NOTE

THE IMPACT OF INTERPRETATION: THE AGE DISCRIMINATION IN EMPLOYMENT ACT AS DETERMINED BY THE SIXTH CIRCUIT

Megan Jordan Strickland

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I. Introduction

To most Americans, age discrimination in the workplace can be as injurious and degrading as racial, religious or sexual discrimination

because of its ability to permeate both an existing job and the search for new employment.[1] This is especially problematic in modern society where people are often compared and judged based on their respective livelihoods.[2] While the Age Discrimination in Employment Act ("ADEA") has provided protection for most age-based disputes,[3] no decision has yet resolved the issue of whether reverse age discrimination claims are permitted under this statute.[4]

In *Cline v. General Dynamics Land Systems,* the Sixth Circuit considered this type of controversial age discrimination claim.[5] Specifically, *Cline* addressed whether younger employees within the protected class of the ADEA could bring a claim against older members of the same protected class.[6] Previous court decisions determined that "reverse" age discrimination claims are not recognized by the ADEA.[7] The Sixth Circuit, however, held that the ADEA does permit a cause of action for interclass reverse age discrimination.[8] The *Cline* opinion sharply departs from established precedent, calling into question the true and proper meaning of the ADEA with respect to reverse age discrimination.[9] The courts have interpreted the language of the statute

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[1] Bryan B. Woodruff, *Unprotected Until Forty: The Limited Scope of the Age Discrimination in Employment Act of 1967*, 73 IND. L.J. 1295, 1300 (1998). "Our society which prides itself on a system that guarantees equality of opportunity and freedom of choice for all of its people, for too long has tolerated the mean and arbitrary indignity of [age discrimination]." *Id.*

[2] *See* 29 U.S.C. § 623(a)(1) (2002).

> Employer practices. It shall be unlawful for an employer (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

Id.

[3] *See generally* 29 U.S.C. §§ 621-34. "It is therefore the purpose of this Act to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." *See id.* § 621(b).

[4] Gen. Dynamics Land Sys. v. Cline, 123 S. Ct. 1786 (2003). The Supreme Court heard oral arguments on this issue in November 2003, but has yet to hand down a decision. *Id.*

[5] Cline v. Gen. Dynamics Land Sys., 26 F.3d 466 (6th Cir. 2002).

[6] *Id.* at 467; *see also* 29 U.S.C. § 631(a) ("The prohibitions of this Act shall be limited to individuals who are at least 40 years of age.").

[7] *See* Hamilton v. Caterpillar Inc., 966 F.2d 1226, 1228 (7th Cir. 1992) (holding that the ADEA does not provide a cause of action or a remedy for reverse age discrimination). *See also infra* Part III.C.

[8] *Cline*, 26 F.3d at 467.

[9] *See infra* Part III.D.

differently, resulting in not only a split among the circuits, but also in differing opinions as to how the ADEA should be applied in reverse age discrimination situations.[10]

This note will examine the issue of interclass reverse age discrimination and how the ADEA was interpreted differently in the Sixth and Seventh circuits. Part II provides background information regarding the ADEA and considers why Congress enacted this statute and what type of protection Congress was seeking for the covered class members.[11] Part III discusses the evolution of the statute through case law, considering state anti-discrimination statutes in comparison to the federal statute and resulting court decisions.[12] This section also dissects the conflicting opinions of the Seventh Circuit's decision in *Hamilton v. Caterpillar*[13] and the Sixth Circuit's decision in *Cline v. General Dynamics*.[14] Part IV then provides a reaction to the *Cline* decision, specifically, the effect the decision may have on collective bargaining agreements.[15] In conclusion, this note considers what the United States Supreme Court might decide upon review of this case[16] and the resulting problems if reverse age discrimination becomes a viable cause of action.[17]

II. The ADEA: Providing Protection for Older Workers

The purpose of the ADEA is to protect older workers from unfair employment decisions that are based on the characteristic of age alone.[18] As provided in the statement of findings, Congress recognized the disadvantaged status of older workers in situations such as retaining and

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10 *Cline*, 26 F.3d at 470; *see also infra* Part III.C-D.

11 *See infra* Part II.

12 *See infra* Part III.

13 *Hamilton*, 966 F.2d 1226; *see also infra* Part III.C.

14 *Cline*, 26 F.3d 466; *see also infra* Part III.D.

15 *See infra* Part IV.

16 Gen. Dynamics Land Sys. v. Cline, 123 S. Ct. 1786 (2003).

17 *See infra* Part V.

18 29 U.S.C. § 621(b) (2002) ("[The purpose of the ADEA is] to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."); *see also* Woodruff, *supra* note 1, at 1299. *See also* 132 CONG. REC. S16850 (daily ed. Oct. 16, 1986) (statement by Sen. Heinz). The Congressional record states that the threat of age discrimination extends not only to the quality of life of older workers but also to the stability of the economy and retirement income systems. *Id.*

regaining employment.[19] These disadvantages were created by such employer practices as setting age limitations when hiring and firing employees and were proven through a high unemployment rate among older workers.[20] Studies illustrating that age discrimination in the workplace burdened commerce and affected the free flow of goods enabled Congress to enact the ADEA.[21]

A. *The Legislative Background of the ADEA*

The ADEA emerged from Title VII of the Civil Rights Act,[22] which did not provide coverage for discrimination against a class based on age.[23] Although it considered the inclusion of age as part of the Civil

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[19] 29 U.S.C. §§ 621(a)(1)-(3). The purpose of the ADEA is not to require employers to retain unproductive employees. *Id.* Rather, each employee must be assessed based on his or her individual performance. 132 CONG. REC. S16850 (daily ed. Oct. 16, 1986) (statement by Sen. Heinz). Sen. Heinz concluded that this type of determination is fair and reasonable. *Id.*

[20] *See* 29 U.S.C. §§ 621(a)(1)-(3).

[21] *See id.* § 621(a)(4); *see also* Woodruff, *supra* note 1, at 1297 (quoting SECRETARY OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT, 111 CONG. REC. 23, 037 (1965)). According to published reports, "older workers faced discrimination arising out of 'assumptions about the effect of age on the ability to do a job when there is in fact no basis for these assumptions.' This discrimination placed a substantial burden on the economy, both in terms of unemployment insurance payments and in lost productivity." Woodruff, *supra* note 1, at 1297. Because of these assumptions more people, especially those who are older, become unemployed. *See id.* With the population having less money to spend, the economy becomes and remains stagnant. *See id.; see also* 29 U.S.C. § 630(b) (stating that the ADEA is applicable for employers "engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . .").

[22] 42 U.S.C. § 2000e-2(a) (1994) ("It shall be unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."). The United States Supreme Court determined that the purpose of Title VII was "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) (citing Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971)). Furthermore, the court created an analytical framework upon which ADEA claims are also evaluated. *See id.; see also infra* Part II.B.

[23] 42 U.S.C. § 2000e-2(a). Although Congress identified race, color, religion, sex and national origin as protected categories, age was not identified as a protected category. *Id. See also* George Rutherglen, *From Race to Age: The Expanding Scope of Employment Discrimination Law*, 24 J. LEGAL STUD. 491-92 (1995). One of the core provisions of Title VII of the Civil Rights Act of 1964 is the prohibition of segregation in employment. *Id.* Employment discrimination was formed in light of racial discrimination, and reaches both

Rights Act, Congress determined that age was not a characteristic that deserved the high standard of protection afforded to traits such as sex and race.[24] Congress, however, directed the Secretary of Labor to study the issue of age discrimination in the context of employment.[25] The investigation and subsequent report concluded that although age discrimination is a problem deserving of protection, it is feasible that age can interfere and may affect an employee's ability, whereas sex and

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public and private employers. *Id.* The ADEA differs in form from this established model of employment discrimination law and remains one of the only departures from the constitutional framework established in Title VII that has endured. *Id.* Interestingly, the ADEA framework has survived even though there has never been any form of heightened judicial review of the age classification itself. *Id.* at 492; *see, e.g.*, Goger v. H.K. Porter Co., 492 F.2d 13 (3d Cir. 1974); Holiday v. Ketchum, MacLeod & Grove Inc., 584 F.2d 1221 (3d Cir. 1978). Both *Goger* and *Holiday* illustrate the emergence of the ADEA from the Secretary of Labor's investigation of age discrimination after it was excluded from Title VII. *See* 29 U.S.C. § 621 (2002) (Interpretative notes).

[24] SECRETARY OF LABOR, 95TH CONG., NEXT STEPS IN COMBATING AGE DISCRIMINATION IN EMPLOYMENT (Comm. Print 1977); *see also* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313-14 (1976) ("[E]ven old age does not define a 'discrete and insular' group in need of 'extraordnary protection from the majoritarian political process. Instead, it marks a stage that each of us will reach if we live out our normal span.") (quoting United States v. Carolene Products Co., 304 U.S. 144, 152-53, n.4 (1938)). Under the Americans With Disabilities Act, a disability is another trait that was not afforded protection under Title VII, but was later determined to have detrimental effects on employment, thus becoming worthy of some protection under its own statute. *See* 42 U.S.C. § 12101(a)(3) (2003). It was not until 1990 that Congress considered aiding disabled persons by enacting a protective statute to prevent discrimination based on a disability. *See* Constance Kleiner Hood, *Age Discrimination in Employment and the Americans with Disabilities Act: "A Second Bite at the Apple,"* 6 ELDER L.J. 1, 3 (1998). The interplay between the ADA and the ADEA is significant. *See id.* at 30. Both do not afford complete protection like Title VII gives to sex or gender, but they do work together to insure that both older workers and disabled workers are given as much protection as possible. *Id.* Age is not a disability nor does it necessarily cause disabilities, although the occurrence of such rises with age. *Id.* at 15-16. Of the 5.2% of the general population who actually have a physical disability, 45.4% are between sixty-five to sixty-nine and 55.3% are seventy to seventy-four. *Id.* In 1991, 60% of all disabled Americans were over forty-five. *Id.* (citing Kenneth L. Morse & Sharon Renner, *Older Americans and the Americans with Disabilities Act of 1990: Title 1*, CSG BEST PRACTICE NOTES, Mar. 1994, at 2). When an employer provides a reason for taking an employment action that directly relates to an older employee's health problem, the ADA applies to stop the employer from using that health issue as a legitimate ground for the action taken. Constance Kleiner Hood, *Age Discrimination in Employment and the Americans with Disabilities Act: "A Second Bite at the Apple,"* 6 ELDER L.J. 1, 23 (1998). In other words, the ADEA cannot be sidestepped by using health related problems as legitimate, non-discriminatory reasons for adverse employment decisions against older workers. *Id.*

[25] 29 U.S.C. § 624(a)(1) (2002) ("The Secretary of Labor is directed to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to the Congress.").

race are traits that do not.[26] According to the report, the basis of age discrimination revolves around society's "inaccurate stereotypes about older workers' declining abilities and productivity."[27] The use of arbitrary age discrimination in making employment decisions was determined to be a nationwide problem.[28] A federal policy to reform these employment practices was suggested as the most effective solution.[29]

According to Congressional findings, unemployment rates become higher as employees become older.[30] These increasing rates represent the large number of older workers who will encounter problems such as diminishment of skill level, self-esteem and self-worth in the workforce.[31] Aside from the psychological side effects[32] of workplace

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[26] SECRETARY OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT, 111 CONG. REC. 23, 037 (1965). The report examined the problem of age discrimination but importantly distinguished age as being different from other types of discrimination because the issue of dislike or intolerance as seen in sex and race problems does not exist. *Id.* at 6. Older workers are viewed less favorably because of certain stereotypes that focus on the inability of older workers to be a productive asset to a company. Tara Van Ausdall, O'Connor v. Consolidated Coin Caterers Corp., *"Can an ADEA Plaintiff Ever Win?"* 33 TULSA L.J. 643, 652 (1997).

[27] Toni J. Querry, *A Rose by Any Other Name No Longer Smells as Sweet: Disparate Treatment Discrimination and the Age Proxy Doctrine After* Hazen Paper Co. v. Biggins, 81 CORNELL L. Rev. 530, 533 (1996) (citing SECRETARY OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT, 111 CONG. REC. 23, 037 (1965)). Congressional debates highlighted the problems faced by older workers, "employers valued older employees as prized workers because they had better attendance records, fewer injuries, and better skills, training and knowledge than younger workers, but employers despised older employees as new hires because of stereotypes about failing health, inflexibility and low productivity." Hood, *supra* note 24, at 4.

[28] SECRETARY OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT, 111 CONG. REC. 23, 037 (1965) at 21.

[29] *Id.* at 22. "A clear cut and implemented Federal policy against arbitrary discrimination in employment on the basis of age would provide a foundation for a much needed vigorous, nationwide campaign to promote hiring on the basis of ability rather than age." *Id.* The report was concerned primarily with the lack of uniformity in the development of state law and the inadequacy of the state systems to enforce compliance with respective statutes. *Id.* In general, action taken to protect older workers tended to become immersed with other anti-discrimination programs such as race and religion. *Id.* Thus, age discrimination was not receiving the specific attention necessary to begin curtailing age discrimination action. *Id.*

[30] 29 U.S.C. § 621(a)(3) (2002).

[31] *See id* § 621(a)(3).

[32] LARSON ON EMPLOYMENT DISCRIMINATION, § 98.20 at 21-28 (1984); *see infra* note 33 and accompanying text.

discrimination, the financial effects are equally serious.[33] In order to assist in combating these detrimental effects,[34] Congress enacted the ADEA.[35] Presently, this protection is extended to employees age forty and older.[36]

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[33] *See* LARSON, *supra* note 32. Older workers tend to feel the burden of economics much harder than their younger counterparts since the older employee will experience a much longer duration of unemployment periods and subsequently run out of employment insurance benefits much faster. *Id.* Looking at unemployed workers ranging from age fifty-five to sixty four, almost one fifth were unemployed after the traditional unemployment insurance span of twenty-six weeks expired while one sixth were still unemployed in the forty-five to fifty-four year old group. *Id.* In contrast, only one-twenty-sixth of the sixteen to twenty-four-year-old group was unemployed after twenty-six weeks. *Id.* (discussing the nature of the age discrimination problem and quoting U.S. Dep't. of Labor, Bureau of Labor Statistics, 21(1) Employment and Earnings 21-22 (July 1974)); *see also* Dorsch v. L.B. Foster Co., 782 F.2d 1421, 1428-29 (7th Cir. 1986).

[34] 29 U.S.C. § 621. In *Polstorff v. Fletcher*, the court examined these economic and psychological problems. Polstorff v. Fletcher, 452 F. Supp. 17 (N.D. Ala. 1978). The employer in this case implemented a reduction in force that resulted in the downgrading of one employee and the termination of another, both sixty-two years old. *Id.* at 20-21. Employees claimed that action was taken against them based on their age. *Id.* at 23. This case specifically cites the purpose of the ADEA to be a relief mechanism implemented because of the unfair employment practices imposed upon older workers and the effects such activities have on these individuals. *Id.* The court held in favor of the employees and ordered the employer to reinstate each worker, provide them with back pay, seniority and all rights that they would have had if the employer had not improperly applied the reduction in force. *Id.* at 22.

[35] 29 U.S.C. § 621.

[36] 29 U.S.C. § 631(a) (2002). The ADEA was initially proposed to cover employees from age forty through sixty-five. *Id.* After age sixty-five, it was theorized that an employee's work may be affected. Age Discrimination in Employment Act, Pub. L. No. 90-202, 81 Stat. 602 (1967). Congress decided that employees should be evaluated based on their merit as a worker and not on their age (or any other factor as included in Title VII like race, religion or sex). 132 CONG. REC. S16850 (daily ed. Oct. 16, 1986) (statement by Sen. Heinz). The age limit was raised to seventy in 1978 and finally removed altogether in 1986. Age Discrimination in Employment Amendments, Pub. L. No. 99-592, 100 Stat. 3342, 3344 (1986). This amendment removed the maximum age limit for forced or mandatory retirement. *Id.* The Congressional Record indicates that removing this age limit shows employees that they are evaluated and employed based on their ability and not their age. *Id.* At the time of this amendment, there were 1.1 million employees in America age seventy and older. *Id.* This amendment allows those workers to continue contributing to society and to the economy with protection from the federal law. *Id.* According to the Congressional Record, to allow otherwise would deprive a class of citizens equal opportunity based only on their age. *Id.; see also* 132 CONG. REC. S16850 (daily ed. Oct. 16, 1986) (statement by Sen. Heinz). The Congressional Record examines the accomplishments of some of our country's great legal minds as proof that age is not determinative of ability. Age Discrimination in Employment Amendments, Pub. L. No. 99-592, 100 Stat. 3342, 3344 (1986). For example, the Congressional Record looks at Justice Oliver Wendall Holmes, who served on the United States Supreme Court well into his nineties and Congressman Claude Pepper, who at age eighty-six was known as "the father

B. *The Structure and Evolution of an ADEA Claim*

After enacting the ADEA, Congress appointed the Equal Employment Opportunity Commission ("EEOC") to enforce and administer the ADEA.[37] This agency reported age discrimination claims to be among the fastest growing claims.[38] Because age discrimination claims under the ADEA are similar in nature to Title VII claims,[39] the

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of Age Discrimination Law in this country." *Id.*

[37] *See* Hood, *supra* note 24, at 6 n.33. "Regulation and enforcement of the ADEA were initially committed to the Secretary of Labor, *see* Pub. L. No. 90-202, § 7, 81 Stat. 602, 604 (1967), but were transferred to the EEOC on January 1, 1979." *See* Reorganization Plan No. 1 of 1978, Pub. L. No. 95-599, § 2, 92 Stat. 3781. The Equal Employment Opportunity Commission ("EEOC") was created by Congress under Title VII of the Civil Rights Act of 1964. *Id.* The plan took effect on July 2, 1965 and the EEOC received enforcement responsibilities on January 1, 1979. *Id.* The EEOC operates as an extension of the federal government to enforce age discrimination statutes and to eliminate discrimination in the workplace. *Id.; see also* Rebecca Hanner White, *The EEOC, The Courts and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51 (1995).

[38] Van Ausdall, *supra* note 26, at 643 (citing Vinhstadt, Congressional Update, 5 Bifocal 8 (1984)). The EEOC's Program Operations office issued an Annual Report in 1985. *Id.* The number of ADEA charges filed with the agency rose from 8,101 in 1981 to 11,328 in 1984, which was a forty percent increase during the four year span, while Title VII claims only increased by four percent. *Id.* at 643 n.4; *see also* Janice C. Whiteside, *Title VII and Reverse Discrimination: The Prima Facie Case*, 31 IND. L. REV. 413 (1998).

[39] *See* Barry Bennett Kaufman, *Preferential Hiring Policies for Older Workers Under the Age Discrimination in Employment Act,* 56 S. CAL. L. REV. 825, 842 (1983). Many courts have interpreted Title VII as being analogous to the ADEA. *Id.* The experience in dealing with Title VII claims was apparently relied upon by many early court decisions that used Title VII as a guideline in determining its scope and enforcement. *Id.* In *Hodgson v. First Federal Savings*, one of the first ADEA cases, the court explained "with a few minor exceptions the prohibitions of [the ADEA] are in terms identical to those of Title VII of the Civil Rights Act of 1964 except that 'age' has been substituted for 'race, color, religion, sex or national origin.'" Hodgson v. First Federal Savings, 455 F.2d 818 (5th Cir. 1972). Not all courts, however, treat Title VII and the ADEA as deserving the same standard. Kaufman, *supra* note 39, at 844. The ADEA was described as "something of a hybrid, reflecting, on the one hand, Congress' desire to use an existing statutory scheme and a bureaucracy with which employers and employees would be familiar and, on the other hand, its dissatisfaction with some elements of each of the preexisting schemes." Lorillard v. Pons, 434 U.S. 575 (1978); *see also* Kaufman, *supra* note 39, at 844. According to this article, although most courts through the utilization of mechanisms such as the *McDonnell Douglas* test have treated Title VII and the ADEA as synonymous, other courts do not find that such a comparison exists. Kaufman, *supra* note 39, at 844-45; *see also* Rodriguez v. Taylor, 569 F.2d 1231, 1236-37 (3d Cir. 1977) (explaining that Title VII classifications are different than age based classifications because age is not an immutable trait); Williams v. City & County of San Francisco, 483 F. Supp. 335, 344 (N.D. Cal. 1979) (arguing that because age is not like race or sex due to the progressiveness of the condition, it presents a barrier to the adoption of Title VII case law to ADEA claims).

tests to determine whether discrimination has occurred have been widely accepted by courts in age-based complaints.[40] Age discrimination claims can be established either by direct evidence[41] or by circumstantial evidence.[42] In *McDonnell Douglas Corp. v. Green*, the United States Supreme Court instituted a four-part test to review circumstantial evidence in Title VII discrimination cases.[43]

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[40] Van Ausdall, *supra* note 26, at 654. Some of the courts that have followed the *McDonnell Douglas* framework include: Mitchell v. Toledo Hosp., 964 F.2d 577 (6th Cir. 1992); Richmond v. Bd. of Regents of the Univ. of Minn., 957 F.2d 595 (8th Cir. 1992); O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308 (1996); Caldwell v. Nat'l Ass'n of Home Builders, 771 F.2d 1051 (7th Cir. 1985).

[41] *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

> When a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account.

Id. at 258. According to the court, direct evidence consists of statements by employers that show an employee was discriminated against based on a trait like age (or gender or sex under Title VII). *Id.*; *see generally* Hazen Paper Co. v. Biggins, 507 U.S. 604, 609-10 (1993).

[42] *See* West v. Russell Corp., 868 F. Supp. 313, 317 (M.D. Ala. 1994); *see also Hazen Paper Co.*, 507 U.S. at 609-10. Circumstantial evidence is an alternative method for a plaintiff to establish a prima facie case when direct evidence such as actual statements or actions taken by the employer is unavailable. *Hazen Paper Co.*, 507 U.S. at 609-10. The Supreme Court in *McDonnell Douglas* created a test that evaluates the value of circumstantial evidence when trying to meet this burden. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); *see also infra* note 43 and accompanying text. It is important to note that the Supreme Court recently addressed mixed-motive instructions in Title VII cases. *See* Desert Place v. Costa, 123 S. Ct. 248 (2003). The Court concluded that "direct evidence was not required" for plaintiffs to receive a mixed-motive instruction. *See* R. Joseph Barton, *Determining the Meaning of "Direct Evidence" in Discrimination Cases Within the 11th Circuit: Why Judge Tjoflat Was (W)Right,* 77 FLA. BAR J. 42, 43 (2003). The Court did not address how much evidence would be enough to allow a mixed-motive instruction. *Id.* Rather the focus was on the language of the 1991 amendments to Title VII passed after the *Price Waterhouse* decision. *Id.* The Court determined that a mixed-motive claim may be proven by direct and/or circumstantial evidence. *Id.* Because the Court focused solely on Title VII cases, this decision is arguably limited to such cases and therefore does not apply to statutes such as the ADEA that were not amended like Title VII after *Price Waterhouse*. *Id.*

[43] *See generally McDonnell Douglas Corp.*, 411 U.S. 792. To meet the prima facie burden plaintiff must show that: 1) plaintiff belongs to a racial minority; 2) plaintiff applied and was qualified for a job for which the employer was seeking applicants; 3) despite plaintiff's qualifications plaintiff was rejected; 4) after plaintiff's rejection, the position remained open and the employer continued to seek applicants from persons of plaintiff's qualifications. *Id.* This test was originally designed for race discrimination cases but was later adapted to suit age discrimination. *See* Van Ausdall, *supra* note 26, at 649; *see also infra* note 49 and accompanying text.

Courts have varied in their interpretations of the fourth requirement of the *McDonnell Douglas* test.[44] This prong requires proof that after a plaintiff is rejected from an open job position, that position remains open and the employer still seeks applicants who have the same qualifications as the rejected employee.[45] This factor obviously does not fit every situation since discrimination can occur in ways other than being rejected for a position.[46] Rather it is used as a guideline to establish a prima facie case of discrimination.[47] This test was originally established to measure the validity of a racial discrimination claim.[48] The test, particularly the fourth prong, was modified to suit age discrimination claims by requiring that the employee be replaced by a person outside of the protected age class.[49] This requirement mandating that the replacement employee must be outside of the protected class appears to have prohibited claims of discrimination where the statute also protected the replacement employee, even if he or she was younger.[50]

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[44] Van Ausdall, *supra* note 26, at 647. Some courts, such as the Sixth and Fourth Circuits, have mandated that the plaintiff prove the replacement hired was not only younger, but also outside of the protected class. *See, e.g.,* Roush v. KFC Nat'l. Mgmt. Co., 10 F.3d 392, 395-96 (6th Cir. 1993); Mitchell v. Data Gen. Corp., 12 F.3d 1310, 1314-15 (4th Cir. 1993). The Sixth Circuit applied this test narrowly, requiring the employee to show that her replacement was not afforded protection by the ADEA. *Rousch*, 10 F.3d at 395-96. The Fourth Circuit also took this approach with the fourth prong, requiring proof of non-protected status. Van Ausdall, *supra* note 26, at 647; *see also Mitchell*, 12 F.3d at 1314-15. At the opposite end of the spectrum, the First Circuit required only that an employee show the decision was based on age, and thus, did not need to show that the replacement was not protected. Van Ausdall, *supra* note 26, at 648 (citing Loeb v. Textron, Inc., 600 F.2d 1003, 1013 (1st Cir. 1979)).

[45] *McDonnell Douglas Corp.*, 411 U.S. at 792.

[46] *See supra* note 2 and accompanying text.

[47] Kurt Schaub, *The "Substantially Younger" Requirement in* O'Connor v. Consolidated Coin Caterers Corp.*: Will ADEA Plaintiffs Lose Again?*, 16 HOFSTRA LAB. & EMP. L.J. 225, 232-33 (1998).

[48] *See generally McDonnell Douglas Corp.*, 411 U.S. 792.

[49] Van Ausdall, *supra* note 26, at 649. This framework was modified to apply to age discrimination cases. To meet the prima facie burden plaintiffs must show that: 1) they were forty or older; 2) they were qualified to do the job; 3) they were fired or not hired, promoted, etc.; and 4) were replaced by people outside the protected class. *See generally O'Connor*, 517 U.S. 308. The United States Supreme Court in *O'Connor*, however, subsequently discarded the fourth requirement. *Id.* at 312; *see also* Schaub, *supra* note 47, at 233.

[50] *See* Van Ausdall, *supra* note 26, at 653 ("Nothing in the ADEA suggests that an employer may discriminate against an older employee in favor of a younger one merely because the younger one is in the protected class.").

Because the *McDonnell Douglas* test was adapted from its original form, courts have not uniformly applied the fourth prong of the test.[51] The Supreme Court considered the varied application of *McDonnell Douglas* in the age discrimination context in the Fourth Circuit case, *O'Connor v. Consolidated Coin Caterers Corp.*[52] The Court decided to intervene in order to determine the proper interpretation of the class membership requirement.[53] The Court concluded that the ADEA's primary focus was to prevent discrimination based upon a person's age and therefore does not require the person benefiting from the discrimination to be outside of the protected class.[54] Thus, the Supreme Court settled the dispute over the fourth prong standard in *McDonnell Douglas* by deciding that a plaintiff need not prove that the replacement employee was outside of the protected class.[55] In dicta, however, Justice Scalia suggested that the fact that a replacement is *substantially younger* could be a strong indicator of age discrimination, stronger in fact than the replacement being outside of the protected class.[56] This decision, through a broader interpretation of the requirements of a prima facie case of discrimination, has allowed the possibility that claims may arise as a result of employment decisions involving members of the ADEA protected class as both the beneficiaries and the victims.[57] Proving a

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51 Van Ausdall, *supra* note 26, at 647-48; *see also supra* note 44 and accompanying text.

52 *O'Connor*, 517 U.S. 308 (1996).

53 *Id.*

54 *Id.* at 312. The United States Supreme Court determined that it is not as important that a person has been discriminated against by another person within the same class, rather it is the source of this discrimination that is of concern. *Id.* If the employee received negative treatment solely because of his age, then this should be the determinative fact, not whether the person was inside or outside of the statute's protected class. *Id.*

55 *Id.*

56 *O'Connor*, 517 U.S. at 313. *See also* Van Ausdall, *supra* note 26, at 650. The United States Supreme Court in *O'Connor*, however, did not give guidelines to follow in determining how much younger a replacement needs to be in order to meet the fourth prong of the test. *Id.*

57 Woodruff, *supra* note 1, at 1298. The ADEA left some question as to whether situations involving discrimination within the protected class presented viable causes of action. *Id.* In *O'Connor*, the Supreme Court attempted to answer this question by prohibiting discrimination occurring among members of the ADEA protected class. *Id.*; *see also* Greer v. Pension Benefit Guar. Corp., 85 Fair Empl. Prac. Cas. (BNA) 416 (S.D.N.Y. 2001). Plaintiff was employed by Pan American World Airways and claimed that he was discriminated against because the retirement plan benefited older employees who had been with the company fewer years than the plaintiff, but were entitled to better pension benefits. *Greer*, 85 Fair Empl. Prac. Cas. (BNA) at 416. The court dismissed the claim because the

prima facie case of discrimination, however, does not necessarily mean that a plaintiff has won the suit; rather, it is just an initial obstacle that must be overcome in proving the existence of discrimination.[58]

III. State and Federal Interpretations of Age Discrimination Statutes and Language

While the interpretation of the class membership requirement of a prima facie case was a significant step in clarifying the boundaries of the ADEA, it was a much smaller move in actually determining if a reverse discrimination claim is recognized and remedied by the federal statute. In comparison to the federal regulations, states have their own age discrimination statutes that employ different language than the ADEA.[59] In terms of reverse age discrimination, some plaintiffs in a few select states have actually succeeded in arguing a reverse age discrimination claim.[60]

A. *Various States Already Permit Reverse Age Discrimination Claims*

Several states have allowed their discrimination statutes to encompass reverse discrimination actions.[61] Additionally, a number of

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ADEA allows for early retirement plans. *Id.*

[58]Van Ausdall, *supra* note 26, at 647.

> A prima facie case raises inferences of discrimination only because the acts are presumed, when otherwise unexplained, because more likely than not they are based on consideration of impermissible factors. This is largely presumed because experience shows that more often than not, people do not act arbitrarily, without underlying agendas, especially in the workforce. Once the plaintiff establishes the prima facie case, the burden of production then shifts to the employer to produce evidence rebutting the prima facie presumption. The employer must articulate, but does not have to prove, a legitimate, nondiscriminatory reason for its actions. If the employer does meet this burden by articulating a legitimate, nondiscriminatory explanation for the action, then the burden of production shifts back and the plaintiff must produce evidence that the employer's explanation was false.

Id.

[59] *See infra* note 62 and accompanying text.

[60] *See infra* note 62 and accompanying text.

[61] *Cline*, 296 F.3d at 474. For example, the New Jersey Supreme Court considered whether a twenty-five–year-old could utilize age discrimination provisions of the New Jersey Law Against Discrimination to show that he was discriminated against based on his young age. Bergen Commercial Bank v. Sisler, 723 A.2d 944 (N.J. 1999). Plaintiff was a vice president at Bergen Commercial Bank. *Id.* After finding out that he was only twenty-five, plaintiff's supervisors tried to place him in an alternate position and upon refusal he

states are recognizing reverse age discrimination claims between members of the respective protected classes.[62] It is important to note, however, that these states do not explicitly classify the protected group by age, as does the ADEA.[63] Rather, the expansive language of the state statutes allow for these types of reverse situations.[64]

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was terminated and replaced by a thirty-one year old. *Id.* The court held that New Jersey's age discrimination statutes were expansive and supported the plaintiff's youth based discrimination claim. *Id.* The court did distinguish this state statute from the federal ADEA because the federal statute expressly states that protection is afforded to persons over forty while the state statute contains no such limitation. *Id.* at 950. A reverse-discrimination standard requires: "(1) that circumstances rendered Bergen Bank's actions suspect with respect to discrimination against a member of the majority; (2) that he was terminated notwithstanding that he met the reasonable performance expectations; and (3) that he was replaced by one whose age permitted an inference of discrimination based on youth." Joy L. Lindo, *Youth-Based Termination-An Employee Age Discrimination Claim Based on Youth is Cognizable Under the New Jersey Law Against Discrimination and Appropriately Evaluated Under a Heightened Reverse-Discrimination Standard,* 30 SETON HALL L. REV. 682, 687-88 (2000) (citing *Bergen*, 723 A.2d at 959). The following two parts of the New Jersey Law Against Discrimination (LAD) pertain to the prohibition of age discrimination. "All persons shall have the opportunity to obtain employment . . .without discrimination because of . . . age . . ., subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right." N.J. STAT. ANN. § 10:5-4 (West 2002).

> It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination . . . for employer, because of the . . . age . . . of any individual . . . to refuse to hire or employ or to bar or to discharge or require to retire . . . from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

N.J. STAT. ANN. § 10:5-12(a). *See* Joy L. Lindo, *Youth-Based Termination-An Employee Age Discrimination Claim Based on Youth is Cognizable Under the New Jersey Law Against Discrimination and Appropriately Evaluated Under a Heightened Reverse-Discrimination Standard,* 30 SETON HALL L. REV. 682, 687-88 (2000) ("Although the court frames today's employment market as largely youth-oriented, the court laudably recognizes that younger workers may face discrimination in a manner similar to that which older workers encounter. The court goes to great lengths to support its determination that LAD protects young workers against age discrimination."); *see also infra* note 62 and accompanying text.

[62] *Cline*, 296 F. 3d at 475 ("Thus, based on the congressional statements of purpose and similar state-law provisions, it is not absurd to allow members of the protected class to sue for reverse discrimination."); *see also Bergen Commercial Bank*, 723 A.2d at 957; Ogden v. Bureau of Labor, 699 P.2d 189, 192 (Or. 1985) (Oregon age discrimination statute allows claims by younger workers); Zanni v. Medaphis Physician Servs. Corp., 612 N.W.2d 845, 847 (Mich. Ct. App.2000) (Michigan Civil Rights Act "protects workers who are discriminated against on the basis of youth"), *appeal denied*, 618 N.W.2d 596 (Mich. 2000); Graffam v. Scott Paper Co., 870 F. Supp. 389, 405 n.27 (1994) (Maine Human Rights Act does not limit claims to a certain range of ages).

[63] *See supra* note 61 and accompanying text.

[64] *See supra* note 61 and accompanying text; *see also* N.J. STAT. ANN. § 10:5-4 (West

B. *Federal Statutes Have Not Been Interpreted To Allow Reverse Age Discrimination Claims*

Although state courts have begun to allow reverse age discrimination suits, the federal courts have a long, firm history of disallowing these types of claims.[65] The difference between state and federal statutes lies primarily within the language of each respective statute.[66] Examining the language, however, is not always enough. Legislative history and differing views regarding who is worthy of coverage in age-based claims also play a large role in the interpretation of a statute.[67] In 1988, three decisions from three different circuits considered whether the ADEA could be interpreted to include the protection of younger workers.[68] Each court determined that reading reverse age discrimination into the ADEA was not appropriate.[69]

These previous decisions tended to rely heavily on the notion that the purpose of the ADEA was the protection of older workers from

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2002); N.J. STAT. ANN. § 10:5-12(a) (West 2002).

[65] *See infra* Part III.B.

[66] *Bergen Commercial Bank*, 723 A.2d at 950 ("29 U.S.C.A. § 631(a) specifies that the 'prohibitions in [the ADEA] shall be limited to individuals who are at least 40 years of age.' Thus unlike LAD, the ADEA by its terms limits its protection to 'older' workers.").

[67] *See supra* note 18 and accompanying text.

[68] Karlen v. City Colleges of Chicago, 837 F.2d 314 (7th Cir. 1988) (holding that early retirement plans, which are more beneficial to older employees, are not in violation of the ADEA.); Schuler v. Polaroid Corp., 848 F.2d 276 (1st Cir. 1988) (a fifty-seven-year-old employee failed to prove age discrimination when he accepted a severance package offered by his employer due to employee reductions); *see also* Wehrly v. American Motors Sales Corp., 678 F.Supp. 1366 (N.D. Ind. 1988) (holding that plaintiff's ADEA claim failed because the plaintiff was too young for the retirement program.).

[69] *See Schuler*, 848 F.2d at 276; *Wehrly*, 678 F. Supp. at 1366. In the First Circuit, the court determined that an age discrimination claim cannot ground its legitimacy by citing terms of a severance plan that are more beneficial to older workers. *Schuler*, 848 F.2d at 278. According to the court, the ADEA is not prohibitive of treatment that is more generous to older workers than other employees. *Id.* at 279 (referencing Bodnar v. Synpol, Inc., 843 F.2d 190 (5th Cir. 1988)); Gray v. New England Tel. & Tel. Co., 792 F.2d 251, 255 (1st Cir. 1986). Similarly, in the Northern District of Indiana, the fact that the plaintiff was too young to participate in his company's early retirement program proved fatal to his age discrimination claim. *Wehrly*, 678 F. Supp. at 1381. The court relied on this Seventh Circuit decision which established the ADEA's purpose to be the encouragement and protection of older employees. *Id.* at 1381 (citing Dorsch v. L.B. Foster Co., 782 F.2d 1421, 1428 (7th Cir. 1986)). The court of appeals held that: (1) evidence was sufficient to support finding that salesman had not established prima facie case of age discrimination; (2) evidence was sufficient to support finding that employer's reason for placing employee on early retirement was not a pretext for discrimination; and (3) employer's early retirement plan, did not violate the Act. *Wehrly*, 678 F. Supp. at 1381.

negative treatment based on their age.[70] The courts did not appear to find a problem with older employees being treated more favorably as they reached retirement age.[71] While the employees receiving such benefits are unlikely to raise much opposition, the employees too young to participate are likely to challenge programs that do not afford them the same opportunities.[72] This can create a major problem, however, since most plaintiffs do not consider the consequences that may result from challenging attractive retirement programs for older employees.[73] "People do not act as if they will eventually experience old age. Denial is a powerful force, whether it be youthful denial of the inevitability of aging or judges' denial about society at large."[74]

C. *The Seventh Circuit: Hamilton v. Caterpillar—Maintaining Precedent and Forbidding Reverse Age Discrimination*

In this class action suit, employees claimed that the "Special Early Retirement Program" offered by their employer violated the ADEA by benefiting older employees while harming younger employees who were also within the ADEA's protected class.[75] The court determined that the ADEA does not provide employees with a cause of action or a remedy for reverse age discrimination.[76]

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[70] *See supra* note 18 and accompanying text.

[71] 29 U.S.C. § 623(f) (2002); *see infra* note 151 and accompanying text.

[72] *See supra* note 62 and accompanying text.

[73] Michael C. Dorf, *Equal Protection Incorporation,* 88 VA. L. REV. 951, 994 (2002).

[74] *Id.*

[75] *Hamilton*, 966 F.2d at 1226. The United States District Court for the Central District of Illinois dismissed the claim and appealed to the Court of Appeals for the Seventh Circuit. *Id.* The defendant, Caterpillar Incorporated, was considering closing two of its plants in Iowa and began working with the employee union to establish a benefit plan upon closure. *Id.* at 1227. Caterpillar established the "Special Early Retirement Program" which provided early retirement benefits to workers based on age and years of service. *Id.* The existing early retirement program was applicable to workers age sixty or older with ten years of service or workers fifty-five or older with terms of service, when added to their ages, totaling eighty-five. *Id.* The new plan negotiated between the company and the union expanded these benefits to those workers fifty and older with ten years of service. *Id.* The plants were eventually closed and all employees laid off in June 1988. *Hamilton*, 966 F.2d at 1227.

[76] *Id.* at 1226. The plaintiff claimed that his class, aged forty through fifty who had ten years of service when the plant closed, was discriminated against based on their age because they were too *young* to qualify for the new benefits. *Id.* at 1227. The district court found that the ADEA does not apply to reverse discrimination, and in the alternative, that if reverse discrimination was covered, the benefit plan is protected by section 4(f)(2) of the ADEA. *Id.* The court did not render a holding on count two regarding 4(f)(2). *Id.*

This was a case of first impression for the Seventh Circuit, however, the court previously held that the ADEA "does not protect the young as well as the old, or even, we think, the younger against the older."[77] The court looked to other jurisdictions that have circled the issue without actually answering the question of reverse age discrimination.[78] Ultimately, the Seventh Circuit's decision focused on the distinction between age discrimination and other forms of protected classes such as race and sex.[79] The plaintiff argued that these types of discrimination are similar enough to age classification and that the discriminatory effects can be felt by both the young and the old.[80] The court, however, disagreed and distinguished race and sex discrimination from age discrimination by concentrating on the fact that age is ever changing, not distinctive at birth and not immutable.[81] Therefore, the court reasoned that because of these differences between age and race or sex, which are covered in Title VII, Congress intended to exclude age because it does not share the same special characteristics that allows for full protection and is able to be applied in the "reverse."[82]

The Seventh Circuit relied heavily on the language of the statute as proof of Congressional intent.[83] Specifically, the court explained that if the ADEA were intended for all age ranges to sue, there would be no need for an age limitation.[84] Because the Congressional findings use the terminology "older workers" and "older persons," the court found the focus of the Act to be the prevention of arbitrary age discrimination of

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Through 4(f)(2), an exception was carved out to allow programs such as collective bargaining agreements, pension plans, or benefit programs to exist without being subject to claims of discrimination. *See infra* note 151 and accompanying text.

77 *Hamilton*, 966 F.2d at 1227 (citing *Karlen*, 837 F.2d at 318).

78 *Id.* (citing *Schuler*, 848 F.2d at 278) (The ADEA "does not forbid treating older persons more generously than others.").

79 *Id.; see also* Rutherglen, *supra* note 23, at 499.

> The prohibition against age discrimination is likely to remain narrower than the prohibitions against race and sex discrimination so long as age is a more acceptable basis for decisions in public and economic life. For the young, age serves as a restriction on such common activities as voting, driving, and employment; and for the old, it figures in the eligibility for and cost of a variety of insurance and social welfare programs.

Rutherglen, *supra* note 23, at 499.

80 *Hamilton*, 966 F.2d at 1227.

81 *Id.; see also* Rutherglen, *supra* note 23, at 499 (citing *Murgia*, 427 U.S. at 313-14).

82 *Hamilton*, 966 F.2d at 1227.

83 *Id.*

84 *Id.*

"older workers" referred to in the language itself.[85] There is no mention of the consequences of denial of benefits based on youth.[86] The court concluded that, "Congress was concerned that older people were being cast aside on the basis of inaccurate stereotypes about their abilities.[87] The young, like the non-handicapped, cannot argue that they are similarly victimized."[88] Based on these findings, the Seventh Circuit determined that the ADEA does not provide a remedy or cause of action for reverse age discrimination.[89] After the 1992 *Hamilton* decision, most federal courts used this case as a benchmark for deciding various types of discrimination cases.[90]

D. *The Sixth Circuit: Cline v. General Dynamics—Breaking Through the Language and Recognizing Reverse Age Discrimination*

When the United States District Court for the Northern District of Ohio first addressed the issue of whether a reverse age discrimination claim constituted a cause of action, the court relied on the reasoning of several circuits.[91] The court considered the important Seventh Circuit decision in *Hamilton*[92] as well as the District of Connecticut[93] and the

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85 *Id.* at 1228 (citing 29 U.S.C. §§ 621(a)(1)(2)(3)).

86 *Hamilton*, 966 F.2d. at 1228.

87 *Id.*

88 *Id.*

89 *Id.*

90 In the Seventh Circuit, for example, three cases cited *Hamilton* when deciding if beneficial treatment to older employees was considered discriminatory. In *Gustovich v. AT&T Communications, Inc.*, the court determined that beneficial retirement plans encouraging a worker to retire are not discriminatory. Gustovich v. AT&T Comm. Inc., 972 F.2d 845, 850 (7th Cir. 1992) (". . .the existence of attractive retirement plans is no proof of age discrimination; to the contrary, it suggests favoritism for older workers, as younger workers cannot take advantage of them"). Both *Nabat v. Aetna Casualty & Surety Co.* and *Kralman v. Illinois Department of Veterans' Affairs* rely on the *Hamilton* decision to reinforce their position about favoritism in terms of older employees. *See* Nabat v. Aetna Casualty & Surety Co., 45 F.3d 432 (7th Cir. 1995); *see also* Kralman v. Illinois Department of Veterans' Affairs, *23* F.3d 150 (7th Cir. 1994). These courts determined that the treatment enjoyed by older workers did not constitute an instance of discrimination.

91 *Cline*, 26 F.3d at 470.

92 *See supra* Part III.C; *see also Hamilton*, 966 F.2d at 1226.

93 Dittman v. Gen. Motors, 941 F. Supp. 284 (1996). In Connecticut, the plaintiffs were between forty and fifty years old and claimed that a plant closing agreement involving their employer "discriminated against plaintiffs based on age by making generous early retirement plans available to employees who were over age fifty, but not to employees between ages forty and fifty." *Id.* at 286. The court dismissed the claim after a two-part

District of Maine[94] in rendering the decision in favor of the defendants.[95] The court held that the ADEA does not allow a cause of action for reverse age discrimination.[96]

The plaintiffs appealed the decision of the lower court, and the Sixth Circuit reviewed *de novo* the district court's dismissal.[97] The Sixth Circuit addressed the conditions under which a cause of action arises pursuant to the ADEA for employees within the protected class, alleging that the favorable treatment of older employees is also within the realm of the statute's protection.[98] The court held that the ADEA

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analysis. *Id.* at 290. The first part focuses on a particular provision of the ADEA, which states that the statute is not violated just because "an employee pension benefit plan...provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits." *Id.* at 286-87; *see* 29 U.S.C. § 623(l)(1)(A) (2002). The court determined that the intent of the ADEA was not to eliminate incentive programs, because "if employers could not set a minimum age of eligibility for early retirement incentive plans, these plans would effectively be outlawed." *Dittman*, 941 F.Supp. at 287. The effect of such an outlaw would be catastrophic for most companies, forcing them to make employee reductions through less favorable methods such as layoffs. *Id.* at 286 (citing S. REP. NO. 623 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1557). The second part of the analysis revolved around the "reverse discrimination" issue and the court, relying on *Hamilton*, found that the ADEA does not prohibit "discrimination against the young in favor of the old." *Dittman*, 941 F. Supp. at 287 (citing *Hamilton*, 966 F.2d 1226); *see also* Stone v. Travelers Corp., 58 F.3d 434 (9th Cir. 1995) (stating that the ADEA does not prohibit older workers from receiving more generous treatment than younger workers); *Karlen*, 837 F.2d at 318 (noting that the ADEA does not protect the young against the old).

94 Parker v. Wakelin, 882 F. Supp. 1131 (1995). In the District of Maine, teachers claimed that they were being discriminated against due to an age-based classification, which benefited older employees in terms of their retirement benefits. *Id.* The court held that the ADEA does not afford protection to younger workers alleging discrimination, and that "the existence of a minimum age requirement suggests that it was only discrimination in favor of younger individuals that the law is designed to prohibit." *Id.* at 1140. The court in *Parker* also relied on the *Hamilton* case as a basis for denying a cause of action and subsequently dismissing the claim. *Id.* The court suggested that the statute lacks any indication that younger workers can bring a claim of reverse discrimination because of the statutes referral to "older" workers. *Id.*

95 *Cline*, 26 F.3d at 467.

96 *Id.*

97 FED. R. CIV. P. 12(b)(6); *see* Lawrence v. Ch. Court of Tenn., 188 F.3d 687, 691 (6th Cir. 1999).

98 *Cline*, 26 F.3d at 466. The employees of General Dynamics Land Systems, Inc. filed this suit concerning a new collective bargaining agreement for its employees and the provision regarding retirement benefits. *Id.* at 468. The new agreement no longer required the company to provide full health benefits to retirees unless an employee was at least fifty years old as of July 1, 1997. *Id.* Thus the plaintiffs allege that the age group between forty and forty-nine has been discriminated against based on their age. *Id.* The district court dismissed the suit and further concluded that the ADEA does not cover claims for 'reverse discrimination'. *Id.*

does provide plaintiffs with a cause of action and furthermore, the plaintiffs in this case established such an actionable claim.[99] In reaching this decision, the Sixth Circuit focused almost exclusively on statutory language as the determinative factor.[100]

The legislative intent of a statute can be uncovered through the plain language.[101] When the language is unambiguous, the words on their face are adequate to decipher meaning and application.[102] The particular section of the ADEA at issue referred to "any individual" being discriminated against in respect to his or her employment.[103] Congress defined "any individual" as those more than forty years of age.[104] The court concluded by this plain language that an employer may not discriminate on the basis of age if an employee is within the protected class.[105] In addition, the court determined the plain meaning to apply to anyone over the age of forty, not just anyone "relatively older than any other group of employees with whom they are compared."[106]

The Sixth Circuit also addressed the *Hamilton* decision, which refused to recognize a cause of action for reverse age discrimination.[107] The court claimed that the Seventh Circuit misapplied the plain language of the statute found in the Congressional Statement of Findings and Purpose.[108] In *Hamilton*, the court used this language to

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[99] *Id.* at 467.

[100] *Cline*, 26 F.3d at 467.

[101] *Id.* at 469 (citing *In re* Comshare, Inc. Sec. Litig., 183 F. 3d 542, 549 (6th Cir. 1999)).

[102] *Cline*, 26 F.3d at 469.

[103] 29 U.S.C. § 623(a)(1) (2002) ("It shall be unlawful for an employer - (1) to fail or refuse to hire or to discharge *any individual* or otherwise discriminate against *any* individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.").

[104] *Cline*, 26 F.3d at 469 ("Those younger than 40 are not protected by the ADEA.") (citing *O'Connor*, 517 U.S. at 312).

[105] *Cline*, 26 F.3d at 469.

[106] *Id.*

[107] *Id.* at 470; *see, e.g., Schuler*, 848 F.2d at 278; *Karlen*, 837 F.2d at 318.

[108] 29 U.S.C. §§ 621(a)-(b).

> The Statement of Findings and Purpose: (a) That Congress hereby finds and declares that (1) in the face of rising productivity and affluence, *older workers* find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs. (b) It is therefore the purpose of this chapter to promote employment of *older persons* based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

dismiss the cause of action, focusing on the phrase "older workers or persons."[109] The *Cline* court, however, read the language to protect *all* workers in the protected class, not just those relatively older.[110]

The *Cline* court took the analysis a step further, focusing on the importance of reading a statute as a whole and considering if all of the parts concur to a create a congruent meaning.[111] The conflict in the statute stems from § 621,[112] which discusses the protection of older workers and § 623,[113] which deals with discrimination against any individual over forty years old.[114] The court reasoned that § 621 establishes a plan to protect older workers and §§ 623 and 631 state that older workers are those individuals over forty.[115] Thus, according to *Cline*, a proper reading of the statue as a whole gives effect to the actual purpose of the ADEA, to protect older workers in society within the protected class, age forty and over.[116]

Interestingly, the *Cline* court determined that this cause of action should not even be considered "reverse discrimination."[117] Rather, the court concluded that this was simply a case of age discrimination and that the lower courts involved have used this terminology mistakenly.[118] The plaintiffs were all members of the ADEA's protected class and

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Id.

[109] *Hamilton*, 966 F.2d at 1228. Older workers are those relatively older and thus it would not follow that a forty year old could have a cause of action against a fifty year old. *Id.*

[110] *Cline*, 26 F.3d at 470.

[111] *Id.* at 471 (citing United States v. Stauffer Chem. Co., 684 F.2d 1174, 1184 (6th Cir. 1982)).

[112] 29 U.S.C. § 621 (2002); *see also supra* note 108 and accompanying text.

[113] 29 U.S.C. § 623(a)(1) ("It shall be unlawful for an employer- (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age."); *see also* 29 U.S.C. § 631(a) ("The prohibitions in this Act shall be limited to individuals who are at least 40 years of age.").

[114] *Cline*, 26 F.3d at 471; *see also* Cafarelli v. Yancy, 226 F.3d 492, 499 (6th Cir. 2000).

[115] *Cline*, 26 F.3d at 471.

[116] *Id.*

[117] *Id.*

[118] *Id.*

> Presumably, what the district judge and others mean when they conclude that the ADEA does not prohibit 'reverse discrimination' is that otherwise prohibited discrimination is permitted if the victims are literally (statutorily) within the protected class, but are a group within the class who in most cases are the beneficiaries of discrimination against others.

Id.

claim that they were discriminated against and denied benefits based on their age.[119] "Therefore, the protected class should be protected; to hold otherwise is discrimination, plain and simple."[120]

The final step in the *Cline* analysis addressed the role of the EEOC as the enforcer of the ADEA.[121] The court placed great weight on the EEOC's interpretation of the statute, stating that it "is significant because an agency's interpretation of an ambiguous provision within the statute it is authorized to implement is entitled to judicial deference."[122] This being established, the EEOC's regulations conclude that it is unlawful to discriminate against or give preference to one employee over another where both are protected by the statute.[123]

The Sixth Circuit reasoned that the ADEA protects everyone over forty, and even though those being discriminated against were younger than the beneficiaries, this alone did not alter the interpretation of the ADEA.[124] The ADEA explicitly "prohibits age discrimination against any individual within the protected class."[125] According to the court, these individuals were denied retirement benefits exclusively based on their age, and the plain language of the statute does not entitle only those workers relatively older to have a cause of action.[126] The court reconciled their interpretation of the statute by pointing out that if Congress wanted the ADEA to always apply to those relatively older, as the *Hamilton* court concluded, then it could have articulated the statute

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119 *Id.*

120 *Cline*, 26 F.3d at 471.

121 *Id.*

122 *Id.* at 471 (quoting Burzynski v. Cohen, 264 F.3d 611, 619 (6th Cir. 2001)).

123 *Cline*, 26 F.3d at 471. "Discrimination between individuals protected by the Act: (a) It is unlawful in situations where this Act applies, for an employer to discriminate in hiring or in any other way by giving preference because of age between individuals 40 and over." 29 C.F.R. § 1625.2(a). "Thus, if two people apply for the same position, and one is 42 and the other 52, the employer may not lawfully turn down either one on the basis of age, but must make such decision on the basis of some other factor." *Cline*, 26 F.3d at 471; *see also* 8-123 LARSON ON EMPLOYMENT DISCRIMINATION, § 123.02, *"Reverse" Age Discrimination Protection* (2002). The *Cline* court abides by the regulations promulgated by the EEOC, whereas other courts, including *Hamilton*, have not. *Cline*, 26 F.3d. at 471. According to these regulations, an employee may have a claim of reverse discrimination against an older person in the protected group. *Id.* Courts that have encountered reverse discrimination claims, however, have not applied this regulation, some claiming that the provision is outside of the scope of the ADEA and the legislative history does not indicate that Congress was concerned with problems encountered by younger employees. *Id.*

124 *Id.* at 472.

125 *Id.*

126 *Id.*

in a way which clearly defines that purpose.[127] Because Congress did not structure the statute in a manner lending such an interpretation, the court was bound by the plain language and to the text alone.[128]

Although Justice Cole concurred, he wrote separately to discuss whether or not Congress actually intended for the ADEA to apply to those over forty claiming reverse age discrimination.[129] Justice Cole stated that protecting older employees is the primary purpose of the ADEA, however, the Act also invites reverse situations for those within the protected class by prohibiting *all* age discrimination for that class.[130] His opinion also recognized the established law in the Sixth Circuit regarding statutory interpretation and that the court was bound to follow its own precedent.[131] According to Justice Cole, this was not a case in which one of the exceptions to reading the plain language of a statute applied, thus the court was bound to the literal reading.[132]

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127 *Cline*, 26 F.3d at 472.

128 *Id.*

129 *Id.* at 472.

130 *Id.* Although reverse situations are not normal ADEA claims, the language of the statute does not disallow such types of claims according to both §§ 621 and 623. *Id.*

131 *Id.* at 473. "A court may look beyond the text in only four limited instances: 1) where the text is ambiguous; 2) where a literal reading is inconsistent with other statutory provisions; 3) where a plain-language reading is inconsistent with congressional intent; 4) where the plain statutory meaning leads to absurd results." *See* Vergos v. Gregg's Enters., Inc., 159 F.3d 989, 990 (6th Cir. 1998); *see also* Appleton v. First Nat'l Bank of Ohio, 62 F.3d 791, 801 (6th Cir. 1995).

132 *Cline*, 26 F.3d at 473. In order to rectify the Sixth Circuit's decision with the Seventh Circuit's widely accepted decision in *Hamilton*, Justice Cole recognizes the basis of the Seventh Circuit's reasoning. *Id.* He concludes, however, that such a reading of the language renders a portion of the ADEA meaningless. *Id.* Justice Cole reviews several sections of the statute including §§ 631, 623 and 621(a). *Id.* Justice Cole concludes that the reading of these sections in relation to one another in *Cline* does not make § 623(l)(1)(A) meaningless. *Id.* Section 623(l)(1)(A) provides: "It shall not be a violation of subsection (a), (b), or (e) solely because (A) an employee pension benefit plan of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(2)) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits." *Id.* (citing 29 U.S.C. § 623(l)(1)(A)). This section permits minimum ages to be established for pension plans. *Cline*, 26 F.3d at 473. Justice Cole reasons that if younger employees in the protected class were not allowed (under the statute) to sue for more favorable pension benefits bestowed to older employees, then there would not be a need to protect the minimum age requirement. *Id.* Only if § 623 and §631 allow for reverse discrimination, then § 623(l)(1)(A) is an important provision. *Id.*

The concurrence's central message focuses on the importance of a plain reading of the language of the statute, and the consistency that remains between this reading and the purpose of the ADEA when allowing reverse discrimination claims. *Id.* at 474; *see also* 29 U.S.C. § 621(b) (2002) (Purpose of the ADEA). "Permitting that type (reverse age

IV. Reaction to Cline

Most of the reaction to the *Cline* decision has not been particularly favorable. Law journal articles condemn the decision for being "overly simplistic."[133] The decision is considered to be a very literal reading of the statute, which in turn produced unintended results.[134] One of those unintended results may involve the future of collective bargaining

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discrimination) of age discrimination to continue without a remedy hardly amounts to a solution to the problems arising out of the impact of age on employment." *Cline*, 26 F.3d at 474. The court illustrates the purpose of the ADEA as being consistent with reverse age discrimination by stating that a fifty-year-old worker is just as disadvantaged when he loses his job to a thirty-year-old as when he loses his job to a sixty-year-old. *Id.* According to Congress, age discrimination in employment is a substantial burden on commerce. 29 U.S.C. § 621(a)(4). Thus, when providing relief for victims of reverse age discrimination, Congressional intent is being reconciled by alleviating this economic burden. *Cline*, 26 F.3d at 475. One last point addressed by the concurrence involves the United States Supreme Court decision in *O'Connor*. *Id.* This is an important case because *O'Connor* requires proving that a replacement was substantially younger when deciding if a prima facie case for age discrimination has been made. *O'Connor*, 517 U.S. at 313. It is important to remember, however, that this is a prima facie case where circumstantial evidence is being considered. *Id. Cline*, on the other hand, is a direct evidence case that does not rely on the circumstantial evidence test. *Cline*, 26 F.3d at 475. The *Cline* court confronts the *O'Connor* decision by concluding that the United States Supreme Court was not considering a reverse discrimination case at that time and allowed for members of the same protected class to sue one another. *Id.* Therefore, the court does not see a substantial problem with the fact that the *O'Connor* decision ultimately rules out reverse age discrimination by specifically stating that in order to prove a prima facie case, the plaintiff must be younger. *O'Connor*, 517 U.S. at 313.

[133] *See, e.g.*, Michael P. Maslanka & Burton D. Brillhart, *Appearances Can Be Deceiving-Employment Laws Contain Hidden Dangers for GC's*, TEX. LAWYER, at 7 (2002).

[134] *Id.* The authors reference recent changes in employment law by stating, "so the next time you find yourself holding on to a belief for dear life, insisting to yourself and others that you just can't conceive it could be anything other than what you believe, or worse, that it shouldn't be different, step back and think again. It just might be when it's employment law." *Id.* In terms of unintended results, strict interpretation of the language of the ADEA may result in preferential policies benefiting older members of the protected class discriminatory against younger members of the protected group who are not covered by such a policy. Kaufman, *supra* note 39, at 835. Thus, these programs can become violations of the provisions of the ADEA. *Id.* Employment policies that allocate special consideration on the basis of some age criterion between forty and seventy constitute unlawful age discrimination. *Id.* To mitigate what must have been perceived as an undesirable result of this literal interpretation, the Commission added to their interpretative regulations a new paragraph that defines the extent to which "preferential discrimination" is unlawful: "The extension of additional benefits, such as increased severance pay, to older employees within the protected age bracket may be lawful if an employer has a reasonable basis to conclude that those benefits will counteract problems related to age discrimination. The extension of those additional benefits may not be used as a means to accomplish practices otherwise prohibited by the Act." 29 C.F.R. § 1625.2(a) (1982).

agreements for workers approaching retirement age.[135] This concern was addressed by the dissent in the *Cline* decision, as apprehension regarding such a ruling appears to be not only in direct conflict with the express statutory language of the ADEA, but also encourages employers to withdraw beneficial retirement benefits.[136]

A. *Statutory Interpretation Issues – Was the Sixth Circuit too Liberal with its Reading?*

The *Cline* court approached the reverse discrimination claim with an extremely literal reading of the statutory language of the ADEA.[137] Although a seemingly small difference in respective opinions, one of the most poignant distinctions between *Cline* and *Hamilton* stems from the significance placed on each court's interpretation of the term "older worker."[138] The *Hamilton* court determined that "older workers" pertained to all workers *relatively* older, and thus barred cases in which a person over forty, yet younger than the benefited party, claims discrimination.[139] The *Cline* court took a different approach.[140] The court determined that to grant any worker over age forty a cause of action does not counteract the purpose and intent of the ADEA, even if claiming this discrimination favors an older person also within the protected class.[141] The *Cline* court considered an "older worker" to include anyone in the protected class, not just a respectively older worker.[142] Perhaps the reason for this discrepancy and the source of the difficulty encountered by both the *Cline* and *Hamilton* courts arises from the fact that the statute does not provide a definition of an older worker or older persons.[143] Thus, the term could be read in either fashion, encompassing only relatively older persons or all persons

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135 *See* discussion *infra* note 171.

136 *See* discussion *infra* note 171.

137 *Cline*, 26 F.3d at 467 ("We rest our holding on familiar canons of statutory construction too elementary to require a citation, which direct courts to apply statutes consistent with their plain language; that is, by assigning to the words of the statute their primary and generally understood meaning.").

138 *See supra* Part III.D. (discussing § 621 with respect to §§ 623 and 631).

139 *Hamilton*, 966 F.2d at 1228.

140 *Cline*, 26 F.3d at 466.

141 *Id.* at 470.

142 *Id.* at 469.

143 *Id.* at 470.

considered older by the statute itself.[144] It appears that the language chosen by Congress was not as clear and concise as it could have been when mandating for the protection of the older American worker.[145] The problem that still exists for the *Cline* court is that this ambiguity begs further interpretation by looking beyond the text and at the true intent of Congress.[146] The *Cline* court simply did not consider the intent as thoroughly as may have been needed.[147]

Although the Sixth Circuit claims their decision is congruent with the purpose of the ADEA, it appears to lack standing when confronted with the aftershock it may have on collective bargaining agreements.[148] According to the dissent and the legal community's reaction, the Sixth Circuit did not adequately address Congress' specific exception to treating older workers differently through the implementation of retirement programs and collective bargaining agreements.[149] Most important and most damaging is the fact that the court did not achieve harmony between all provisions of the statute, especially with § 623(f)(2), which is the exception that allows collective bargaining.[150] According to the ADEA, eradication of these plans is not the intent of the statute.[151] Congress specifically addressed the need for retirement

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144 *Id.*

145 *Hamilton*, 966 F.2d at 1228. "The prohibitions in § 623 may be somewhat over-inclusive, but the language Congress used is also more economical than the more precise alternatives. Perhaps Congress should have written 'because such individual is older' or 'on the basis of such individual's advancing age,' but we are unwilling to open the floodgates to attacks on every retirement plan because Congress chose more graceful language." *Id.* (citing *Karlen*, 837 F.2d at 318).

146 *See supra* note 101 and accompanying text.

147 *Cline*, 296 F.2d at 476.

148 *See infra* note 153 and accompanying text; *see also supra* note 90 and accompanying text.

149 *See* discussion *infra* note 171.

150 29 U.S.C. § 623(f) (2002); *see also infra* note 151 and accompanying text.

151 *See id.* § 623(f).

> Lawful practices; age and occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause. It shall not be unlawful for an employer, employment agency, or labor organization . . . (2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section—(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by § 631(a) of this title because of the age of such individual; or (B) to observe the terms of a bona fide employee benefit plan—(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is

programs for the benefit of older workers within the protected class.[152] Several courts have interpreted the statute to allow collective bargaining agreements that favor older workers to remain in operation for their benefit.[153]

Aside from the statutory language issue, the *Cline* decision has another serious inconsistency, namely, *O'Connor v. Consolidated Coin.*[154] In a strong reaction from the Ohio legal community, the *Cline* decision was deemed "the silliest opinion of the year."[155] This reaction recognized the major problem of minimalizing the *O'Connor* decision.[156]

> no less than that made or incurred on behalf of a younger worker, as permissible under § 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or (ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter. Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by § 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or (3) to discharge or otherwise discipline an individual for good cause.

See id. §§ 623(f)(2)(A)-(B).

[152] *See id.* §§ 623(f)(A)-(B).

[153] *See supra* note 90 and accompanying text. In the Seventh Circuit, Judge Posner discussed the value of early retirement plans for older workers as only "slightly tarnished by the knowledge that sometimes employers offer it because they want to ease out older workers." *Karlen*, 837 F.2d at 317. Judge Posner relied on a previous decision by the Seventh Circuit, *Henn v. National Geographic Society*, 819 F.2d 824 (7th Cir. 1987), that barred an employee from claiming discrimination after taking early retirement unless that employee could show he would suffer punishment if he refused. *Karlen*, 837 F.2d at 317. Judge Posner concluded that early retirement plans, which are *more* beneficial to older employees, do not violate the ADEA. *Id.* at 318. Furthermore, the court recognized the overarching problem of allowing age discrimination claims in the context of early retirement agreements. *Id.* Specifically, the difficulty of recognizing such claims of forty to fifty-four year olds alleging age discrimination where a retirement plan covers workers age fifty-five and older opens endless liability for employers. *Id.* (citing *Henn*, 819 F.2d 824.). This liability would be avoided only by offering everyone in the protected class, which begins at age forty, access to early retirement benefits. *Karlen,* 837 F.2d at 318. Obviously, employers would not be able to bear the financial burden this would create, thus it would be rational to assume allowing these types of claims would effectively eliminate early retirement plans. *Id.*

[154] *O'Connor*, 517 U.S. 308; *see* Denlinger, Rosenthal & Greenberg, *Silliest Opinion of the Year*, OHIO EMP. L. LETTER, Sept. 2002.

[155] Denlinger, Rosenthal & Greenberg, *Silliest Opinion of the Year*, OHIO EMP. L. LETTER, Sept. 2002.

[156] *Id.*

The *O'Connor* court decided that although the replacement employee does not have to be outside the protected age group, that person does have to be "substantially younger" than the plaintiff.[157] The *Cline* court addressed *O'Connor* only through a concurring opinion that made a small mention of such an important Supreme Court case.[158] The *Cline* concurrence identified three reasons why the Supreme Court would uphold reverse discrimination claims within the protected class.[159] First, the Supreme Court was not even considering a circumstance of reverse discrimination when deciding *O'Connor*.[160] Second, *O'Connor* does acknowledge that members of the protected class are allowed to sue one another. Finally, the *Cline* court reviewed the plain text of § 623(a)(1) and § 631(a) as did the Supreme Court.[161] Relying on these reasons, Justice Cole believed that had the Supreme Court in *O'Connor* addressed a reverse age discrimination claim, the Court would have revised its language to allow the fourth prong of a prima facie case to be a "substantial difference in age" rather than "substantially younger."[162] Justice Cole's speculation about what the Supreme Court *might* have meant does not appear to be a strong enough justification for essentially disregarding the important decision.[163]

B. *Collective Bargaining Consequences – How will the AARP React?*

In general, the AARP takes a position against all forms of age discrimination and works to ensure that ADEA protection is seriously enforced.[164] The AARP is concerned with retiree benefits and ensuring

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157 *See O'Connor*, 517 U.S. at 313.

158 *Id.*

159 *Id.*

160 *Id.*

161 *Id.*

162 *Id.* at 475; *see also supra* note 43 and accompanying text.

163 *Cline*, 26 F.3d at 475.

164 *Your Financial Security-Age Discrimination on the Job,* THE POLICY BOOK: AARP PUBLIC POLICIES 2002, *available at* http://www.aarp.org/priorites/five.html. The AARP is the largest nonprofit organization representing the interests of older Americans, both employed and retired, over the age of fifty. *Id.* Such interests are served by making a collective voice heard on issues concerning older Americans ranging from Medicare prescription plans to ensuring retirement security. *Id.* Roughly half of the members of the AARP are working full or part time and the other half are retired. *Id.* One third of members are under sixty, forty-six percent are sixty to seventy-four and twenty-one percent are seventy-five and older. *Id.* The AARP focuses on sharing strategies and information to

that "older workers' pension benefits are treated the same as others."[165] According to the AARP, health benefit plans are a major part of an employee's decision to retire.[166] This becomes more important if the retiree has not reached age sixty-five when Medicare benefits are available.[167] Therefore, the organization supports any legislation that might "preserve the ADEA's prohibition against age discrimination in any and all benefits offered by employers, including benefits offered in retirement."[168] Because of this position, the AARP might become concerned, as was the dissent in the *Cline* case,[169] that courts will "stand watch over labor unions that represent employees of a company and interfere with their negotiations with employees."[170] According to Justice Williams' dissent, the *Cline* decision *may* "call into question the validity of seniority and early retirement programs contained in collective bargaining agreements across the country."[171] The senior attorney for AARP litigation reported that the organization is still unclear as to which side of the debate they will support.[172]

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organizations that are concerned with the issue of age. *Id.*

165 *Your Financial Security-Age Discrimination on the Job,* THE POLICY BOOK: AARP PUBLIC POLICIES 2002, *available at* http://www.aarp.org/priorites/five.html. According to the AARP's policy book, the organization proposes the strengthening of the ADEA through legislation that will employ the full force of the Act and provide rights and remedies comparable to Title VII. *Id.* at 5. In addition, the organization calls for a broad reading of the Act and opposes any legislation or judicial interpretation that might abate the protection afforded by the Act. *Id.* at 6.

166 *Id.* at 8.

167 *Id.*

168 *Id.*

169 *See* discussion *infra* note 171.

170 *Cline*, 26 F.3d at 476.

171 *Id.* The dissent is concerned with the effects that such a ruling will have on the collective bargaining of soon-to-be retirees and is persuaded by the *Hamilton* reasoning that the ADEA is concerned with *older* employee problems within the protected class. *Hamilton*, 966 F.2d at 1228. Judge Williams recognizes that no other court in the country has allowed reverse age discrimination claims to be brought by protected class members against older similarly protected members. *Cline*, 26 F.3d at 476. The dissent relies on *Hamilton's* reasoning that the ADEA does not provide protection for the younger against the older. *Id.* at 476; *see also Karlen,* 837 F.2d at 318. The *Cline* dissent determined that it is the older, and not the younger employees who are deserving of protection, and it is equally important to note that it is not the role of the court to interfere with negotiations over collective bargaining agreements. *Cline*, 26 F.3d at 476. The dissent concludes that the majority's decision "could have a devastating effect on the collective bargaining process." *Id.*

172 Andrew Brownstein, *'Younger' Workers Can Sue Under ADEA, Sixth Circuit Finds, at* http://www.atla.org/Publications/trial/0210/t1002nt5.aspx. Tom Osborne, senior attorney for AARP litigation expressed concern over the controversial *Cline* decision, stating, "I'm

The AARP is also very concerned with a ripple effect that may cause employers to curtail special benefits now offered to older employees.[173] Rather than face the threat of a reverse discrimination lawsuit, the elimination of these programs may prove more cost effective.[174] This is a severe consequence that may arise out of a decision that professes its main objective to be the protection of older workers' interests.[175] The *Cline* decision does not adequately address this possibility of interference with collective bargaining agreements for retirees.[176] Thus the decision itself appears to be flawed and could lead to an abundance of litigation if followed as precedent.[177]

One aspect of the *Cline* decision that is not only interesting but also encouraging for future plaintiffs is the court's removal of the "reverse discrimination" label when dealing with this type of claim.[178] The Sixth Circuit made a statement about age discrimination that is simple, yet convincing. Specifically, anyone over the age of forty who is treated differently based on age is due some sort of protection under the ADEA.[179] Other courts obviously disagree, focusing on "reverse discrimination" and the lack of reciprocity provided by the statute.[180] This argument will be key to determining whether or not claims such as that in *Cline* will be viable for future litigants. The implications of

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not sure which way to go. I don't think we've ever filed something on the side of an employer in an age discrimination case. But obviously, the idea of setting two groups of older workers against each other is just distasteful." *Id.*

173 *Id.*

174 *Id.* According to Tom Osborne, senior attorney for AARP litigation, a significant fear exists regarding employers who decide to cut back on employee benefits due to the ever-present threat of a lawsuit. *Id.* "Employers may say 'why bother' and decide not to provide retirement benefits to older workers at all." *Id.*

175 *See generally Cline*, 26 F.3d 466.

176 *Id.*

177 *See* discussion *supra* note 171.

178 Arthur McCune, *'Reverse' Age Discrimination Suit Viable*, NAT'L L.J., July 29, 2002, at B-1. E. Bruce Hadden, one of the plaintiff's attorneys, expressed his satisfaction of removing the label of 'reverse' discrimination from these interclass lawsuits. *Id.* According to Hadden, this could be viewed as a positive step because reverse discrimination may imply that the case is dealing with someone outside of the protected class suing someone within the protected class. *Id.* On the other hand, this could be an impediment to plaintiffs since this type of reverse discrimination has not been historically embraced by courts, while the situation in *Cline* deals with all of the older workers that the statute was intended to protect. *Id.* The plaintiff's attorney also concluded, "if you can get around the statute by a collective bargaining agreement, then there's no reason for the statute." *Id.*

179 *Cline*, 26 F.3d at 471.

180 *Hamilton*, 966 F.2d at 1228.

affirming the *Cline* decision, however, are consequential enough to ignore the simplistic approach offered by *Cline* and protect both retiree benefit programs and collective bargaining agreements.[181]

V. Conclusion

In light of the reaction thus far to the *Cline* decision and the precedent set by other courts like the Seventh Circuit, it is difficult to imagine that the United States Supreme Court will uphold this decision.[182] The fear of obliterating collective bargaining agreements remains a primary reason not to expand the ADEA to encompass reverse discrimination claims.[183] If retirement incentive plans are disturbed, far too many Americans may suffer when the time comes to retire.[184]

The *Cline* court was correct to look at the plain language of the statute and apply it in a manner that achieved harmony between text and intent.[185] However, by doing so in a fashion that always protects the "older" worker, courts like *Hamilton* have targeted what they determine to be the true application of Congressional intent.[186] This is reinforced by the *O'Connor* reasoning which states that the replacement employee must be "substantially younger" in order to establish a prima facie case of age discrimination.[187] Even though *Cline* reasons that this allows inter-class lawsuits, *O'Connor* does not go so far as to imply that it allows reverse age discrimination claims.[188]

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[181] Greenebaum Doll & McDonald PLLC, *'Younger' ADEA-Protected Workers Can Proceed with Discrimination Claim,* KY. EMP. L. LETTER, Sept. 2002. Because this is the first time reverse discrimination has ever been entertained under a federal law, other circuits may be reluctant to follow in the footsteps of a decision that has consequences which may be potentially crushing to the older workers around the nation. *See* discussion *supra* note 171. The issue of collective bargaining agreements was not fully addressed in the *Cline* decision, and the dissent's concern over the eradication of such valuable programs to senior employees will be a major issue with which future decisions will contend. *See* discussion *supra* note 171.

[182] *See supra* Part IV.A-B.; *see also* discussion *supra* note 171.

[183] *Cline*, 26 F.3d at 476.

[184] *See* discussion *supra* note 171.

[185] *See supra* note 131 and accompanying text.

[186] *Hamilton*, 966 F.2d at 1228.

[187] *O'Connor*, 517 U.S. at 313.

[188] *Cline*, 296 F.3d at 470 ("To hold, as the ADEA requires us to hold, that employment age discrimination against any worker at least forty years of age is prohibited, does nothing to defeat the congressional intent to protect 'older workers' and 'older persons.'"); *see also O'Connor*, 517 U.S. at 312.

Cline concluded that any discrimination based on age is contrary to the Congressional intent of the ADEA.[189] However, the court may have expanded the intent of Congress too far, reading the statute to provide claims that were simply never considered. The primary purpose of the ADEA is to protect older workers from discrimination based on age.[190] Allowing an employee over forty to sue an older employee because he has received better treatment does not appear to aid in the protection of older Americans. Rather, it merely provides an age at which discrimination begins. Thus, while a twenty-five-year-old may not establish a claim for reverse discrimination, a forty-year-old now has a case.

This is the slippery slope at issue in the *Cline* decision. Once younger workers begin to sue older workers, the ADEA may begin to lose its luster of protection. The ADEA was established to set guidelines and boundaries to keep employers from arbitrarily discriminating based solely upon age-related characteristics.[191] The older a worker gets, the harder it is for him to be judged by merit alone. The Supreme Court has granted certiorari and will soon rectify this significant split among the circuits.[192]

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189 *Cline*, 296 F.3d at 469.

190 *See supra* note 3 and accompanying text.

191 *See supra* note 3 and accompanying text.

192 Gen. Dynamics Land Sys. v. Cline, 123 S. Ct. 1786 (2003).