N.Y. 1987); Branson v. Price River Coal Co., 627 F. Supp. 1324 (D. Utah 1986); Gelof v. Papineau, 648 F. Supp. 912 (D. Del. 1986); Husbands v. Econo Therm Energy Sys., 650 F. Supp. 294 (D. Minn. 1986); Metz v. Transit Mix Inc., 646 F. Supp. 286 (N.D. Ind. 1986), *rev'd*, 828 F.2d 1202 (7th Cir. 1987); Chipollini v. Spencer Gifts, Inc., 613 F. Supp. 1156 (D.N.J. 1985), *rev'd*, 814 F.2d 893 (3d Cir.), *cert. dismissed*, 483 U.S. 1052 (1987); Garig v. N.L. Indus., Inc., 671 F. Supp. 1460 (S.D. Tex.

cases presented disparate treatment claims.[97] Specifically, courts analyzed the cases using the *McDonnell Douglas/Burdine* burden shifting test for circumstantial evidence of intentional discrimination.[98] Generally courts reviewed the argument that the action was based on the older worker's higher salary during the third step[99] of the "minuet."[100] Thus, courts considered whether the salary justification was pretext for intentional age discrimination.

B. Procedural Disposition

Despite the prominence of early cases such as *Metz*,[101] *Leftwich*,[102] and *Geller*[103] in which plaintiffs successfully argued ADEA violations based

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1985), *aff'd*, 792 F.2d 1120 (5th Cir. 1986); Mantione v. Ted Bates Advertising, 38 Fair Empl. Prac. Cas. (BNA) 1457 (S.D.N.Y. 1985); Graefenhain v. Pabst Brewing Co., 620 F. Supp. 696 (E.D. Wis. 1985), *rev'd*, 827 F.2d 13 (7th Cir. 1987); Bernstein v. Consolidated Foods, 622 F. Supp. 1096 (N.D. Ill. 1984); Lombardo v. Columbia Dentoform Corp., 36 Fair Empl. Prac. Cas. (BNA) 869 (S.D.N.Y. 1984); Pfeifer v. Lever Bros., 693 F. Supp. 358 (D. Md. 1987), *aff'd*, 850 F.2d 639 (4th Cir. 1988).

The following 11 cases involved disputes over hiring or rehiring decisions: Bolton v. Scrivner, Inc., 36 F.3d 939 (10th Cir. 1994) (charging discriminatory discharge and failure to rehire), *cert. denied*, 115 S. Ct. 1104 (1995); Rivas v. Federacion de Asociaciones Pecurarias, 929 F.2d 814 (1st Cir. 1991); Bruno v. W.B. Saunders Co., 882 F.2d 760 (3d Cir. 1989), *cert. denied*, 493 U.S. 1062 (1990); EEOC v. Atlantic Community Sch. Dist., 879 F.2d 434 (8th Cir. 1989); EEOC v. Sperry Corp., 852 F.2d 503 (10th Cir. 1988) (involving discharge and failure to rehire decisions); Nabat v. Aetna Casualty & Sur., 64 Fair Empl. Prac. Cas. (BNA) 1774 (N.D. Ill 1993) (concerning discharge and failure to rehire charges), *aff'd*, 45 F.3d 432 (7th Cir. 1995); EEOC v. Francis W. Parker Sch., 61 Fair Empl. Prac. Cas. (BNA) 967 (N.D. Ill 1993), *aff'd*, 41 F.3d 1073 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 2577 (1995); Nerenstone v. Barr, 784 F. Supp. 912 (D.D.C. 1992); Whitten v. Farmland Indus., 759 F. Supp. 1522 (D. Kan. 1991); Diamantopulos v. Brookside Corp., 683 F. Supp. 322 (D. Conn. 1988); Kaczor v. City of Buffalo, 657 F. Supp. 441 (W.D.N.Y. 1987).

97. *But see* EEOC v. Francis W. Parker Sch., 61 Fair Empl. Prac. Cas. (BNA) 967 (reviewing charges under both disparate impact and disparate treatment theories), *aff'd*, 41 F.3d 1073 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 2577 (1995); Holt v. Gamewell Corp., 797 F.2d 36 (1st Cir. 1986).

98. *But see, e.g.*, Serben v. Inter-City Mfg., 36 F.3d 765 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1402 (1995); Radabaugh v. Zip Feed Mills, 997 F.2d 444 (8th Cir. 1993); Doyne v. Union Elec., 953 F.2d 447 (8th Cir. 1992); Rivas v. Federacion de Asociaciones Pecurarias, 929 F.2d 814 (1st Cir. 1991); EEOC v. Atlantic Community Sch. Dist., 879 F.2d 434 (8th Cir. 1989). Gilliam v. Armtex, Inc., 820 F.2d 1387 (4th Cir. 1987).

99. The plaintiff presented a prima facie case, the defendant rebutted this charge with a legitimate, non-discriminatory reason for the action, and then the plaintiff introduced the salary-age argument in an attempt to expose the defendant's reason as pretext for discrimination. In a number of cases, the court reviewed this evidence as part of the plaintiff's prima facie case. Generally, this occurred in reduction-in-force (RIF) cases in which courts require additional evidence of age discrimination as an element of the prima facie case, instead of the more typical requirement of evidence of replacement (by a younger worker) in non-RIF cases.

100. The term "minuet" has been used to describe the carefully choreographed, burden-shifting steps of *McDonnell Douglas/ Burdine* test. Malamud, *supra* note 35, at 2232 & n.16.

101. 828 F.2d 1202 (7th Cir. 1987).

on salary, most recent plaintiffs have failed with this argument. A review of ADEA cases decided between 1984 and 1995 revealed that defendants consistently won cases in which either the defendant or plaintiff introduced evidence of, or argued that, the employment action was based on the higher salary of an older worker.[104] In lower court dispositions, defendants won on summary judgment thirty times.[105] In addition, lower courts entered eight judgments as a matter of law (JMAL) and six judgments after bench trial for the defendant.[106] In contrast, courts

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102. 702 F.2d 686 (8th Cir. 1983).

103. 635 F.2d 1027 (2d Cir. 1980).

104. Defendants won 47 of 66 cases listed *supra* note 95.

105. Early v. Bankers Life & Casualty, 65 F.3d 170 (7th Cir. 1995); Woroski v. Nashua Corp., 31 F.3d 105 (2d Cir. 1994); Bolton v. Scrivner, Inc., 36 F.3d 939 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1104 (1995); DiCola v. Swissre Holding, 996 F.2d 30 (2d Cir. 1993); EEOC v. Clay Printing Co., 955 F.2d 936 (4th Cir. 1992); Gray v. York Newspapers, 957 F.2d 1070 (3d Cir. 1992); Bay v. Times Mirror Magazine, 936 F.2d 112 (2d Cir. 1991); Rivas v. Federacion de Asociaciones Pecurarias, 929 F.2d 814 (1st Cir. 1991); Baker v. Sears, Roebuck & Co., 903 F.2d 1515 (11th Cir. 1990); Montana v. First Fed. Sav. & Loan, 869 F.2d 100 (2d Cir. 1989); Holt v. Gamewell Corp., 797 F.2d 36 (1st Cir. 1986); Lenz v. Erdmann Corp., 773 F.2d 62 (6th Cir. 1985); Phillips v. Lehigh Valley Ass'n of Rehabilitation Ctrs., 66 Fair Empl. Prac. Cas. (BNA) 1676 (E.D. Pa. 1995); Armbruster v. Unisys Corp., 62 Fair Empl. Prac. Cas. (BNA) 395 (E.D. Pa. 1993), *rev'd*, 32 F.3d 768 (3d Cir. 1994); Nabat v. Aetna Casualty & Sur., 64 Fair Empl. Prac. Cas. (BNA) 1774 (N.D. Ill 1993), *aff'd*, 45 F.3d 432 (7th Cir. 1995); Schibursky v. IBM, 820 F. Supp. 1169 (D. Minn. 1993); Meeker v. Unisys Corp., 65 Fair Empl. Prac. Cas. (BNA) 950 (N.D. Ga. 1993), *vacated and appeal dismissed*, 65 Fair Empl. Prac. Cas. (BNA) 1344 (11th Cir. 1994); EEOC v. MCI Int'l Inc., 829 F. Supp. 1438 (D.N.J. 1993); Frankina v. First Nat'l Bank, 801 F. Supp. 875 (D. Mass. 1992), *aff'd*, 991 F.2d 786 (1st Cir. 1993); Goldman v. First Nat'l Bank, 59 Fair Empl. Prac. Cas. (BNA) 204 (D. Mass. 1992), *aff'd*, 985 F.2d 1113 (1st Cir. 1993); Pagliarini v. General Instrument Corp., 855 F. Supp. 459 (D. Mass. 1991); Nelson v. Kennicott Bros., 58 Fair Empl. Prac. Cas. (BNA) 187 (E.D. Wis. 1990), *aff'd*, 951 F.2d 352 (7th Cir. 1991); Murray v. Sears, Roebuck & Co., 722 F. Supp. 1500 (N.D. Ohio 1989); Kilgore v. Sears, Roebuck & Co., 722 F. Supp. 1535 (N.D. Ill 1989); Bedow v. Valley Nat'l Bank, 755 F. Supp. 276 (D. Ariz. 1989); Wilson v. Popp Yarn Corp., 680 F. Supp. 208 (W.D.N.C. 1988); Schweizer v. Strippit/Di-Arco-Houdaille, 44 Fair Empl. Prac. Cas. (BNA) 1894 (W.D.N.Y. 1987); Branson v. Price River Coal Co., 627 F. Supp. 1324 (D. Utah 1986); Husbands v. Econo Therm Energy Sys., 650 F. Supp. 294 (D. Minn. 1986); Chipollini v. Spencer Gifts, Inc., 613 F. Supp. 1156 (D.N.J. 1985), *rev'd*, 814 F.2d 893 (3d Cir.), *cert. dismissed*, 483 U.S. 1052 (1987); Mantione v. Ted Bates Advertising, 38 Fair Empl. Prac. Cas. (BNA) 1457 (S.D.N.Y. 1985); Pfeifer v. Lever Bros., 693 F. Supp. 358 (D. Md. 1987), *aff'd*, 850 F.2d 689 (4th Cir. 1988).

These results may correspond with a more general, yet likewise pronounced, increase in the use of summary judgment in ADEA and other contexts. *See* Robert J. Gregory, *There is Life in That Old (I Mean More Senior) Dog Yet: The Age Proxy Theory After* Hazen Paper Co. v. Biggins, 11 Hofstra Lab. L.J. 391, 425 (1994) (discussing "near-explosion in the use of summary judgment").

106. Phelps v. Yale Security, Inc., 986 F.2d 1020 (6th Cir.) (judgment notwithstanding verdict (JNOV) for defendant, voiding jury verdict for plaintiff), *cert. denied*, 114 S. Ct. 175 (1993); EEOC v. Atlantic Community Sch. Dist., 879 F.2d 434 (8th Cir. 1989) (judgment on verdict for defendant); Walker v. St. Anthony's Medical Ctr., 881 F.2d 554 (8th Cir. 1989) (judgment on verdict for defendant); Bhaya v. Westinghouse Elec., 832 F.2d 258 (3d Cir. 1987) (voiding jury verdict for plaintiff with JNOV for defendant), *cert. denied*, 488 U.S. 1004 (1989); Gray v. New England Tel. & Telegraph, 792 F.2d 251 (1st Cir. 1986) (JMAL for defendant); Tice v. Lampert Yards, Inc., 761

entered no summary judgments or JMALs for plaintiffs, but entered twelve judgments for the plaintiff,[107] most following jury verdicts. In sum, two-thirds of the cases resulted in rulings for the defendant. Appellate courts affirmed seventeen of twenty-three decisions in favor of defendants, and six of ten decisions for plaintiffs—ratios maintaining the defendants' advantage.[108] Determining the specific shortcomings of the plaintiffs' cases requires an examination of each particular case. Nonetheless, the pattern of the cases demonstrates the difficulties faced by plaintiffs who claimed age discrimination on the basis of their relatively high salaries.

F.2d 1210 (7th Cir. 1985) (JNOV for defendant); LaMontagne v. American Convenience Prod., 750 F.2d 1405 (7th Cir. 1984) (JNOV for defendant); Nerenstone v. Barr, 784 F. Supp. 912 (D.D.C. 1992) (judgment for defendant after bench trial); Florkowski v. First Pa. Bank, 57 Fair Empl. Prac. Cas. (BNA) 1536 (E.D. Pa. 1991) (JMAL for defendant); Latimore v. President, 669 F. Supp. 1345 (W.D.N.C. 1987) (JMAL for defendant), *aff'd in part*, 856 F.2d 186 (4th Cir. 1988); Metz v. Transit Mix Inc., 646 F. Supp. 286 (N.D. Ill 1986), *rev'd*, 828 F.2d 1202 (7th Cir. 1987) (judgment for defendant); Garig v. N.L. Indus., Inc., 671 F. Supp. 1460 (S.D. Tex. 1985) (judgment for defendant), *aff'd*, 792 F.2d 1120 (5th Cir. 1986); Graefenhain v. Pabst Brewing Co., 620 F. Supp. 696 (E.D. Wis. 1985), *rev'd*, 827 F.2d 13 (7th Cir. 1987) (voiding verdict for plaintiff with JNOV for defendant); Cope v. McPherson, 594 F. Supp. 171 (D.D.C. 1984) (judgment for defendant after bench trial), *aff'd*, 781 F.2d 207 (D.C. Cir. 1986).

107. Serben v. Inter-City Mfg., 36 F.3d 765 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1402 (1995); Radabaugh v. Zip Feed Mills, 997 F.2d 444 (8th Cir. 1993); Doyne v. Union Elec., 953 F.2d 447 (8th Cir. 1992); Denison v. Swaco Geolograph Co., 941 F.2d 1416 (10th Cir. 1991); Bruno v. W.B. Saunders Co., 882 F.2d 760 (3d Cir. 1989), *cert. denied*, 493 U.S. 1062 (1990); EEOC v. Sperry Corp., 852 F.2d 503 (10th Cir. 1988); Gilliam v. Armtex, Inc., 820 F.2d 1387 (4th Cir. 1987); Reynolds v. C.L.P. Corp., 812 F.2d 671 (11th Cir. 1987); Bonura v. Chase Manhattan Bank, 795 F.2d 276 (2d Cir. 1986); Gelof v. Papineau, 648 F. Supp. 912 (D. Del. 1986); Holley v. Sanyo Mfg., 771 F.2d 1161 (8th Cir. 1985); Kaczor v. City of Buffalo, 657 F. Supp. 441 (W.D N.Y. 1987).

108. Affirming dispositions in favor of the defendant: Bolton v. Scrivner, Inc., 36 F.3d 939 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1104 (1995); DiCola v. Swissre Holding, 996 F.2d 30 (2d Cir. 1993); Phelps v. Yale Security, Inc., 986 F.2d 1020 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 175 (1993); Gray v. York Newspapers, 957 F.2d 1070 (3d Cir. 1992); Rivas v. Federacion de Asociaciones Pecurarias, 929 F.2d 814 (1st Cir. 1991); Bay v. Times Mirror Magazine, 936 F.2d 112 (2d Cir. 1991); Baker v. Sears, Roebuck & Co., 903 F.2d 1515 (11th Cir. 1990); Walker v. St. Anthony's Medical Ctr., 881 F.2d 554 (8th Cir. 1989); EEOC v. Atlantic Community Sch. Dist., 879 F.2d 434 (8th Cir. 1989); Gray v. New England Tel. & Tel., 792 F.2d 251 (1st Cir. 1986); Holt v. Gamewell Corp., 797 F.2d 36 (1st Cir. 1986); Tice v. Lampert Yards, Inc., 761 F.2d 1210 (7th Cir. 1985); La Montagne v. American Convenience Prod., 750 F.2d 1405 (7th Cir. 1984); Goldman v. First Nat'l Bank, 59 Fair Empl. Prac. Cas. (BNA) 204 (D. Mass. 1992), *aff'd*, 985 F.2d 1113 (1st Cir. 1993).

Affirming pro-plaintiff dispositions: Radabaugh v. Zip Feed Mills, 997 F.2d 444 (8th Cir. 1993); Doyne v. Union Elec., 953 F.2d 447 (8th Cir. 1992); Denison v. Swaco Geolograph Co., 941 F.2d 1416 (10th Cir. 1991); Bruno v. W.B. Saunders Co., 882 F.2d 760 (3d Cir. 1989), *cert. denied*, 493 U.S. 1062 (1990); Gilliam v. Armtex, Inc., 820 F.2d 1387 (4th Cir. 1987); Reynolds v. C.L.P. Corp., 812 F.2d 671 (11th Cir. 1987); Bonura v. Chase Manhattan Bank, 795 F.2d 276 (2d Cir. 1986); Reynolds v. C.L.P. Corp., 812 F.2d 671 (11th Cir. 1987).

C. *Employer Motive*

Very few cases included direct evidence of age animus.[109] Rather, more cases included evidence that salary motivated the decision,[110] including employer comments such as "[we could] hire two for the price of one,"[111] "[we] cannot afford to keep people over 50 and 50" (referring to older workers earning over fifty thousand dollars per year),[112] and "I'm just losing too much money."[113] Less direct evidence included the salary-reduction policy, a showing of the correlation between age and salary, and evidence linking the policy to the adverse employment decision. In failure to hire cases, the employer sometimes responded to an external constraint, but more often the plaintiff's assigned starting salary was discretionary.[114]

Few opinions seriously tested the salary justification to determine whether the justification was a legitimate, non-discriminatory reason for the employment action or whether the justification was pretext for another reason. The opinions did not consider other cost-cutting options, the extent to which employers control salary levels, and the fact that wages represent, at least loosely, employer evaluations of employee worth.

First, the opinions seldom noted either the presence or absence of evidence that the employer considered a wage reduction in lieu of termination despite the *Metz* court's discussion of the importance of such evidence.[115] Even fewer opinions included evidence that the court had

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109. *See, e.g.*, Radabaugh v. Zip Feed Mills, 997 F.2d 444, 449 (8th Cir. 1993); Bolton v. Scrivner, Inc., 36 F.3d 939, 944–45 (10th Cir. 1994) (finding that age-related comments by plaintiff's supervisor, including calling plaintiff "old fart," did not raise inference of pretext), *cert. denied*, 115 S. Ct. 1104 (1995).

110. *See, e.g.*, Woroski v. Nashua Corp., 31 F.3d 105, 110 (2d Cir. 1994) (noting existence of cost cutting policy plus statements by general manager regarding dissatisfaction with older workers who received high salaries and generous benefits); Buttell v. American Podiatric Medical Ass'n, 700 F. Supp. 592, 597 (D.D.C. 1988) (finding documentation of defendant's saving as result of termination and evidence that this documentation was altered); *see also* Pfeifer v. Lever Bros. Co., 693 F. Supp. 358 (D. Md. 1987) (identifying cost savings as most common reason underlying age discrimination), *aff'd*, 850 F.2d 689 (4th Cir. 1988).

111. Kaczor v. City of Buffalo, 657 F. Supp. 441, 445 (W.D.N.Y. 1987).

112. Armbruster v. Unisys Corp., 32 F.3d 768, 775 (3d Cir. 1994).

113. Wilson v. Popp Yarn Corp., 680 F. Supp. 208, 212 (W.D.N.C. 1988).

114. EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1076 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 2577 (1995); Diamantopulos v. Brookside Corp., 683 F. Supp. 322, 326 (D. Conn. 1988).

115. *But see, e.g.*, Doyne v. Union Elec., 953 F.2d 447, 449 (8th Cir. 1992) ("[T]he only alternative given to [plaintiff] was retirement."); Metz v. Transit Mix, Inc., 828 F.2d 1202, 1203–04 (7th Cir. 1987); Gilliam v. Armtex, Inc., 820 F.2d 1387 (4th Cir. 1987).

asked the employer: "Why not?"[116] In other words, why did employers concerned with costs fail to explore retaining experienced workers at a lower cost? The opinions also generally failed to consider whether the employer took other cost-savings steps affecting younger workers. Employers faced with cost pressures, but who only consider cost-cutting actions that affect older workers should be required to refute the discriminatory implication.

Second, courts seemingly ignored *Metz*' observation that salaries fall largely within an employer's control. An employer who granted discretionary raises and shortly thereafter terminated workers with relatively high salaries should not be allowed to merely cite cost concerns as a non-discriminatory justification. If an employer elected to pay a premium to women workers to cover costs of cab fare, attended parking, and other security precautions, but then terminated women workers to save the costs of these premiums, courts would rightly view the cost-cutting justification skeptically. A justification so easily manipulated by the defendant does not warrant the courts' usual deference to business decisions.

Finally, salaries reflect, at least loosely, the employer's evaluation of an employee's worth. The fact that an employer initially set the salary level should raise a presumption that this salary level reflected the employer's evaluation of the employee's productivity. A later determination that this salary was "excessive" should not, therefore, enjoy the typical deference afforded to employer evaluations.[117] In the opinions reviewed, however, courts did not require evidence that the plaintiff's "worth" changed. Moreover, evidence of the plaintiffs' current productivity, when offered, lacked specificity and assurances of objectivity. For example, defendants explained that the plaintiff's were

116. DiCola v. Swissre Holding, 996 F.2d 30, 32 (2d Cir. 1993) (accepting without further questioning that higher salary no longer "economically justifiable"); *Diamantopulos*, 683 F. Supp. at 326 (noting that defendant was not aware of the plaintiff's willingness to accept available salary when he interviewed for position and concluding, without further analysis, that "[d]efendant's failure to inquire as to whether the plaintiff would accept the position at that salary cannot be said to be unreasonable"). In cases in which the plaintiff had forced the issue by unilaterally offering to work for less, this evidence was not consistently held to undercut the employer's salary justification. *See, e.g.*, EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1076 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 2577 (1995); Graefenhain v. Pabst Brewing Co. 827 F.2d 13 (7th Cir. 1987).

117. The employer should be required to present evidence to explain this shift. For example, evidence of market changes, changes in job requirements, or altered employer goals could counter this presumption.

"not meeting expectations" [118] or were "over-qualified."[119] By accepting a salary justification without considering wage reduction evidence, evidence of other cost-cutting measures, or evidence of the relationship between the plaintiff's salary and productivity, courts accepted a justification that was insufficient as a legitimate, non-discriminatory reason for the employment action.

Although *Biggins* stressed the ADEA's goal of prohibiting decisions based on stereotypes about older workers,[120] cases involving claims of age discrimination based on salary generally did not include any analysis of whether age stereotyping played a role in the employment action. Empirical research confirms that employers often do not have accurate information regarding the productivity of individual workers.[121] Without objective information, employers cannot accurately consider a worker's productivity when determining that the worker is overpaid. Rather, the employer looks only at salary level and, perhaps, compares this salary level to market rates. The comparison between the individual worker's salary and his or her productivity is unstated and susceptible to the influence of pervasive age stereotypes that discount productivity.

A Second Circuit case, *Bay v. Times Mirror*,[122] provides an example of the dangers of stereotyping inherent in salary-based decisions about older workers. The Second Circuit allowed a termination based on salary, reasoning with unusual care that the defendant made an individualized decision by comparing the plaintiff's salary to market rates.[123] A fuller consideration of the salary to productivity ratio of an older worker is not, however, an analysis of the relationship between the components. The plaintiff's productivity may exceed or lag behind that of the workers

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118. Early v. Bankers Life & Casualty, 65 F.3d 170 (7th Cir. 1995); *see also* Robert H. Faley et al., *Age Discrimination and Personnel Psychology: A Review of the Legal Literature with Implications for Future Research*, 37 Personnel Psychol. 327, 342 (1984) (questioning business sense of decision to retain lower over higher paid employees without consideration of their work performance where such decision could result in inferior work force).

119. Pagliarini v. General Instrument Corp., 855 F. Supp. 459, 464 (D. Mass. 1991); Murray v. Sears, Roebuck & Co., 722 F. Supp. 1500, 1505 (N.D. Ohio 1989). Whether over-qualification can ever constitute a legitimate, non-discriminatory reason for an employment action is debatable. *See* Taggart v. Time, 924 F.2d 43 (2d Cir. 1991) (holding that reasonable juror could infer age discrimination from defendant's proffered reason of over-qualification); EEOC v. District of Columbia Dep't of Human Servs., 729 F. Supp. 907, 913 (D.D.C. 1990) ("Indeed, the very term 'over qualified and over specialized' is almost a buzzword for 'too old.'"), *vacated*, 925 F.2d 488 (D.C. Cir. 1991).

120. Hazen Paper Co. v. Biggins, 507 U.S. 604, 610–11 (1993).

121. AARP, *supra* note 5, at 33.

122. 936 F.2d 112 (2d Cir. 1991).

123. *Id.* at 117.

earning the market rate. An employer that does not explicitly consider the individual worker's productivity risks incorporating stereotypes about the productivity of the older worker into any assessment of whether the worker is "overpaid."

IV. PROPOSALS

When an employer fires or refuses to hire an older worker because of salary concerns, this decision may violate the ADEA if the decision is (a) actually motivated by age animus or (b) infected by illegal age stereotyping.[124] The traditional doctrinal framework, namely the *McDonnell Douglas/Burdine* test, is potentially adequate for the task of identifying decisions actually motivated by age animus. However, the current doctrinal framework does not allow courts to accurately determine which decisions based on salary fall into the second forbidden category.

This Comment proposes two modifications to address this failing. A salary-based justification should not constitute a legitimate, non-discriminatory reason in the face of evidence that the employer did not consider wage reductions or other cost-cutting measures instead of terminations and did not consider productivity losses when calculating salary savings. However, this modification alone will not unmask age stereotyping. Courts should require that employers counter claims of age discrimination based on salary with the affirmative defense of a reasonable factor other than age (RFOTA).

A. View Wage Reduction Evidence as Pretext Evidence

Employment actions based on age animus are adequately analyzed using the traditional *McDonnell Douglas/Burdine* burden shifting test only if the test is rigorously applied. Evidence that the employer did not offer a reduced wage to the plaintiff in place of termination and refused to consider all applicants willing to work for the available salary regardless of "over-experience" should be considered evidence of pretext.[125] For those employers who did not take these steps, the question

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124. *See supra* note 7.

125. *See* Peter H. Harris, *Age Discrimination, Wages and Economics: What Judicial Standard*, 13 Harv. J.L. & Pub. Pol'y 715, 756 (1990) ("[O]lder workers must be given a 'right of first refusal' on their jobs at the level of compensation determined by economic considerations . . . so long as their jobs continue to exist and they are qualified to perform them."); Note, *supra* note 41, at 588–92 (recommending that employers be required to prove substantial cost burden and consider wage

remains: "Why not?" This unresolved question undercuts the validity of the salary justification. Although some courts have considered such evidence of pretext,[126] the vast majority have not.

Critics of proposals to ask employers why they did not offer a wage reduction in lieu of termination, or in failure to hire cases, why they did not consider all applicants willing to work for the salary available, may present the following arguments. First, the practical result for older workers may be a trade of salary for security, a poor consolation for older workers who feel pressured into accepting lower salaries than younger workers of comparable productivity could command. Some older workers will decline the offer, but others undoubtedly will accept, as demonstrated by cases in which plaintiffs extended the offer to work for less.[127] Second, employers cannot engage in wage reduction negotiations with represented workers under most collective bargaining agreements.[128] Thus, the alternative is not always a viable option for employers. However, because the overwhelming share of workers are not represented, the alternative will typically be available to employers. Third, a seldom cited section of the ADEA seems to prohibit wage reductions.[129] However, limited case law suggests that this section does not prohibit the type of reductions proposed.[130] Fourth, employers have

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reductions, or other less detrimental alternatives, before discharging older workers with high "direct" costs).

126. Gilliam v. Armtex Inc., 820 F.2d 1387 (4th Cir. 1987); Graefenhain v. Pabst Brewing Co. 827 F.2d 13 (7th Cir. 1987); Metz v. Transit Mix, Inc., 828 F.2d 1202, 1203–04 (7th Cir. 1987).

127. Serben v. Inter-City Mfg., 36 F.3d 765 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1402 (1995); EEOC v. Newport Mesa Unified Sch. Dist., 893 F. Supp. 927 (C.D. Cal 1995).

128. U.S. Dep't of Labor, *Union Members in 1994* (Feb. 8, 1995) ("About 16.7 million wage and salary employees, 15.5 percent of total employment, were union members in 1994.") (on file with the *Washington Law Review*).

129. "It shall be unlawful for an employer . . . to reduce the wage rate of any employee in order to comply with this Act." 29 U.S.C. § 623(a).

130. Rivas v. Federacion de Asociaciones Pecurarias, 929 F.2d 814, 820 (1st Cir. 1991) ("[P]laintiffs' unwillingness to accept the decrease [in pay], even if motivated by their status as older and more experienced workers and an expectation of earning their former union wages for the exact same work, does not translate into age discrimination."). In Green v. Edward J. Bettinger Co., 608 F. Supp. 35, 42 (E.D. Pa. 1984), *aff'd*, 791 F.2d 917 (3d Cir. 1986), *cert. denied*, 479 U.S. 1069 (1987), the court stated:

> The employer's justification for the [wage reduction]—to maintain an appropriate relationship between Plaintiff's compensation and the results of her efforts, to rationalize the compensation schedule in light of the changed circumstances, to preserve the morale of similarly situated employees, and to head off a potential undeserved, windfall for Plaintiff, is eminently reasonable.

Id.

argued that wage reductions dampen employee morale[131] but offer no evidence that terminations achieve improved results.[132] Fifth, in failure to hire cases, employers argue that "overqualified" workers will leave the position as soon as a position matching their qualifications becomes available. This argument overestimates the opportunities available to older workers. The older applicant who accepts a reduced salary has calculated that the job market will not pay for his or her experience. Finally, employers may voice concern about experienced workers in entry level or other positions reporting to less experienced supervisors. All of these concerns lose force when we consider what the employer who is able to implement the strategy receives as a result of the wage or starting salary reduction: an increase in work force experience and a decrease in payroll. A court considered this result and stated that "[t]he worst result that could befall [the employer] would be a savings of thousands of dollars a year . . . as a result of the pay reduction Plaintiff would probably have to take to obtain an entry level legal position."[133]

Even if an employer offered wage reductions or considered all applicants available for the starting salary, thus supporting the validity of the salary justification, the employment action nonetheless might violate the ADEA.[134] A rigorous application of the *McDonnell Douglas/Burdine* test would require that employers who proffer a salary justification for an employment action against an older worker demonstrate that this decision included an objective comparison of the individual worker's productivity to his or her salary.[135] Moreover, if the salary justification contradicts the employer's prior evaluations of the employee's worth, the employer should be required to offer an explanation for this disparity.

If the employer objectively calculated the productivity of the plaintiff in setting the reduced wage, then there is little danger that the action involved stereotypes about older workers as a group;[136] however, courts

131. Binder v. Long Island Lighting, 933 F.2d 187, 192 (2d Cir. 1991).

132. *See* Visser v. Packer Eng'g Assocs., 924 F.2d 655, 657 (7th Cir. 1991) (discussing impact of terminations because of pension status and noting that "[t]his is a shortsighted strategy, because it creates ill will among employees and forces the employer to pay new employees more in order to compensate them for the risk of falling victim to the strategy").

133. Nerenstone v. Barr, 784 F. Supp. 912, 917 (D.D.C. 1992).

134. *See* Marshall v. Pyramid Life Ins., 52 Fair Empl. Prac. Cas. (BNA) 1398 (D. Kan. 1990) (denying defendant's motion for summary judgment on ADEA wage-discrimination claim; plaintiff paid less than other regional secretaries with less responsibility and experience).

135. *See* Collingsworth, *supra* note 22, at 599–600 (recommending that employers factor out wage differential between employees and instead consider relative productivity).

136. There is considerable danger of exploitation of older workers in this scenario, however. Workers will be negotiating with their employers as individuals knowing that the alternative to a

have not generally conducted such vigorous reviews,[137] despite the prescriptive holdings of *Biggins*[138] and *Metz*.[139] This failing suggests the need for additional modifications. These modifications must test the employer's justification for age animus as well as for age stereotyping. The modification must enhance the key weakness of the *McDonnell Douglas/Burdine* test as applied to ADEA cases—its inability to detect age stereotyping. Finally, the modification must recognize that age stereotyping occurs subconsciously as well as consciously.

B. Recognize the Reasonable Factor Other Than Age Defense

The search for alternatives begins with the statute itself. The statute includes standards for the employer.[140] Of these standards, the "reasonable factor other than age defense" (RFOTA) standard is most applicable to the salary-age cases.[141] Because the RFOTA is an affirmative defense,[142] the employer would be required to meet a burden

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wage reduction is termination. Considering the difficulty that older workers face securing alternate employment due to age discrimination as well as other labor market factors, these workers may well accept a wage less than their productivity should dictate. *See* Harris, *supra* note 125, at 754 (stating that requirement that employers offer wage reductions instead of termination, at least where replacement-worker market provides objective, reliable information regarding cost-productivity comparison, could enhance danger of wage exploitation; but concluding that danger is not unchecked).

137. *See supra* notes 121–23 and accompanying text.

138. 507 U.S. 604 (1993).

139. 828 F.2d 1202 (7th Cir. 1987).

140. 29 U.S.C. § 623(f)(1), (2)(A), (2)(B), 3.

141. The BFOQ defense is a narrow, strict defense available to employers with facially discriminatory policies, such as an age limit for certain jobs. *See* Western Airlines v. Criswell, 472 U.S. 400, 412 (1985). The "good cause" exception simply reaffirms that the ADEA does not protect older workers from non-discriminatory employment actions justified by usual business concerns. For an example of an RFOTA, see Marshall v. Goodyear Tire & Rubber, 22 Fair Empl. Prac. Cas. (BNA) 775 (W.D. Tenn 1979) (recognizing employee strength, dexterity, and stamina as RFOTA justifying dismissal).

142. 29 C.F.R. § 1625.7(d), (e) (1995) ("When the exception of 'a reasonable factor other than age' is raised against an individual treatment claim of discriminatory treatment, the employer bears the burden of showing that the 'reasonable factor other than age' exists factually."). However, if the claim raised is a disparate impact claim, then the regulations equate the 'reasonable factor other than age' standard with the Title VII business necessity standard. *See* EEOC v. Westinghouse Elec., 725 F.2d 211, 222 (3d Cir. 1983) ("[The defendant] bears the burden of going forward with evidence to demonstrate reasonable factors other than age justifying its action."), *cert. denied*, 464 U.S. 820 (1984); Criswell v. Western Airlines, 709 F.2d 544 (9th Cir. 1983), *aff'd on other grounds*, 472 U.S. 400 (1985); Howard Eglit, *The Age Discrimination in Employment Act's Forgotten Affirmative Defense: The Reasonable Factor Other than Age Exception*, 66 B.U. L. Rev. 155, 197 (1986) (concluding that RFOTA exception should be construed as affirmative defense).

of persuasion with its justification.[143] To qualify as a RFOTA the salary justification could not include age animus or depend on age stereotypes. Otherwise, the factor is neither reasonable in terms of the ADEA's purposes nor distinct from age.[144] Unless the employer presents evidence that salary concerns were the basis for the employment action and that the decision included a review of the individual worker's productivity, the employer will not survive summary judgment.

Incorporating the RFOTA exception into the *McDonnell Douglas/Burdine* test would advance the ADEA's anti-animus and anti-stereotyping goals. The likelihood of a finding of liability for the employer is higher than under the current test, and, consequently, the employer has a stronger incentive to offer convincing proof that the action did not depend on animus or stereotyping. Also, the fact-finder tests the credibility of the justification directly, instead of relying only on the plaintiff's showing of pretext to discover motive information typically within the employer's control. The modification would require more of the employer who offers salary as a justification and would penalize the employer who does not examine his or her motives for firing a highly paid, older worker.

Biggins stressed that age and seniority are analytically distinct, a neat argument that ignored the degree to which the two factors intertwine in practice and reminiscent of another intellectually tidy but practically messy argument advanced to allow distinctions based on pregnancy. *Biggins* held that a decision based on seniority is not necessarily based on age.[145] The Court reasoned that an older worker hired by his or her employer late in his career might enjoy less seniority than younger co-workers.[146] Therefore, age and seniority are unrelated or analytically distinct.[147] The Court advanced a similar argument, rebuked by Congress when it passed the Pregnancy Discrimination Act (PDA)[148] in 1978 to

143. *See* Michael D. Moberly, *Reconsidering the Discriminatory Motive Requirement in ADEA Disparate Treatment Cases*, 24 N.M. L. Rev. 39 (1994) (recognizing differences between Title VII and ADEA in terms of statutory language and purpose and arguing that courts should incorporate RFOTA exception into *McDonnell Douglas/ Burdine* test).

144. Mack A. Player, *Title VII Impact Analysis Applied to the Age Discrimination in Employment Act: Is a Transplant Appropriate?*, 14 Toledo L. Rev. 1261, 1278 (1983) (arguing that factors that are inherently time-based such as tenure and experience cannot be factors other than age).

145. Hazen Paper Co. v. Biggins, 507 U.S. 604, 610–11 (1993).

146. *Id.*

147. *Id.*

148. Pregnancy Discrimination Act of 1978, Pub. L. No. 95–555, 92 Stat. 2076 (amending 42 U.S.C. § 2000e(k)).

clarify Title VII. Prior to passage of the PDA, the U.S. Supreme Court allowed a disability benefits plan that excluded disabilities based on pregnancy, holding, in essence, that discrimination based on pregnancy was not discrimination based on sex.[149] The Court reasoned that because the insurance plan in question divided individuals into pregnant women and because non-pregnant people and the latter group included both men and women, the policy did not discriminate on the basis of sex.[150] Justice Brennan dissented, stating that "[s]urely it offends common sense to suggest . . . that a classification revolving around pregnancy is not, at the minimum, strongly 'sex-related.'"[151] Congress agreed with this dissent, passing the PDA in 1978 to clarify that discrimination on the basis of pregnancy status is discrimination on the basis of sex.[152] Although not all older workers have seniority, only older workers have seniority of a certain length, say twenty-five years, just as only women are affected by pregnancy.[153] Thus, a decision based on salary where salary depends on seniority is, at least, a highly suspicious action triggering an affirmative defense requirement.

V. CONCLUSION

Modest modifications—to ask employers whether they considered salary in terms of the productivity of the particular worker and whether they considered offering the job at a reduced wage—would allow courts to better test the adequacy of a salary justification. A number of features of employment actions based on salary support an argument for a more aggressive modification of the *McDonnell Douglas/Burdine* test to place a burden of persuasion on the employer in the form of the RFOTA affirmative defense. First, the common incidence of age discrimination

149. General Elec. v. Gilbert, 429 U.S. 125 (1976).

150. *Id.* at 135.

151. *Id.* at 149.

152. *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearings on H.R. 5055 & H.R. 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 1 (1977) (statement of Rep. Hawkins) ("In my view, such a prohibition [against pregnancy discrimination] was clearly intended in Title VII. Unfortunately, the Supreme Court in General Electric versus Gilbert and IUE decided otherwise this last December."); H.R. Rep. No. 948, 95th Cong., 2d Sess. 2–3 (1978) ("It is the committee's view that the dissenting Justices correctly interpreted the Act. . . . H.R. 6075 was introduced to change the definition of sex discrimination in Title VII to reflect the commonsense view.").

153. Consider the comments of Sen. Williams: "Such plans which have a negative impact on only one sex are, by definition, discriminatory." *Discrimination on the Basis of Pregnancy, 1977: Hearings on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong, 1st Sess. 1 (1977) (remarks of Chairman Sen. Harrison A. Williams, Jr.).

cases based on salary and the general unwillingness of courts to rigorously review the employer's salary justification under current doctrine call for greater scrutiny. Second, the employer's salary motive may have rested upon stereotypes that consistently eluded detection by a test primed to detect animus. Finally, an action based on salary where salary depends on seniority is suspicious and requires that an employer assert an affirmative defense.

Age discrimination operates differently than does discrimination prohibited by Title VII.[154] Congress recognized these differences, noting that age discrimination stemmed more frequently from inaccurate stereotyping than from animus, and constructed a statute with exceptions not found in Title VII.[155] Notwithstanding these differences, Title VII tools, including the *McDonnell Douglas/Burdine* test, have been used in age discrimination cases.[156] Not surprisingly, the transplant has been less than completely successful. The ADEA itself provides a solution and courts should require that employers meet the statutory standard of the RFOTA exception.

154. *See Secretary's Report, supra* note 2, at 5, reprinted in *Legislative History, supra* note 2, at 22.

155. *Supra* note 21.

156. *Supra* note 97 and accompanying text.