University of Dayton Law Review

Volume 29 | Number 1 Article 7

10-1-2003

Finding a Hole in the ADEA: Allowing a Cause of Action for Age Discrimination among Employees within the Age of Protected Class

Tara-Ann Topputo
University of Dayton

Finding a Hole in the ADEA: Allowing a Cause of Action for Age Discrimination among Employees within the Age of Protected Class

Cover Page Footnote

The author wishes to thank her family and friends for their continued support, as well as Professor Cochran, Professor Perna, and Janice Baker, her executive editor, for providing the motivation and input necessary to write this comment.

FINDING A HOLE IN THE ADEA: ALLOWING A CAUSE OF ACTION FOR AGE DISCRIMINATION AMONG EMPLOYEES WITHIN THE AGE PROTECTED CLASS

Tara-Ann Topputo[*]

I. INTRODUCTION

A common thread among most Americans, regardless of race, age, gender, or socio-economic background, is income and employment. In order to earn money to eat and have a place to live, an individual must be employed. In the case of a retired employee, some type of former employment must have existed in order to receive pension benefits to live on. Employment or former employment, in the eyes of most Americans, equates with livelihood.

Keeping this in mind, imagine you are an employee over the age of 50, and your employer hires and promotes employees between the ages of 40 and 49 more frequently than employees age 50 and older. As an employee age 50 or older, would you feel discriminated against by your employer in favor of the younger co-employees? Now, turn the scenario around. Imagine your employer is hiring and promoting employees age 50 and older more frequently than employees between the ages of 40 and 49. As an employee between the ages of 40 and 49, would you feel discriminated against by your employer who favored the older co-employees? The language of the Age Discrimination in Employment Act of 1967,[1] which

---

[*] Executive Editor, 2003-2004, University of Dayton Law Review. J.D. expected May 2004, University of Dayton School of Law; M.A., 1998, University of Cincinnati; B.S., 1995, Ithaca College. The author wishes to thank her family and friends for their continued support, as well as Professor Cochran, Professor Perna, and Janice Baker, her executive editor, for providing the motivation and input necessary to write this comment.

[1] The Age Discrimination in Employment Act of 1967 is codified as 29 U.S.C. §§ 621-34 (2000). The Age Discrimination in Employment Act of 1967 ("ADEA") prohibits employers from engaging in "arbitrary age discrimination in employment" against workers between 40 and 70 years of age. 29 U.S.C. §621(b) (1994) (stating "[i]t 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."). Employees between the ages of 40 and 70 are considered to be within the protected class of the ADEA and, therefore, are protected from age discrimination within the workplace. 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, 543 (1996) (stating that individuals between the ages of 40 and 70 are deemed to "fall within the protected age category" of the ADEA). Title VII of the Civil Rights Act of 1964 also recognizes protected classes of individuals including race, color, religion, national origin and gender. 42 U.S.C. § 2000e-2(a)(1) (2000) (stating that "[i]t shall be an 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

protects employees age 40 and over from workplace discrimination, is now currently in debate. The circuit courts are split over whether employees age 40 and over can bring a claim for age discrimination against their employer when the employees receiving the benefit of the age discrimination are also within the age 40 and over protected age class.[2]

In *Cline v. General Dynamics Land Systems, Inc.* ("*Cline I*"),[3] employees between the ages of 40 and 49 sued their employer for discrimination under the ADEA, claiming a new company policy denied them retiree health benefits while providing them to workers age 50 and over.[4] Under a collective bargaining agreement, General Dynamics enacted a new policy that substantially altered its employees' eligibility for health care benefits upon retirement; the new policy favored employees over the age of 50.[5] In addressing whether employees within the age protected class may sue for age discrimination, the Sixth Circuit concluded, in a 2-1 decision, that the workers age 40 and over were protected workers as defined by the ADEA and held that they were denied their full health benefits at retirement solely on the basis of their age.[6]

The Sixth Circuit was the first appellate court to interpret the ADEA as benefiting "what might be called the 'younger old' over the 'older old.'"[7] The majority of courts at the federal level that have considered this issue have held that the ADEA does not provide a cause of action for age

---

respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.").

[2] *See infra* nn. 3, 8.

[3] 98 F. Supp. 2d 846 (N.D. Ohio 2000) (granting General Dynamic's motion to dismiss because Cline did not allege any facts to provide a basis for a cause of action for an age discrimination claim under the ADEA) ("*Cline I*"); *Cline v. Gen. Dynamics Land Systems, Inc.*, 296 F.3d 466 (6th Cir. 2002) ("*Cline II*").

[4] *Cline I*, 98 F. Supp. 2d at 847; *Cline II*, 296 F.3d at 467-68.

[5] *Cline I*, 98 F. Supp. 2d at 847; *Cline II*, 296 F.3d at 467-68. The new policy stated that as of a certain date, anyone 50 or over could receive full health benefits upon retirement. *Cline I*, 98 F. Supp. 2d at 847; *Cline II*, 296 F.3d at 468. In contrast, the old policy provided for full benefits to all retiring employees with 30 years seniority. *Cline I*, 98 F. Supp. 2d at 847; *Cline II*, 296 F.3d at 468. Consequently, those employees in their 40's, who had 30 years seniority under the old plan, lost their full retirement benefits because they would not reach age 50 by the new policy date. After the Federal District Court granted the employer's motion to dismiss, the employees appealed to the Sixth Circuit Court of Appeals. *Cline II*, 296 F.3d at 468.

[6] *Id.* Accordingly, the Court remanded the case for further proceedings and instructed the District Court to "address the plaintiff's declaratory judgment argument concerning standing and ripeness, which was not considered by the district court and thus [was] not properly before us for review." *Id.*

[7] Andrew Brownstein, *'Younger' Workers Can Sue Under ADEA, Sixth Circuit Finds*, http://www.atla.org/Publications/trial/0210/t1002nt5.aspx (accessed Feb. 2, 2003). For example, a "younger old" employee within the age protected class could be between the age of 40 to 49 and an "older old" employee within the age protected class could be between the age of 50 to 59 or 60 to 69.

discrimination within the protected class.[8] Consequently, the Sixth Circuit's decision creates a significant split among the federal courts.[9] The United States Supreme Court recently granted *certiorari* for this case.[10]

This Comment addresses the issue of whether the ADEA provides a cause of action to employees age 40 and over, who bring claims of age discrimination even though they are discriminated against to the benefit of other members of the protected class. Section II of this Comment discusses the origin, legislative history and plain language of the ADEA. It also discusses the concept of reverse discrimination, the Equal Employment Opportunity Commission's ("EEOC")[11] interpretation of the ADEA, and the current status of "age discrimination against 'any individual' within a protected class"[12] among the federal courts.

Section III argues that employees age 40 and over should have a cause of action under the plain language of the ADEA for age discrimination if any worker age 40 and over is provided more favorable treatment than another worker age 40 and over. It should not matter whether employees ages 40 to 45 feel they are being discriminated against in favor of employees age 45 and older, or whether employees age 50 and older allege discrimination by their employer for the benefit of employees ages 40 to 49. The purpose and plain language of the ADEA, the EEOC's interpretation of reverse discrimination, and previous federal case law and Supreme Court dictum support the proposition that employees age 40 and over are *not* prohibited from pursuing age discrimination claims, even though they are discriminated against for the benefit of other members of the protected class. However, the realities of applying the plain language of the ADEA to economic, retirement, or healthcare benefits cases involving discrimination, are not supported by public policy, and as a result, negatively impact employees and employers. Older employees, as they approach retirement age, tend to receive favoritism in treatment in the area of healthcare/retirement benefits. For these reasons, it is necessary to carve out a narrow exception in these cases, allowing employers to use age as a factor, or a defense, when determining healthcare and retirement benefit plans for those employees reaching retirement age.

---

[8] The First, Second and Seventh Circuits have ruled that the ADEA does not cover reverse age discrimination or provide a cause of action for those employees suing within a protected class. *See infra* n. 75 (discussing case names and holdings).

[9] *See infra* nn. 75-76 (discussing case names and holdings).

[10] *See Gen. Dynamics Land Systems, Inc. v. Cline*, 296 F.3d 466 (6th Cir. 2002), *cert. granted*, 2003 WL 256915 (2003).

[11] For information on the EEOC, *see* U.S. EEOC, *U.S. Equal Opportunity Commission Home Page*, http://www.eeoc.gov (accessed Feb. 2, 2003).

[12] *Cline II*, 296 F.3d at 472.

II. BACKGROUND

This section examines the history and plain language of the ADEA, analyzes the evolution of the concept of reverse discrimination, provides an explanation of age discrimination under the ADEA, and explains the EEOC's interpretation of the ADEA. This section also discusses the federal law addressing age discrimination under the ADEA for employees within the protected class.

A. *The History of the ADEA*

Legislative and executive initiatives appeared as early as the 1950's to eliminate arbitrary age discrimination in employment.[13] Half of all private job openings were not available to applicants over the age of 55 in 1967, and a quarter were not available to those over the age of 45.[14] Nevertheless, in 1967, suggestions to place protective provisions for elderly workers in Title VII[15] to fight "ageism"[16] and age discrimination in the workplace were rejected.[17] However, Congress issued a directive under Title VII to the Secretary of Labor to make a "full and complete study of the factors which might tend to result in discrimination in employment because of age"[18] that resulted in a proposal for "recommendations for legislation to prevent arbitrary discrimination in employment because of age."[19] Following this directive, W. Willard Wirtz ("Wirtz"), then Secretary of Labor, issued a

---

[13] Querry, *supra* n. 1, at 532. Former President Johnson issued an executive order establishing a "'federal policy' against age discrimination in employment" on February 12, 1964. *Id.* at n.16. *See* Richard L. August, *Age Discrimination in Employment: Correcting a Constitutionally Infirm Legislative Judgment*, 47 S. Cal. L. Rev. 1311, 1324-28 (1974) (providing a summary of early legislative and executive efforts to eliminate age discrimination in the workplace).

[14] Samuel Issacharoff & Erica Worth Harris, *Is Age Discrimination Really Age Discrimination?: The ADEA's Unnatural Solution*, 72 N.Y.U. L. Rev. 780, 783 (1997).

[15] 42 U.S.C. §§ 2000e-1-17 (1994). Title VII of the Civil Rights Act of 1964 prohibits discrimination against an individual based on race, color, religion, national origin or gender. 42 U.S.C. § 2000e-2(a)(1). The primary focus of Title VII is to eliminate workplace discrimination and restore injured employees to their pre-discrimination status. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). This should not occur by providing redress, but by preventing the harm caused by discrimination altogether. *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998) (citing *Albemarle*, 422 U.S. at 417). The secondary purpose of Title VII is to compensate victims of discrimination. *Albemarle*, 422 U.S. at 417.

[16] Querry, *supra* n. 1, at 532. Ageism is defined as the "process of systematic stereotyping of and discrimination against people because they are old." *Id.* at n. 17. *See* James E. Birren & Wendy L. Loucks, *Age Related Change and the Individual*, 57 Chi.-Kent L. Rev. 833, 833 (1981).

[17] Querry, *supra* n. 1, at 532-33.

[18] *Id.* at 533 (quoting the Civil Rights Act of 1964 § 715, 42 U.S.C. §2000(e)).

[19] *Id.*

report detailing and documenting the problems older workers faced in retaining employment.[20]

Wirtz described age discrimination as an inaccurate stereotype that an older worker is unable to maintain productivity in job performance.[21] The report stated that although age discrimination was not due to a dislike or intolerance of older workers,[22] it recommended legislative action be taken to resolve the social problem of "'arbitrary' age discrimination."[23] The report concluded that "decisions about aging and ability to perform in individual cases . . . may or may not be arbitrary discrimination on the basis of age, depending on individual circumstances."[24] In 1967, Congress enacted the ADEA with the general "theme of the ADEA [being to] shift [the] focus away from chronological age and age-related barriers."[25]

In an attempt to ensure that the ADEA protected older workers, Congress explicitly set the minimum age limit at 40.[26] Following the ADEA's 1967 enactment, Congress passed another separate age discrimination statute, the Age Discrimination Act of 1975 ("ADA").[27] A minimum age for protection was not set under the ADA; thus, both the young and old received protection against age discrimination.[28] The ADA prohibits age discrimination in federal programs and protects all age groups, unlike the ADEA which specifically targets discrimination against

---

[20] U.S. Dept. of Labor, *The Older American Worker: Age Discrimination in Employment* (1965) reprinted in the EEOC's Legislative History of the Age Discrimination in Employment Act 16-41 (1981)[hereinafter Wirtz 1965 Report]; *see* Querry, *supra* n. 1, at 533, n. 20. Under the Fair Labor Standards Act Amendments of 1966, then Secretary of Labor Wirtz was "directed to prepare and submit a legislative proposal addressing the problems of age discrimination in the workplace." *Id.* at n. 28; *see* Fair Labor Standards Act Amendments of 1966, Pub. L. No. 89-602, § 606, 80 Stat. 845 (1966). Wirtz then submitted to Congress what became the Age Discrimination in Employment Act of 1967, eventually signed into law on Dec. 15, 1967. *See* 113 Cong. Rec. 1377 (1967); Querry, *supra* n. 1, at 533, n. 28; *Williams v. Gen. Motors Corp.*, 656 F.2d 120, 126 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

[21] Querry, *supra* n. 1, at 533; Wirtz 1965 Report, *supra* n. 20, at 5-6.

[22] Querry, *supra* n. 1, at 533; Wirtz 1965 Report, *supra* n. 20, at 5-6. This discrimination is in contrast to other types of discrimination, such as race, which is often due to a dislike or intolerance.

[23] Querry, *supra* n. 1, at 534.

[24] *Id.* at 533 (quoting Wirtz 1965 Report, *supra* n. 20, at 5).

[25] *Id.* at 535 (quoting Steven J. Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 Fla. L. Rev. 229, 235 (1990)); *see* Evan H, Pontz, *What a difference ADEA Makes: Why Disparate Impact Discrimination Theory Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C. L. Rev. 267, 272 (1995).

[26] Querry, *supra* n. 1, at 535.

[27] 42 U.S.C. § 6101-07 (2000).

[28] Jeffrey Paul Fuhrman, *Can Discrimination Law Effect The Imposition Of A Minimum Age Requirement For Employment In the National Basketball Association?*, 3 U. Pa. J. Lab. & Emp. L. 585, 599 (2001).

older workers age 40 and over.[29] While the legislative history of the ADEA discusses the impact of age discrimination on older workers, the "sparse"[30] history available makes no mention of whether an individual within the age 40 and over protected class can be discriminated against in favor of another worker within the same protected class.

B. The Plain Language of the ADEA

Congress enacted the ADEA[31] to "promote [the] employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and employees deal with problems caused by the impact of age on employment."[32] Originally, the ADEA prohibited discrimination against private sector employees ages 40 to 60.[33] In 1974, the ADEA was amended to extend coverage to federal and state government employees.[34] In its present form, the ADEA prohibits employment discrimination against all workers between 40 and 70 years of age in the private sector and provides no age ceiling for federal workers.[35]

Specifically, the ADEA states it is unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate

---

[29] *Id.* (stating "[b]y not setting a minimum age for protection under the ADA, Congress suggested that the young are often subject to discrimination and, therefore, warrant protections as well. Strangely, this logic did not apply when Congress passed the ADEA.").

[30] Querry, *supra* n. 1, at 535, n. 38 ("[T]he ADEA's sparse legislative history likewise provides little guidance"); Barry Bennett Kaufman, *Preferential Hiring Policies For Older Workers Under the Age Discrimination in Employment Act*, 56 S. Cal. L. Rev. 825, 841 ("In conclusion, the sparse legislative history of the ADEA does not clearly identify the intended model of group protection.").

[31] The ADEA has been described as having a "hybrid nature," part Title VII of the Civil Rights Act of 1964 ("Title VII") and part Fair Labor Standards Act of 1938 ("FLSA"). Joseph E. Kalet, *Age Discrimination in Employment Law* 3 (Bureau of Natl. Affairs, Inc. 1986). *See supra* note 15 for information regarding Title VII. The Fair Labor Standards Act of 1938 is codified as 29 U.S.C. § 201 (2000). For discussion regarding the "hybrid nature" of the ADEA, *see* H. Lane Dennard, Jr. and Kendall L. Kelly, *Price Waterhouse: Alive and Well Under the Age Discrimination in Employment Act*, 51 Mercer L. Rev. 721, 721 (2000). For further information on the "hybrid" nature of the ADEA, *see* Kalet, at 27-58. "The original intent of the drafters of what was to become the ADEA was merely to accord age the same protected status as that extended to race and sex under Title VII." *Id.* at 2. "[T]he Title VII enforcement scheme and proof considerations were followed extensively in the drafting of the ADEA" due to the fact that Title VII already had an "established [] framework within which the ban on employment discrimination could be enforced." *Id.* However, the absence of a full remedial scheme caused the drafters to look to the Fair Labor Standards Act of 1938. *Id.* at 3.

[32] 29 U.S.C. § 621(b) (2000); *see* Abigail Cooley Modjeska, *Employment Discrimination Law*, § 3.01 (3d ed. West 2002).

[33] Kalet, *supra* n. 31, at 3; *see* Pub. L. No. 90-202 (Dec. 15, 1967); 29 U.S.C. §§ 621-634 (2000).

[34] Kalet, *supra* n. 31, at 3 (stating that "[s]ubsequent amendments to the Act have extended its coverage to federal employees, raised the ceiling to age 70 for private sector employees, and removed entirely the upper age limit for federal employees' protection under the Act.").

[35] *Id.* at 7.

against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[36] "Any individual," according to Congress, means those "individuals who are at least 40 years of age."[37] Therefore, any individual younger than 40 is not protected by the ADEA.[38] However, some individuals are exempted. For example, high level executives, policy makers and partners in business are not covered by the ADEA.[39] The ADEA also provides employers several defenses to an alleged claim of age discrimination.[40] These include: 1) the bona fide occupational qualification ("BFOQ") defense;[41] 2) the reasonable factors other than age ("RFOA") defense;[42] 3) the bona fide seniority system or bona fide employee benefit plan defense;[43] and 4) the good cause defense.[44]

Employers,[45] labor organizations,[46] employment agencies,[47] and federal, state, and local governments are included within the scope of the ADEA to

---

[36] 29 U.S.C. § 623(a)(1).

[37] *Id.* at § 631(a). The EEOC webpage states that "hiring and firing; compensation, assignment, or classification of employees; transfer, promotion, layoff, or recall; job advertisements; recruitment; testing; use of company facilities; training and apprenticeship programs; fringe benefits; pay, retirement plans, and disability leave; or other terms and conditions of employment" are discriminatory practices prohibited by the ADEA. EEOC, *Federal Laws Prohibiting Job Discrimination: Questions and Answers*, http://www.eeoc.gov/facts/qanda.html (accessed Oct. 31, 2003).

[38] *Cline II*, 296 F.3d at 469; *see O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312 (1996).

[39] Wayne S. Jacobsen, *The Age Discrimination in Employment Act and Employee Benefits* (Glasser Legal Works 1998). High level executives and policymakers are not protected under the ADEA and "may be forced to retire at 65 if they are entitled to benefits equaling at least $44,000 per year." *Id.* at 320. Also, partners are not considered employees, thus, the ADEA does not protect them from discrimination. *Id.* at 310.

[40] 29 U.S.C. § 623(f).

[41] The BFOQ defense states in § 623(f)(1): "[T]ake any action otherwise prohibited . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business . . . ." *See* Kalet, *supra* note 31, at 75 and Modjeska, *supra* note 32, at § 3:18 for further discussion.

[42] The RFOA defense states in § 623(f)(1): "[T]ake any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age . . . ." For further discussion, *see* Kalet, *supra* note 31 at 82, and Modjeska, *supra* note 32 at § 3:19.

[43] The bona fide seniority system defense states in § 623 (f)(2)(A): "[O]bserve the terms of a bona fide seniority system or any bona fide employee benefit plan . . . which is not a subterfuge to evade the purposes of the Act . . . ." For further discussion, *see* Kalet, *supra* note 31, at 84-86, and Modjeska, *supra* note 32, at § 3:20.

[44] The good cause defense states in § 623 (f)(3): "[D]ischarge or otherwise discipline an individual for good cause." As discussed by Kalet, *supra* note 31, at 75, the "'good cause' defense is more a creature of labor law than employment discrimination law . . . ."

[45] 29 U.S.C. § 623(a).

[46] *Id.* at § 623(c).

[47] *Id.* at § 623(b).

"remedy the neglect of older persons"[48] within the employment context.[49] The ADEA covers employers with 20 or more employees.[50] In 1978, the authority to oversee the ADEA shifted from the Secretary of Labor to the Equal Employment Opportunity Commission.[51] With this shift in authority, the EEOC received the "responsibility for conciliation, investigation, and recordkeeping under the ADEA, and enforcement of the Act in both the federal and private sectors, administratively as well as in the courts."[52]

A charge of age discrimination under the ADEA must be filed with the EEOC within 180 days of the alleged discriminatory act.[53] If the state has an anti-discrimination statute, and an agency authorized to grant or seek relief, a charge must be presented to that state or local agency.[54] In certain jurisdictions, a charge may be filed with the EEOC within 300 days of the age discriminatory act, or 30 days after receiving notice that the state or local agency terminated the processing of the charge.[55] Federal employees claiming age discrimination under the ADEA may choose between filing a claim with the EEOC or filing a suit in court after providing notice to the EEOC.[56] When choosing the latter option, an employee must give the EEOC 30 days notice of intent to file an action, and that notice must be no more than 180 days after the discriminatory act.[57] These two options are not available for age discrimination claims against private employers.[58]

The ADEA provides jury trials for private employees and state and local government employees, but does not provide the right of a jury trial to federal employees.[59] Remedies under the ADEA may include reinstatement, affirmative orders, attorney's fees for prevailing plaintiffs, back pay, front pay and "double damages as liquidated damages in cases

---

[48] Modjeska, *supra* n. 32, at § 3.01.

[49] *See* Kalet, *supra* n. 31, at 13; Modjeska, *supra* n. 32, at 2; *Brennan v. Ace Hardware Corp.*, 495 F.2d 368 (8th Cir. 1994).

[50] EEOC, *supra* n. 37, at http://www.eeoc.gov/facts/qanda.html.

[51] Kalet, *supra* n. 31, at 3. *See supra* note 11 for EEOC website.

[52] Kalet, *supra* n. 31, at 3. Originally, the Secretary of Labor was responsible for overseeing the ADEA. *Id.* However, authority to oversee the ADEA was transferred to the EEOC under the Reorganization Act of 1977. *Id.*; *see* Pub. L. No. 95-17, 91 Stat. 29 (Apr. 6, 1977); 5 U.S.C. §§ 901-912 (2000).

[53] Mark A. Rothstein, Charles B. Craver, Elinor P. Schroeder & Elaine W. Shoben, *Employment Law* vol. 1, § 2.37 (2d ed. West 1999) (stating that "[t]he filing procedures and time limitations of the ADEA now are virtually the same as those of Title VII.").

[54] EEOC, *Filing a Charge*, http://eeoc.gov/facts/howtofil.html (accessed Oct. 31, 2003).

[55] *Id.*

[56] Rothstein et. al, *supra* n. 53, at 1.

[57] *Id.*

[58] *Id.*

[59] *Id.*

where the defendant commits a willful violation of the [ADEA]."[60] However, the ADEA does not provide damages for pain and suffering.[61]

Although the ADEA appears to "provide broad protection for older workers against employment discrimination,"[62] it actually prohibits only "arbitrary" discrimination in employment.[63] Neither the "sparse" legislative history,[64] nor the language of the ADEA, provide much guidance as to what types of discrimination are considered arbitrary or state what constitutes unlawful age discrimination.[65] Wirtz described "arbitrary discrimination" in his 1965 report to Congress as "the rejection [of older workers] because of assumptions about the effect of age on their ability to do a job when there is in fact no basis for these assumptions."[66]

Neither the language of the ADEA, nor its legislative history, defines unlawful age discrimination.[67] Although the statute makes reference to "older persons" in its Statement of Findings and Purpose,[68] it does not define "older workers" or "older persons."[69] Additionally, the plain language of the statute also does not refer to or address "reverse age discrimination."[70]

C. *Evolution of the Concept of Age Discrimination Under the ADEA*

The Sixth Circuit stated that the expression "reverse discrimination"[71]

---

[60] *Id.*

[61] *Id.*

[62] Pontz, *supra* n. 25, at 272.

[63] Querry, *supra* n. 1, at 535. The ADEA mentions "arbitrary" discrimination no less than three times in the preamble of the ADEA. *Id.* at n. 38. However, the ADEA does not specify the types of discrimination considered "arbitrary" nor does the ADEA state what constitutes "discrimination." *Id.*; *see* Pontz, *supra* n. 25, at 273, n. 34.

[64] *See supra* n. 30 for further information on the sparse legislative history of the ADEA.

[65] Querry, *supra* n. 1, at 535, n. 38.

[66] *Id.* (quoting Wirtz 1965 Report, at 2).

[67] Kaufman, *supra* n. 30, at 847.

[68] *See supra* n. 1; *infra* n. 70.

[69] *Cline II*, 296 F.3d at 470.

[70] *See* 29 U.S.C. § 621(a)-(b) (State of Findings and Purpose); 29 U.S.C. § 623(a)(1) (language of the statute itself); 29 U.S.C. § 631(a) (definition of "any individual").

[71] Reverse discrimination is defined as a "preferential treatment of minorities, usu. through affirmative-action programs, in a way that adversely affects members of a majority group." *Black's Law Dictionary* 480 (Bryan A. Garner, 7th ed., West 1999). Reverse discrimination has also been defined as "discrimination against white persons or males resulting from preferential policies intended to remedy past discrimination against minorities or females." *Webster's American Dictionary* 674 (College Ed., Random House 2002). Reverse is defined as "opposite or contrary in position, direction, order, or character." *Id.*

has "no ascertainable meaning in the law."[72] Based on whether the individual bringing the action is within the protected class of the statute, an action could be viewed as either discriminatory or not discriminatory.[73] In other words, it does not matter whether the discrimination is a reverse type of age discrimination; it is still discrimination. In the context of the ADEA, there has been limited success for age discrimination claims where one group of employees within the age protected class are discriminated against to the benefit of other employees within the same age protected class. These types of claims are sometimes referred to as "reverse age discrimination."[74] The majority of courts hearing such claims have not interpreted the ADEA to allow such claims.[75] However, several courts have acknowledged claims of age discrimination within the protected class under the ADEA,[76] and the EEOC takes the position that the ADEA prohibits discrimination when an employee is favored over another within

---

[72] *Cline II*, 296 F.3d at 471.

[73] *Id.*

[74] John F. Buckley, *Favoring Older Workers Becomes Dangerous Trend*, http://www.smartpros.com/x25814.xml (accessed Feb. 2, 2003); Legal Clinic, *Workindex.com Legal Archives*, http://www.workindex.com/editorial/legal/legalarc-0207-35.asp (accessed Feb. 2, 2003).

[75] Fuhrman, *supra* n. 28, at 601. *See Hamilton v. Catepillar, Inc.*, 966 F.2d 1226, 1228 (7th Cir.. 1992) (holding that the ADEA does not provide a cause of action or remedy for reverse-age discrimination claims); *Schuler v. Polaroid Corp.*, 848 F.2d 276, 279 (1st Cir. 1988) (holding that the plaintiff did present sufficient facts to permit a jury to find that defendant, Polaroid, did not abolish the plaintiff's job but rather "'retained' a younger person 'in the same position'"); *Dittman v. Gen. Motors Corp.*, 941 F. Supp. 284 (D. Conn. 1996) (holding that plaintiffs between the ages of 40 and 50 who were employed by General Motors did not provide a cause of action for age discrimination within the age protected class when GM and the employee union entered into an agreement making generous early retirement plans available to employees over age 50, but not to those plaintiffs between ages 40 and 50); *Parker v. Wakelin*, 882 F. Supp. 1131, 1140 (D. Me. 1995) (holding that the plaintiffs, who were teachers, with less than ten years of creditable service with the Maine State Retirement System who were over 40 but less than 50 years old, failed to state a claim on which relief could be granted for age discrimination. The Court stated that the "ADEA has never been construed to permit younger persons to claim discrimination against them in favor of older persons."); *Karlen v. City Colleges of Chi.*, 837 F.2d 314, 318 (7th Cir. 1988) (stating that the ADEA does not protect the young against the old); *Stone v. Travelers Corp.*, 58 F.3d 434 (9th Cir. 1995) (stating that the ADEA does not forbid treating older workers more generously than younger workers).

[76] *Cline II*, 296 F.3d at 467; *see Cline I*, 98 F. Supp. 2d at 847; *Miss. Power & Light Co. v. Intl. Bhd. of Elec. Workers Loc. Union Nos. 605 & 985*, 945 F. Supp. 980, 985 (S.D. Miss. 1996) (holding that a collective bargaining provision allowing against transferring disabled employees to new work locations if employees were between the ages of 60 and 65 and had attained 30 years of service was "keyed to an employees age, it [was] facially violative of the ADEA"), *aff'd*, 102 F.3d 551 (5th Cir. 1996). Although not addressing whether the ADEA allows for a cause of action of age discrimination within the protected class, the Court in *O'Conner v. Consol. Coin*, held that to "indirectly prove age discrimination, an ADEA plaintiff must demonstrate age discrimination that favors a substantially younger person." *Cline II*, 296 F.3d at 475 (Cole, R., Concurring) (interpreting *O'Conner v. Consol. Coin*, 517 U.S. 308 (1996)). The *Consolidated Coin* Court further stated that "[t]he fact a person in the protected class lost out to another person in the protected class is thus irrelevant, so long as he lost out *because of his age*." 517 U.S. at 312.

the age protected class.[77]

D. *The EEOC's Interpretation of the ADEA*

The EEOC provides that in situations where the ADEA applies, it is unlawful for an employer to "discriminate in hiring or in any other way by giving preference because of age between individuals 40 and over."[78] For instance, the EEOC states hypothetically, that "if two people apply for the same position, and one is 42 and the other is 52, the employer must not lawfully turn down either one on the basis of age, but must make such decision on the basis of some other factor."[79] Furthermore, an EEOC administrative court held that the postal service needed to stop using an employee's date of birth as a tie breaker, when determining seniority list placement, if such actions involved employees over the age of 40.[80] The EEOC court stated that the discriminatory event was the postal service's use of age as a tie-breaker.[81]

Courts have stated that because the EEOC is the primary agency in charge of implementing and enforcing the ADEA, the EEOC's interpretation of the ADEA is "entitled to great deference."[82] The deference given to the implementation and enforcement of the rules and regulations of the EEOC is often referred to as the "*Chevron deference*."[83] Step one of the *Chevron* analysis asks whether the statute is ambiguous.[84] If the statute is ambiguous, then step two of the *Chevron* analysis examines whether the

---

[77] 29 C.F.R. § 1625.2(a) (1988). *See infra* text accompanying pt. II(D).

[78] 29 C.F.R. § 1625.2(a).

[79] *Id.*

[80] *Garrett v. Henderson*, 1999 WL 909980 at *3 (E.E.O.C. Sept. 30, 1999).

[81] *Id.*

[82] *Kralman v. Ill. Dept. of Veterans' Affairs*, 23 F.3d 150, 155 (7th Cir. 1994); *see Chevron, U.S.A., Inc. v. Nat. Resources Def. Council*, 467 U.S. 837 (1984).

[83] *Chevron*, 467 U.S. 837. In 1984, the Supreme Court in reviewing an agency interpretation embodied in a statutorily authorized informal rulemaking stated:

> [w]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether the U.S. Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43.

[84] William S. Jordan III, *Updating Deference: The Court's 2001-2002 Term Sows More Confusion About Chevron*, 32 Envtl. L. Rptr. 11459, 11459 (2002).

agency adopted a reasonable interpretation.[85] The term "*Chevron deference*" refers to the second step of the analysis, where the court "must accept an agency's interpretation of an ambiguous statute as long as [the interpretation] is reasonable."[86]

Some courts find that an administrative agency's interpretation is merely persuasive and not entitled to deference.[87] However, it is the "widely accepted view" that as long as the interpretation is reasonable, is not in conflict with the plain language of the statute, has a long history, and is uniform, the court interpreting the regulation will give "substantial deference to the administrative construction or interpretation by an agency of its own regulation."[88] Some courts give even more deference and state that when interpreting administrative regulations, the administrative regulation is the "ultimate criterion" and "becomes the controlling weight unless it is plainly erroneous or inconsistent with the regulation or inconsistent with the statute under which it was promulgated."[89]

In addition, in *Kralman v. Illinois Department of Veteran Affairs*,[90] the Seventh Circuit, relying on the EEOC's hypothetical that permitted claims within the protected class stated that "it is considered 'hornbook law' that [an] ADEA action can be based on discrimination between older and younger members of the protected class."[91] The Supreme Court recently solidified this principle, in dictum, in *O'Connor v. Consolidated Coin Caterers Corp.*[92] It stated that although a person within the protected class has lost out to another within the same class, it does not matter "so long as [the person] lost out because of [the person's] age."[93] However, the majority of courts have not been deterred from narrowly interpreting the ADEA.

E. Federal Law Addressing Age Discrimination Under the ADEA for Employees Within the Protected Class

Courts have narrowly construed the ADEA, limiting the protection afforded the elderly against employment discrimination, while at the same

---

[85] *Id.* at 11459-60.

[86] *Id.* at 11460.

[87] 2 Am. Jur. 2d *Administrative Law* § 240 (1994).

[88] *Id.*

[89] *Id.*

[90] *Kralman*, 23 F.3d at 150.

[91] *Id.* at 155.

[92] 517 U.S. 308 (regarding *O'Connor v. Consolidated Coin*, see *supra* note 76).

[93] *Id.* at 312.

time providing inconsistent interpretations of the ADEA.[94] Most federal courts facing the issue of whether an age discrimination cause of action brought from within the protected class should be recognized under the ADEA, have declined to allow such an interpretation of the statute or legislative history.[95] These courts include the First Circuit,[96] the Second Circuit,[97] the District Court of Maine[98] and the District Court of Connecticut.[99] The case replied upon frequently in court decisions prohibiting a cause of action for reverse-age discrimination claims under the ADEA is *Hamilton v. Caterpillar, Inc.*[100]

In *Hamilton*, employees brought a class action suit against Caterpillar, Inc. claiming that Caterpillar's special early retirement program offered to employees when company plants closed violated the ADEA. Hamilton alleged that the supplemental plan, which extended early retirement benefits to workers 50 or older with ten years of service, eliminated certain employees between the ages of 40 and 50 who had ten years of service with the company from qualifying for the plan. He claimed that the supplemental plan violated the ADEA because, as a class, they were "too *young* to qualify for early retirement benefits."[101] Thus, the plan was discriminatory.

The *Hamilton* court looked to other federal court interpretations, to the plain language of the ADEA, and to the EEOC regulations.[102] Hamilton argued that age discrimination, similar to race or sex discrimination, "cuts both ways."[103] The court found this argument plausible based on the statute; however, it did not feel that the EEOC's regulation should be read to allow age discrimination suits alleging discrimination between groups of employees within the protected class.[104] The court stated that interpreting the EEOC's regulation to "authorize reverse age discrimination suits" exceeded the scope of the statute.[105] It then indicated that there was no

---

[94] Kaufman, *supra* n. 30, at 847.

[95] *See supra* note 75 for cases not providing a cause of action for age discrimination within the protected class under the ADEA.

[96] *Polaroid Corp.*, 848 F.2d 276; *see supra* n. 75 for holding.

[97] *Hamilton*, 966 F.2d 1226; *see supra* n. 75 for holding.

[98] *Parker*, 882 F. Supp. 1131; *see supra* n. 75 for holding.

[99] *Dittman*, 941 F. Supp. 284; *see supra* n. 75 for holding.

[100] *Hamilton*, 966 F.2d 1226. Both *Dittman* and *Parker* cite to *Hamilton* in holding the ADEA does not provide a cause of action for age discrimination within the protected class. *Dittman*, 941 F. Supp. at 287; *Parker*, 882 F. Supp. at 1141.

[101] *Hamilton*, 966 F.2d at 1227.

[102] *Id.* at 1227-28.

[103] *Id.* at 1227.

[104] *Id.* at 1227-28.

[105] *Id.*

evidence in the legislative history of the ADEA that Congress was concerned with the groups of workers that were "arbitrarily denied opportunities and benefits because they [were] too *young*."[106]

In rejecting the existence of an age discrimination claim by plaintiffs because they fell within the age protected class, the *Hamilton* Court analogized age discrimination to disability discrimination. It stated, that "Congress was concerned that older people were being cast aside on the basis of inaccurate stereotypes about their abilities. The young, like the non-handicapped, cannot argue that they are similarly victimized."[107] The young may not be viewed as physically incapable of taking care of themselves, while the old may be considered as being incapable of caring for themselves or others.

However, a few courts recognize or support a cause of action for age discrimination within the protected class.[108] In *Mississippi Power*,[109] a collective bargaining agreement provision allowed employees between the ages of 60 and 65 "to resist any efforts by [the employer] to transfer them to new work locations."[110] The *Mississippi Power* Court explained that the provision:

> on its face explicitly favors members of the protected age group between the ages of 60 and 65 over other members of the protected age group with respect to a benefit of employment. That is, only workers between the ages of 60 and 65 who have been with the company for 30 years are granted the privilege of remaining at their present headquarters should they become disabled. Other members of the protected group (i.e., employees between the ages of 40 and 60 and those 66 and older) who satisfy the 30-year employment and disability prerequisites are not granted this privilege. For example, a disabled 50-year old employee with 30 years of employment would not be entitled to remain at his present headquarters under paragraph 58(d) solely because he is not between the ages of 60 and 65. *Because this provision against transferring is keyed to an employee's age, it is facially violative of*

---

[106] *Id.*

[107] *Id.*

[108] The Courts that recognize or support a cause of action for age discrimination within the protected class are: *Miss. Power*, 945 F. Supp. 980 (*see supra* n. 76 for holding); *Consol. Coin*, 517 U.S. 308 (*see supra* n. 76 for supporting cause of action); and *Cline II*, 296 F.3d 466 (*see supra* n. 5 for facts).

[109] 945 F. Supp. 980.

[110] *Id.* at 981.

the ADEA.[111]

The most recent case to address age discrimination within the protected class under the ADEA is *Cline v. General Dynamics Land Systems, Inc.* ("*Cline II*").[112] Relying on the plain language of the statute, the Sixth Circuit found no need to resort to the legislative history of the ADEA to determine Congressional legislative intent. The Court concluded, "[i]t is not the Court's role to address perceived inadequacies in [a statute]."[113] In concluding that the words of the statute alone were clear, the Court found that the ADEA provides a cause of action for employees within the protected class who claim that their employer discriminated against them on the basis of age because of the employer's more favorable treatment of older employees, also within the protected class.[114] However, the Sixth Circuit declined to use the term "reverse-age discrimination."[115] Instead, the court stated:

> [I]t is clear that Cline and his classmates did not suffer "reverse age discrimination." By the plain language of the ADEA they are the victims of "age discrimination." Congress has singled out the over-40 class of workers from the general workforce for protection from age discrimination by their employers. All the plaintiffs are members of the protected class created by § 631(a), and all properly allege that they were denied job benefits due to their age. Therefore, the protected class should be protected; to hold otherwise is discrimination, plain and simple.[116]

The Sixth Circuit's ruling created a clear split, because the First and Seventh Circuits had already ruled that the ADEA does not recognize age discrimination claims brought by employees belonging to the age protected class.[117] The case has been granted *certiorari* by the Supreme Court.[118]

The Supreme Court has never directly addressed the issue of whether a

---

[111] *Miss. Power*, 945 F. Supp. at 985 (emphasis added).

[112] 296 F.3d 466; *see* text accompanying pt. I and *supra* n. 5 for further explanation.

[113] *Cline II*, 296 F.3d at 469 (citing *In re Aberl*, 78 F.3d 241, 244 (6th Cir. 1996) (quoting *Wolf Creek Collieries v. Robinson*, 872 F.2d 1264, 1269 (6th Cir. 1989))).

[114] *Id.* at 469-72.

[115] *Id.* at 471 (stating "[W]e do not share the commonly held belief that this situation is one of so-called 'reverse discrimination.' Insofar as we are able to determine, the expression 'reverse discrimination' has no ascertainable meaning in the law. An action is either discriminatory or it is not discriminatory, and some discriminatory actions are prohibited by law").

[116] *Id.*

[117] *See Polaroid*, 848 F.2d 276 (standing as a case from the 1st Cir.); *Hamilton*, 966 F.2d 1226 (standing as a case from the 7th Cir.).

[118] *See supra* n. 10.

cause of action exists when age discrimination occurs among employees within the age protected class under the ADEA. However, in *Consolidated Coin*,[119] the Supreme Court ruled on a case involving a 56 year old employee fired by his company and replaced by a 40 year old employee.[120] The plaintiff in *Consolidated Coin* filed suit alleging that his discharge violated the ADEA because he was dismissed as a result of his age.[121] The Court, although not focusing on age discrimination, addressed whether the replacement of an ADEA plaintiff by someone outside the protected class was an element for establishing a prima facie case of age discrimination under the burden shifting framework of *McDonnell Douglas Corp. v. Green*.[122] The Supreme Court, in dicta, stated that although the language of the ADEA is limited to individuals at least 40 years of age, the language itself:

> bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older. The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age*.[123]

Regardless of whether a person alleging discrimination is a younger or older member of the protected class, the determinative factor is age.

III. ANALYSIS

Aging is a "universal human process."[124] Growing older is something every worker in society, regardless of race or gender, can understand, which makes age different characteristically from other protected classes.[125] While gender and race are immutable characteristics[126] that cannot be changed, age changes from year to year, dissimilar to race and gender

---

[119] 517 U.S. 308.

[120] *Id.* at 309-10.

[121] *Id.* at 309.

[122] 411 U.S. 792 (1973).

[123] *Consol. Coin*, 517 U.S. at 312 (emphasis added).

[124] Pontz, *supra* n. 25, at 315.

[125] Querry, *supra* n. 1, at 533 (stating that "[a]ge discrimination in employment, unlike race and gender discrimination, [is] not due to any dislike, intolerance, or 'antagonism' toward older workers, but rather [is] based on inaccurate stereotypes about older workers' declining abilities and productivity"). *See supra* note 1 for information regarding protected classes.

[126] *Regents of U. of Cal. v. Bakke*, 438 U.S. 265, 360 (1978) (stating "race, like gender . . . is an immutable characteristic which its possessors are powerless to escape or set aside").

which cannot be altered.[127] The plain language of the ADEA does not distinguish between younger and older workers within the protected class. The plain language and purpose of the ADEA, the EEOC's interpretation of the ADEA, and federal court precedent collectively provide strong support for a reading of the language of the ADEA to permit a cause of action for age discrimination within the protected class. Thus, the statute should be enforced as written.

The statute, as written, should be construed to allow for a cause of action to be brought for age discrimination by plaintiffs already within the protected class. However, a narrow exception should be carved out as an employer defense when age is used as a factor in determining the amount of healthcare and retirement benefits an employee approaching retirement age will receive.

A. *The Plain Language of the ADEA Supports the Ability of a Worker Within the Protected Class to File Age Discrimination Claims*

"As is true in every case involving the construction of a statute," the starting point in interpreting the statute is to examine the language employed by Congress.[128] We are governed by the "provisions of our laws," not the "principle concerns of our legislators."[129] When presented with the plain language of a statute, the court's only function is to enforce the statute according to its words.[130] Furthermore, where a statute's language is plain and unambiguous, there is no justification for resorting to legislative history to ascertain the lawmaker's intent.[131]

The language of the ADEA is clear and unambiguous.[132] The Act prohibits discrimination, and is not concerned with who benefits from the discrimination.[133] For example, a strict interpretation of the language of the

---

[127] Pontz, *supra* n. 25, at 307-08 (stating that "[a]ge is not an immutable characteristic such as race, sex, or national origin, since age changes over time. Older persons have faced no lifetime bias—any bias that arises does so only later in life").

[128] *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979); *see Cline II*, 296 F.3d at 468-69; *Consumer Products Safety Comm. v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980).

[129] *Cline II*, 296 F.3d at 469; *see Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998).

[130] *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917). *See U.S. v. Ron Pair Enterprises Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors Inc.*, 458 U.S. 564, 571 (1982) (discussing rare cases where the literal application of a statute will produce a result that is demonstrated to be at odds with the intentions of the statute's drafters)).

[131] *Cline II*, 296 F.3d at 469.

[132] *Id.*

[133] Kaufman, *supra* n. 30, at 835. Kaufman was referring singularly to any preferential policy toward "older members of the protected group necessarily discriminatory against those younger

ADEA would make any employer policy favoring younger workers ages 40 to 49, or perhaps older workers ages 60 to 69, discriminatory and in violation of the ADEA. The plain language of the ADEA suggests that when an individual within a protected class is discriminated against for the benefit of another member of the protected class, they are simply victims of "age discrimination." Therefore, a special term such as "reverse age discrimination" is not necessary.[134]

The plain language of the ADEA states, it shall be unlawful for an employer "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*."[135] Congress declared that "any individual" in relation to the ADEA means those "individuals who are at least 40 years of age."[136] The ADEA prohibits discrimination "because of [an] individual's age" and does not include any qualifiers,[137] restrictions or limits on individuals age 40 and older. The minimum age is set at 40. Although the ADEA's Statement of Findings and Purpose refers to "older persons,"[138] the statute itself does not define or include "older workers" or "older persons." However, Congress did identify "older workers" in its definition of "individual."[139] The logical inference to be drawn is that "older workers" describes an "individual" at least 40 years of age.

The use of "individual" within the statute represents "age-neutral" wording[140] because it does not indicate there is an age requirement to fit within the protected class itself. As a result, the "age-neutral" language can be defined broadly "to challenge discrimination against anyone who is a member of the protected age group."[141] As a result of the discernible, plain

---

members of the protected group excluded by such a policy, and thereby violative of the provisions of the ADEA." *Id.* Kaufman's statement has been conceptually altered for the purpose of this analysis to apply to all claims of age discrimination within the protected age class under the ADEA, not just claims by the younger employees within the protected group who claim discrimination as a result of favoritism towards older employees within the protected group.

[134] *Cline II*, 296 F.3d at 471.

[135] 29 U.S.C. § 623(a)(1) (emphasis added).

[136] *Id.* at § 631(a).

[137] *See Johnson v. U. of Cincinnati*, 215 F.3d 561, 573 (6th Cir. 2000) (rejecting the proposition that a high level affirmative action official cannot bring a Title VII claim for discrimination based upon his or her advocacy of women and minorities). The court based its reasoning on Title VII's broad remedial purpose and the fact that the statute is worded such that it prohibits discrimination "because of such individual's race" stating there was no mention of the words "directly" or "indirectly" in the statute. Similarly, in the case of a worker within a protected class filing an age discrimination claim, the ADEA prohibits discrimination *because of an individual's age* and does not include any qualifiers.

[138] *See supra* n. 1.

[139] *Cline II*, 296 F.3d at 471.

[140] Kaufman, *supra* n. 30, at 833.

[141] *Id.*

language of the statute, Congressional intent need not be explored. Furthermore, the ADEA produced "sparse" legislative history which makes what little is currently available a weak indicator of legislative intent. Ultimately, the plain language of the statute should allow for employer liability under the ADEA for age discrimination claims brought by employees within the age protected class against employers favoring other employees within the protected age group.

B. The Purpose of the ADEA Supports a Broad Interpretation Allowing for Age Discrimination Claims Within the Protected Class

Even if one looks beyond the plain meaning of the statute, Congressional intent found within other parts of the statute supports the notion that the ADEA can be interpreted to allow a cause of action for age discrimination within the protected class. The Preamble of the ADEA states three purposes for the Act. The first purpose is to "promote the employment of older persons based on their ability rather than age"; the second purpose is "to prohibit arbitrary age discrimination in employment"; and the third purpose is to "help employers and workers find ways of meeting problems arising from the impact of age on employment."[142] The original Congressional intent of protecting the aging from discrimination within the employment context can still be achieved by allowing a cause of action by younger or older members of the age protected class alleging claims of discrimination under the ADEA.[143]

The correct inference to be drawn is that Congress identified "older workers" as "any individuals" age 40 and over.[144] The ADEA should allow claims by individuals within the protected class because this adjustment in the law will not alter the original Congressional intent of protecting the elderly from discrimination. Rather, it would effectuate Congressional intent by protecting everyone within the protected class, regardless of the beneficiary of the discrimination.[145] "Older workers" can just as easily be individuals 42 years of age as they can be 62 years of age. Congress did not distinguish between those "older workers" 42 years of age and "older

---

[142] 29 U.S.C. § 621(b). *See* Modjeska, *supra* n. 32, at § 3.01.

[143] Younger members of the age protected class, for example, can be employees ages 40 to 49. Older members of the age protected class, also for example, can be employees ages 50 to 59 or 60 to 69.

[144] *Cline II*, 296 F.3d at 469.

[145] Fuhrman, *supra* n. 28, at 602. Fuhrman argues that the ADEA should extend its protection to the young as well as the elderly stating that the adjustment would not alter the "original congressional intent of protecting the elderly from discrimination because it would still command the same protection for them." *Id.* at 603. Fuhrman's argument has been conceptually altered for the purpose of this analysis to apply to age discrimination within the protected class under the ADEA.

workers" who happen to be 62 years of age when it defined "any individual." As a result, interpreting the ADEA to allow a cause of action for age discrimination by those within the protected class is in line with the three purposes set out in the Preamble of the ADEA to help protect workers age 40 and over in their employment regardless of age.

C. *The EEOC's Interpretation, that the ADEA Encompasses Discrimination Against Anyone Within the Protected Age Group, Should Be Persuasive to the Courts*

Federal courts support the proposition that the EEOC, acting as the primary agency in charge of implementing the ADEA, should be given great deference to its interpretation of the ADEA.[146] The EEOC states that "if two people apply for the same position, and one is 42 and the other is 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."[147] The language specifically states that the younger employee and the older employee have rights under the ADEA to not suffer discrimination based upon their age. It suggests that any person within the protected class may have a cause of action for age discrimination when an employer favors another employee within the protected class. Furthermore, an adjudicative action, heard by an EEOC administrative court, stated that an employee's date of birth, could not be used in determining seniority list placement within the workplace.[148] Age, in that decision, was looked upon as a discriminatory event.[149]

As the administrative agency charged with administering the ADEA, the EEOC has expressly shown that a cause of action should be permitted when a claim is brought for age discrimination by members of the protected class who are discriminated against in favor of other members of the class. As a result, courts should honor the EEOC interpretation under the *Chevron* analysis. In looking at the plain language of the ADEA under the first *Chevron* step,[150] the language of the ADEA is not ambiguous. Therefore, in the absence of any ambiguity, step two of the *Chevron* analysis is not needed[151] and the court must accept the plain language of the statute. Even if a court were to erroneously find the plain meaning

---

[146] *See supra* pt. II(D).

[147] 29 C.F.R. § 1625.2(a).

[148] *Garrett*, 1999 WL 909980 at *3.

[149] *Id.*

[150] Jordan, *supra* n. 84.

[151] *Id.* at 11459-60.

ambiguous, step two would require deference to the EEOC's interpretation. Courts should recognize that the EEOC's regulation example and adjudicative ruling, paired with the language of the ADEA and the absence of language contrary to its plain meaning, indicate that federal courts should follow the EEOC's interpretation allowing a claim for age discrimination within the protected class.

D. Federal Court Precedent Supports a Broad Reading of the ADEA to Include Age Discrimination Claims Within the Protected Class

Although few courts have supported the proposition that the ADEA should allow a cause of action for age discrimination within the protected class,[152] the concept is slowly gaining strength. The interpretations in the Fifth Circuit's *Mississippi Power*, the Sixth Circuit's *Cline II*, and the Supreme Court's dicta in *Consolidated Coin*, collectively support a discrimination claim "against anyone who is a member of the protected age group,"[153] leaving open the possibility of age discrimination claims within the protected class.

Currently, the trend within the state courts is to limit age discrimination protection only to those employees age 40 and over.[154] Although not binding within the federal court system, more than a third of U.S. states have age discrimination laws that protect either all employees or all employees over the age of 18.[155] State court systems have been more receptive to age discrimination suits brought by employees within the age protected class than has the federal court system.[156] In light of the Sixth Circuit's decision in *Cline II*, the next step is the Supreme Court's judicial review.[157]

---

[152] *See e.g. supra* n. 76.

[153] Kaufman, *supra* n. 30, at 833.

[154] Christopher R. Nolan, *Does ADEA Protect "Younger" Employees?: Employment, Labor and Benefits: October 2002, vol. 12, Issue 4*, http://www.hklaw.com/Publications/Newsletters.asp?*ID*=313&Article=1739 (accessed Feb. 2, 2003). Florida, Maryland, Minnesota, New Jersey, Ohio and Virginia do not limit age discrimination protection to only those employees age 40 and over.

[155] *Id.*

[156] *Id.*

[157] *See supra* n. 10.

E. The Application of the Plain Language of the ADEA to Healthcare/Retirement Benefits Cases May Require that a Narrow Exception or Defense Be Available to Employers Allowing Age to Be Considered as a Factor

The application of the plain language of the ADEA may leave an employer open to the "threat of statutory liability"[158] when addressing health and retirement benefits for its employees. A problem may arise given the fact that the employer may give preference to older workers at the expense of younger workers within the protected class when determining the amount of health care coverage and retirement benefits to be provided. The plain language of the ADEA states that no employee age 40 and over shall experience age discrimination within employment. A narrow exception allowing employers to use age as a factor or defense is needed when dealing with healthcare/retirement benefits cases. On its face, the idea of a narrow exception or defense for employers allowing age to be a factor in these types of cases may seem discriminatory. However, the effects of such an exception would be benign when taking into account the public policy interests of the employer and employee and the life cycle model of employment.[159]

1. The Need for Preferential Treatment of Older Workers Within the Protected Class in Employer Healthcare/Retirement Benefit Planning

All older employees were once younger workers able to make choices about their education and training free from age discrimination. Concerns about age discrimination do not impact younger workers, because only older workers are subject to such discrimination.[160] Victims of age discrimination have not experienced a history of purposeful unequal treatment in the same way as those who have suffered decades of race and gender discrimination within the workforce.[161] Therefore, those protected

---

[158] Kaufman, supra n. 30, at 829.

[159] *See infra* pt. III(E)(1)-(2) (discussing employer/employee interests and the life cycle of employment).

[160] "[T]hose who are victims of age discrimination as older workers may have benefited when they were younger from such discrimination against other older workers." Pontz, *supra* n. 25, at 308.

[161] *Id.* (stating that "age discrimination can bring benefits and is not invidious clearly differentiates it from racial discrimination, or discrimination due to Title VII's other protected characteristics. Discrimination against persons due to their age is generally not based on bigotry or hatred, but rather it is due to stereotypes attached to older persons and assumptions about their abilities as employees. Furthermore, in addition to distinctions between the types of discrimination the different classes

under Title VII have a need for equal treatment, whereas those protected under the ADEA might not need equal treatment with the protected class. An employee who has worked his whole life expects that at the end of his employment, he will receive something back for his years of service. This may be retirement benefits or healthcare benefits. The expectations then are on the employers to develop a plan to compensate the older workers upon retirement. This would require the employers, in some way, to provide preferential treatment to the older workers. Older workers, not because of their age, but because of the service they have performed, should be entitled to preferential treatment in economic/benefits planning by employers. The notion of equal treatment then becomes less important in these economic/benefits planning situations as employees spend more years in service.

If employers are not permitted to use a narrow defense that allows age to be a factor in determining healthcare/retirement benefit plans based on the employees' years of service then, employer sponsored benefits would be jeopardized. Employers would be forced to reevaluate practices that benefit those workers nearing retirement.[162] To minimize risk of litigation, employers would be forced to reduce benefits offered, choose to discontinue benefits already existing, or choose not to offer benefits at all.[163] These benefits would include retiree health benefits and retiree benefit pension plans.[164] Failing to allow consideration of age in determining benefits would also negatively impact employees because they would lose valuable benefits. If employers would begin to cut benefit plans and pensions, the employees would be the true losers. Employees would suffer because they possibly could lose all forms of retirement benefits and be forced to rely on the Social Security system, a system already pushed to its limit by a growing elderly population that is working and living longer.[165]

---

currently face, the history of that discrimination in our country also greatly differs."). The treatment of older workers has not experienced a "history of purposeful unequal treatment." *Id.* at 311.

[162] Jordan S. Schreier, *Reverse Age Discrimination Prohibited*, http://www.butzel.com/pub/bulpdf/BeneftsWinter2002.pdf (accessed Feb. 2, 2003) (stating that "it would be prudent for employers considering establishing benefits programs with minimum age eligibility criteria greater than age 40 or which already maintain such programs, to review the implications of the *Cline* case").

[163] Brownstein, *supra* n. 7 (quoting American Association of Retired Persons (AARP) senior litigation attorney Tom Osbourne as stating "[m]y fear is that we're going to get beat over the head with this decision by employers who want to cut back on benefits for older workers. . . .There would always be the threat of a lawsuit. Employers may just say, 'Why bother?' and decide not to provide retirement benefits to older workers at all.").

[164] Schreier, *supra* n. 162.

[165] National Women's Law Center, *National Women's Law Center*, http://www.nwlc.org/display.cfm?section=social%20security (stating that "[n]early two-thirds of women 65 and over get a majority of their income from Social Security, and nearly one-third rely on

2. Applying the Plain Language of the ADEA Will Negatively Impact the Life Cycle Model of Employment in Healthcare/Retirement Benefits Planning

The life cycle model of employment was "developed to explain the paradox of what economists would term the absence of wage elasticity, or simply, the failure of wages to fluctuate in response to the actual productivity of employees."[166] At the beginning of a career, an employer invests time, energy and education into the employer/employee relationship before the employee does.[167] This effort is considered to be the beginning of the life cycle of employment.[168] At this stage, employees risk "opportunistic termination."[169] This means an employee may be arbitrarily fired after accepting a new job, even if in accepting the new job the employee was required to move and quit a prior job in reliance on the new job.[170] At the early stages of the life cycle of employment, age is often not a factor in the termination of an employee. Workers are young and in training, they are expected to learn and grow. Employers are not hurt by this arbitrary release of an employee because they have yet to invest anything in the employee.[171]

Once an employer makes a substantial investment of time, money, and training in an employee, the possibility of an employee's arbitrary release diminishes.[172] Mid-career employees are often trapped in their jobs because of years of service and invested capital, at a time when an employer is making money from its relationship with the employee.[173] The employer more than likely will not arbitrarily release an employee from which it is siphoning knowledge and money. Therefore, the employer receives the benefit at the mid-career life cycle of employment.[174]

Employees at the end of their careers are at the end of their life cycle of

---

Social Security for 90% or more of their income. Without Social Security, more than half of all elderly women would be living in poverty. But, even with Social Security, one of every five elderly women living alone is poor.").

[166] Issacharoff, *supra* n. 14, at 787-88. *SeeId.* at n. 33 for a history of the life-cycle model of employment. *See* Steven L. Willborn, Stewart J. Schwab, & John Burton, Jr., *Employment Law Cases and Materials*, 7, 222-26 (Matthew Bender & Co., Inc. 2002); Stewart J. Schwab, *Life Cycle Justice: Accommodating Just Cause and Employment At Will*, 92 Mich. L. Rev. 8 (1993) for further explanation regarding the life-cycle of employment.

[167] Schwab, *supra* n. 166, at 39.

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *Id.* at 42.

[172] *Id.* at 47.

[173] *Id.*

[174] Issacharoff, *supra* n. 14, at 792.

employment. At this stage, the employees are the beneficiaries because they are often earning more than their current productivity level.[175] As employees prepare for retirement, it is their time to receive a return benefit from the employer and from society. After employees put in so much time and energy at the beginning of the life cycle of employment and then are exploited by employers at the mid-career cycle of their employment,[176] it is sound public policy to reward employees who have dedicated their lives by working to strengthen the economy with benefits.

The give and take between the employer and employee is a balance. If employers are forced to stop using age as a factor in determining health, retirement, and pension benefits, then there is less incentive for employees to remain in the workforce and less incentive for employers to provide benefits or pensions to workers. Employees will not have the motivation to continue working if they know that they will not receive any benefit from it except for their daily wage. And an employer who provides preferential benefits to those nearing retirement may not have the ability to provide all of its workers with the same benefits. A worker at age 30 will not need the same level of benefits as a worker age 60; thus, forcing an employer to provide these benefits to all employees would be impractical and costly. As an alternative, years of service could be used to determine economic benefits provided to employees. But using years of service as a criterion does not reward employees who have changed their job during their last few years of employment.

Workers of all ages within the protected class are needed to promote a strong economy. Employees in their 20s are hired as cheap labor because of their inexperience. This is counterbalanced by overpaying employees in their 50s and 60s for their knowledge and experience. Employees in their 40s are still continuing to learn from those in their 50s and 60s. Eventually, the employees in their 20s will replace the workers in their 40s, who will eventually replace the late career workers in their 50s and 60s who possess the most knowledge and experience when they retire. By providing preferential retirement treatment to older employees within the protected class for health and economic benefits, the life cycle of employment remains in balance. A 40 year old employee has another 20 years to work before retirement. A man already 60 who has worked an extra 20 years of his life to gain preferential benefits, right before retirement, is entitled to the preferential treatment. It is the give and take of the life cycle of employment that requires this treatment; otherwise, there would be no incentive to work except for the sole benefit of receiving a wage.

---

[175] Schwab, *supra* n. 166, at 43.

[176] *Id.* at 47.

IV. CONCLUSION

"The process of aging is inescapable."[177] Americans are living and working longer;[178] 40 is no longer stereotyped as "old" by society the way it was years ago. Although it was unheard of 40 to 50 years ago, many adults today switch careers or attend college midway through life. The plain language of the ADEA does *not* prohibit a cause of action for age discrimination occurring between individuals within the protected class.[179] A cause of action should be allowed when dealing with non-economic type age discrimination cases. In addition to the plain language of the ADEA, this is also supported by Congressional intent within the Preamble of the ADEA, the EEOC's interpretation of the ADEA, and federal case law. An exception should apply, however, when employers determine health benefits and retirement plans. In this case, it is in the best interest of the employee and employer to allow some form of preferential treatment toward those in the latter part of their employment life cycle. Although this may seem facially discriminatory, the results would be benign in application to the group alleging discrimination. Therefore, either a narrow exception should be carved out for healthcare/retirement benefit type cases, allowing employers to use age as a factor, or employers should be allowed to use age as a defense in these types of cases.

---

[177] Howard C. Eglit, *The Age Discrimination in Employment Act At Thirty: Where It's Been, Where It Is Today, Where It's Going*, 31 U. Rich. L. Rev. 579, 676 (May 1997).

[178] Issacharoff, *supra* n. 14, at 803 (stating that the number of older Americans has increased, the percentage of national wealth of older Americans has risen and that older Americans have steadily brought cases under the ADEA). By 2005, an estimated 56.7 million workers ages 45 and older are expected to be in the work force. *See* Eglit, *supra* n. 177, at nn. 223-224. This is an increase of 16.7 million over workers in the same age group in 1994. *Id.*

[179] *Cline II*, 296 F.3d 466.

The University of Dayton