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INTRODUCTION

Increasingly in today's market, employers are rejecting older "overqualified" applicants for jobs that they appear to be able to perform. Even though the Age Discrimination in Employment Act ("ADEA")[1] protects older applicants from discrimination based on age, an employer may be able to reject an older applicant if it believes the applicant is overqualified and therefore likely to become bored or transfer to a different job. Such an action by an employer can create problems by leaving older workers without a job and without any remedy for an adverse employment action taken, at least arguably, because of their age. Suppose, for example, the following situation:

> John Martin is fifty-five years old and has been a school superintendent for the past three years. As superintendent he turned the school district from one of the worst in the state into one of the best. Previously, he was a principal at a public high school in the same school district and was regarded as one of the best ever to lead the public high school. Besides being an excellent superintendent and principal, he taught for over fifteen years at a private high school that only accepted the brightest students from the community. Furthermore, he had graduate degrees in English and School Administration from a prestigious university. After his term as superintendent, John decided he wanted to go back to teaching.

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1. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-633a (1994). The statute provides:

> 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.

Id. § 623(a)(1).

> John applied for many different types of entry-level teaching jobs because no lateral positions were available. He applied to teach at an elementary school in a large city. Despite the availability of a position and his apparent qualifications, the school board rejected John because it thought that he would be bored, unchallenged, and uninterested in teaching children from the inner city after making policy decisions and being involved in various administrations. Furthermore, the school board thought that after he realized how difficult the students were, John would seek alternative employment. Therefore, he was not hired.
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> John also applied to teach at a middle school. This school board did not hire John either. The board reasoned that as a former superintendent he would attempt to control the administration of the school as well as his classroom. Furthermore, the school board reasoned that the academic program would not offer him the challenge and sophistication that a person of his background would want, and believed he was better suited to teach at a private school or remain a school administrator. The middle school's board also thought that once John realized how boring and simple classes were, he would quit.

Does this sound reasonable? Well, for reasons remarkably similar to these, employers are rejecting older job applicants. Rejection of older applicants based on their "overqualification" has become a serious problem, in part, because Americans are living longer than ever before.[2] As baby boomers move into their fifties, it is not surprising that a large part of America's workforce is aging.[3] The effect that the growing population of older adults will have on the workforce is still unclear. However, older workers may feel less secure as to their future in their jobs. This sense of insecu-

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2. *See generally* RESOURCE SERVS. GROUP, ET AL., A PROFILE OF OLDER AMERICANS: 1997 (1997). "The older population—persons 65 years or older—numbered 33.9 million in 1996. They represented 12.8% of the U.S. population, about one in every eight Americans. The number of older Americans increased by 2.6 million or 8% since 1990, compared to an increase of 6% for the under-65 population." *Id.* at 1. Since 1900, the percentage of Americans 65 and over has more than tripled (4.1% in 1900 to 12.8% in 1996), and the number has increased nearly eleven times (from 3.1 million to 33.9 million). *See id.* "The older population itself is getting older. In 1996 the 65-74 age group (18.7 million) was eight times larger than in 1900, but the 75-84 group (11.4 million) was 16 times larger and the 85+ group (3.8 million) was 31 times larger." *Id.* "By 2030, there will be about 70 million older persons, more than twice their number in 1996. People 65+ are projected to represent almost 13% of the population in the year 2000 but will be 20% by 2030." *Id.* at 2.

3. *See* BUREAU OF NAT'L AFFAIRS, OLDER AMERICANS IN THE WORKFORCE: CHALLENGES AND SOLUTIONS 6 (1987) (stating that in 1986, persons age 40 and above composed 37.8% of the workforce; by 2010, people age 40 and older are expected to comprise nearly half of the workforce).

rity is not unfounded. Recently, declining profitability has led many companies to cut costs.[4] Often this is accomplished by making large-scale reductions in workforces, or downsizing.[5] Downsizing is most often achieved by thinning out the ranks of middle management, using automation, and by establishing incentives for early retirement.[6] Whichever method is used, a disproportionately large number of older workers are displaced.[7]

Unemployment can have devastating consequences to older workers whether due to a reduction in force, age discrimination, or any other reason.[8] Those who are newly unemployed are confronted with the prospects of finding a new job and stabilizing their lives often after many years in the same position with the same employer. These older workers may seek re-employment, but are

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4. *See generally* AARP, AMERICAN BUSINESS AND OLDER WORKERS: A ROAD MAP TO THE 21ST CENTURY (1995) (discussing trends within the business workplace affecting older employees).

5. According to the Labor Department's Bureau of Labor Statistics, in the third quarter of 1999 there were 1099 mass lay-off actions by employers that involved 242, 289 workers. *See* Bureau of Labor Statistics (visited Apr. 8, 2000)<http://stats.bls.gov/news.release/mslo.toc.htm>. Therefore, despite the current booming economy, mass reductions in force ("RIFs") continue to be commonplace. *See generally* Bureau of Labor Statistics News Releases website (visited Apr. 8, 2000) <http://stats.bls.gov/newsrels.htm> (providing current national statistics regarding mass reductions); *see also* COMMISSION ON LEGAL PROBLEMS OF THE ELDERLY, ABA, DOWNSIZING IN AN AGING WORK FORCE: THE LAW, THE LIMITS, AND THE LESSONS 6 n. 9 (1992) [hereinafter DOWNSIZING IN AN AGING WORK FORCE]. An American Management Association ("AMA") survey in July 1987 found that of 1,134 companies that responded, 45% had undergone significant RIFs between January 1986 and June 1987. *See id.* "A later AMA survey conducted in 1989 showed that in the preceding year, 39% of the 1,084 companies and nonprofit organizations surveyed by the AMA reduced their workforces, cutting an average of 162 employees." *Id.*

6. *See* DOWNSIZING IN AN AGING WORKFORCE, *supra* note 5, at 2-4.

7. *See* Bureau of Labor Statistics, *supra* note 5 (noting the large number of workers layed off in 1999).

8. *See* National Senior Citizens Law Ctr., *Untender Mercies: Layoff and the Older Worker*, 22 CLEARINGHOUSE REV. 1104, 1104 (1989) (finding that nearly one million workers over the age of 55 lost their jobs because of plant closings or employment cutbacks between 1981 and 1985). One-half of these workers were displaced from the jobs they had held for 15 years or more; less than half were re-employed. *See id*; *see also* U.S. SENATE SPECIAL COMM. ON AGING, AGING AMERICA: TRENDS AND PROJECTIONS, S. REP. NO. 101-249, vol. 2, at 93 (1989) [hereinafter SPECIAL COMM. ON AGING] (finding that older workers endure greater earnings loss in subsequent jobs than do younger workers and are more likely to give up looking for another job altogether); Tamar Lewin, *When or Whether to Retire: New Ways to Handle Strain*, N.Y. TIMES, Apr. 22, 1990, at A1 (according to Commonwealth Fund Senior Vice President Thomas Moloney, "[o]f the older people who are out of the workforce, half are satisfied, a quarter can't work because of their health or family situations, and the other quarter are very unhappy about the situation they're in. . . . That quarter represents about two million people . . .").

often forced to apply for entry-level (and therefore lower wage) jobs because they lack the training necessary for the higher paying jobs in different industries or because middle or upper-management positions are not available. Yet, older workers are even prevented from attaining lower level positions when employment recruiters reject them on the basis that they are overqualified.[9]

"Overqualification" is a subjective quality that cannot be measured accurately through a standardized test. Thus, when supervisors reject older applicants because they are overqualified, there is a real danger that the supervisors are in fact acting with discriminatory intent, or at a minimum, are basing an employment decision on subconscious stereotypes and prejudices. Because of this danger and its potential effect on older workers, it is important to consider whether "overqualification" should be considered a legitimate reason not to hire an applicant. This Article will examine the differences in three circuit court opinions that have considered the use of "overqualification" by employers as a reason to reject older applicants.

The Second, Sixth, and Ninth Circuits have addressed the issue of "overqualification" within the context of the ADEA in the hiring process. In *Taggart v. Time, Inc.*,[10] the Second Circuit held that rejecting older applicants based on "overqualification" can be a mask for age discrimination, and is therefore not a legitimate reason for rejection.[11] Conversely, the Sixth Circuit in *Stein v. National City Bank*[12] and the Ninth Circuit in *EEOC v. Insurance Co. of North America*[13] held that although rejecting applicants based on "overqualification" grounds may at times be a mask for age discrimination, it also may be a legitimate reason to reject applicants.[14]

Part I of this Article addresses the origin and development of the ADEA and discusses the elements necessary for a plaintiff to

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9. *See generally* Toni J. Querry, Note, *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, 539-40 & n.71 (1996) (discussing the age proxy doctrine and how using overqualifcation is an impermissible proxy for age in the employment context).

10. 924 F.2d 43 (2d Cir. 1991).

11. *See id.* at 48. See *infra* Part II.A for a discussion of *Taggart*.

12. 942 F.2d 1062 (6th Cir. 1991). See *infra* Part II.B for a discussion of *Stein*.

13. 49 F.3d 1418 (9th Cir. 1995). See *infra* Part II.C for a discussion of *Insurance Co. of N. Am.*

14. *See Insurance Co. of N. Am.*, 49 F.3d at 1421 (stating that "reliance on 'overqualification' as a disqualifying factor in hiring can easily mask age discrimination when 'overqualified' is not defined"); *Stein*, 942 F.2d at 1066.

establish a prima facie case of discrimination under the ADEA. Part II examines the opinions rendered in *Taggart v. Time, Inc.*, *Stein v. National City Bank*, and *EEOC v. Insurance Co. of North America*. Part III of this Article identifies types of objective and subjective evidence used in discrimination cases, analyzes the use of "overqualification" by employers to establish a legitimate nondiscriminatory reason for an adverse employment decision, and critiques the Ninth Circuit's decision in *EEOC v. Insurance Co. of North America*. Part III further provides a framework for how employers should handle overqualified applicants that they do not wish to hire so as to limit their potential liability under the ADEA.

I. BACKGROUND

When Congress passed Title VII[15] in 1964 to protect minorities from discrimination in the workplace, it declined to pass legislation that would protect older Americans from discrimination based upon age.[16] However, aware that age discrimination might be a problem, Congress did require the Secretary of Labor to undertake a study of age discrimination in section 715 of the Civil Rights Act of 1964.[17] The study ultimately revealed that age discrimination was a problem for American workers and that it had an adverse effect on the ability of older workers to find and retain employment.[18] It was from this report that the ADEA was born.

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15. 42 U.S.C. §§ 2000e to 2000e-17 (1994). Section 2000e-(2)(a)(1) provides that it is "an unlawful employment practice for an employer . . . 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." *Id.*

16. *See* Brendan Sweeney, Comment, *"Downsizing" the Age Discrimination in Employment Act: The Availability of Disparate Impact Liability*, 41 VILL. L. REV. 1527, 1539 nn.40-41 (1996); Carol E.B. McKenny, *Enforcement of Age Discrimination in Employment Legislation*, 32 HASTINGS L.J. 1157, 1158 (1981). Prior to the ADEA, age discrimination claims could only be brought in the few states that had enacted laws prohibiting such discrimination. *See* 2 MERRICK T. ROSSEIN, EMPLOYMENT DISCRIMINATION: LAW AND LITIGATION § 22.1(2) (1990). Employees of the federal government, who were not protected by state law, had to bring age discrimination claims under either the equal protection or due process clause of the U.S. Constitution. *See id.* While government workers were not originally protected under the ADEA, the Act was amended in 1974 to protect them as well. *See* MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW § 6.01(b), at 506-07 (1988).

17. *See* 42 U.S.C. § 2000e-14 (1994); *see also* U.S. DEPARTMENT OF LABOR, REPORT TO THE CONGRESS ON AGE DISCRIMINATION IN EMPLOYMENT UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964 (1965) [hereinafter REPORT TO CONGRESS].

18. *See* REPORT TO CONGRESS, *supra* note 17. Although the study determined that there was "no evidence of prejudice based on dislike or intolerance for the older worker," the evidence did indicate that organizations discriminated on the basis of age. *See id.* Furthermore, the study determined that discrimination was a result of errone-

A. *History and Scope of the ADEA*

Four years later, in 1967, Congress passed the ADEA to protect older Americans from discrimination in the workplace.[19] The asserted goal of the ADEA is to "promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."[20] As originally enacted, the ADEA only protected individuals working in the private sector between the ages of forty and sixty-five.[21] Since then, however, the reach of the Act has expanded to protect a greater number of employees.[22] Currently, the ADEA protects employees[23] age forty or older from being discriminated against by an employer[24] on account of their age. The employee is protected regardless of whether the discrimination occurs in terms of hiring, discharging, compensation, or any other conditions of employment.[25]

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ous assumptions employers had adopted concerning the effects of age on economic efficiency in the workplace. *See id.*; *see also* SPECIAL COMM. ON AGING, *supra* note 8, at 75 (recognizing that once persons age 55-64 lose their jobs, they suffer the longest duration of unemployment of any group in the country).

19. *See* ADEA, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-634 (1994)); *see also* ROSSEIN, *supra* note 16, §22.1(2) (stating that prior to the ADEA, age discrimination claims could only be brought in the few states that had enacted laws prohibiting such discrimination).

20. 29 U.S.C. § 621(b) (1994); *see also* Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993) ("Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes."). Congress found that older persons "find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs." 29 U.S.C. § 621(a)(1) (1994).

21. *See* PLAYER, *supra* note 16, § 6.01(b), at 507.

22. In 1974, the ADEA was amended to expand coverage to federal, state, and local government employees. *See* PLAYER, *supra* note 16, § 6.01(b), at 507. In 1978, the ADEA was amended to extend coverage to individuals up to the age of 70. *See id.* § 6.01(c), at 507. In 1986, Congress expanded coverage to any individual over the age of 40. *See id.* § 6.01(e), at 508.

23. *See* 29 U.S.C. § 630(f) (1994) (stating that an employee under the ADEA is "an individual employed by any employer"). The term employee also encompasses U.S. citizens employed overseas by U.S. corporations or their subsidiaries. *See id.* § 630(f)(1).

24. *See id.* § 630(b). In order for an employer to be considered subject to the ADEA, the employer must be a "person engaged in an industry affecting commerce" who has 20 or more employees each day for at least 20 calendar weeks of either "the current or preceding calendar year." *Id.* The ADEA also provides that the term employer includes all private sector organizations which employ at least twenty people, all state and local governments, and any agent of such persons or organizations. *See id.* § 630(a)-(b).

25. *See id.* § 623(a). See *supra* note 1 for the text of § 623(a)(1).

The ADEA covers many, but not all, employer-employee relationships. For example, the ADEA does not cover uniformed personnel in the active or reserve armed forces.[26] Also, true independent contractors are not protected by the ADEA because they are not considered "employees" of covered employers.[27] In addition, a number of affirmative defenses are available to defendants in ADEA cases. For example, an employment decision based on a reasonable factor other than age or good cause is lawful.[28] A bona fide occupational qualification ("BFOQ") is a defense that acknowledges that age may be used as a criterion in an employment practice or policy, but only if the use of age is "reasonably necessary to the normal operation of the particular business."[29] In addition, a bona fide employee benefit plan and a bona fide seniority system which "is not intended to evade the purposes of [the ADEA]" are also affirmative defenses.[30] A release that meets the standards set by the Older Workers Benefit Protection Act ("OWBPA") is another defense.[31] A good faith effort to conform with, or in reliance on, a written interpretation of the EEOC guidelines is also a defense.[32] Still, as a preliminary matter, a claimant

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26. *See* Spain v. Ball, 928 F.2d 61, 63 (2d Cir. 1991) (per curiam); Kawitt v. United States, 842 F.2d 951, 953-54 (7th Cir. 1988); Helm v. California, 722 F.2d 507, 509 (9th Cir. 1983).

27. *See* 29 U.S.C. § 630(f) (1994). Indian tribes are also exempt from the definition of employer. *See, e.g.*, EEOC v. Fond du Lac Heavy Equip. & Constr. Co., 986 F.2d 246, 249 (8th Cir. 1993).

28. *See* 29 U.S.C. § 623(f)(1) & (3) (1994).

29. *See id.* § 623(f)(1); *see also* Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 407 (1985) (holding that a BFOQ defense is available only if the BFOQ is reasonably necessary to the normal operation or essence of the defendant's business). *Compare* Coupé v. Federal Express Corp., 121 F.3d 1022, 1023 (6th Cir. 1997), *cert. denied*, 118 S.Ct. 1300 (1998) (noting that the Federal Aviation Administration's rule prohibiting employment of pilots over age 60 was a valid BFOQ), *and* Murnane v. American Airlines, Inc., 667 F.2d 98, 100-01 (D.C. Cir. 1981) (finding that the practice of only hiring pilots under the age of 40 is a BFOQ because the age requirement was "reasonably necessary to the normal operation of the airline"), *and* Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 238 (5th Cir. 1976) (finding the employer bus company did establish a BFOQ based on age), *with* EEOC v. Kentucky State Police Dept., 860 F.2d 665 (6th Cir. 1988) (holding that the police department's policy of mandatorily retiring state troopers at the age 55 is not a BFOQ under the ADEA since it is not reasonably linked to an employee's physical fitness), *aff'd in part, rev'd in part*, 80 F.3d 1086 (6th Cir. 1996); *and* Smallwood v. United Air Lines, Inc., 661 F.2d 303, 307-09 (4th Cir. 1981) (finding that the practice of not hiring new pilots who are over the age of 35 is not a BFOQ in view of the carrier's failure to establish a relationship between the policy and airline safety).

30. *See* 29 U.S.C. § 623(f)(2)(A) (1994).

31. *See id.* § 626(f)(1).

32. *See id.* § 626(e) (cross-referencing § 259).

under the ADEA must show that both the employee and employer are subject to the Act.

B. *Discrimination and the Prima Facie Case*

ADEA violations may be established under either the disparate impact or disparate treatment of liability.[33] In the ADEA context, a disparate treatment claim arises when the employer treats some people less favorably than others because of their age.[34] In such cases, the central question is whether the employer's actions were motivated by discriminatory intent.[35] By contrast, the dispa-

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33. *See* Smith v. City of Des Moines, 99 F.3d 1466, 1470 (8th Cir. 1996); Fisher v. Transco Servs.-Milwaukee, Inc., 979 F.2d 1239, 1244-45 (7th Cir. 1992) (reviewing a disparate impact claim based upon a program to measure and evaluate performance); Wooden v. Board of Educ., 931 F.2d 376, 379 (6th Cir. 1991) (reviewing a salary policy that credited newly employed teachers for up to 10 years prior teaching experience, plus a maximum of four years for experience earned more than 10 years ago); MacPherson v. University of Montevallo, 922 F.2d 766, 772 (11th Cir. 1991) (reviewing the alleged practice of paying market rates to newly hired faculty but not to incumbent professors); Rose v. Wells Fargo & Co., 902 F.2d 1417, 1423-24 (9th Cir. 1990) (reviewing subjective discretion of managers when making reduction in force ("RIF") decisions); Lowe v. Commack Union Free Sch. Dist., 886 F.2d 1364, 1374 (2d Cir. 1989) (finding that plaintiffs failed to demonstrate that any of the employer's hiring practices fell more harshly on older applicants); Nolting v. Yellow Freight Sys., Inc., 799 F.2d 1192, 1195-96 (8th Cir. 1986) (discussing operator evaluation system devised to measure job performance and productivity); Holt v. Gamewell Corp., 797 F.2d 36, 37 (1st Cir. 1986) (discussing high salary as a criterion for RIF). *But see* Mullin v. Raytheon Co., 164 F.3d 696, 701 (1st Cir. 1999) ("Since 1993, a majority of the courts of appeals that have addressed the question have held that the ADEA does not recognize causes of action premised on disparate impact . . . proof of intentional discrimination is a prerequisite to liability under the ADEA."); EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1077 (7th Cir. 1994) (stating that the ADEA does not prohibit "decisions based on criteria which merely tend to affect workers over the age of forty more adversely than workers under forty"). *See generally* Donald R. Stacy, *A Case Against Extending the Adverse Impact Doctrine to the ADEA*, 10 EMPLOYEE REL. L.J. 437 (1984-85).

34. *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993); *cf. International Bhd. of Teamsters*, 431 U.S. at 335 n.15 (discussing disparate treatment in terms of Title VII claims).

35. *See Hazen Paper Co.*, 507 U.S. at 609 (stating that "'[p]roof of discriminatory motive is critical, although it can in some situations be inferred'") (quoting *International Bhd. of Teamsters*, 431 U.S. at 335 n.15); *cf.* Brinkley-Obu v. Hughes Training, Inc., 36 F.3d 336, 344-45 & n.17 (4th Cir. 1994) (differentiating plaintiff's burden in Equal Pay Act claim, to show unequal pay compared to similarly situated male co-worker, without regard to motive, from plaintiff's burden in Title VII claim, in which plaintiff must prove the differentiation was "motivated by discriminatory intent"); Palmer v. Shultz, 815 F.2d 84, 96 (D.C. Cir. 1987) ("[T]he ultimate issue in a disparate treatment case is whether the disparity resulted from unlawful discriminatory animus."); Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 898 (3d Cir. 1987) (en banc) (stating that the employer must submit sufficient evidence to permit "the trier of fact rationally to conclude that the employment decision had *not* been motivated by discrim-

rate impact theory of liability holds that an employer's facially neutral policy or practice may be unlawful, even absent a showing of discriminatory intent, merely because it has a significant adverse impact upon a protected group.[36] Thus, disparate treatment focuses on discriminatory intent, while disparate impact focuses on discriminatory results. As the three cases discussed in this Article demonstrate, ADEA claims are typically brought under the disparate treatment theory because this type of discrimination is more readily apparent to potential plaintiffs who are adversely affected. In addition, a prima facie case in a disparate impact case may be more difficult to establish than in a disparate treatment case because the plaintiff must do more than raise an inference of discriminatory impact; the plaintiff must demonstrate the discriminatory impact itself.[37]

To successfully bring a claim under the ADEA, whether under a disparate impact or disparate treatment theory of liability, a plaintiff must initially set forth a prima facie case. In disparate impact cases, a prima facie case is established by showing that an employer's policy or practice has a significantly disproportionate impact upon a protected class.[38] Once the plaintiff has established a prima facie case, the employer may defend its policy or practice by proving that the policy is "job related for the position in question and consistent with business necessity."[39] However, even if the em-

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inatory animus") (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 257 (1981)).

36. *See, e.g., Hazen Paper Co.*, 507 U.S. at 609 (citing *International Bhd. of Teamsters*, 431 U.S. at 335-36 n.15); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988) (plurality opinion); *see also* EEOC v. McDonnell Douglas Corp., No. 98-3897, 1999 WL 711068, at *1 (8th Cir. Sept. 14, 1999); Stewart B. McKinney Found., Inc. v. Town Plan and Zoning Comm'n, 790 F. Supp. 1197, 1217 (D. Conn. 1992) ("The Second Circuit has stated a disparate impact analysis examines a facially-neutral policy or practice, such as a hiring test or zoning law, for its differential impact or effect on a particular group, whereas a disparate [differential] treatment analysis involves differential treatment of similarly situated persons or groups."). Under the ADEA, the plaintiff's protected group would be those "individuals who are at least 40 years of age." *See* 29 U.S.C. § 631(a) (1994).

37. *See* Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1312 (10th Cir. 1999).

38. *See id.* See *supra* note 36 for additional disparate impact cases. There are two tests of statistical significance used to determine whether there is a substantially disproportionate impact. The first is a .05 probability level or two standard deviations. *See* 29 C.F.R. § 1607.14B(5) (1999). The other test is the "80 percent rule" which provides that an employee establishes a prima facie case of adverse impact when the selection criterion operates to select members of a protected group at a rate less than four fifths that of an allegedly preferred counterpart. *See* 29 C.F.R. § 1607.4D (1999).

39. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994); *see also Bullington*, 186 F.3d at 1312.

ployer demonstrates that the policy or practice is job-related and consistent with business necessity, a plaintiff may still prove unlawful age discrimination by showing the existence of "an alternative employment practice" with a lesser adverse impact which the employer refuses to adopt.[40] The Supreme Court has yet to resolve the issue of whether an ADEA claim may be established by proving disparate impact treatment.[41]

In disparate treatment cases a prima facie case may be based either on a presumption of discrimination arising from the consideration of factors set forth in *McDonnell Douglas Corp. v. Green*,[42] or by more direct evidence of discriminatory intent.[43] Among disparate treatment cases, each case will be handled differently by the courts depending on whether direct or indirect evidence of discrimination is offered.[44]

1. Direct Evidence

Direct evidence of discrimination is "[e]vidence which in and of itself suggests that the person or persons with the power to hire, fire, promote, and demote the plaintiff were animated by an illegal employment criterion . . . ."[45] When a plaintiff proceeds with direct

40. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (1994); *see also Bullington*, 186 F.3d at 1312 (stating that in an ADEA case the plaintiff must offer an alternative employment practice that serves the employer's goals without a discriminatory effect).

41. *See Hazen Paper Co.*, 507 U.S. at 609-10 (holding that the disparate treatment theory of liability is available under the ADEA). The Court has not, however, ruled on whether the disparate impact theory of liability is also available. *See id.* at 618 (Kennedy, J., concurring) (stating that "substantial arguments" exist against applying disparate impact analysis to the ADEA).

42. 411 U.S. 792, 802-03 (1973) (holding that the complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination, which may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications). See *infra* Part I.B.2 for a discussion of the *McDonnell Douglas* paradigm in the context of the ADEA; *see also Hazen Paper Co.*, 507 U.S. at 612 (noting that *McDonnell Douglas* creates a burden of proof framework applicable to ADEA cases).

43. *See generally* JOHN W. STRONG, MCCORMICK ON EVIDENCE § 185, at 339-40 (4th ed. 1992) (defining "direct" and "circumstantial" evidence). See *infra* Part I.B.1 for a discussion of what may constitute direct evidence.

44. *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (finding that the burden shifting scheme set forth in *McDonnell Douglas* is not applicable in ADEA cases where the plaintiff presents direct evidence of discrimination).

45. Venters v. City of Delphi, 123 F.3d 956, 972 (7th Cir. 1997); *see also* Miles v. M.N.C. Corp., 750 F.2d 867, 873-74 (11th Cir. 1985).

evidence of discriminatory intent, the evidence by itself is sufficient to establish a prima facie case of impermissible discrimination.[46] Direct evidence usually takes the form of statements made by managers or supervisors demonstrating their bias.[47] Statements by "nondecision-makers" or statements by decision-makers unrelated to the adverse employment decision usually do not suffice.[48]

Furthermore, for a remark to constitute direct evidence, it must bear some relationship to the employment decision in question. Inappropriate but isolated and ambiguous comments that amount to no more than "stray remarks" will not suffice.[49] How-

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46. *See* Rollins v. TechSouth, Inc., 833 F.2d 1525, 1528 n.6 (11th Cir. 1987) (finding that direct evidence, which is rarely found in discrimination cases, is evidence that "proves [the] existence of [a] fact in issue *without inference or presumption*") (citations omitted).

47. *See* EEOC v. G-K-G Inc., 39 F.3d 740, 746-47 (7th Cir. 1994) (recognizing that the comment by the decision-making supervisor that the plaintiff's accounts could use some "younger blood" constituted direct evidence of discrimination); Sischo-Nownejad v. Merced Community College Dist., 934 F.2d 1104, 1108, 1112 (9th Cir. 1991) (stating that a supervisor's reference to a teacher as "an old warhorse" and to her students as "little old ladies" constituted direct evidence of age and gender bias); Morgan v. Arkansas Gazette, 897 F.2d 945, 951 (8th Cir. 1990) (finding that the city circulation manager's statement that the plaintiff was "an old fuddy-duddy" constituted direct evidence of discrimination); Spulak v. K Mart Corp., 894 F.2d 1150, 1155 (10th Cir. 1990) (finding that references to older workers as "old fogies" and statements to plaintiff that if he were younger he could work for the manager were probative of pretext); Siegel v. Alpha Wire Corp., 894 F.2d 50, 55 (3d Cir. 1990) (holding that the manager's use of the phrase "old dogs won't hunt" when referring to the plaintiff and another older employee, coupled with evidence of favorable employment evaluations for younger employees, raised a material issue as to whether the reasons given for the plaintiff's discharge were pretextual).

48. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring) ("[S]tray remarks in the workplace . . . cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard."); Mauter v. Hardy Corp., 825 F.2d 1554, 1558 (11th Cir. 1987) (finding that an alleged comment by the company vice-president that management planned to "weed out the old ones" does not undermine the defendant's articulated reason for the plaintiff's dismissal because it was undisputed that the vice-president played no part in the termination decision); La Montagne v. American Convenience Prods., Inc., 750 F.2d 1405, 1412 (7th Cir. 1984) (stating that evidence that a senior vice-president told the president not to terminate the plaintiff until he had a younger replacement was insufficient to support a verdict for the plaintiff because the president did not need the vice-president's concurrence to terminate the plaintiff).

49. *See* Fuka v. Thomson Consumer Elec., 82 F.3d 1397, 1403 (7th Cir. 1996) (stating that to "qualify as direct evidence of discrimination, the plaintiff must show that the remarks 'were related to the employment decision in question'") (quoting McCarthy v. Kemper Life Ins. Cos., 924 F.2d 683, 686-87 (7th Cir. 1991)); Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526, 531 (10th Cir. 1994) (stating that the CEO's statement that the hospital "need[s] some new young blood" and that "long-term employees have

ever, if the plaintiff's direct evidence proves that his or her age was a motivating or substantial factor in the contested employment decision, the burden of proof shifts to the defendant.[50] To meet this burden, the defendant must then show by a preponderance of the evidence that the same employment decision would have been made even if the improper criteria played no role in the decision.[51] In the absence of such a showing by the defendant, summary judgment will be granted in favor of the plaintiff.[52] However, due to the heightened awareness of employers, managers, and supervisors re-

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a diminishing return" are stray remarks and insufficient to defeat the hospital's motion for summary judgment); Heim v. Utah, 8 F.3d 1541, 1547 (10th Cir. 1993) (stating that inappropriate personal opinions do not prove employer acted with discriminatory intent); Nesbit v. Pepsico, Inc., 994 F.2d 703, 705 (9th Cir. 1993) (finding that the decision-maker's statement "[we] don't necessarily like grey hair," where not tied to the plaintiff's termination, was a stray remark that could not defeat summary judgment for the employer); Waggoner v. City of Garland, 987 F.2d 1160, 1166 (5th Cir. 1993) (holding that the stray remark that the plaintiff is an "old fart" is insufficient to raise an issue of material fact); *McCarthy*, 924 F.2d at 686-87 (stating that racial comments alone cannot suffice to prove discrimination; it must be shown that race was in fact relied upon in making the employment decision); DeHorney v. Bank of Am. Nat'l Trust & Sav. Ass'n, 879 F.2d 459, 468 (9th Cir. 1989) (requiring in § 1981 cases a nexus between the alleged animus and the decision to terminate); *cf.* EEOC v. Beverage Canners, Inc., 897 F.2d 1067, 1071 (11th Cir. 1990) (upholding the trial court's finding that racially hostile remarks were so "commonplace, overt and denigrating" that they created an atmosphere charged with racial hostility); Siegal v. Alpha Wire Corp., 894 F.2d 50, 55 (3d Cir. 1990) (reversing summary judgment for the employer in light of the company president's repeated use of the phrase "old dogs won't hunt").

50. *See Price Waterhouse*, 490 U.S. at 250 ("[T]he plaintiff who shows that an impermissible motive played a motivating part in an adverse employment decision has thereby placed upon the defendant the burden to show that it would have made the same decision in the absence of the unlawful motive."); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (finding that once an illegal motive is proved to have been a significant factor in an employment decision, the defendant must show "by a preponderance of the evidence that it would have reached the same decision" even absent that factor); *see also* Haynes v. W.C. Caye & Co., 52 F.3d 928, 931 (11th Cir. 1995); Brown v. East Miss. Elec. Power Ass'n, 989 F.2d 858, 861 (5th Cir. 1993); Beshears v. Asbill, 930 F.2d 1348, 1353 (8th Cir. 1991).

51. *See Price Waterhouse*, 490 U.S. at 252-53.

52. A party is entitled to summary judgment upon a showing that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). All justifiable inferences must be drawn in favor of the non-movant. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Conclusory allegations are insufficient to defeat a motion for summary judgment when the movant has met its summary judgment burden. *See, e.g.*, Campbell v. Sonat Offshore Drilling, Inc., 979 F.2d 1115, 1119 (5th Cir. 1992). To successfully oppose a motion for summary judgment, the non-movant cannot rest on mere allegations or denials but must set forth specific facts showing that a genuine issue of material fact exists. *See* Fed. R. Civ. P. 56(e); Celotex Corp. v Catrett, 477 U.S. 317, 321-22 (1986). A material fact is any fact "that might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248.

garding their potential liability, "there is rarely direct evidence of discrimination."[53] Given the difficulty of obtaining direct evidence of discrimination, plaintiffs have been forced to resort to the "indirect method" of proof articulated by the Supreme Court in *McDonnell Douglas*.

2. Indirect Evidence

In *McDonnell Douglas Corp. v. Green*,[54] and more recently in *St. Mary's Honor Center v. Hicks*,[55] the Supreme Court articulated a burden shifting scheme for discrimination cases.[56] Although the plaintiff must always establish a prima facie case, the Supreme Court has stated that "[t]he burden of establishing a prima facie case of disparate treatment is not onerous."[57] In an ADEA hiring case,[58] the prima facie case consists of a showing that (1) the plaintiff is a member of the protected class; (2) the plaintiff suffered an adverse employment action; (3) the plaintiff was qualified for the position at issue; and (4) the plaintiff was treated less favorably than others not in the protected class.[59]

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53. Ingels v. Thiokol Corp., 42 F.3d 616, 621 (10th Cir. 1994); *see also* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) ("There will seldom be 'eyewitness' testimony as to the employer's mental processes."); Rosen v. Thornburgh, 928 F.2d 528, 533 (2d Cir. 1991) ("An employer who discriminates is unlikely to leave a 'smoking gun,' such as a notation in an employee's personnel file, attesting to a discriminatory intent."); *cf.* Richards v. New York City Bd. of Educ., 668 F. Supp. 259, 265 (S.D.N.Y. 1987) (stating that "direct, smoking gun, evidence of discrimination" is not required for the plaintiff to prevail), *aff'd* 842 F.2d 1288 (2d Cir. 1988).

54. 411 U.S. 792 (1973).

55. 509 U.S. 502 (1993).

56. "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. . . . The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas Corp.*, 411 U.S. at 802. See *supra* note 42 for the requirements of the *McDonnell Douglas* burden shifting scheme.

57. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). The requirement of a prima facie case of age discrimination is not met unless there is "at least a logical connection between each element of the prima facie case and the illegal discrimination for which it establishes a 'legally mandatory, rebuttable presumption.'" O'Connor v. Consolidated Caterers Corp., 517 U.S. 308, 311-12 (1996) (quoting *Burdine*, 450 U.S. at 254 n.7). Thus, an inference of discrimination cannot be made where an employer replaces a worker with someone under 40 if that person is only insignificantly younger. *See id.*

58. The Supreme Court has never decided whether the *McDonnell Douglas* test applies to ADEA cases. *See O'Connor*, 517 U.S. at 311 (assuming the framework's applicability in an ADEA case where neither party challenged it).

59. *See McDonnell Douglas Corp.*, 411 U.S. at 802; Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1315-16 (10th Cir. 1999); *see also* Rinehart v. City of Inde-

Once the plaintiff presents a prima facie case, the burden shifts to the employer to produce evidence of a legitimate, nondiscriminatory reason for its decision.[60] A legitimate nondiscriminatory reason is essential for an employer to survive a summary judgment motion.[61] Although the employer's burden at this stage may appear exceedingly light, the employer must "articulate its nondiscriminatory reason for the challenged action with some specificity in order to afford the plaintiff a full and fair opportunity to demonstrate pretext."[62] Legitimate reasons commonly asserted by an employer include the plaintiff's unsuitability or incompetence,[63] economic factors,[64] as well as various policy reasons.[65] Other examples of legitimate reasons employers have articulated to rebut an inference of discrimination include: lesser comparative qualifications,[66] inability to get along with supervisors or other employees,[67]

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pendence, 35 F.3d 1263, 1264 (8th Cir. 1994); Hebert v. Mohawk Rubber Co., 872 F.2d 1104, 1110-11 (1st Cir. 1989) (stating the requirements for a prima facie case in a reduction-in-force case); Davis v. Combustion Engineering, Inc., 742 F.2d 916, 920-21 (6th Cir. 1984).

60. *See Burdine*, 450 U.S. at 252-53 (discussing burdens of production and persuasion in Title VII disparate treatment cases) (citing *McDonnell Douglas Corp.*, 411 U.S. at 802).

61. *See* 29 U.S.C. § 623 (f)(1) (1994) (stating that an employer may defend an age discrimination claim on the ground that differentiation was based on "reasonable factors other than age").

62. *See* FIVE YEAR CUMULATIVE SUPPLEMENT TO SCHLEI & GROSSMAN'S EMPLOYMENT DISCRIMINATION LAW 480 & n.73 (David A. Cathcart & R. Lawrence Ashe, Jr., eds., 2d ed. 1989) [hereinafter EMPLOYMENT DISCRIMINATION LAW SUPP.].

63. *See, e.g.*, Cliff v. Board of Sch. Comm'rs, 42 F.3d 403, 411-12 (7th Cir. 1995) (upholding summary judgment for school district based on evidence that the plaintiff was an ineffective teacher); Austin v. Cornell Univ., 891 F. Supp. 740, 747 (N.D.N.Y. 1995) (discussing employer's refusal to re-hire plaintiffs based on their past poor performance and inability to perform increased responsibilities).

64. *See, e.g.*, Aremendariz v. Pinkerton Tobacco Co., 58 F.3d 144, 150 (5th Cir. 1995) ("Job elimination or office consolidation is a sufficient nondiscriminatory reason for discharge."); Allen v. Diebold Inc., 33 F.3d 674, 679 (6th Cir. 1994) (finding defendant's replacement of plaintiffs with younger, less costly workers did not state an ADEA claim); Kelly v. Drexel Univ., 907 F. Supp. 864, 875 (E.D. Pa. 1995) (observing in a reduction-in-force case that "[e]conomic necessity is a legitimate, nondiscriminatory reason for employment decisions") (citations omitted).

65. *See, e.g.*, Ellis v. United Airlines, Inc., 73 F.3d 999, 1005 (10th Cir. 1996) (finding that even if the plaintiffs established a prima facie case, summary judgment for defendant would be upheld because refusal to hire was based on defendant's legitimate weight standards); Kralman v. Illinois Dep't of Veterans' Affairs, 23 F.3d 150, 157 (7th Cir. 1994) (upholding rejection of plaintiff's job application where defendant gave hiring preference to a veteran); Roxas v. Presentation College, 885 F. Supp. 1323, 1328 (D.S.D. 1995) (finding a legitimate nondiscriminatory reason where employer's rejection of employee's application for a paid sabbatical was based upon deficiencies in the application submitted).

66. *See, e.g.*, Wooden v. Board of Educ., 931 F.2d 376, 378 (6th Cir. 1991) (recog-

insubordination,[68] and poor performance.[69] However, courts are skeptical of an employer's reason when the employment decision is based on vague subjective standards, such as the lack of dedication, enthusiasm, and even ability or skill.[70]

If the employer sufficiently meets its burden of production, the presumption of intentional discrimination disappears and the burden shifts back to the employee to prove that the employer's articulated reason for the adverse employment action was a pretext for discrimination.[71] To meet this burden, the plaintiff cannot simply

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nizing that a more qualified applicant was hired); Goetz v. Farm Credit Servs., 927 F.2d 398, 401 (8th Cir. 1991) (recognizing selection of better qualified applicant); Weber v. Port Arthur Sch. Bd., 759 F. Supp. 341, 343 (E.D. Tex. 1991) (finding position filled by more qualified applicant); Collins v. School Dist., 727 F. Supp. 1318, 1323 (W.D. Mo. 1990) (finding individual with superior work experience was hired).

67. *See, e.g.*, McNairn v. Sullivan, 929 F.2d 974, 978 (4th Cir. 1991) (finding that employee was not promoted because she was caustic with other employees, made mistakes, and did not follow instructions); Blake v. J.C. Penney Co., 894 F.2d 274, 278 (8th Cir. 1990) (finding that employee was discharged for slapping a co-worker); Burrus v. United Tel. Co., 683 F.2d 339, 342 (10th Cir. 1982) (upholding employment decision based on employee's inability to get along with others); Jones v. Lumberjack Meats, Inc., 680 F.2d 98, 101 (11th Cir. 1982) (recognizing poor relations with fellow employees as a legitimate reason for discharge).

68. *See, e.g.*, Busby v. City of Orlando, 931 F.2d 764, 777 (11th Cir. 1991) (recognizing that the refusal to follow company policies and disregarding orders from supervisors are legitimate nondiscriminatory reasons for adverse employment action).

69. *See, e.g.*, Little v. Republic Ref. Co., 924 F.2d 93, 97 (5th Cir. 1991); Shager v. Upjohn Co., 913 F.2d 398, 401 (7th Cir. 1990); Hebert v. Mohawk Rubber Co., 872 F.2d 1104, 1113-14 (1st Cir. 1989).

70. *See* McCullough v. Real Foods, Inc., 140 F.3d 1123, 1129 (8th Cir. 1998) (stating that the employer's sole reliance on *subjective* selection criteria, including the fact that the employee wanted a lot of time off and planned to quit soon, was "critical" to the court's finding that the employer's asserted reasons could be considered pretextual); Miles v. M.N.C. Corp., 750 F.2d 867, 871-72 (11th Cir. 1985) (finding that where the employer had only offered subjective and vague criteria for firing the employee, such as one supervisor's evaluation that the employee was "not a good worker," and where there were no guidelines for evaluating performance and no regular or written evaluations made on employees, the employer did not meet its burden of showing a legitimate nondiscriminatory reason); *cf.* Baldwin v. Bellsouth Adver. & Publ'g Corp., 677 F. Supp. 1573, 1581 (M.D. Ga. 1988) (finding that employer used several objective reports in addition to subjective evaluations to make its decision and acknowledging that some subjectivity is unavoidable). *See generally* EMPLOYMENT DISCRIMINATION LAW SUPP., *supra* note 62, at 484 & n.99 (noting that some courts scrutinize more closely employment decisions when they are based on subjective criteria or standards).

71. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (indicating that the ultimate burden remains with the employee to prove intentional discrimination); Udo v. Tomes, 54 F.3d 9, 12 (1st Cir. 1995) (emphasizing that the presumption of discrimination disappears once the employer articulates a nondiscriminatory reason for its decision); Courtney v. Biosound, Inc., 42 F.3d 414, 418 (7th Cir. 1994) (indicating that no presumption of discrimination exists once the employer provides a nondiscriminatory basis for its action); Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th

rely upon the prima facie case.[72] Rather, "there must be some additional evidence beyond the elements of the prima facie case to support a finding of pretext."[73] A plaintiff may establish pretext either with direct evidence that the employer "was more likely than not motivated by a discriminatory reason," or with indirect evidence that the employer's explanation lacks credibility.[74] This may be accomplished if the plaintiff can show "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered reasons for its action that a reasonable factfinder could rationally find them unworthy of credence."[75] The plaintiff may also use comparative evidence[76] or statistics[77] to demonstrate

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Cir. 1994) (noting that the employer's nondiscriminatory reason eliminates the presumption of discrimination created by the plaintiff's prima facie case); Carter v. City of Miami, 870 F.2d 578, 584 (11th Cir. 1989) (stating that in order to avoid a directed verdict, the plaintiff must present "significantly probative" evidence of pretext).

72. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507-08 (1993) (finding that once the defendant carries its burden of production, "'the presumption raised by the prima facie case is rebutted,'" and the plaintiff must then prove that the legitimate, nondiscriminatory reasons offered by the defendant were not the true reasons for the employment decision) (quoting *Burdine*, 450 U.S. at 255); *see also* Lam v. University of Hawaii, 40 F.3d 1551, 1558-59 (9th Cir. 1994) (finding that in order to prevail, "the plaintiff must demonstrate that the employer's alleged reason for the adverse employment decision is a pretext for another motive which is discriminatory") (quoting *Wallis*, 26 F.3d at 889); Monaco v. Fuddruckers, Inc., 1 F.3d 658, 661 (7th Cir. 1993) (same). In addition, the employee may not rely solely on his or her subjective belief that the termination resulted from age discrimination. *See* Molnar v. Ebasco Constructors, Inc., 986 F.2d 115, 119 (5th Cir. 1993); *see also* EMPLOYMENT DISCRIMINATION LAW SUPP., *supra* note 62, at 266 & n.37.

73. Krenik v. County of Le Sueur, 47 F.3d 953, 959 (8th Cir. 1995); *see also* Wolf v. Buss (America) Inc., 77 F.3d 914, 919-20 (7th Cir. 1996) (holding that the test of pretext in an ADEA case is whether an employer honestly believes the reasons it gives, not whether it made mistakes or bad business judgments) (citing McCoy v. WGN Continental Broad. Co., 957 F.2d 368, 373 (7th Cir. 1992)); Caponigro v. Navistar Int'l Transp. Corp., No. 93-C-0647, 1995 WL 238655, at *4 (N.D. Ill. Apr. 20, 1995) (unreported decision) (finding that the plaintiff must show that each reason offered by the employer is a pretext, although if the reasons are sufficiently intertwined, a successful attack on one may call the others into doubt).

74. *See* Sarsha v. Sears, Roebuck & Co., 3 F.3d 1035, 1039 (7th Cir. 1993).

75. Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1317 (10th Cir. 1999) (quoting Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997) (quoting Olson v. General Elec. Astrospace, 101 F.3d 947, 951-52 (3d Cir. 1996))). It is not enough, however, to assert that the employer's proffered reasons are not "wise, fair or correct"; rather, the question is whether the employer "honestly believed those reasons and acted in good faith upon those beliefs." *Id.* at 1318 (citing Sanchez v. Phillip Morris, Inc., 992 F.2d 244, 247 (10th Cir. 1993)); *see also* Fischbach v. District of Columbia Dept. of Corrections, 86 F.3d 1180, 1183 (D.C. Cir. 1996) (quoting *McCoy*, 957 F.2d at 373; Pignato v. American Trans Air., Inc., 14 F.3d 342, 349 (7th Cir. 1994)).

76. Comparative evidence shows that similarly situated employees outside of the plaintiff's protected group received favored treatment, did not receive the same adverse treatment, or that the employer's treatment of the plaintiff departed from its normal

that an employer's reasoning for termination was simply a pretext to cover underlying discrimination.

II. "OVERQUALIFICATION" AND THE COURTS

The question of whether "overqualification" constitutes a legitimate nondiscriminatory reason for denying employment is important to older applicants seeking work. If "overqualification" is considered a legitimate reason for an adverse employment action, employers will be free to prevent older applicants from re-entering the workforce in entry-level positions. On the other hand, if "overqualification" is considered a prohibited reason for denial of employment, older applicants will have more opportunities available to them when they seek employment. This issue has been considered in the Second, Sixth, and Ninth Circuits with varying results. This section will discuss the decisions rendered by these courts.

A. Taggart v. Time Inc.[78]

Thomas Taggart ("Taggart") was employed as a print production manager by Preview Subscription Television, Inc. ("Preview"), a subsidiary of Time, Inc. ("Time").[79] In May of 1983, Time notified Preview employees that it intended to dissolve Preview and lay off its employees.[80] On September 2, 1983, it did just that.[81] Time invited the laid-off employees to apply for job openings at Time.[82] Of the more than thirty jobs at Time that Taggart applied for, he obtained eight interviews.[83] Seven of the employers concluded that

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policies or practices. *See generally* EMPLOYMENT DISCRIMINATION LAW SUPP., *supra* note 62, at 264-66; Carolyn Ratti Matthews, Comment, *Accent: Legitimate Nondiscriminatory Reason or Permission to Discriminate?*, 23 ARIZ. ST. L.J. 231, 248 (1991).

77. *See* Pollard v. Rea Magnet Wire Co., 824 F.2d 557, 556 (7th Cir. 1987); Weems v. Ball Metal & Chem. Div., Inc., 753 F.2d 527, 531 (6th Cir. 1985); Miles v. M.N.C. Corp., 750 F.2d 867, 870 (11th Cir. 1985); Elliott v. Group Med. & Surgical Serv., 714 F.2d. 556 (5th Cir. 1983).

78. 924 F.2d 43 (2d Cir. 1991), *rev'g* No. 87 CIV. 3408 (MBM), 1990 WL 16956, at *1 (S.D.N.Y. Feb. 20, 1990) (unreported decision).

79. *See Taggart*, 1990 WL 16956, at *1.

80. *See id.*

81. *See id.*

82. *See id.*

83. *See id.* Each of these employers conducted interviews with Taggart and stated various reasons for not hiring him. *See id.* Such reasons included: interviewer thought pressure would affect Taggart and that he appeared unenthusiastic about the job; others had superior production backgrounds and made a better impression during the interview; interviewer was not impressed with Taggart or his ideas as to how to resolve Time's operating deficiencies; he lacked electronic scanner skills and experience; he made typographical errors in his résumé; he scored lowest on color matching aptitude

Taggart was unqualified.[84] However, Home Box Office ("HBO"), the eighth employer to interview Taggart, stated that it would not hire Taggart because he was overqualified.[85] Consequently, on May 17, 1985, Taggart filed a claim of age discrimination with the Equal Employment Opportunity Commission ("EEOC").[86] On May 13, 1987, he filed a complaint in the United States District Court for the Southern District of New York, claiming that all eight interviews were a sham and that his age was the real reason he was denied employment.[87]

The district court applied the *McDonnell Douglas* test[88] and concluded that Taggart failed to state a prima facie case of discrimination because he did not show that he was "appropriately qualified for many of the positions or that the evidence raise[d] an inference of discrimination."[89] Further, the court stated that in all eight instances the "[d]efendant has satisfied its burden to articulate legitimate, non-age related reasons for refusing to rehire" Taggart and that Taggart had not "rebutted those legitimate reasons by 'solid circumstantial evidence' showing them to be mere pretexts."[90] Thus, the district court granted summary judgment for Time.[91]

Taggart appealed the district court decision to the Court of Appeals for the Second Circuit.[92] The Second Circuit affirmed the summary judgment with respect to three of the four positions for which Taggart was turned down on the basis that those decisions were not age discriminatory.[93] However, the appeals court disagreed with the trial court regarding the position at HBO.[94] Specifically, the court of appeals rejected Time's argument that "overqualified" can mean "unqualified."[95] Rather, the court determined that denying employment because of "overqualification"

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test on job application; he failed to meet the basic job qualifications; he had no financial experience; and he was argumentative during job application process. *See id.* at *4-6.

84. *See id.* at *4.

85. *See id.* Since the position was a "junior position," the interviewer thought the job would not interest or challenge Taggart. *See id.*

86. *See id.* at *2.

87. *See id.*

88. *See id.* See *supra* Part I.B.2 for a discussion of the *McDonnell Douglas* test.

89. *Taggart*, 1990 WL 16956, at *9.

90. *Id.* (quoting Clements v. County of Nassau, 835 F.2d 1000, 1005 (2d Cir. 1987)).

91. *See id.*

92. *See* Taggart v. Time Inc., 924 F.2d 43 (2d Cir. 1991).

93. *See id.* at 46-47.

94. *See id.* at 47-48.

95. *See id.* at 47.

alone may be "a euphemism to mask the real reason for refusal [to hire], namely, [that] in the eyes of the employer the applicant is too old."[96] Thus, the Second Circuit rejected the district court's conclusion that it was reasonable to exclude an overqualified applicant on the grounds that the job would not challenge the applicant.[97] The case was reversed and remanded for a trial on the merits.[98]

B. Stein v. National City Bank[99]

In March 1985, Sol Stein ("Stein") applied for a customer service representative position with National City Bank ("Bank").[100] The Bank had an unwritten policy of not hiring college graduates for that position because it believed that college graduates would leave the position as soon they found that it was not sufficiently challenging.[101] Because Stein had a college degree, he was not hired.[102] In June 1985, Stein filed a discrimination claim with the EEOC based on age and/or religion.[103] The EEOC determined that the Bank did not discriminate against Stein on either ground.[104] Stein then filed a discrimination complaint in federal court based on violations of the ADEA and Title VII.[105] The district court found that Stein failed to make out a prima facie case of age discrimination and granted summary judgment to the Bank.[106]

Stein appealed to the Sixth Circuit Court of Appeals where the court applied the *McDonnell Douglas* test.[107] It found that Stein made out a prima facie case of age discrimination.[108] However, the court also found that the Bank's proffered reason for not hiring Stein was legitimate.[109] Specifically, the court was persuaded that a policy of only hiring individuals who are more likely to remain em-

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96. *Id.*
97. *See id.*
98. *See id.* at 48.
99. 942 F.2d 1062 (6th Cir. 1991).
100. *See id.* at 1064.
101. *See id.*
102. *See id.*
103. *See id.* at 1063-64.
104. *See id.* at 1064.
105. *See id.* He later abandoned his Title VII claim. *See id.*
106. *See id.*
107. *See id.* at 1064-65. See *supra* Part I.B.2 for a discussion of the *McDonnell Douglas* factors and the test's use as a burden-shifting device in Title VII cases.
108. *See id.* at 1064-65. Plaintiff made out a prima facie case because he was (1) a member of the protected class; (2) subjected to an adverse employment action; (3) qualified for the position; and (4) replaced by a younger person. *See id.*
109. *See id.*

ployed for a prolonged period of time would promote the employer's interest in reducing turnover.[110] Further, the court reasoned that turnover could also be decreased if the company did not hire individuals who would get bored easily or could obtain better jobs.[111] Although Stein argued that reducing turnover was pretextual because the hiring policy was not uniformly applied and was unreasonable because it failed to achieve its purported ends, the court summarily concluded that Stein's assertions were without merit and upheld summary judgment for the employer.[112]

C. EEOC v. Insurance Co. of North America[113]

In June 1988, Richard Pugh ("Pugh") responded to an advertisement for a "loss control representative" by submitting a résumé to Insurance Co. of North America ("ICNA").[114] Pugh had more than thirty years experience in loss control and engineering.[115] Despite this fact, Pugh was never interviewed for the position.[116] He filed a complaint with the EEOC alleging age discrimination.[117] In response, ICNA claimed that it did not interview Pugh because "he was overqualified . . . would have delved too deeply into accounts . . . and [would have unnecessarily] consume[d] too much of the insureds' time."[118] The district court found that Pugh established a prima facie case of age discrimination.[119] To meet its burden, ICNA explained that it rejected Pugh because he had an unprofessional résumé and his background was too technical for the position.[120] Upon concluding that ICNA's proffered reasons were legitimate, nondiscriminatory, and not pretextual,[121] the district court granted summary judgment for ICNA.[122] Subsequently, the EEOC appealed to the Ninth Circuit.[123]

The Court of Appeals for the Ninth Circuit assumed that the principal reason Pugh was rejected was that he was considered

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110. *See id.*
111. *See id.*
112. *See id.* at 1065-66.
113. 49 F.3d 1418 (9th Cir. 1995).
114. *See id.* at 1419.
115. *See id.*
116. *See id.*
117. *See id.*
118. *Id.*
119. *See id.* at 1419-20 & n.1.
120. *See id.* at 1420.
121. *See id.*
122. *See id.* at 1419.
123. *See id.*

overqualified; the court did not address whether the alternative reasons for rejecting Pugh were supportive of a summary judgment motion.[124] The court noted that the rejection of an applicant on the basis of "overqualification" may sometimes function as a proxy for age discrimination.[125] However, the court held that a refusal to hire a prospective employee based on an honest belief that he is overqualified for a position does not by itself violate the ADEA.[126] Indeed, the Ninth Circuit determined that ICNA's rejection of Pugh due to his "overqualification" was based on a defined business interest.[127] The court further found that the company's reason for rejecting Pugh was objective, non-age related, and that the evidence supported the conclusion that ICNA's rejection was not a mask for age discrimination.[128]

While *Taggart*, *Stein*, and *Insurance Co. of North America* addressed the use of "overqualification" by employers as a legitimate nondiscriminatory reason for employment decisions that affect older workers, the question remains as to whether "overqualification," standing alone, should be recognized by the courts as a legitimate reason to deny employment, thus requiring age discrimination plaintiffs to prove it is pretextual. To answer this question it is necessary to analyze the three cases in light of the types of criteria that employers use in making employment decisions.

III. "OVERQUALIFICATION": PRETEXT OR LEGITIMATE NONDISCRIMINATORY REASON

This section will show that the use of "overqualification" as a reason for rejecting an applicant can be, and often is, a mask for age discrimination. However, since "overqualification" can also be a legitimate reason for an adverse employment decision, this section will explore the various methods and devices used by employers when making employment decisions and analyze the extent to which these devices may provide objective evidence to support an employer's claim that "overqualification" was the employer's legitimate nondiscriminatory reason. This section will further show that while *Taggert* and *Stein* were correctly decided, *Insurance Co. of North America* was not. Lastly, this section will further assert that

124. *See id.* at 1420 n.2 (stating that "the primary reason ICNA did not interview or hire Pugh was that it considered him overqualified for the position").

125. *See id.* at 1420-21.

126. *See id.* at 1420.

127. *See id.* at 1421.

128. *See id.*

employers who rely solely on subjective reasons to justify adverse employment decisions, such as an applicant's "overqualification" for the position, will expose themselves to potential discrimination lawsuits.

A. *"Overqualification": Evidence of Discrimination?*

Employers generally rely on two types of criteria when attempting to assert a legitimate nondiscriminatory reason for hiring, promotion, transfer, and discharge decisions: objective and subjective criteria. Objective[129] criteria typically include: scored tests,[130] education requirements,[131] work experience,[132] or performance.[133] Such criteria are neutral because they are applied mechanically and without exception to all applicants and employees and leave little or no room for the use of discretion. Nevertheless, objective criteria can be the basis of either a disparate impact or disparate treatment claim. A disparate impact claim may exist if the application of the neutral criteria has an adverse impact on a protected group.[134] A disparate treatment claim may also exist if a criterion is applied in a

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129. Objective is defined as "expressing or involving the use of facts without distortion by personal feelings or prejudices." WEBSTER'S THIRD NEW INT'L DICTIONARY 1556 (3d ed. 1993).

130. *See, e.g.,* Griggs v. Duke Power, 401 U.S. 424, 432 (1971); EEOC v. Navajo Ref. Co., 593 F.2d 988, 992 (10th Cir. 1979).

131. *See, e.g.,* EEOC v. Joint Apprenticeship Comm., 895 F.2d 86, 91 (2d Cir. 1990) (remanding for determination whether prerequisites for admission into an electrician apprenticeship program (high school diploma requirement and maximum age limit) have any disparate impact on African Americans and women); Briggs v. Anderson, 796 F.2d 1009, 1023 (8th Cir. 1986) (finding that plaintiff "failed to show that the degree requirement did not 'bear a demonstrable relationship to successful performance of the [job] for which it is used'") (quoting *Griggs*, 401 U.S. at 431); Carpenter v. Stephen F. Austin State Univ., 706 F.2d 608 (5th Cir. 1983) (using high school education requirement); *Navajo Ref. Co.*, 593 F.2d at 992 (stating that the "company is free to use its tests and high school education requirements if the result is not discrimination in fact"); Payne v. Travenol Lab., Inc., 565 F.2d 895, 899 (5th Cir. 1978) (stating that the defendants failed to prove that the college degree requirement was justified by business necessity).

132. *See, e.g.,* Foster v. Board of Sch. Comm'rs, 872 F.2d 1563, 1569 (11th Cir. 1989) (requiring prior administrative experience for position as school principal); Cooper v. Allen, 493 F.2d 765, 766 (5th Cir. 1974) (requiring five years experience to become professional golfer).

133. *See, e.g.,* Dwyer v. Smith, 867 F.2d 184, 189 (4th Cir. 1989) (requiring that police officers qualify with a 12-gauge shotgun fired from the shoulder); Castro v. Beecher, 459 F.2d 725, 734 (1st Cir. 1972) (requiring a swim test for police officers).

134. See *supra* Part I.B for a discussion of age discrimination based on disparate impact.

different manner to certain protected class members.[135]

By contrast, subjective[136] criteria allow for the use of discretion by the decision maker.[137] An employer using subjective criteria draws on his or her perspectives, beliefs, experiences, and judgment when making a decision. Subjective selection devices include: interviews, performance appraisals not based on "hard" data such as quantifiable attendance or production records, nepotism, and the use of "grapevine" hiring or promotion systems which selectively announce job openings.[138] In addition, employment valuations based on a person's leadership or aggressiveness, ability to fit in, interpersonal skills, or other traits such as personal appearance, interest, attitude, and personality constitute subjective criteria.[139] These discretionary criteria are standardless in the sense that there are no identifiable means by which they can be measured. Consequently, the application of subjective devices is characterized by a lack of uniformity.

Whether based on objective or subjective criteria, ADEA violations may be established by proving either disparate treatment or disparate impact.[140] As a practical matter, plaintiffs can more easily attack subjective criteria under the disparate treatment theory be-

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135. See *supra* Part I.B for a discussion of age discrimination based on disparate treatment.

136. Subjective is defined as "peculiar to a particular individual modified by individual bias and limitations: personal." WEBSTER'S THIRD NEW INT'L DICTIONARY 2275-76 (3d ed. 1993).

137. *See* 29 C.F.R. § 1607.6B(1) (1999) (referring to subjective criteria as "informal" or "unscored" procedures); Andrea R. Waintroob, *The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level*, 21 WM. & MARY L. REV. 45, 48 (1979) (stating that subjective procedures are those in which "judgment or discretion [is exercised] on the part of the evaluator"). *See generally* EMPLOYMENT DISCRIMINATION LAW SUPP., *supra* note 62, at 194-206 (discussing the characteristics of subjective employment practices).

138. *See, e.g.*, Brief for Amicus Curiae American Psychological Association in Support of Petitioner at 14, Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) (citing BENJAMIN SCHNEIDER & NEAL SCHMITT, STAFFING ORGANIZATIONS (2d ed. 1986); IRWIN L. GOLDSTEIN, TRAINING IN ORGANIZATIONS (2d ed. 1986)).

139. *See* Donald R. Stacy, *Subjective Criteria in Employment Decisions Under Title VII*, 10 GA. L. REV. 737, 737, 740-41 (1976); *see also* Watson v. Fort Worth Bank & Trust, 798 F.2d 791, 812 n.26 (5th Cir. 1986) (Goldberg, J., dissenting) (examining employer evaluations of employees on such factors as drive, friendliness, courtesy, and personal appearance).

140. *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 617-18 (1993) (Kennedy, J., concurring) (stating that the Court has "not yet addressed the question whether such a claim is cognizable under the ADEA, and there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA"). The majority agreed that the issue was an open question. *See id.* at 610. See *supra* Part I.B for a discussion of the disparate impact and disparate treatment theories of liability.

cause offering statistical evidence of subjective data is very difficult and costly.[141] In an ADEA disparate treatment case, the question that must be answered when subjective evidence is presented by an employer as its legitimate reason for an employment decision is whether the employment decision was wholly motivated by non-age factors.[142] This question is of the utmost importance because if it is not answered in the affirmative, an age discrimination suit will be dismissed in favor of the employer. However, if plaintiffs can get past the summary judgment stage and to a jury, their chances of obtaining a favorable settlement or jury award improve substantially, since juries tend to favor employees over employers.

When analyzing whether subjective criteria are legitimate and nondiscriminatory, courts often consider whether the employer uses criteria based upon observable behaviors or job performance ratings rather than personal traits.[143] Another factor to be considered is whether the employer uses objective criteria in conjunction with the subjective criteria in the decision-making process.[144] Absent objective evidence that clearly indicates that the subjective criterion itself, rather than age, was the decisive factor in the employment decision, a claim for age discrimination should proceed so that a fact finder may have an opportunity to scrutinize the defendant's credibility.

Although subjective employment criteria are especially suscep-

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See *supra* note 33 for lower court cases that have applied both theories of liability in ADEA cases.

141. *See, e.g.*, Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 869-70 (D. Minn. 1993) (holding defendants liable under both disparate impact and disparate treatment claims by the plaintiffs); Stender v. Lucky Stores, Inc., 803 F. Supp. 259, 330-36 (N.D. Cal. 1992) (analyzing relief under both disparate impact and disparate treatment theory for respondent's subjective decision making).

142. *See Hazen Paper Co.*, 507 U.S. at 611. "In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." *Id.* at 610 (citations omitted). "'Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . .'" *Id.* at 609 (quoting Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977)). See *supra* Part I.B.2 for a discussion of the burdens of proof in a disparate treatment case.

143. *See* Lujan v. Walters, 813 F.2d 1051, 1057 (10th Cir. 1987) (stating that "the use of such subjective criteria as 'dedicated' and 'enthusiasm' may offer a convenient pretext for giving force and effect to prejudice, and can create a strong inference of employment discrimination") (citing Mohammed v. Callaway, 698 F.2d 395, 401 (10th Cir. 1983)); *cf.* Lerma v. Bolger, 689 F.2d 589, 592 (5th Cir. 1982) (finding that subjective evaluations made in good faith and based upon the successful candidate's record as an employee rebutted plaintiff's prima facie case of discrimination).

144. See *supra* notes 63-70 and accompanying text for a discussion of objective and subjective criteria used in decision-making.

tible to abuse because of the large amount of discretion they confer on the decision maker, there is nothing inherently wrong or unlawful in using subjective criteria to make employment decisions.[145] Courts have approved the use of subjective criteria that are related to the skills demanded by a position and are used fairly as part of a reasonably circumscribed procedure.[146] Indeed, fairness to both the applicant and the employer may require using such criteria because exclusively using objective criteria might not lead to hiring the best person for the position. Subjective criteria such as a person's ability to get along with others and impressions gleaned from an interview are criteria that are important in determining if a person is a "fit" for the job in question. Nevertheless, as an evaluation becomes less objective, the risk that an employer's use of subjective criteria masks discriminatory motive increases.

Courts have reasoned that the risk that subjective criteria is a front that permits the employer to discriminate on the basis of age is too great to allow the employer to rely on such criteria as a "legitimate" reason for adverse employment decisions.[147] The concern is that an employer would then be able to articulate any vague assertion regarding qualification or experience levels to defeat a plaintiff's discrimination claim. Thus, in cases where the employer uses only subjective criteria upon which to base its adverse employment decision, there is an increased risk that the employer is using a proxy as a mask for age discrimination, and at the very least, a factual inference of age discrimination may exist.[148]

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145. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990 (1988) ("[A]n employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct."); McKnight v. General Motors Corp., 908 F.2d 104, 113-14 (7th Cir. 1990) (stating that subjective methods of appraising performance are not in and of themselves discriminatory, although they are susceptible to discriminatory application); Mallory v. Booth Refrigeration Supply Co., 882 F.2d 908, 910 (4th Cir. 1989) (stating that the use of subjective criteria, standing alone, does not prove a violation, although the use of subjective criteria is relevant).

146. *See, e.g.*, Risher v. Aldridge, 889 F.2d 592, 597 (5th Cir. 1989) (stating that "[s]ubjective criteria necessarily and legitimately enter into personnel decisions involving supervisory positions"); Healy v. New York Life Ins. Co., 860 F.2d 1209, 1220 (3d Cir. 1988) (stating that when a company deems a trait essential it has a right to make a business decision based on that trait); McCarthney v. Griffin-Spalding County Bd. of Educ., 791 F.2d 1549, 1552 (11th Cir. 1986) (stating that "[t]he use of recommendations does not, because they are subjective, require [the court] to invalidate the school system's promotion procedure").

147. *See* Rowe v. General Motors Co., 457 F.2d 348, 359 (5th Cir. 1972) (analyzing subjective criteria in a Title VII case).

148. *See id.*

In the three cases discussed in Part II, *Taggart*,[149] *Stein*,[150] and *Insurance Co. of North America*,[151] older applicants were rejected because the employers felt that they were overqualified.[152] These cases suggest that there is a natural correlation between "overqualification" and age because older people are likely to have been in the workforce longer and have greater work experience. Thus, the term overqualified, when used to reject an applicant, can be a disguise for a rejection that relies on age.[153] However, the court in each case reached a different result, suggesting an area of confusion in the way courts handle the issue of "overqualification."

B. Taggart v. Time Inc.

In *Taggart v. Time Inc.*,[154] the Court of Appeals for the Second Circuit acknowledged that the plaintiff made out a prima facie case of age discrimination[155] and recognized that "overqualification" is often correlated with age.[156] When the employer was required to offer a legitimate nondiscriminatory reason for its employment decision, it stated that Taggart was rejected because he was overqualified.[157] As a result, the employer believed that the job would not challenge him, and he would likely seek other employment.[158] The court questioned whether these non-age reasons were the real reasons for rejecting Taggart.[159] Significantly, the employer did not offer any objective evidence to support its claim that overqualified candidates are likely to seek other employment. In fact, there is evidence to the contrary: older workers are often viewed as better workers in comparison to workers of any other age category regarding skill, experience, and work ethic, including punctuality, good attendance, and reliability.[160] In *Taggart*, the employer might have been able to convince the court that its reason was legitimate and nondiscriminatory by producing objective evidence to support its

149. *See supra* Part II.A.
150. *See supra* Part II.B.
151. *See supra* Part II.C.
152. See *supra* Part II.A-C for a discussion of these cases.
153. See *supra* Part II.A & C for examples of courts that have found that overqualified may indeed be a euphemism for age.
154. 924 F.2d 43 (2d Cir. 1991).
155. *See id.* at 46.
156. *See id.* at 47.
157. *See id.* See *supra* Part I.B for a discussion of the allocation of burdens in discrimination cases.
158. *See id.*
159. *See id.* at 47-48.
160. *See generally* DOWNSIZING IN AN AGING WORK FORCE, *supra* note 5, at 8-9.

subjective claim.[161] For example, Time could have tried to show that overqualified workers are poor performers, create high turnover, or bear some demonstrable relationship to performance on the particular job for which Taggart was being interviewed. However, because no such evidence was offered, the court carefully scrutinized the employer's stated reason and rejected it.[162]

When Congress enacted the ADEA, it was concerned that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.[163] The employer's subjective reason in *Taggart* is an example of just such an inaccurate, stigmatizing, and age-based stereotype that prompted Congress to enact the ADEA.[164] Thus, the Second Circuit properly scrutinized the employer's subjective reasons. Because "overqualification" is correlated with age, and because the employer did not offer any objective or identifiable evidence to support its claim that actual "overqualification" and not age was its reason for not hiring Taggart, the court properly remanded the case to the district court for a trial on the merits.[165]

C. Stein v. National City Bank

In *Stein v. National City Bank*,[166] the Sixth Circuit also recognized that the applicant made out a prima facie case, thus requiring the defendant to offer a legitimate nondiscriminatory reason for its adverse employment action.[167] In this case, the employer also rejected the applicant based on his "overqualification"; however, the

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161. See *supra* Part III.A for a discussion of the use of subjective versus objective evidence as it applies to legitimate nondiscriminatory reasons offered by employers in discrimination claims.

162. *See Taggart*, 924 F.2d at 47-48.

163. See *supra* Part I.A for a discussion of the history of the ADEA.

164. *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993). In *Hazen Paper*, the Supreme Court stated in dicta that (1) disparate treatment "captures the essence of what Congress sought to prohibit in the ADEA," and (2) Congress enacted the ADEA out of a concern that "older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes." *Id.* at 610. However, "[w]hen the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears." *Id.* at 611. (emphasis in original); *see also* EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1080-81 (7th Cir. 1994) (Cudahy, J., dissenting) (arguing that disparate impact is a viable theory in age cases, since it is a means to detect employment decisions based on inaccurate and stigmatizing stereotypes).

165. *See Taggart*, 924 F.2d at 48.

166. 942 F.2d 1062 (6th Cir. 1991).

167. *See id.* at 1064-65; see *supra* Part I.B for a discussion of the allocation of burdens in discrimination claims.

employer relied on a general policy of not hiring college graduates.[168] The policy was an effort to prevent high turnover rates in its customer service representative positions.[169] While the use of "overqualification," standing alone, is a subjective reason for an adverse employment decision and is carefully scrutinized by the courts,[170] the employer in *Stein* utilized an "overqualification" policy that had objective (i.e., measurable) criteria.[171] The policy of not hiring college graduates for certain jobs operated on the reasonable assumption that persons without college degrees would not be as readily employable by a different employer.[172] Hence, both persons under and over the age of forty would be rejected under the hiring scheme. Because the employer supported its rejection of the plaintiff with an objective measure—whether the applicant had a college degree—the Sixth Circuit was able to determine that the policy was reasonable and applied in a nondiscriminatory manner.[173] The court concluded that the reason proffered by the defendant to reject the older applicant was, in fact, motivated by a non-age factor.[174] Thus, the employer rightly succeeded in its motion for summary judgment.[175]

D. EEOC v. Insurance Co. of North America

Like in *Taggart* and *Stein*, the court in *EEOC v. Insurance Co. of North America*,[176] recognized that the applicant made out a prima facie case of age discrimination.[177] Thus, the employer was required to offer a legitimate nondiscriminatory reason for its adverse employment decision.[178] This employer also offered "over-

168. *See Stein*, 942 F.2d at 1064.

169. *See id.* However, the policy was unwritten and "no statistical study or other empirical data supports the assumptions" that it would prevent high turnover. *See id.* at 1065.

170. *See, e.g.*, Binder v. Long Island Lighting Co., 933 F.2d 187, 193 (2d Cir. 1991) (stating that "overqualification" policies may "serve as a mask for age discrimination" so courts need to make sure that policies are adopted in good faith); Taggart v. Time Inc., 924 F.2d 43, 47-48 (2d Cir. 1991) (discussing how "overqualification" policies can be used to discriminate based on age).

171. *See Stein*, 942 F.2d at 1066.

172. *See id.* at 1065.

173. *See id.* at 1066.

174. *See id.*

175. *See id.*

176. 49 F.3d 1418 (9th Cir. 1995).

177. *See id.* at 1419-20.

178. *See id.*; see *supra* Part I.B for a discussion on the allocation of burdens in discrimination claims.

qualification" as its reason for rejecting the plaintiff.[179] The employer further explained that it feared "that someone with Pugh's extensive background . . . would delve too deeply into . . . assign[ments]."[180] The Ninth Circuit held that this was an objective and non-age related reason for the rejection and granted summary judgment for the employer.[181] However, because the employer's proffered reason was purely subjective,[182] it should have been more carefully scrutinized just as the court of appeals did in *Taggart*.[183]

In contrast to the employer in *Stein*, ICNA did not maintain an objective hiring policy that could justify its subjective reason for not hiring Pugh.[184] In addition, the employer failed to offer evidence in support of its conclusion that an older worker would "delve too deeply" or even to explain how "delving too deeply" would be a potential problem.[185] Moreover, it is arguable that a younger worker who delved deeply into accounts would not be seen in such a negative light, but rather would be viewed as aggressive or a potential leader of the company. Stigmatizing stereotypes that suggest that older employees are liabilities rather than assets are precisely what the ADEA was enacted to protect against.[186] Because the employer's conclusions were unsupported by any statistical, empirical, or otherwise measurable evidence, the rejection based solely on "overqualification" was likely a mask for age discrimination. Thus, the employer's summary judgment motion should have been defeated. Such a result would have allowed the case to proceed to a jury which could have then assessed the credibility of the employer. Unfortunately for the plaintiff and all older applicants, the Ninth Circuit ruled otherwise.[187]

E. *Suggestion to Employers*

People of all ages often find themselves unemployed. Such a change can be both economically and emotionally devastating.

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179. *See Insurance Co. of N. Am.*, 49 F.3d at 1419.

180. *Id.* at 1421.

181. *See id.*

182. See *supra* Part III.A for a discussion of the use of subjective evidence in discrimination suits.

183. See *supra* Part III.B for a discussion of the Second Circuit's finding in *Taggart* that "overqualification," by itself, is not a legitimate nondiscriminatory reason for an adverse employment action.

184. See *supra* Part III.C for a discussion of the objective hiring policy in *Stein*.

185. *See Insurance Co. of N. Am.*, 49 F.3d at 1421.

186. See *supra* Part I.A for a discussion of the purpose of the ADEA.

187. *See Insurance Co. of N. Am.*, 49 F.3d at 1421.

However, the problem is compounded for an older person who has been terminated, since the prospect of finding a job in the same field of work or at the same managerial level is limited because such positions are already filled by long-term employees or because the workforce has been reduced.[188] In order to remain productive and support their families, an older person may be forced to apply for any position which is open.

Employers who are reluctant to hire older people for entry-level positions based on a belief that they are overqualified not only run the risk of violating the ADEA, but also contribute to larger societal problems. For instance, a large number of older persons who are unable to find work will result in a reduction of both income and confidence for many Americans.[189] These problems will continue to increase if employers are reluctant to hire older workers because they subjectively believe an applicant is "unqualified" simply because the applicant appears to be "overqualified." Thus, employers faced with an applicant or employee who they do not believe is suited for the position should be cautious about, if not avoid entirely, not hiring or promoting that person based upon a subjective trait such as "overqualification."

However, an employer who makes decisions based on an applicant's subjective qualities may take steps to avoid the possibility of ADEA litigation. Specifically, if an employer bases employment decisions on subjective traits, it should set forth in its hiring policy all the desired qualities that can only be evaluated subjectively. Traits and qualities that require subjective determination should directly correlate with an applicant or employee's ability to perform the job. This serves to demonstrate the legitimacy of the criterion at issue by showing that the trait is important to the position. An employer should also use objective factors in conjunction with subjective decision-making when hiring, promoting, firing, and taking other employment actions.[190] In the event of litigation, the additional use of objective criteria may reduce the likelihood that a

188. *See* DOWNSIZING IN AN AGING WORK FORCE, *supra* note 5, at 5 n.2.

189. *See id.* at 2, 5 n.5 (noting that a Louis and Harris survey, conducted in 1989, reported that one million workers aged 50 to 64 believed that they would be forced to retire before they were ready). Most of this group, anticipating an unwanted early retirement, said they would prefer to work for years longer. *See id.* Another Harris survey, conducted in 1992, found that 5.4 million older Americans, one in seven of those 55 and older who were not working at that time, were willing to work but could not find a suitable job. *See id.*

190. See *supra* Part III.A for a discussion on the appropriateness of using subjective criteria in employment decision-making.

court will find that the employment action was based on age related factors.

An employer should use objective criteria, rather than subjective criteria, to evaluate whether an applicant is overqualified. If possible, the employer should also use objective criteria to determine the relative qualifications of the individual, which will bolster the employer's claim that the applicant was rejected for a legitimate, nondiscriminatory reason, should litigation ensue. If an employer uses subjective criteria, it should maintain a hiring policy that indicates the relationship between a worker's subjective traits and the position at issue. The hiring policy will help employers defend their use of subjective criteria in future litigation by demonstrating that even thought the subjective trait played a role in the employment decision, other legitimate factors were also considered.

CONCLUSION

The ADEA does not require employers to give preferential treatment to older applicants. However, it does require that an older applicant, who is equally or more qualified than any other applicant, not be denied an equal opportunity in the hiring process because of his or her age. While using subjective criteria to make employment decisions is not per se unlawful, employers may avoid liability if they produce objective and identifiable reasons for their employment decisions in order to support their claims that a particular adverse decision was not based on age. A requirement that "overqualification" be supported by objective standards would advance the policy goals of the ADEA by ensuring that older workers receive equal opportunity for jobs, while maintaining an employer's ability to seek out and retain the most suitable employees.