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This Article explores how platforms in the workplace (both social media and hiring platforms) might enable, facilitate, or contribute to age discrimination in employment. The Article starts with evidence of age discrimination on work platforms particularly with regard to design elements, such as the availability of age-related proxies. The article then describes how these platforms use practices that redline, cull, or dissuade older job applicants. It then presents the challenging legal issues raised by the mediation of discriminatory employment practices by an information intermediary in the form of a platform, notably the problems of meeting the burden of proof and the assignation of liability. The Article then puts forth a three-part proposal to combat age discrimination in the face of platform authoritarianism. These proposals include: 1) reinforcement of the disparate impact cause of action for the Age Discrimination in Employment Act (ADEA) via codification; 2) education for employers regarding the use of ageist language in job ads; and 3) new EEOC guidelines for criteria documentation and data retention for job advertisement, recruitment, and hiring platforms.

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INTRODUCTION

In 2014, the comedian Bill Maher proclaimed that "ageism is the last acceptable prejudice in America."[1] While this sentiment has not been affirmed by the research of several legal scholars, age discrimination in employment has been an important preoccupation of legal scholarship.[2] In

1. Greg Gilman, *Bill Maher Rips 'Shallow' American Culture for Allowing 'Ageism' to Impact Politics*, THE WRAP (Nov. 9, 2014), https://www.thewrap.com/bill-maher-rips-shallow-american-culture-for-allowing-ageism-to-impact-politics/ [https://perma.cc/U4M3-YHC6]; *see also* Nicole Karlis, *Time to rethink how we talk about older people*, SALON (Mar. 31, 2018), https://www.salon.com/2018/03/31/time-to-rethink-how-we-talk-about-the-elderly/ (in which Dr. Bill Thomas, author of *What are Old People For?*, observes that "Aging is the last form of bigotry you can speak of in public.").

2. A survey of legal scholarship on age discrimination did not characterize it as an acceptable social prejudice, however, several law review articles address the problem of age discrimination in employment. *See, for example*, Laurie A. McCann, *The Age Discrimination in Employment Act at 50: When Will It Become A "Real" Civil Rights Statute?*, 33 A.B.A. J. LAB. & EMP. L. 89, 94-95 (2017); Pnina Alon-Shenker, *Legal Barriers to Age Discrimination in Hiring Complaints*, 39 DALHOUSIE L.J. 289, 313 (2016); Debra Lyn Bassett, *Silencing Our Elders*, 15 NEV. L.J. 519, 527 (2015); Michael Harper, *Reforming the Age Discrimination in Employment Act: Proposals and Prospects*, 16 EM. RTS. & EMP. POL'Y J. 13 (2012); Jamie Darin Prenkert, *Bizarro Statutory Stare Decisis*, 28 BERKELEY J. EMP. & LAB. L. 217 (2007); Aida Marie Alaka, *Corporate Reorganizations, Job Layoffs, and Age Discrimination: Has* Smith v. City of Jackson *Substantially Expanded the Rights of Older Workers Under the ADEA?*, 70 ALB. L. REV. 143 (2006); Michael Evan Gold, *Disparate Impact under the Age Discrimination in*

the same year as Maher's assertion, there were reports of Silicon Valley tech workers (some in their mid-twenties) resorting to plastic surgery to maintain what they perceived as the mandatory youthful appearance for job retention.[3] Moreover, a 2018 *ProPublica* investigation uncovered that IBM may have engaged in systematic and internally orchestrated age discrimination by laying off a large number of older U.S. employees.[4] According to *ProPublica*'s estimates, "IBM has eliminated more than 20,000 American employees ages 40 and over, about 60 percent of its estimated total U.S. job cuts" in the last five years.[5]

The perception that youth is a requisite for employment in Silicon Valley is confirmed by statements from industry leaders. For example, in 2007, Mark Zuckerberg, the founder of Facebook, told an audience at Stanford University, "I want to stress the importance of being young and technical."[6] Zuckerberg added: "Young people are just smarter."[7] If such casual ageism pervades Silicon Valley culture, then consider how these ageist perceptions might influence hiring practices, especially as evinced by job advertisement, recruitment, and job postings on hiring platforms.

Despite the five decades since the passage of the Age Discrimination in Employment Act ("ADEA")[8] – a law meant to protect older workers in the labor market – age discrimination in employment has not abated in recent years.[9] The law was passed in recognition of the social phenomenon of age

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Employment Act of 1967, 25 BERKELEY J. EMP. & LAB. L. 1(2004); Judith D. Fischer, *Public Policy and the Tyranny of the Bottom Line in the Termination of Older Workers*, 53 S.C. L. REV. 211 (2002).

3. Noam Scheiber, *The Brutal Ageism of Tech*, THE NEW REPUBLIC (Mar. 23, 2014), https://newrepublic.com/article/117088/silicons-valleys-brutal-ageism.

4. Peter Gosselin & Ariana Tobin, *Cutting 'Old Heads' at IBM*, PROPUBLICA (Mar. 22, 2018), https://features.propublica.org/ibm/ibm-age-discrimination-american-workers/ ("The company reacted with a strategy that, in the words of one confidential planning document, would 'correct seniority mix.'")

5. *Id.*

6. Andrew Ross, *In Silicon Valley, age can be a curse*, SF GATE (Aug. 20, 2013), https://www.sfgate.com/business/bottomline/article/In-Silicon-Valley-age-can-be-a-curse-4742365.php.

7. *Id.*

8. On December 15, 1967, Congress enacted the Age Discrimination in Employment Act ("ADEA") to prohibit and eradicate systemic age discrimination that older workers faced in the workplace. *See* Pub. L. No. 90-202, 81 Stat. 602.

9. *See* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AGE DISCRIMINATION IN EMPLOYMENT ACT (CHARGES FILED WITH EEOC) (2017), https://www.eeoc.gov/eeoc/statistics/enforcement/adea.cfm [hereinafter EEOC, CHARGES FILED] (showing no significant decrease in discrimination claims each year between 1997-2017). "Age discrimination claims are on the rise in both volume of cases filed and size of verdicts. Given the current economic landscape, widespread layoff announcements, and the aging boomer generation, that trend seems unlikely to abate anytime soon." Carla J. Rozycki & Patricia A. Bronte, *A Game of Numbers: ADEA Compliance and Litigation*, 1 LAB. LAW. 18, 203 (2002). *See also*, Jana E. Cuellar, The Age Discrimination in Employment Act: Handling the Element of Intent in Summary Judgment Motions, 38 EMORY L. J. 523, 524 (1989); Howard C. Eglit, *The Age Discrimination in Employment Act at Thirty: Where It's Been, Where It Is Today, Where It's Going*, 31 U. RICH. L. REV. 579, 591-96 (1997); Anne Noel Occhialino & Daniel Vail, *The 40th Anniversary of Title VII of The Civil Rights Act of 1964 Symposium: Why the EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L.J. 671, 682-83, 687 (2005)

discrimination in hiring, wherein arbitrary age limits for job applicants lead to greater unemployment rates for older workers.[10] Thus, the ADEA offers labor market protections for workers over forty years of age.[11] The ADEA prohibits employers and employment agencies from age discrimination in job advertising, recruiting, hiring, and other employment opportunities.[12] In addition, the ADEA makes it unlawful to send or publish employment ads that discriminate or indicate a preference or limitation based on age.[13] Yet, statistics indicate that age discrimination is thriving in the digital age, with 20,857 age discrimination complaints filed with the U.S. Equal Employment Opportunity Commission ("EEOC") in 2016 alone.[14]

Furthermore, there is the widespread suspicion that online job ads may be excluding older workers. In a 2017 study from the Federal Reserve Bank of San Francisco,[15] researchers created 40,000 fictitious resumes for job applicants to uncover statistical evidence of age discrimination.[16] Although the ages of the applicants were not explicitly listed on the resumes, each applicant's age could be implicitly derived from the included high school graduation year.[17] The study revealed evidence of age bias among several low-skilled jobs categories such as sales, administrators, and janitors. For instance, for older male applicants, callbacks fell from 20.89 percent to 14.70 percent—indicating an almost 30 percent decrease in callback rate.[18] However, older women applicants had an even more precipitous drop in callbacks—a 47 percent lower callback rate for women in administrative jobs and a 36 percent lower callback rate for women in sales jobs compared to younger applicants—indicating the presence of even stronger intersectional age and gender bias.[19]

In addition to audit studies that revealed the potential for platforms to enable age bias, another recent study makes clear the connection between

10. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (2012).

11. 29 U.S.C. §§ 621; 631(a)–(b) (2012). But note that some jurisdictions have passed laws to include workers under age 40.

12. 29 U.S.C. § 623(a), (b), (e) (2012).

13. *Id.*

14. *See* Austin O'Connor, *Bias Toward Older Workers on the Rise as Age Discrimination Goes Online*, THE MILWAUKEE INDEPENDENT (Jan. 10, 2018), http://www.milwaukeeindependent.com/syndicated/bias-toward-older-workers-on-the-rise-as-age-discrimination-goes-online/; *see also* EEOC, CHARGES FILED, *supra* note 9.

15. David Neumark, et. al., *Age Discrimination and Hiring of Older Workers*, FEDERAL RESERVE BANK OF SAN FRANCISCO (Feb. 27, 2017), https://www.frbsf.org/economic-research/publications/economic-letter/2017/february/age-discrimination-and-hiring-older-workers/.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

platforms and age discrimination in employment recruitment on platforms.[20] The investigative study by *ProPublica* and *The New York Times* concluded that dozens of employers—among them Verizon, Amazon, Goldman Sachs, Target, and Facebook—targeted applicants by age and excluded individuals over 40,[21] a forbidden action under the ADEA.[22] Specifically, the *ProPublica* investigation obtained a job advertisement database which revealed that Facebook ads can be and are targeted to precise age groups, allowing employers to recruit job applicants that are below a certain age.[23] For example, the obtained jobs ads show that in a search for "part-time package handlers," Facebook enabled the United Parcel Service to run an advertisement that targeted only individuals between the ages of 18 to 24.[24] Another job ad uncovered by *ProPublica* showed the insurance company State Farm targeted only job applicants between 19 and 35.[25]

This age-targeted advertising is the subject of a recent class action complaint filed against Facebook.[26] That complaint lays out the causal link between age discrimination and how job ads are advertised on social media and job recruitment platforms. The complaint was filed on behalf of the Communications Workers of America ("CWA") against several companies, including Amazon and T-Mobile, and a class of employers across the country.[27] The primary allegation is that the named companies and the defendant class are shielding older workers from receiving job ads by "specifically targeting their employment ads to younger workers via Facebook's ad platform."[28] The complaint alleges that Facebook's involvement in this practice "is not simply that of an intermediary that operates a platform to develop, sell, and deliver ads to Facebook users."[29] Rather, "Facebook has used its own ad platform to recruit job applicants to work at Facebook, and Facebook routinely used the same discriminatory age filters to exclude older workers from seeing Facebook's own employment ads for a range of positions" in the company.[30] This distinction, that Facebook is not merely acting as a third-party provider, is important. Section

20. Julia Angwin, et. al., *Facebook Job Ads Raise Concerns About Age Discrimination*, THE NEW YORK TIMES (Dec. 20, 2017), https://www.nytimes.com/2017/12/20/business/facebook-job-ads.html.

21. *Id.*

22. *See* 29 U.S.C. § 623(a), (b), (e).

23. *See* Julia Angwin et al., *supra* note 20.

24. *Id.*

25. *Id.*

26. Class Action Complaint & Demand for Jury Trial, Commc'ns Workers of Am. v. T-Mobile, Inc., No. 17-cv-07232 (Dec. 20, 2017) [https://perma.cc/9FHQ-UACR].

27. *Id.* at ¶ 1.

28. *Id.*

29. *Id.* at ¶ 22.

30. *Id.*

230 of the Communications Decency Act ("CDA")[31] holds that ISPs (that is, internet service providers) such as Facebook, cannot be held liable for user-generated content where the provider did not create or develop the content at issue. Following the same logic, some courts have ruled that when online platforms are manipulating content they could be considered content developers under the CDA and thus exempt from the liability protections of Section 230.[32]

Platforms are generally understood as services that "process (meta)data through algorithms and formatted protocols" before presenting the interpreted information to third parties.[33] While this definition of platforms is expansive enough to include internet-enabled infrastructure for hiring and management, the layperson's conceptualization of platforms is largely restricted to one genre: social media platforms. Most Americans are familiar with, and regularly use, social media platforms such as Facebook, Twitter, etc. And thus far, most legal scholarship on platforms have focused on problems associated with social media.[34] Increasingly, Americans are also interacting with recruitment platforms such as LinkedIn. However, work platforms have been largely exempt from the public discussion and understanding of employment discrimination. Few researchers have studied how these automated hiring platforms work in concert with social media to cull or redline older job applicants via unlawful practices.

Part I of this Article details the design and use features through which platforms might enable, facilitate, or contribute to age discrimination. Notably, regarding the design features, I note how platforms use proxies both to bar older job applicants from access to advertised jobs and also to glean prohibited age information. In Part II, I observe how antidiscrimination law, such as the ADEA, may be inadequate to curtail design features that enable

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31. Communications Decency Act of 1996, 47 U.S.C. § 230 (2012).

32. *See infra* Part II.A for a discussion of the cases.

33. JOSE VAN DIJCK, THE CULTURE OF CONNECTIVITY: A CRITICAL HISTORY OF SOCIAL MEDIA 29 (2013).

34. *See generally* Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271 (2017) (noting racial discrimination on Airbnb platform); Alexander Tsesis, *Symposium: Social Media Accountability for Terrorist Propaganda*, 86 FORDHAM L. REV. 605 (2017) (discussing terrorist forums on social media platforms); Catherine Tremble, Note, *Wild Westworld: Section 230 of the CDA and Social Networks' Use of Machine-Learning Algorithms*, 86 FORDHAM L. REV. 825 (2017) (discussing § 230 immunity and whether machine learning algorithms fall under such protection); Brian Mund, Note, *Social Media Searches and the Reasonable Expectation of Privacy*, 19 YALE J.L. & TECH. 238 (2017) (discussing the reasonable expectation of privacy on social media platforms); James Long, Note, *#Fired: The National Labor Relations Act and Employee Outbursts in the Age of Social Media*, 56 B.C. L. REV. 1217 (2015) (noting ambiguity surrounding employee posts as concerted activity); Shelby Sklar, Note, *The Impact of Social Media on the Legislative Process: How the Speech or Debate Clause Could be Interpreted*, 10 NW. J. L. & SOC. POL'Y 389 (2015) (discussing Speech and Debate Clause and the use of social media in the legislative process); Amy J. St. Eve et al., *#Jury Box: The Latest on Juries and Social Media*, 12 DUKE L. & TECH. REV. 64 (2014) (discussing implications of social media use by jurors).

platform age discrimination in employment. In Part III, I put forth a three-part proposal to combat age discrimination in the face of platform authoritarianism. By platform authoritarianism, I refer to our present social position vis-à-vis platforms, wherein creators of platforms demand that we engage with those platforms solely "on their dictated terms, without regard for established laws and business ethics."[35] My proposals for combating age discrimination on online platforms include: 1) reinforcing the disparate impact cause of action for the ADEA via codification; 2) educating employers regarding the use of ageist language in job ads; and 3) applying new EEOC guidelines regarding design and documentation requirements for job advertisement, recruitment, and hiring platforms.

I. PLATFORM DESIGN & AGE DISCRIMINATION

Although hiring algorithms have been touted as an efficiency tool for a now digitized workplace,[36] there are some indications that the growing use of platforms for recruitment and hiring is contributing to age discrimination. Since 1999, the number of age discrimination charges filed with the EEOC has risen by 47 percent.[37] Given this increase in the number of claims, age discrimination has been established as one of the most common forms of employment discrimination.[38] But why have claims of discrimination risen so drastically over such a short period of time?

One explanation is that the average age of the working population has been gradually rising. In fact, workers aged 65 and older make up the fastest

35. Ifeoma Ajunwa, *Facebook Users Aren't the Reason Facebook is in Trouble Now*, WASH. POST, (Mar. 23, 2018), https://www.washingtonpost.com/news/posteverything/wp/2018/03/23/facebook-users-arent-the-reason-facebook-is-in-trouble-now/ [https://perma.cc/576A-NBL8].

36. *See, e.g.*, Vivian Giang, *Why New Hiring Algorithms are More Efficient—Even if They Filter Out Qualified Candidates*, BUSINESS INSIDER, (Oct. 25, 2013 10:51 AM), http://www.businessinsider.com/why-its-ok-that-employers-filter-out-qualified-candidates-2013-10 [https://perma.cc/7S6Y-373T] (quoting Steve Goodman, CEO of job site Bright.com as stating, "the Internet has democratized the entire application process. Anybody can go online and spray and pray their resume all over the place. That's why it's actually OK if increasingly complicated algorithms accidentally filter out some qualified candidates in order to identify the really good ones . . . . People do fall through the cracks, there's no question about it. But people don't fall through the cracks with every job. They fall through the cracks with one job here, one job there.")

37. *See* EEOC, CHARGES FILED, *supra* note 9.

38. "Older workers and those who seek employment after the age of 65 have historically confronted intractable institutional and social barriers. . . Negative societal stereotypes about older adults are still prevalent and most elders report experiencing or witnessing instances of age-based discrimination." Jessica Z. Rothenberg & Daniel S. Gardener, *Protecting Older Workers: The Failure of the Age Discrimination in Employment Act of 1967*, 1 J. Soc. & Soc. Welf. 38, 10 (2011). *See also*, Judith J. Johnson, Reasonable Factors other than Age: The Emerging Specter of Ageist Stereotypes, 33 SEATTLE U. L. REV. 49, 53-5 (2009); Judith J. Johnson, Rehabilitate the Age Discrimination in Employment Act: Resusciate the Reasonable Factors Other than Age Defense and the Disparate Impact Theory, 55 HASTINGS L.J. 1399, 1399-1401 (2004); Samuel Issacharoff & Erica Worth Harris, Is Age Discrimination Really Age Discrimination: The ADEA's Unnatural Solution, 72 N.Y.U. L. REV. 780, 782 (1997).

growing segment of the working-age population in the United States.[39] This trend is expected to continue into the future, as well, with 31 percent of non-retired adults stating that they intend to remain employed until age 68 or older.[40] Additionally, the average age of retirement within the population has risen to 62, up from 57 when polls were taken in the 1990s.[41] Although this increase in the population of older workers and their later retirement could explain, in part, why there are more claims of age discrimination than in the past, this demographic explanation may not account entirely for the drastic rise in recent claims. In addition to an older worker population, I argue that online platforms, and the ways in which those platforms are deployed, have contributed to the rise of age discrimination in employment.

A. Proxies for Age Discrimination in Advertisement Platforms

One mechanism driving the rise in age discrimination claims is that job advertisement platforms, both in their design and function, allow for the substitution of age-related proxies in advertising language. The use of ageist language in job advertisements is not a novel problem. For example, in the 1975 case of *Hodgson v. Approved Personnel Services*, the Fourth Circuit ruled that the use of the term "recent graduate" in a job advertisement was not "merely informational," but instead deterred older workers from applying. Thus, such language violated the ADEA.[42] In the 1996 case *Boyd v. City of Wilmington*, the Eastern District of North Carolina was faced with a similar question when a plaintiff brought an action against the city of Wilmington for indicating that "candidates for MPA or MSIR degrees [were] preferred."[43] The plaintiff, William Boyd, claimed that the language in this job advertisement, because it referred to newly created degrees, violated the ADEA's provision that it is "unlawful for an employer . . . to publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer . . . indicating any preference, limitation, specification, or discrimination, based on age."[44] The Court held, however, that Boyd had not been able to show "discriminatory intent" and had failed

39. *Id.* at 1.

40. Lydia Saad, *Three in 10 U.S. Workers Foresee Working Past Retirement Age*, GALLUP NEWS, (May 13, 2016), http://news.gallup.com/poll/191477/three-workers-foresee-working-past-retirement-age.aspx [https://perma.cc/8NF3-AC5G].

41. Rebecca Riffkin, *Average U.S. Retirement Age Rises to 62*, GALLUP NEWS, (Apr. 28, 2014), http://news.gallup.com/poll/168707/average-retirement-age-rises.aspx [https://perma.cc/VTK7-ZNV3]; *see* Katie Rockwood, *Hiring in the Age of Ageism*, SOC'Y FOR HUM. RESOURCE MGMT., (Jan. 22, 2018), https://www.shrm.org/hr-today/news/hr-magazine/0218/pages/hiring-in-the-age-of-ageism.aspx [https://perma.cc/4JQ4-UMYB] (explaining that these statistics, which show a steadily increasing average age of the American worker, can be viewed largely as a result of the financial challenges and employment gaps that many workers endured during the Great Recession of 2008).

42. Hodgson v. Approved Personnel Serv., Inc., 529 F. 2d 760, 766 (4th Cir. 1975).

43. Boyd v. City of Wilmington, 943 F. Supp. 585, 587, 590-91 (E.D.N.C. 1996).

44. *Id.* at 590 (quoting 29 U.S.C. § 623(e) (1985)).

to show that the advertisement had "exposed an inclination for the younger generation or actually resulted in disparate treatment of older workers."[45] In comparison, today's job advertisement platforms allow for some sophistication in how age discrimination might be achieved. While the term "recent graduate" might be regarded as inarguably ageist, an online ad that lists a requisite *skill set* (albeit a new skill set that older graduates might not have) may more easily escape legal scrutiny while still effectuating an age discriminatory result.

Technological advancements have allowed ageist job advertisements to take on even more subtle dimensions. One example is the development of Facebook Affinity Groups. These groups comprise "socially active" Facebook users of different demographics which allow advertisers to target messages.[46] With Affinity Groups, clients or advertisers can choose to narrow or "refine [their] audience," opting to limit their ads to certain people.[47] More specifically, these Affinity Groups can allow companies to focus their ads on prospective applicants in specific age bands, such as "ages 18 to 38."[48]

While this data often helps business owners to refine their audiences and advertise to individuals who might be more likely to become customers, this kind of digital sorting also holds great potential for discrimination. In fact, in a recent class action suit against Facebook, plaintiffs have alleged that many large companies engaged in widespread age discrimination in employment advertising, recruitment processing, and hiring due to their use of these online affinity groups.[49] The plaintiffs' formal complaint alleges that major American employers routinely exclude older workers from receiving their employment and recruiting ads on Facebook, thereby denying older workers equal opportunity for jobs.[50] Additionally, plaintiffs allege that the companies' decisions to exclude older workers from seeing their ads were deliberate, as the companies targeted only younger workers—or left out Affinity Groups for potential recruits in older age ranges.[51]

The Communications Workers of America allege that this practice of "age-based targeting" actively denies job opportunities to potentially qualified individuals, solely on the basis of age.[52] Furthermore, the plaintiffs argue that online platforms such as Facebook have become the dominant

45. *See id.* at 592.

46. *See U.S. Hispanic Affinity on Facebook*, FACEBOOK BUSINESS, https://www.facebook.com/business/a/us-hispanic-affinity-audience (last visited Oct. 2, 2018).

47. *Id.*

48. Complaint, *supra* note 26, ¶ 11.

49. Amended Complaint ¶ 20, Bradley v. T-Mobile US, Inc., No. 17-cv-07232-BLF (N.D. Cal. May 29, 2018), https://www.onlineagediscrimination.com/sites/default/files/documents/og-cwa-complaint.pdf [https://perma.cc/NSM8-UPG9].

50. Complaint, *supra* note 26, ¶ 11.

51. *Id.* ¶ 7.

52. Amended Complaint, *supra* note 49, ¶ 22.

force for recruiting in the national labor market.[53] Thus, by eliminating older workers from seeing their ad campaigns, companies significantly reduce the potential job opportunities for these older workers.[54] While the use of ageist language in ads was the primary problem in the past, the targeting capabilities of platforms now enable employers to ensure that older workers are effectively screened out of many applicant pools.

B. Proxies for Age Discrimination in Automated Hiring Platforms

Much like how platform technology has transformed ageism in job advertisements, automated hiring has changed how age discrimination is effectuated during the hiring process. Automated hiring platforms usually provide resume screening.[55] This feature is extremely appealing for recruiters who otherwise would spend many hours screening for a single hire.[56] However, the value of any time and labor saved must be balanced against the potential discriminatory impacts on older candidates. Previously, the discriminatory impacts of automated hiring platforms on older applicants have largely gone unnoticed. One explanation is that age is not always a salient variable of job discrimination for employers to consider. In fact, while 64 percent of CEOs report to have solid diversity and inclusion initiatives in place, a mere 8 percent state that they include age as part of their efforts.[57]

This lack of interest in curbing age discrimination means that barriers to inclusion for older workers are often overlooked. One barrier to inclusion is the redlining of older workers into inferior job positions, such as part-time jobs. For example, while the job site Indeed.com at one point claimed to have over 16 million jobs listed worldwide, it was reported that the site also had a specific category titled "Part Time Jobs, Senior Citizen Jobs."[58] Not only does this sort of category separate out "senior citizen jobs" from all seemingly "regular" jobs, which may in itself be discriminatory, it also links "senior citizen jobs" with "part-time jobs," likely diminishing the number of hours that older applicants might be able to work when they do find a job. Another problem arises from the availability of jobs within the category, which

53. Amended Complaint ¶ 9, Bradley v. T-Mobile US, Inc., No. 17-cv-07232-BLF (N.D. Cal. May 29, 2018), https://www.onlineagediscrimination.com/sites/default/files/documents/og-cwa-complaint.pdf [https://perma.cc/NSM8-UPG9].

54. *Id.* ¶ 10.

55. *See* Ji-A Min, *Three Ways Automation Will Change Recruiting Forever*, TALENT CULTURE, (May 3, 2017), https://talentculture.com/3-ways-recruitment-automation-will-change-recruiting-forever/.

56. *See id.* (recruiters "spend an average of 23 hours screening resumes for a single hire").

57. *See* 18th Annual Global CEO Survey, *A Marketplace Without Boundaries?*, PRICEWATERHOUSECOOPERS INTERNATIONAL, 31 (2015), https://www.pwc.com/gx/en/ceo-survey/2015/assets/pwc-18th-annual-global-ceo-survey-jan-2015.pdf.

58. Bob Sullivan, *Online Job Sites May Block Older Workers*, CNBC (Mar. 12, 2017), https://www.cnbc.com/2017/03/10/online-job-sites-may-block-older-workers.html.

contains a mere 158,000 positions of the boasted 16 million total positions.[59] At one time, only 0.9% of jobs on Indeed.com were geared specifically towards older workers, even though these workers make up a much larger proportion of the working-age population. However, Indeed.com is not alone in segregating "older applicants" in this manner. Monster.com also has a special home page for older workers titled "Careers at 50+."[60] Categories like these act as ageist digital redlining, guiding older applicants to limited jobs and signaling that only certain age groups should apply.

Other hiring platforms have user interfaces that may be used to cull older job applicants. For example, some online hiring platforms have drop-down menus that ask applicants to input their birth dates which are later submitted with their applications. However, some job applicants have discovered that these drop-down menus only allow for birth years since 1980 to be submitted.[61] To exacerbate the issue, many platforms will not allow the applicant to submit the application without an answer to the age question.[62] In one case, a 70-year-old Illinois man filed a complaint with the office of the Illinois Attorney General when he discovered that he was unable to use an online resume building tool because of built-in age restrictions.[63] The result of the complaint was a request for information by Attorney General Lisa Madigan to several automated hiring platforms including Monster.com, Ladders.com, Indeed.com, and several others.[64] All of their websites had varying age cutoffs limiting the age of any applicant.[65]

C. Proxies for Age Discrimination in Recruitment Platforms

Recruitment platforms are also rife with age-related proxies and ageist euphemisms, particularly in the manner in which some companies present their work cultures and open job positions online. This is a problem, for instance, when companies describe themselves as having a culture comprised of "digital natives."[66] By using this term to describe corporate culture and by advertising for "digital natives" or "new grads,", companies deter older workers from applying. As the EEOC has previously advised that using

59. *Id.*

60. *Id.*

61. O'Connor, *supra* note 14.

62. *Id.*

63. Ina Jaffe, *Older Workers Find Age Discrimination Built Right into Some Job Websites*, NATIONAL PUBLIC RADIO: ALL THINGS CONSIDERED (Mar. 28, 2017), https://www.npr.org/2017/03/28/521771515/older-workers-find-age-discrimination-built-right-into-some-job-sites.

64. Letters from Lisa Madigan, Att'y Gen., Ill., to Online Hiring Agencies (Mar. 1, 2017), https://media.npr.org/assets/news/2017/03/letters.pdf.

65. Jaffe, *supra* note 63.

66. Vivian Giang, *This is the Latest Way Employers Mask Age Bias, Lawyers Say*, FORBES (May 4, 2015), http://fortune.com/2015/05/04/digital-native-employers-bias/.

phrases like "college student," "recent college graduate," and "young blood" could violate the ADEA,[67] some scholars have also argued that the term "digital native," implying that the applicant has been exposed to new digital technologies from an early age, falls in the realm of discriminatory language.[68] It is problematic when corporations use this genre of terms to define their cultures or conclude that an applicant is a "poor cultural fit" because the individual is not a "digital native."[69]

One prime example is the case of *Reid v. Google,* in which a California man sued his former employer, Google, alleging age discrimination under the California Fair Employment and Housing Law ("FEHA").[70] After only receiving one performance review from Google during his employment from June 2002 to February 2004, Reid was described as having "an extraordinarily broad range of knowledge concerning Operations, Engineering in general and an aptitude and orientation towards operational and IT issues."[71] However, Reid's manager also noted that "[a]dapting to Google culture is the primary task for the first year. . . [which includes] [y]ounger contributors, inexperienced first line managers, and the super-fast pace."[72] At 50 years old, Reid also stated he often felt other employees made derogatory age-related remarks about his speed at work and the relevance of his opinions.[73] In 2004, Google terminated Reid, allegedly giving him no rationale other than lack of "cultural fit."[74] Reid then sued Google for age discrimination and the California Supreme Court ultimately ruled in his favor, noting that stray remarks may be considered evidence of age discrimination.[75]

Reid suggests that it may not be lawful for corporations to indicate that younger applicants might fit better for a company's culture when advertising jobs online. The Society for Human Resource Management goes further, noting that advertising benefits such as "meals included" could be potentially discriminatory against older workers, as it seems to presume that the job applicant should not "have a family waiting for them to come home to dinner."[76]

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67. *Id.*

68. Jessica Sink and Richard A. Bales, *Born in the Bandwidth: "Digital Native" as Pretext for Age Discrimination*, 31 A.B.A. J. OF LAB. & EMP. L., 521-23 (2016).

69. Giang, *supra* note 66.

70. *See* Reid v. Google, Inc., 50 Cal. 4th 512, 516 (2008).

71. *Id*. at 517.

72. *Id*. at 518-19.

73. *Id*. at 517-18.

74. *Id*. at 519.

75. *Id*. at 519, 543-46.

76. *See* Kate Rockwood, *Hiring in the Age of Ageism*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (Jan. 22, 2018), https://www.shrm.org/hr-today/news/hr-magazine/0218/pages/hiring-in-the-age-of-ageism.aspx.

Age discrimination is even more of a problem for recruitment platforms like LinkedIn that request detailed information from job applicants that are made visible to all potential employers. Notably, the length of experience could negatively impact older applicants—with lengthier work experience sections acting as a proxy for age. The notion that employers might discriminate against an applicant with more experience is also not a new problem. In one 1980 case, *Geller v. Markham*, the Second Circuit ruled that employers could not set limits for how much experience applicants could have and that the school hiring only teachers with experience below a certain level was a violation of the ADEA.[77] The court also held that the correlation between age and experience meant that this policy had a disparate impact on teachers over the age of 40.[78]

However, the practice of culling applicants for having "too much experience" has not dissipated since that time. In January 2018, older workers began the "I, Too, Am Qualified" social media campaign to bring awareness to this persistent problem.[79] Through this campaign, older workers around the country have begun to share their stories of age discrimination in the workplace, with the goal of creating change and letting other older workers know that they are not alone in the discrimination that they encounter. In one story, Colorado native Scott Croushore recounted looking for work as a technology consultant.[80] As Croushore reached his late 40s, he noticed that it became more and more difficult to find work.[81] As a test, Croushore slashed 13 years of experience off his resume and recruiting profiles.[82] To his surprise, he found work more quickly.[83]

An additional issue with online recruiting platforms is the use of profile pictures to evaluate candidates. A paper published in the Journal of Social Psychological and Personality Science concluded that a person's first interpretation of another individual's profile picture is likely to stick, even after the two individuals meet in person.[84] The paper suggests that this might be the case because an evaluator's "photograph-based liking judgment[]" — snap judgment based on a profile picture — may affect how warmly the two

77. *See* Geller v. Markham, 635 F.2d 1027, 1034 (1980).

78. *Id*. at 1032-33.

79. *See* Michael Lindenberger & Nancy Fingerhood, *I, Too, Am Qualified*, WORDPRESS (Nov. 17, 2017), https://itooamqualified.wordpress.com/2017/11/17/i-too-am-qualified/.

80. Nell London, *Older Workers Say Age Discrimination is Widespread, Though States Are Hard to Find*, COLORADO PUBLIC RADIO (Jan. 2, 2018), http://www.cpr.org/news/story/older-workers-say-age-discrimination-is-widespread-though-stats-are-hard-to-find.

81. *Id.*

82. *Id.*

83. *Id*.

84. Gul Gunaydin, et al., *Impressions Based on a Portrait Predict, 1-Month Later, Impressions Following a Live Interaction*, 8 J. SOC. PSYCHOL. & PERSONALITY SCI. 36, 41-42 (2016).

behave in person.[85] Thus, when it comes to recruiting online, profile photos on such platforms as LinkedIn become vital information on which applicants are judged.

Photos take on even more employment significance when we consider that LinkedIn estimates that "[a]dding a profile photo makes your profile 7x more likely to be found in searches."[86] Business experts believe that "[n]ot adding a photo to your LinkedIn profile could raise eyebrows and make employers wonder what you're trying to hide."[87] In the online job recruiting culture, job applicants are thus faced with the Hobson's choice of being judged by their profile photos or being viewed negatively if they do not post a photo.

But, for older applicants, and especially women, judgments of physical appearance brings the risk of heightened bias.[88] Profile photos present intersectional discrimination for women, as women are more likely to be held to youthful beauty standards.[89] Age discrimination scholar Nicole Porter argues that because of "society's biases and prejudices about the way women are supposed to look," older women are disproportionately discriminated against in employment particularly due to their appearance.[90] For older workers, the extensive past experiences they detail on these platforms, as well as their no longer youthful photos, may serve as proxies that allow for age discrimination on recruitment platforms.

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85. *Id.* at 41.

86. Aaron Bronzan, *Simple steps to a complete a LinkedIn Profile*, OFFICIAL LINKEDIN BLOG (Feb. 14, 2012), https://blog.linkedin.com/2012/02/14/profile-completeness.

87. Jhaneel Lockhart, *How Not Having a LinkedIn Photo Can Actually Hurt Your Job Search*, BUSINESS INSIDER (Mar. 20, 2012), http://www.businessinsider.com/putting-your-photo-on-linkedin-wont-suddenly-expose-you-to-discrimination-2012-3.

88. Consider that despite the efforts of the FCC, anchorwomen over age 40 experience intersectional sex plus age discrimination. "One only has to look as far as the television in one's home to see an example of how the merging point of sexism and ageism has really affected older women." *See* Nicole B. Porter, *Sex Plus Age Discrimination: Protecting Older Women Workers*, 81 DENV. U. L. REV. 79, _94_ (2003).

89. "Middle-aged women emphasize that their appearance is more often evaluated than the appearance of men, which is why they try to maintain a young look. In the case of men, age is not a factor that could disqualify them in any area, including appearance." *Sociologist: Women judged more by their looks in various spheres of life*, available at http://scienceinpoland.pap.pl/en/news/news%2C28321%2Csociologist-women-judged-more-their-looks-various-spheres-life.html (discussing a study in which "sociologists from the University of Lodz conducted research on attractiveness among women and men in three age categories: young people (20-37 years old); middle-aged (38-62 years old); and elderly (63-80 years old)." *Id.* The research showed, however, that "the attitudes towards appearance vary between age and sex groups. Women more often notice that they are judged by their appearance in various spheres of life more than men"). *Id. See also*, Katie Grant, *Female Job Applicants Far More Likely To Be Judged On Appearance*, THE INDEPENDENT (January 6, 2016), https://www.independent.co.uk/news/business/news/female-job-applicants-far-more-likely-to-be-judged-on-appearance-study-finds-a6799856.html (discussing a study in which respondents looked at the social media pages of job applicants).

90. *See* Porter, *supra* note 88, at 84.

In an effort to curb discrimination in employment, the AARP has created a pledge for employers to affirm that they "believe that 50+ workers should have a level playing field in their ability to compete for and obtain jobs" and agree to "recruit across diverse age groups and consider all applicants on an equal basis."[91] However, while some employers are taking these pledges and joining movements to end age discrimination, the existence of platforms as algorithmic intermediaries, means we must consider how and when the law should intervene.

II. THE ADEA VERSUS PLATFORMS

Given the increased use of platforms in the recruitment and hiring process and their demonstrated ability to enable ageism, it seems then that there is no question as to whether the ADEA applies to platforms, but other laws such as the Communication Decency Act (the CDA) must be taken into account. It is unclear whether the ADEA is robust enough to address the amplified and sophisticated means to age discrimination afforded by platforms. Some courts have also begun to question whether online platforms occupy more than just the neutral role of a publisher or editor if they are effectively controlling the content that appears on their sites and the audiences who see it. In the subsections below, I discuss: 1) whether the ADEA applies to platforms; 2) the difficulties of proof in alleging age discrimination in relation to platforms (given that platforms enable the use of facially neutral proxies); and 3) whether there should be heightened responsibilities assigned to certain types of platforms that traffic in sensitive personal information.

A. Does the ADEA Apply to Platforms?

When it comes to age discrimination enabled by platforms, a key threshold question is whether the ADEA applies. The ADEA does apply when the platform is actively shaping the information transmitted to a third party. Consider that in 2016, a complaint in the Eastern District of New York accused Facebook of aiding terrorist attacks.[92] The plaintiffs in *Cohen v. Facebook* argued that Facebook's machine-learning algorithm, which provides more visibility for stories that are receiving heightened media attention, aided the terrorist attacks through higher visibility and made Facebook complicit in the eventual harm.[93]

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91. *AARP Employer Pledge*, AARP (2018), https://volunteers.aarp.org/employer-pledge-form/default.aspx; *Employer Pledge Program*, AARP (2018), https://www.aarp.org/work/job-search/employer-pledge-companies/.

92. Cohen v. Facebook, Inc., 252 F. Supp. 3d 140, 146-47 (2017).

93. *Id.*

Yet, under Section 230 of the Communications Decency Act (CDA)[94], interactive service providers such as Facebook cannot be held liable for user-generated content where the provider did not create or develop the content at issue.[95] Section 230 also protects publishers and editors from the content they publish, holding that the posted content is the responsibility of the content creator alone. However, this case touched on a potential exemption of Section 230, arguing that Facebook's machine-learning algorithm has the power to personalize what content is shown by selecting which stories to display over others.[96] In her article, *Wild Westworld: The Application of Section 230 of the Communications Decency Act to Social Networks' Use of Machine Learning Algorithms,* Professor Catherine Tremble argues that machine-learning algorithms that personalize content, such as Facebook's, do not qualify for Section 230 immunity because they effectively become co-developers of the content by choosing what content is displayed and when.[97]

The court in *Cohen v. Facebook* dismissed Cohen's complaints, holding that Cohen failed to point to any direct injury to herself that was not also faced by the general public from Facebook's algorithms.[98] But other courts have found that platforms can be liable for discrimination when more personal information is required. For example, in a 2008 case, *Fair Housing Council of San Fernando Valley v. Roommates.com*, the Ninth Circuit held that the CDA did not immunize the Fair Housing Council from liability arising from preferential questions used in housing surveys.[99] In that case, plaintiffs took issue with Roommates.com requiring users to disclose personal information, including their sex, sexual orientations, and whether or not they had children.[100] The court held that Roommates.com was not merely a provider of an interactive service, but had direct control over the content that they showed to other users.[101] Under the CDA, then, Roommates.com was not only publishing information, but was helping to develop unlawful content.[102]

Following the same logic, courts have recently begun to question whether the ADEA can also apply to online hiring platforms. At the root of this question is whether online hiring platforms are manipulating content such that they might be considered content developers under Section 230 the CDA. In *Cramblett v. McHugh* in 2014, the plaintiff argued he was not hired

94. 47 U.S.C. § 230 (2012).

95. Catherine Tremble, *Wild Westworld: Section 230 of the CDA and Social Networks' Use of Machine-Learning Algorithms*, 86 FORDHAM L. REV. 825, 825 (2017)

96. *Id.*

97. *Id.*

98. Cohen v. Facebook, 252 F. Supp. 3d 140, 150-51.

99. Fair Hous. Council v. Roommates.com, 521 F.3d 1157, 1167 (2008).

100. *Id.* at 1161-62.

101. *Id.* at 1166.

102. *Id.*

due to age discrimination and that a computerized algorithm had been used to weed out resumes with "insufficient qualifications," which included candidates' skills and past employment history.[103] Cramblett argued that his age was a "substantial factor" taken into consideration by the algorithm that culled his application.[104] The Ninth Circuit held, however, following the "but for" causation rule under *Gross v. FBL Financial Services*,[105] that Cramblett's showing that his age was a "substantial factor" was not enough to meet the standard of proof for age discrimination.[106] Instead, to make his claim of age discrimination, Cramblett was required to show that "but for" his age, he would have been hired.[107]

While Cramblett failed to meet this burden, his contention that he was culled by an algorithm as a consequence of his age could indicate a growing issue for employers as it relates to ADEA protections for job applicants. Cramblett's claim, and others like it, may be bolstered in the future by stricter data documentation that could show age was a "but for" cause for the hiring decision.

B. "But For" - Difficulties of Proof Under the ADEA

As Cramblett's case implies, even in the event that the ADEA is found to apply to platforms, plaintiffs still must meet the higher "but for" standard of proof. This is because the Supreme Court fundamentally changed the standard which plaintiffs must meet when filing complaints under the ADEA in order to show age discrimination. The case, *Gross v. FBL Financial Services,* held that a plaintiff needed to prove, "by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action."[108] *Gross* drastically raised the standard of proof for ADEA age discrimination claims from the previous "motivating factor" standard.[109] Thus *Gross* has made it much more difficult for plaintiffs to prove ADEA cases.[110]

Melissa Hart has noted that the Supreme Court's majority ruling in *Gross* overruled a twenty-year precedent to the detriment of labor and employment law plaintiffs.[111] Furthermore, Hart writes that the Court's

103. Cramblett v. McHugh, No. 3:10-CV-54-PK, 2012 WL 7681280, at *18 (D. Or. Nov. 19, 2012).

104. *Id.*

105. *See* Gross v. FBL Fin. Servs., 557 U.S. 167, 180 (2009).

106. *See Cramblett*, 2012 WL 7681280 at *31.

107. *Id.*

108. Gross, 557 U.S. 167 at 180.

109. *Id.* at 175-77.

110. Michael L. Foreman, *Gross v. FBL Financial Services - Oh So Gross!*, 40 U. MEM. L. REV. 681, 688 (2010).

111. Melissa Hart, *Procedural Extremism: The Supreme Court's 2008-2009 Labor and Employment Cases*, 13 EMP. RTS. & EMP. POL'Y J. 253, 265 (2009).

"casual, one-paragraph redefinition of what it means for an action to be taken 'because of' a protected characteristic may well have consequences beyond the age discrimination context,"[112] as the decision moves claims under the ADEA away from the Title VII standard of establishing discrimination (which can be proven by establishing a protected characteristic was a "motivating factor" in the adverse employment action).[113]

Further, Hart shows that, because of this movement away from the Title VII standard, *Gross* calls into question the ability of ADEA plaintiffs to make mixed-motive claims.[114] Mixed-motive claims are those in which plaintiffs argue that a protected characteristic was a motivating or substantial factor in an adverse employment action, even if other motivating factors used could have been lawful.[115] Since *Gross* held that discrimination claims under the ADEA must show that the action would not have occurred "but-for" the consideration of the plaintiff's age, making mixed-motive claims under the ADEA has become significantly more difficult, if not impossible.[116] Ultimately, this means that significantly fewer cases of age discrimination can be proven under the ADEA, because many employers might have used lawful considerations in addition to a plaintiff's age when making employment decisions.

Courts have also begun to defer to employers to show that they addressed "reasonable factors other than age" in their contested employment decisions. For example, in the 2016 case *Villarreal v. RJ Reynolds Tobacco,* plaintiff Richard Villarreal applied for a territory sales manager job at Reynolds Tobacco via an online platform.[117] He was 49 years old at the time he sent his application. After applying, Villarreal was never contacted, and he did not follow up with Reynolds.[118] However, several years later, he learned that the company's internal hiring guidelines described "targeted candidates" as those "2-3 years out of college" and that reviewers should "stay away from" applicants whose resumes showed that they had been "in

112. *Id.* at 269.

113. *Id.* at 270.

114. *Id.* at 271.

115. *Id. at 265-66*

116. "In *Gross*, a five-justice majority concluded that the plaintiff had to carry the burden of persuasion at all times, that the burden never shifted to the defendant, and that the plaintiff was not entitled to a mixed-motive jury instruction under any circumstances in an ADEA claim." Andrew M. Witko, *Evolving Causation Standards and Their Post-Nassar Application to Retaliation Claims under the False Claims Act*, 2 A.B.A. J. Lab. & Emp. L. 30, 288, 288 (2015). *See also*, Jessica M. Scales, *Tipping the Balance Back: An Argument for the Mixed Motive Theory under the ADEA*, 30 ST. LOUIS U. PUB. L. REV. 229, 230, 240-42 (2010); Leigh A. Van Ostrand, *A Close Look at ADEA Mixed-motives Claims And Gross V. FBL Financial Services, Inc*., 78 FORD. L. REV. 399, 439-41 (2009); Ann Marie Tracey, *Still Crazy After All These Years? The ADEA, the Roberts Court, and Reclaiming Age Discrimination as Differential Treatment*, 46 AM. BUS. L.J. 607, 609-10, 615-18 (2009)

117. Villarreal v. Reynolds Tobacco Co., 839 F.3d 958, 961 (11th Cir. 2016).

118. *Id.*

sales for 8-10 years."[119] After hearing about these internal guidelines, Villarreal filed suit alleging a violation of the ADEA.[120]

In *Villarreal*, the majority effectively stated that, although Reynolds Tobacco had used discriminatory guidelines internally, Mr. Villarreal could not prove age discrimination because he did not diligently follow up regarding his application decision.[121] Thus, the employment decision could have been made based on a number of factors other than Villarreal's age.[122] The *Villarreal* decision indicates the court's deference to the employer to show that a decision was made for "reasonable factors other than age."[123] Reynolds did not have to show its decision was not discriminatory, but simply had to show that its decision could have been for other factors related to Villarreal's application.[124] Effectively, by linking *Gross*, in which plaintiffs must show age was the "but-for" factor in an adverse employment decision,[125] and *Villarreal*, in which employers must simply show age was not the only factor in their decisions,[126] courts have made it very difficult for plaintiffs to prove ADEA violations.

Thus, courts' changes in ADEA standards have done nothing to mitigate existing factors[127] that have made proving ADEA claims exceedingly difficult. For example, recently terminated workers of Spirit AeroSystems have found their age discrimination claims very difficult to prove because "[e]ven companies that decide that older workers are too expensive, with their larger paychecks and costlier health insurance, rarely detail this in

119. *Id*.

120. *Id.*

121. *See id.* at 970-72.

122. *See id.*

123. *See* 29 U.S.C. § 623(f)(1).

124. Villarreal, 839 F.3d at 971-72.

125. *See* Gross v. FBL Fin. Servs., 557 U.S. 167 (2009).

126. *Supra* note 124.

127. Another major factor involved in proving ADEA claims revolves around the employers' replacement of the affected employee. For example, in *Merrick v. Hilton Worldwide*, an employee had difficulty proving a *prima facie* age discrimination claim in district court because he was required to show he was "(1) at least forty years old, (2) performing his job satisfactorily, (3) discharged, and (4) either replaced by substantially younger employees with equal or inferior qualifications or discharged under circumstances otherwise 'giving rise to an inference of discrimination.'" While Merrick was able to adequately affirm the first three qualifications, the district court found he was not able to show he was replaced by someone substantially younger than him. Merrick's replacement was somewhat complicated. When Merrick was terminated, he was replaced by an employee who was 15-years younger than him, which seemingly should have met the burden of being replaced by someone substantially younger. However, Merrick's duties were only partially given to this younger employee. As opposed to being fully replaced, many of Merrick's duties were outsourced. On appeal, the Ninth Circuit reversed the district court's holding, finding that Merrick did not have to show that he was replaced because he was laid off in a reduction-in-workforce. *Merrick v. Hilton Worldwide, Inc*., 867 F.3d 1139 (9th Cir. 2017). However, this case highlights a potential problem for many employees whose jobs might be outsourced. Even though employees may be targeted for termination because of their age, they may not be able to prove they were replaced by someone substantially younger.

internal documents or emails."[128] Additional issues with proving ADEA claims include the costs of the lawsuits and the time it takes to try them.[129]

C. The Responsibility of Platforms as Information Fiduciaries

An additional theory that could hold platforms liable for age discrimination positions their creators as information fiduciaries who can be held liable for age discrimination on their platforms. In his article, *Information Fiduciaries and the First Amendment*, Jack Balkin defines information fiduciaries as entities "who, because of their relationship with another, [assume] special duties with respect to the information they obtain in the course of the relationship."[130] He compares these online companies to traditional fiduciaries, like doctors and lawyers, who have the duty not to disclose sensitive information about their clients.[131] Balkin primarily believes that this relationship is necessary because these service providers rely on the trust of their clients, and are thus theoretically deterred from misusing the information that they obtain.[132] However, online information fiduciaries have a much wider scope than traditional fiduciaries due to the reach of the internet. By way of online platforms, these fiduciary relationships are widespread, and include companies that are "increasingly using sophisticated algorithms and forms of artificial intelligence to make decisions about people in areas ranging from advertising to employment to policing to credit."[133]

Considered in the context of employment, one primary question has arisen: where do the responsibilities of these fiduciaries lie with regard to the information they receive? More specifically, does the information fiduciary hold any responsibility for creating categories of information or designing its platform in such a way as to capture categories of information, some of which may be considered protected information? Some legal scholars have noted that platforms, which might be considered information fiduciaries because of the amount and type of information they collect from potential job applicants, "can control who is matched with whom for various forms of exchange, what information users have about one another during their interactions, and how indicators of reliability and reputation are made salient."[134]

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128. Elizabeth Olson, *Shown the Door, Older Workers Find Bias Hard to Prove*, N.Y. TIMES, Aug. 7, 2017, https://www.nytimes.com/2017/08/07/business/dealbook/shown-the-door-older-workers-find-bias-hard-to-prove.html [http://perma.cc/9ZRW-5ATF].

129. *Id.*

130. Jack Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1185, 1209 (2016).

131. *Id.* at 1225.

132. *Id.* at 1222-23.

133. *Id.* at 1232.

134. Karen Levy & Solon Barocas, *Designing Against Discrimination in Online Markets*, 32 BERKELEY TECH. L. J. 1183, 1183 (2018).

Here, following Professor Balkin's analogy from above,[135] it might be helpful to draw a comparison between the relationship of online hiring platforms and their users to the relationship that patients have with both doctors and nurses. The role of the online hiring platform might be compared to that of a nurse, who goes through records and conducts a preliminary check-up, determining what the cause of a patient's sickness might be before bringing in a doctor. Then, the information is passed to a doctor, or the employer in this analogy, to conduct a more in-depth review of the patient's condition. This is the function that an online hiring platform might fulfill before passing on information to a hiring manager. In both situations, parties retain sensitive information internally, for their own use. Thus, one might argue that, like an information fiduciary, an online hiring platform has an obligation to act in the interests of its clients.[136]

As other scholars have noted, these platforms "necessarily exercise a great deal of control over how users' encounters are structured."[137] In evaluating certain design policy choices made by platform creators, such as what information might be requested or how the platform is structured to allow certain types of information and not others, it becomes clear that platforms shape the amount of information their users can learn about one another and how they are to do so.[138] Harkening back to the example of limited dates on drop down birthdate data fields described above,[139] a given platform's design choices can exacerbate age discrimination. Thus, some argue, platforms should not be held completely blameless for discrimination, even if their users may be influenced by pre-existing biases.[140] Rather, the law should recognize platform authoritarianism as a socio-technical phenomenon that changes both the responsibility and liability of platforms.

Scholars have challenged the "dominant position in the legal literature that [increased] transparency will solve [the] problem" of algorithmic bias.[141] While the scholars recognize that "the accountability mechanisms and legal standards that govern [algorithmic decisions] have not kept pace with technology," they believe that the only way to fix the issues with technology is by deploying further technological solutions.[142] One suggestion for preventing discrimination in hiring is to create a method whereby technology

135. *See* Balkin, *supra* note 130, at 1225.

136. *See id.* at 1206-07.

137. Levy & Barocas, *supra* note 134, at 1183.

138. *Id.* at 1206-18.

139. *See supra* Part I.B.

140. Levy & Barocas, supra note 134, at 1184–89.

141. Joshua Kroll, *Accountable Algorithms*, 165 U. PA. L. REV. 633, 633 (2016).

142. *Id.*

can show that a particular algorithm "does not directly use sensitive or prohibited classes of information."[143]

In response, Professor Pauline Kim argues that technical "checks" on the decision process like randomization or predefining constraints cannot solve the entire problem at hand.[144] Instead, Professor Kim argues that "causes of bias often lie not in the code, but in broader social processes."[145] The true issue is classification bias, which requires outside scrutiny. For example, third parties could examine computer code or the decision criteria it implements to detect biases.[146]

Although elsewhere I have also argued for third party audits similar to those envisioned by Professor Pauline Kim,[147] I also believe that the responsibility to prevent algorithmic bias and disparate impacts rests on both the employer and platform creator. Indeed, there are many checks that both parties might take to ensure equal opportunity for all workers in the future, such as ending the separation of job categories by age, checking for the use of age-related proxies in job advertisement and by platforms, and subjecting employment data to external audits.

The controversy over whether to hold platform creators responsible for the discrimination that occurs on their sites involves the question of how much control these online hiring platforms exercise over the type of information to be collected and how that information is used. In some cases, it seems the platforms themselves may not have much control over what information they intake and the criteria imposed by employers in searching for applicants.[148] Professor Kim writes that one of the major problems in relying on the conviction of these hiring platforms is "classification bias," essentially that the information they receive is either biased to begin with or is ordered by a third party to be classified into prohibited characteristics such as race or sex.[149] In such a scenario, this might be the reason to make an argument against assigning liability for discriminatory outcomes to the platform as an information fiduciary if the platform only takes an administrative role in sorting through applications based on an employer's preferences.

Thus, the liability of platforms hinges on the amount of control they exact over determining what sensitive information to collect or over how to classify candidates. As in *Fair Housing Council* where the court held

143. *Id*. at 682.

144. Pauline Kim, *Auditing Algorithms for Discrimination*, 166 U. PA. L. REV. ONLINE 189, __ (2017).

145. *Id* at 191.

146. *Id*. at 190.

147. *See* Ifeoma Ajunwa, *The Auditing Imperative for Hiring Systems*, (on file with author).

148. *See* Kim, *supra* note 144, at 194.

149. *See id*. at 190–91.

Roomates.com could be considered a content creator rather than merely a publisher, the ADEA should be extended to automated hiring platforms, when, as detailed previously, they actively shape the content that users see, and such content is specifically the type of content that might be used for age discrimination in employment.[150]

III. SOME PROPOSALS FOR TACKLING AGE DISCRIMINATION BY PLATFORMS

In this section, I offer three proposals for curbing platform-enabled age discrimination in employment. First, because of the difficulty of proving disparate treatment, which typically would require hard evidence of an individual targeted for age discrimination, advocates should attempt to reinforce the disparate impact cause of action for the ADEA via codification. Second, given the issues of ageist language on online hiring platforms, such as the use of terms like "digital natives," the EEOC should provide educational guidelines for employers regarding the use of ageist language or other age proxies in job ads. Finally, with an aim to facilitate disparate impact claims aimed at curbing age discrimination, the EEOC should consider implementing guidelines for the documentation of criteria used to determine suitable applicants and for more stringent data retention on job advertisement, recruitment, and hiring platforms.

A. Strengthen the ADEA by Codifying the Disparate Impact Cause of Action

Strengthening the ADEA with a disparate impact cause of action could help stem age discrimination in employment via platforms. Several legal scholars have analyzed how the frameworks courts use to evaluate discrimination claims impact their success.[151] The lack of a codified disparate impact cause of action is an impediment to plaintiffs seeking redress for platform-enabled age discrimination. The codification of a disparate impact cause of action would provide another avenue of proof for plaintiffs. For one, in *Smith v. City of Jackson*, the Supreme Court has held that the Fifth Circuit was incorrect "to hold that the disparate impact theory of liability was

150. *See supra* Part I.A-C.

151. *See, e.g.*, Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69 (2011); William R. Corbett, *Babbling About Employment Discrimination Law: Does the Master Builder Understand the Blueprint for the Great Tower?*, 12 U. PA. J. BUS. L. 683 (2010); William R. Corbett, *Fixing Employment Discrimination Law*, 62 SMU L. REV. 81 (2009); Martin J. Katz, *Gross Disunity*, 114 PENN ST. L. REV. 857 (2010); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229 (1995); Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313 (2010); Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911 (2005); Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse Is Dead, Whither McDonnell Douglas*?, 53 EMORY L. J. 1887 (2004); Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577 (2001).

categorically unavailable under the ADEA.[152] While courts have concluded that, even in the absence of statutory language, the ADEA does allow for disparate impact claims, codification would provide greater protection to workers and job applicants.

Legal scholars have written about arguments for and against adding a disparate impact clause into the ADEA. For example, Professor Henry Pfutzenreuter noted that "given the textual similarities between Title VII and the ADEA, courts [could apply] the same standards to both acts."[153] In fact, in the *Smith* decision, Justice Stevens identified that the two were almost completely identical in their text and structure.[154] However, because not all courts agree on the availability of implicit ADEA relief under a disparate impact theory for victims of age discrimination, some legal scholars have argued that the risk of the theory's obsolescence for the ADEA is high.[155] Professor Pfutzenreuter proposes a balancing approach between a Reasonable Factor Other than Age (RFOA) defense and a disparate impact defense.[156] Arguing that the minimal threshold for finding a RFOA is too low, Professor Pfutzenreuter suggests courts should instead try to balance the "reasonableness" of an employer's reliance on a factor other than age and then consider discrimination at an implicit level.[157] Overall, he concludes that a solution is needed to fix the current inability of plaintiffs to find discriminatory impact relief under the ADEA.

Following the same logic, Professor Michael Harper argues that the ADEA should be amended to provide the same procedural strengths that Title VII provides.[158] Harper's reasoning arises from "the obvious relative weakness of the nation's regulation of age discrimination in employment" and the lack of effort of the then-Obama administration to combat the confusion surrounding the issue of disparate impact arising from recent court decisions.[159] Further, Harper observes that "the continuing gap between the ADEA and Title VII may reflect assumptions that age discrimination is less likely to be malignly motivated" than the other protected classes–a statement which he suggests may be true.[160] However, Harper notes that the motivation does not make age discrimination in employment any less serious than the forms of discrimination proscribed by Title VII.[161] Following this reasoning,

152. Smith v. City of Jackson, 544 U.S. 228, 240 (2005).

153. R. Henry Pfutzenreuter IV, Note, *The Curious Case of Disparate Impact Under the ADEA: Reversing the Theory's Development into Obsolescence*, 94 MINN. L. REV. 467, 475–476 (2009).

154. *See* Smith v. City of Jackson, 544 U.S. 228, 233 (2005).

155. *See* Pfutzenreuter IV, Note, *supra* note 153.

156. *Id.* at 501-504.

157. *Id.*

158. Michael Harper, 16 *Reforming the ADEA*, EM. RTS. & EMP. POL'Y J. 13, 14-15 (2012).

159. *Id*. at 15.

160. *Id*. at 17.

161. *Id.*

Harper calls for damage remedies, class actions, defenses to disparate impact actions, and causation standards for disparate treatment actions under the ADEA, in line with the protections granted by Title VII.[162]

Professor Judith Johnson argues that because employers are more frequently using age-correlated criteria to make employment decisions that are "opportunistic" for their bottom lines, a solution is necessary to combat "exactly [the age discrimination that] the ADEA was designed to prevent."[163] To alleviate this issue, Professor Johnson proposes a two-stage solution "apply[ing] the disparate impact theory to the ADEA, which would require an employer to justify the use of an age-correlated factor that would have a disparate impact on older workers."[164] To do so, Professor Johnson proposes that the employer should be required to bear the burden of persuasion that the use of any age-correlated factor that selects out older workers, such as high salary, is justified as a "reasonable factor other than age."[165] This solution would effectively make it more difficult for courts to simply defer to employers who might point to an RFOA explanation without legitimate proof that the qualification is "reasonable."

Professor Sandra Sperino notably criticizes the idea of liability for discrimination arising from separate frameworks, questioning whether courts should even "use frameworks to conceptualize discrimination in the first place."[166] Her central argument revolves around the idea that "faulty sorting contributes to stereotyping and societal discrimination" and that by sorting cases into frameworks, courts themselves are operating by the same discriminatory principles that are questioned in the cases they are trying to solve.[167] Professor Sperino does not suggest a return to traditional claims of discriminatory impact, but instead relies on a simpler solution whereby courts carefully follow elements of proof for any discrimination case as defined by the key statutory language in the antidiscrimination statute.[168]

I argue that the ADEA would be more effective with a disparate cause of action and its procedures written into the statute. Such codification would

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162. *Id*. at 18, 49.

163. Judith Johnson, *Rehabilitate the Age Discrimination in Employment Act: Resuscitate the "Reasonable Factors Other than Age" Defense and the Disparate Impact Theory*, 55 HASTINGS L.J. 1399, 1399-1400 (2004). Johnson states, "Even though RFOA has not been adequately defined under the ADEA, it must be afforded a place in the statutory scheme and cannot be considered surplusage," suggesting she advocates a legislative codification. *See id.* at 1404-05. However, she also indicates that a SCOTUS ruling on whether the disparate impact theory applies to the ADEA will be determinative, suggesting a desire for judicial recognition. *See id.* at 1402, 1448. She says, "The ADEA must be rehabilitated," but does not indicate if her solution applies to actual modification of the law or simply its judicial treatment. *Id*. at 1445.

164. *Id*. at 1402.

165. *Id*. at 1403.

166. Sandra Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 70 (2011).

167. *Id.*

168. *Id*. at 72.

standardize the use of a disparate impact theory of action for age discrimination cases, thus alleviating confusion as to how the disparate impact theory would be applied and also encouraging would-be plaintiffs to file claims under the disparate impact theory. As some scholars have noted, the language of the ADEA is in parallel with that of the Title VII, which does have a codified disparate impact cause of action.[169] One could argue then that the similarity between the two statutes means the omission of the disparate impact cause of action was deliberate.[170] But, I argue the omission was merely an oversight that should be remedied, particularly in light of recent decisions like *Smith* that have come out in favor of a disparate impact cause of action for the ADEA.

B. EEOC Education For Employers Regarding Ageist Language In Job Advertisements

Another proposal to curb age discrimination caused by online platforms is the release of EEOC guidelines to educate employers on ageist language in job advertisements. A search of the EEOC website reveals no such existing guidelines.[171] As previously described, job advertisements on platforms are rife with descriptions such as "digital native" or "recent graduate."[172] A generous interpretation of this phenomenon is that employers truly may not understand how such language might dissuade older job applicants. Whether or not this is the case, EEOC guidelines that clarify what might be classified as ageist language in advertisements and resume screening would help employers and plaintiffs seeking to bring suit when they suspect the occurrence of age discrimination on platforms.

C. EEOC Guidelines for Design of Hiring Platforms and Their Data Collection Practices

An EEOC-led effort to combat age discrimination enabled by work platforms should include evidence-backed guidelines for the design of hiring platforms. These design guidelines would, for example, address user

169. Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 578 (2001).

170. *See* Evan Pontz, *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, 274 (1995) ("In creating the ADEA, Congress did not prohibit every use of age as a factor in making employment policies and decisions. The ADEA provides for several statutory defenses, which either permit age discrimination in employment *under certain conditions*, or allow the employer to prove that the employment decision was based on factors other than age.").

171. The author performed a survey of the ADEA Regulations and Guidance available on the Equal Employment Opportunity Commission (EEOC) website and found no evidence of guidelines for ageist language. See, 29 C.F.R Part 1625: Age Discrimination in Employment Act, https://www.eeoc.gov/eeoc/history/adea50th/regs.cfm (last accessed, Dec. 17, 2018).

172. *See supra* Part I.C.

interfaces that are more difficult for older workers to use, such as those with small print or drop-down menus for birthdates or graduation years, for example, that exclude options for older applicants.[173] I would also propose that the EEOC set forth guidelines for data collection practices by platforms that instruct them to prohibit data collection that can be used as proxies against older workers.

CONCLUSION

Age discrimination is not merely a matter of the violation of established law; rather, it is a societal issue that goes to the very survival of elderly people. Consider that on the island of Keos in the Aegean Sea, when the island was besieged and its residents were slowly being starved by the Athenians, the island residents responded by voting that those over sixty years old must commit suicide by drinking hemlock.[174] And according to Greek mythology, on the island of Sardinia, sons slew their elderly fathers, as human sacrifices to the god of time, Cronus.[175] A rule of law that respects the worth of geriatric human life, coupled with technological advances in healthcare mean that humans now live much longer than before. Thus, excluding older workers from gainful employment is akin to the senicide act of sending them into the open sea on a raft with no provisions. Age discrimination on job seeking platforms is increasingly well documented, particularly in regards to design elements and functionality that redline, cull, or dissuade older job applicants. To preserve equal opportunity for employment, the law must attend to the new avenues for age discrimination now presented by the technological capabilities of platforms. The three-part proposal I have set forth will help to combat age discrimination in the face of platform authoritarianism.

173. *See supra* Part I.B.

174. Tim Parkin, OLD AGE IN THE ROMAN WORLD: A CULTURAL AND SOCIAL HISTORY 265 (July 2004).

175. *See* Aaron Atsma, *Kronos*, THE THEOI PROJECT (2017), http://www.theoi.com/Titan/TitanKronos.html.