

5. Cause, effect, and solution? The uneasy relationship between older age bias and age discrimination law

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INTRODUCTION

Causal explanations for age bias may draw from varied theoretical accounts. These include neoliberal accounts based in economics, political economy perspectives emphasizing industrial change and flexible labor markets, and post-modern arguments tied to the breakdown of cultural values and social groups (Wood et al., 2008). From a public policy perspective, however, among the most influential explanations for older age bias are accounts derived from the research of industrial and organizational psychologists. Described variously as the problem of ageism, prejudice, stereotyping, or implicit bias, unfounded assumptions about older workers and their corresponding ill effects are justifications articulated by policymakers and courts for the prohibition of age discrimination in employment (Bisom-Rapp and Sargeant, 2013).

Despite the ubiquity of a psychologically based rationale for legal regulation, deficiencies in the construction and application of legal doctrine, and the recent experience of older workers during the global economic crisis (Bisom-Rapp et al., 2011; Neumark and Button, 2013) raise important questions about the sufficiency of employment discrimination law as protective armor for an aging workforce. Drawing on the authors' previous work, this chapter addresses these matters as follows. First, the chapter lays out a relatively simple account of older age bias derived from the psychological literature and highlights its strong tie to age discrimination law. The chapter proceeds to reveal that bias against older workers is a complex phenomenon that may play out in a manner difficult to discern for the purpose of legal claiming. The chapter then describes the way in which the law in our respective countries (the United Kingdom (U.K.) and the United States (U.S.)) provides incomplete protection to older workers from those complex effects. Our chapter concludes with some suggestions for reform.

AN ACCOUNT FROM INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY ANIMATES LAW

Early accounts of the problem of older age bias reference the problem of ageism. The first use of the term is attributed to Dr. Robert Butler, who in 1969 wrote about the strongly negative reaction of white affluent middle-class residents to a proposal for a public housing project for the elderly poor in Chevy Chase, a neighborhood in northwest Washington, DC. Butler described ageism as “prejudice by one age group against other age groups” (Butler, 1969). A more comprehensive and contemporary definition is contained in a 2009 United Nations (U.N.) report on aging, which describes ageism as encompassing systemic, negative stereotyping and discrimination or denial of opportunities on the basis of age. The report notes that ageism “reinforces a negative image of older persons as dependent people with declines in intellect, cognitive and physical performance . . . [O]lder persons are often perceived as a burden, a drain on resources, and persons in need of care” (U.N. Secretary-General, 2009).

Although, for some psychologists, Dr. Butler’s work marks the beginning of research on ageism (Nelson, 2011), a U.S. government report published four years prior to it found significant evidence of age discrimination in the American workplace resulting from unfounded assumptions about older workers. The study, commonly known as the Wirtz Report, was ordered by the U.S. Congress in order to assess the need for age discrimination legislation. While recommending a legal solution, the report distinguished beliefs about middle-aged and older workers from those affecting workers on the basis of race, religion, color, or national origin. Unlike prejudice based on those other characteristics, age bias was not typically driven by “dislike or intolerance” (U.S. Department of Labor, 1965).

There is a strong connection between the stated problem (stereotyping or unfounded assumptions leading to age discrimination in the workplace) and its potential solution (employment discrimination law). Indeed, the Wirtz Report is a touchstone in American age discrimination jurisprudence, frequently discussed as evidence of the U.S. Congress’s legislative intent in enacting the Age Discrimination in Employment Act of 1967 (ADEA) (*E.E.O.C. v. Wyoming*, 1983; *Gen. Dynamics Land Sys., Inc. v. Cline*, 2004; *Smith v. City of Jackson*, 2005; *Western Airlines, Inc. v. Criswell*, 1985). As the U.S. Supreme Court has noted, “Congress[s] 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” (*Hazen Paper Co. v. Biggins*, 1993).

Ageism and stereotyping are also concerns in the U.K., where equality

legislation aims to eliminate these group-based generalizations or beliefs. Although the prohibition of age discrimination is much more recent in the U.K., dating only from 2006, current guidance to employers on implementing the legislation advises: “Base your decisions about recruitment on the skills required to do the job. Provide training to help those making judgements to be objective and to avoid stereotyping people because of their age” (Acas, 2014). The guidance further warns against the preconceptions evaluators may have about age, and how those notions may cloud fair employment decision-making (Acas, 2014).

Additionally, one finds mention at the supra- and international level of the need to eradicate age stereotyping through legislative action. The U.N., for example, suggests member states eliminate age discrimination through policy actions aimed at “changing negative stereotypes about older persons” (U.N. Secretary-General, 2009). Social scientific understanding of age stereotypes and their relationship to employment discrimination, however, has advanced considerably since the Wirtz Report and Dr. Butler’s early article. The mismatch between simplistic legal conceptions of age discrimination and how bias actually manifests itself in the workplace leaves older workers bereft of the protection they need as labor market participants.

AGE BIAS IS A COMPLEX PHENOMENON

Psychologists explain that people understand the world through a process of categorization (Krieger, 1995). We naturally classify things to simplify the diverse data we take in (McCormick, 2012). For example, upon encountering a stranger, we cognitively place the stranger in a category, which aims to help us predict how the unknown individual might act. Certain characteristics, in particular sex, race, and age, are salient or highly noticeable; we categorize people on those bases automatically (Blaine, 2013). Stereotypes are beliefs about the individuals we place in categories. These beliefs are often, though not always, negative and overgeneralized.

Older age is clearly associated with negative stereotyping, although much less research has been done on age discrimination compared with race and sex discrimination (Bisom-Rapp and Sargeant, 2013). Age-based constructs often operate unconsciously and are triggered automatically (Nelson, 2011); in other words, they operate like other forms of implicit bias and may affect conscious conduct, feelings, and thought. Schmidt and Boland’s seminal study of media depictions of older people identified multiple levels of stereotyping: general characteristics; positive and negative subgroups; and subgroup individual characteristics (Schmidt and

Boland, 1986). Most of the general traits were physical, such as gray hair, baldness, deafness, and bad eyesight. The study also found 12 older people subgroups – eight positive and four negative.

A later replication of the Schmidt and Boland study was performed and, combined with that classic study, seven subgroups of older people emerge. Those subgroups and the individual traits connected to them are: 1) despondent (people who are sad and lonely); 2) severely impaired (those who are senile and feeble); 3) shrew or curmudgeon (people who are stubborn, nosy, and complaining); 4) recluse (those who are timid, quiet, and set in their ways); 5) John Wayne conservative (people who are patriotic, rich, religious, and conservative); 6) perfect grandparent (those who are kind, family-oriented, and wise); and 7) golden ager (persons who are independent, healthy, and productive) (Blaine, 2013).

Negative stereotypes tied to age persist in the workplace. One meta-analysis of older worker stereotypes discerned three main themes that may operate to the detriment of older labor force participants. Older workers are seen as less competent and less motivated, difficult to train, and more expensive because of high salaries and high medical benefit costs (Posthuma and Campion, 2009). Other studies echo these findings. Managers in one study, for example, were found less willing to provide training to older workers, and less likely to promote them to jobs viewed as requiring creativity and innovation (Adams and Neumark, 2006). In terms of the impact of implicit age bias, studies by industrial psychologists and gerontologists reveal that when rating job applicants both managers and coworkers rely on negative age-based stereotypes (Adams and Neumark, 2006). Whether biased ratings affect hiring is less clear, since study results are mixed; some studies find no age effects and other studies find bias in favor of younger workers.

Stereotyping may interact with other decision-making factors in complex ways. It may be that certain jobs are coded as “youth jobs” and more likely to be perceived as a poor fit for older workers (Campion, 2009). Moreover, managers may be more likely to rely on stereotypes when they are preoccupied or busy with matters other than the decision at hand. Hence, age-biased decisions may be produced by statistical discrimination – managers using age as a readily available, group-identity-based selection criterion as a result of the lack of time to obtain more individualized information about candidates (Adams and Neumark, 2006). In such cases, it is not animus driving decisions but merely “cognitive busyness” that results in bias against older workers. Additionally, although negative, age-based stereotypes are triggered automatically and operate unconsciously, whether those stereotypes influence decision-making will vary based on the perspective of the person perceiving the older worker.

More specifically, low-prejudiced individuals may be motivated to override the stereotypes, while high-prejudiced individuals may instead allow the negative attitude to persist (Monteith et al., 1994). This complexity helps explain why, although there may be evidence linking age bias and adverse employment outcomes, some studies are unable to discount other possible explanations for decisions negatively affecting older workers. Although it certainly exists, age bias is more difficult to identify than race or sex discrimination (Winerip, 2013).

Cognitive bias may also operate on more than one basis. For example, older women suffer from the disadvantage of the combination of stereotyping based on age and gender, both of which can negatively affect them in the workplace. Discussions of how aging affects women typically reference the problem of appearance. In societies that prize female youth and beauty, signs of aging in women lead to their devaluation and what has been termed “gendered ageism” (Moore, 2009). Hence, wrinkled skin and gray hair are generally considered unattractive for women but attributes that make men appear more distinguished (Porter, 2003). This is especially so in some occupations, such as television news anchoring (Craft, 1988; Rhode, 2009; Sargeant, 2013). Yet this phenomenon also affects women outside of the appearance-oriented news and entertainment industry (Bisom-Rapp and Sargeant, 2014).

Research reveals three predominant ways that women are stereotyped as they age. First, women are seen as aging sooner than men, and their appearance is judged more negatively. In particular, women are viewed as having reached old age from the ages of 55–59, in comparison to men, who are viewed as having entered old age from the ages of 60–64 (Canetto, 2001). Older women’s appearance is also viewed more harshly than the appearance of older men. Labeling women as “over the hill” and “old bags” is symptomatic of the negative, appearance-based judgments of gendered ageism (Antonucci et al., 2010). Second, compared to older men, aging women are seen “as less competent, intelligent, and wise” (Canetto, 2001). Finally, older women are viewed as more nurturing, sensitive, and warm than older men, a reference to grandmotherly characteristics.

Aging not only affects the responses of others to older women, but has been found to impact women psychologically and more profoundly than men. As Dr. Diane Grant notes:

Gender inequalities are compounded over time and internalised by women; as women grow older, the “social pathology” of ageing affects women more than men, in terms of how they age and the perception that looking older may have on their opportunities. Women appear as more vulnerable to such pressures than men. Indeed, internalisation of previous discriminatory experiences is

made complex by the realisation that in today's society an older women [*sic*] no longer conforms to the modern standards of youth and beauty. (Grant, 2011)

One study found explicit actions taken by unemployed study participants, who anticipated they might face age-related, appearance-based discrimination in job interviews. While “both men and women . . . considered altering their physical appearance for job interviews, this occurred far more frequently for women” (McMullin and Berger, 2006). Such responses are rational, since research indicates that age discrimination due to physical appearance affects women earlier in their lives compared to men. In other words, discriminatory actions are triggered by appearance sooner for women than for men.

Bases other than gender may interact with age stereotyping, including race, national origin, religion, and sexual orientation. There is not much empirical work on older women subject to discrimination on additional bases such as race and class. Researcher Sian Moore, however, conducted a study consisting of 33 interviews with women older than 50 in London, Coventry, and Oxford, U.K. (Moore, 2009). Her study, which also involved a survey of a large organization that yielded about 850 responses, provides results instructive for understanding why age discrimination is difficult to prove in legal settings. The organization she studied had “relatively high levels of older female workers . . . although black and ethnic minority staff were slightly under-represented” (Moore, 2009).

Moore's interviewees described age as a barrier in looking for work, whether they were presently employed or not. Interestingly, however, Moore found that, among her interviewees, age discrimination was intertwined with gender, race, and class bias. The women had trouble identifying specific age effects; some were confused about what kind of discrimination they'd faced (race, sex, or age), confessing that they were not sure what the perpetrator was thinking. Moore hypothesizes that occupational and industry segregation – “women worked alongside other women (often of the same race) and thus could not compare themselves to men or other races” – made it difficult for them to conceptualize the way complex discrimination played out (Moore, 2009). The survey results also indicated that workgroup composition and occupational segregation affect perceptions of bias.

Notwithstanding the complexities, surveys indicate that age discrimination is perceived as a significant societal problem. In the U.S., for example, a recent survey found that 64 percent of those in the age group 45 to 74 say they have witnessed or been a victim of age discrimination in the workplace (AARP, 2014). Of those, almost all believe that age discrimination is somewhat or very common. Fully 58 percent of the survey respondents

believe age bias begins when employees are in their 50s (AARP, 2014). A study in the U.K. concluded that age discrimination and stereotyping continue to be rooted in British society, representing a problem for both old and young (Department for Work and Pensions, 2012). The research found that 79 percent of respondents perceived age discrimination as serious. There were no differences between men and women in their responses, with about one-third reporting that they had experienced some age discrimination in the last year. In the European Union, a 2012 survey of the then 27 member states found that 45 percent of respondents believed that older age discrimination was widespread, although 50 percent thought that it was rare or non-existent (European Commission, 2009).

In sum, the U.K. and the U.S. share a common problem – the continuing existence of negative, age-based stereotypes in society. There is evidence that age bias operates in complex ways in the workplace to the disadvantage of older workers. Additionally, in both countries, law is a chosen solution for combating the problem of age discrimination. The next section compares those chosen solutions – doctrinal law in the U.K. and the U.S. – and reveals that both countries provide inferior protection against age discrimination in comparison to other forms of prohibited workplace bias. Importantly, the present construction of age discrimination law is incapable of accounting for the complex manner in which age bias is manifest in the workplace and safeguarding older workers from increasingly precarious labor market conditions.

A SOLUTION ILL SUITED TO THE TASK AT HAND: THE LEGAL PROHIBITION OF AGE DISCRIMINATION

Comparing British and American age discrimination law is valuable because both countries face high youth unemployment, aging populations, higher than usual older worker unemployment, and difficulty securing for many workers a dignified retirement (Bisom-Rapp et al., 2011). Moreover, despite the similarity of these challenges, each country appears to pursue age discrimination protection using a distinct model.

Age bias law in the U.K. adheres to a “European approach.” The U.K., as a member of the European Union (E.U.), must ensure legal conformance to E.U. directives, which are binding yet flexible supra-national legal measures that member states translate into national law (Blanpain et al., 2012). While equal treatment has been a concern in Europe since the 1970s, particularly regarding gender equality, during the last 15 years new anti-discrimination legislation has been produced at both the supra-national

and the national level, including several important E.U. equal employment opportunity directives. The U.K.'s age discrimination prohibition, enacted pursuant to the E.U.'s Framework Directive on Equal Treatment in Employment and Occupation (the Equal Treatment Directive), is relatively recent, dating to October 2006 (Employment Equality (Age) Regulations 2006). In fact, the U.K. Supreme Court issued its first decision on compulsory retirement in April 2012 (*Seldon v. Clarkson Wright & Jakes*, 2012). Thus, age discrimination law in the U.K. is in its formative phase.

One notable aspect of U.K. law that places it within the European approach is the possibility of employer-justified compulsory retirement. Professor Julie Suk examined the legal conclusions about, and the normative underpinnings of, mandatory retirement in Europe. In the E.U., compulsory retirement is generally viewed as a justification for differential treatment on the basis of age so long as a given scheme is an appropriate and necessary means of achieving a legitimate aim. The jurisprudential rationale for mandatory retirement is that such programs may promote, among other things, older worker dignity and employment opportunities for the young. Suk describes the European approach as one "promoting a normative vision of the ideal life cycle" (Suk, 2012).

In contrast, the American decades-long prohibition of age discrimination generally renders mandatory retirement illegal. In enacting the ADEA, Congress sought the eradication of employers' inaccurate stereotypes about older workers' productivity and competence. Under that statute, workers must be evaluated on the basis of merit (*Western Airlines, Inc. v. Criswell*, 1985). The American approach combats negative age-based stereotypes about when and how older workers should exit the labor market (Suk, 2012).

Over time, however, U.S. Supreme Court decisions have greatly weakened the ADEA's protections, making it difficult for plaintiffs to make out a prima facie case of age discrimination and easier for employers to defend against suits. The Court's decisions have also complicated the government's enforcement efforts (Johnston, 2010). Additionally, aggressive corporate downsizing, very laxly regulated in the U.S., increasingly sweeps older workers within its ambit, leaving them without employment at a point in their lives when finding replacement work is most difficult (Bisom-Rapp and Sargeant, 2013). Finally, U.S. law fails to account for the complexity of implicit age bias, rendering the law an ineffective tool for combating this social ill.

Indeed, despite what may appear as great doctrinal contrasts, the age discrimination laws of the U.K. and the U.S. converge in many respects. Both systems view age stereotyping as an ill to be cured. Both countries

ultimately provide for inferior legal protections against age discrimination as compared to other forms of prohibited workplace bias. Both approaches to age discrimination render workers vulnerable in their later working years even though each nation's laws arguably arrive there by a different route.

Age Discrimination Law in the U.K.

Despite recognizing the challenges of an aging population as far back as the Beveridge Report of 1942 (Beveridge, 1942), for decades successive U.K. governments declined to take any regulatory action with respect to age discrimination. On numerous occasions prior to 2006, members of Parliament attempted to introduce modest measures against age discrimination in recruitment advertising. All of these measures were opposed by the government of the day, and all were, therefore, unsuccessful (Bisom-Rapp and Sargeant, 2013).

The prohibition of age discrimination in employment finally came to the U.K. as a result of the E.U.'s Equal Treatment Directive of 2000. Without this directive, it is doubtful that age discrimination would have been prohibited in the U.K. In October 2006, the directive was transposed into law by regulations. Those 2006 regulations, with the exception of Schedule 6, which concerned procedures for enforcing a default retirement age of 65, were incorporated into the Equality Act 2010. The weakness of the legislation in the U.K., and indeed of the directive itself, is the wide latitude given for justifying exceptions. This breadth has the effect of making it more possible to justify age discrimination than discrimination on different grounds under the relevant measures. Hence, one may view the U.K.'s embrace of age discrimination law as not only recent, but also somewhat ambivalent.

Age is the only protected characteristic in British equality law for which it is possible to justify direct discrimination – a type of discrimination analogous to “disparate treatment” in the U.S. Regarding all the other unlawful grounds of discrimination, it is possible to justify only indirect discrimination, which is akin to the theory of “disparate impact” discrimination in the U.S. Motivating this weaker prohibition of age discrimination may be the potential number of specific exceptions required if there were not a permissible general exception. Of course, having a general exception may lead to unforeseen consequences. Specifically of concern to older workers, the law's broadly stated general exception can be used to justify less favorable treatment, such as compulsory retirement.

The U.K. Supreme Court first addressed the permissible parameters of employer-justified compulsory retirement in *Seldon v. Clarkson*

Wright & Jakes. Seldon involved the compulsory retirement of an equity partner in a firm of solicitors at the end of the year in which he reached age 65. The Court in *Seldon* held “that the approach to justifying direct age discrimination cannot be identical to the approach to justifying indirect discrimination” (*Seldon v. Clarkson Wright & Jakes*, 2012). Where direct discrimination is at issue, justification requires that an employer’s aims be “of a public interest nature” and “consistent with the social policy aims of the state.” Additionally, proportionate means must be used to achieve the aims – means that are “appropriate to the aim and (reasonably) necessary to achieve it.”

Three of the firm’s articulated aims for the compulsory retirement age were before the U.K. Supreme Court: 1) ensuring associates were provided with partnership opportunities in order to retain them; 2) facilitating workforce planning by being able to ascertain when partnership vacancies would arise; and 3) contributing to the firm’s collegial culture by limiting partner expulsion based on performance deficiencies. As to the lawfulness of these aims, the Court highlighted two legitimate social policy objectives that are deemed permissible by the Court of Justice of the European Union (CJEU).

The first is an “intergenerational fairness” aim, which the Court characterized as uncontroversial. This objective includes “facilitating access to employment by young people” and “sharing limited opportunities to work in a particular profession fairly between the generations,” presumably by removing older workers from their jobs. The second aim, seen by the Supreme Court as more controversial, seeks to promote employee “dignity” by eschewing “costly and divisive disputes about [older worker] capacity or underperformance.” Did the firm’s aims pass muster? The first two – staff retention and workforce planning – were deemed connected to intergenerational fairness. The third – limiting partner expulsion due to performance deficiency – was held related to the CJEU’s dignity objective. In short, the Court found all three of the firm’s aims were legitimate.

Next, the U.K. Supreme Court noted that the Employment Tribunal should determine whether age 65 was an appropriate means for achieving the firm’s stated objectives. As noted by Lady Hale, “There is a difference between justifying *a* retirement age and justifying *this* retirement age.” While certainly a mandatory retirement age is possible where an employer can justify it, in theory it may be difficult for employers to demonstrate that a particular age – whether age 65 or some other age – is appropriate under the circumstances in question. Even so, the Employment Tribunal subsequently accepted that 65 was the right age in *Seldon*. Thus, an employer-justified retirement age remains possible in the U.K.

In the U.K., age discrimination is clearly on a different and lesser footing than other grounds of discrimination. Moreover, the inferior civil rights protections afforded to workers on the basis of age turn at least in part on the supposed economic imperative of intergenerational fairness. As for the assumptions undergirding the “employee dignity” aim, one might wonder whether being jettisoned from the workplace based on age is any more dignified than losing one’s job due to allegations of performance deficiencies. In any case, there is no empirical research supporting the employee dignity assumption. Compulsory retirement policies are a poor tool for combating the stereotype of older worker performance incapacity. Such policies are based on the idea that at least some of those who are involuntarily retired perform at a subpar level.

Age Discrimination Law in the U.S.

In contrast to the U.K.’s Equality Act 2010, the ADEA’s effectiveness in preventing disparate treatment (direct discrimination) is not undercut by a general employer justification. Rather, the protective shortfall of the ADEA is caused by the more onerous burden of establishing a prima facie case of disparate treatment as compared with that of other protected characteristics and, consequently, an increase in the ease with which employers may defend against age discrimination suits. A case of disparate treatment age discrimination is doctrinally more difficult to establish than a case of disparate treatment based on race, color, religion, national origin, or sex.

Additionally, ADEA plaintiffs are disadvantaged in disparate impact (indirect discrimination) litigation in comparison with plaintiffs suing on other grounds. This handicap is tied to the “reasonable factor other than age” (RFOA) defense, which appears in the ADEA’s text and has been interpreted by the Supreme Court. By hobbling the use of disparate treatment theory and, simultaneously, by articulating a defense to disparate impact that is highly deferential to employer business interests, the Supreme Court has made the government’s enforcement efforts more difficult, harmed older workers, and privileged economic concerns over civil and human rights.

That it is more difficult to establish a case of disparate treatment on the basis of age than discrimination on other bases is in part tied to the U.S. Supreme Court’s refusal to allow mixed motive disparate treatment ADEA claims (*Gross v. FBL Financial Services, Inc.*, 2009). In *Gross v. FBL Financial Services, Inc.*, the 54-year-old plaintiff with 32 years of service with the firm sued over his demotion from claims administration director to claims project coordinator. His employer reassigned many of his duties to a woman in her early 40s, who had previously been his

subordinate. Gross asserted that he was discriminated against, at least in part, based on age. The company asserted that Gross's reassignment was merely part of a corporate restructuring. Instead of answering the question upon which it had granted review, the Supreme Court held that mixed motive claims – claims involving both discriminatory and non-discriminatory reasons – are not cognizable under the ADEA.

Under this precedent, a plaintiff claiming disparate treatment based on age must prove that age was the “but for” cause of the challenged decision. Unlike plaintiffs suing for other types of discrimination, ADEA plaintiffs must demonstrate that age had a decisive impact on the employer's actions – even in cases where the employer admits that age motivated its decision in part. This leaves no possibility of burden shifting to the employer in such cases, and creates a legal hurdle for age discrimination victims that, for many, may be insurmountable. Plaintiffs under Title VII of the Civil Rights Act, which prohibits discrimination on the basis of race, color, religion, national origin, and sex, need only prove that a protected characteristic was a *motivating* factor in an employment decision, recognizing the possibility that a complex set of reasons might be in play. As one commentator has noted, *Gross* allows some age-biased employers to escape liability without consequence, under-deters illegal employment decision-making, and provides a windfall to discriminating employers who relied on factors in addition to age (Katz, 2010).

To prevail under *Gross*, plaintiffs must separate all possible motives and prove that age is the overriding cause of a negative employment decision. Yet, as noted above, age stereotyping often interacts with other factors involved in employer decision-making in complex ways. For example, negative stereotypes about older worker competence may interact with the coding of certain jobs as less appropriate for older workers because they are years removed from their professional training. Separating the clearly illegal negative performance stereotype from what some may view as a legitimate rationale – that is, that more recent training makes one candidate better suited for the job than the other – may be virtually impossible for a plaintiff. The two motives may be inextricably intertwined; one's view that more recent training is superior to experience in the field may even be driven by age bias.

Gross, although the most recent such ADEA decision, is not the only case in which the Supreme Court has made clear that age discrimination is different than other forms of discrimination. Another illustrative case is *Hazen Paper Co. v. Biggins*, in which the plaintiff was terminated shortly before his pension was to vest based on his years of service with the company. Noting that “[i]t is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity

and competence decline with old age,” the Court held that pension status, while correlated with age, is both analytically distinct from age and unrelated to prohibited stereotyping (*Hazen Paper Co. v. Biggins*, 1993). Thus, while it is illegal to fire someone whose pension is about to vest under the Employee Retirement Income Security Act of 1974 (ERISA), unless the plaintiff can muster evidence that the employer used pension status as a proxy for age the termination does not violate the ADEA.

Of course, bias against older workers is closely bound with the perception that older workers are more costly workers. As early as 1965, the seminal Wirtz Report noted that employers were loath to hire older workers for a number of cost-based reasons, such as: 1) younger workers command lower salaries; 2) pension plans represent unwanted costs; and 3) employers are concerned that healthcare and life insurance costs are greater for older workers. By both narrowly defining age discrimination as an erroneous belief in declining performance, and characterizing cost-based justifications such as pension eligibility as analytically distinct from age, the Court significantly restricted the type of circumstantial evidence available to prove age discrimination (Zimmer, 1996). As a result, employers are generally free to use salary and length of service – factors very commonly associated with age and higher costs – as the rationale for economically devastating employment actions, such as reductions in force (Minda, 1997). Under *Biggins*, such cost-based factors are unlikely to be deemed evidence of disparate treatment based on age (Alon-Shenker, 2014). Case law that shields cost-based justifications from challenge clearly privileges the “needs of the free market,” allowing an economic imperative to trump the civil rights of older workers (Rothenberg and Gardner, 2011).

The cases reviewed above demonstrate that employees receive less protection from disparate treatment based on age than on other grounds. Moreover, the case law makes tackling implicit bias against older workers very difficult. Put concretely, *Gross* requires proof that age-based stereotypes based on lack of competency are the overriding cause of an employer’s adverse actions, when we know that bias is a complex phenomenon. Additionally, *Biggins* and its progeny stand for the proposition that employers that act on factors correlated with age, such as higher salary, are generally not liable for disparate treatment based on age. According to the courts, higher salary is, like pension status, analytically distinct from age. This narrow view may in some cases privilege cost-based employment decisions that are driven by “ageism, ageist stereotypes, inaccurate generalizations, and assumptions about senior workers” (Alon-Shenker, 2014). But might such employers making such decisions be subject to disparate impact liability? After all, choosing to downsize employees based

on higher salary is likely to have a greater impact on older workers, whose salaries increase over the course of their careers. Unfortunately for older workers, as discussed below, the answer is “no.”

In 2005, the U.S. Supreme Court held that disparate impact was actionable under the ADEA (*Smith v. City of Jackson*). This theory allows legal challenges to the use of neutral policies or criteria that fall more harshly on older workers. The statute, however, expressly provides that it is permissible for an employer to differentiate between workers where its actions are based on a reasonable factor other than age. This language, reasoned the Court, indicates that age, unlike other protected categories, often is relevant to an employee’s ability to perform certain jobs (*Smith v. City of Jackson*). The U.S. Congress, in this way, provided less protection to employees from age discrimination than bias based on other grounds. In fact, what has come to be known as the RFOA defense has proven an effective shield for employers that wish to use cost-based factors such as higher salaries and higher healthcare costs in their decision-making. Commentators note that courts considering the defense are highly deferential to employers (Johnson, 2009; Rozycki and Sullivan, 2010). Such deference allows so-called business interests to trump older workers’ civil rights.

Neither U.K. nor U.S. Law Properly Accounts for Complex Age Bias

Age discrimination might be different from other forms of discrimination because there is no discrete group that has its own membership. Everyone has some age (Friedman, 1984), and old age is a state that the majority of the population will reach at some time. As the U.S. Supreme Court noted: “Old age does not define a ‘discrete and insular’ group . . . in need of ‘extraordinary protection from the majoritarian political process.’ Instead, it marks a stage that each of us will reach if we live out our normal span” (Jolls, 1996; *Massachusetts Board of Retirement v. Murgia*, 1976). Indeed, judicial skepticism about the prohibition of age discrimination abounds, as evidenced by the Court’s statement, which refuses to acknowledge that age bias is no different in cause or impact from other grounds of discrimination. Many argue that age discrimination stands apart from, or has lesser importance than, discrimination on other grounds such as race or gender. There is a belief that somehow disadvantage suffered at one age can be offset and made acceptable because of advantage gained at another age.

Certainly the courts in the U.S. and Europe have decided that it is so. In *Gross*, *Biggins*, and *Smith*, the U.S. Supreme Court treated age discrimination as distinctive. The U.K. Supreme Court, in *Seldon*, explicitly stated

that age is different. It is “not ‘binary’ in nature (man or woman, black or white, gay or straight) but a continuum which changes over time” (*Seldon v. Clarkson Wright & Jakes*, 2012). Hence, “younger people will eventually benefit from a provision which favours older employees, such as an incremental pay scale; but older employees will already have benefitted from a provision which favours younger people, such as a mandatory retirement age” (*Seldon v. Clarkson Wright & Jakes*, 2012). At the European Court of Justice, Advocate General Mazák stated:

So far as non-discrimination on grounds of age, especially, is concerned, it should be borne in mind that that prohibition is of a specific nature in that age as a criterion is a point on a scale and that, therefore, age discrimination may be graduated. It is therefore a much more difficult task to determine the existence of discrimination on grounds of age than for example in the case of discrimination on grounds of sex, where the comparators involved are more clearly defined. (*Félix Palacios de la Villa v. Cortefiel Servicios SA*, 2007)

The view that age should be treated differently is strongly entrenched. One does not simply compare the treatment of an individual or a particular age group to another individual or age group. One must instead assess age bias in terms of intergenerational fairness with many possibilities to enable a justification of the discrimination experienced.

Yet in reality, while age discrimination does, of course, take place at a particular age, it is often also, perhaps more importantly, linked to other grounds of discrimination. It is the intersection of age and gender, for example, which can create particular disadvantage for older women in comparison, say, to older men (Bisom-Rapp and Sargeant, 2014).¹ An Irish government report noted:

Older people’s experiences have been acquired through living within a particular set of social, economic and cultural circumstances. So, the experience of an older professional man can be quite different from the experience of an older woman . . . Within the group of older people, there are people who suffer and/or have suffered discrimination on other grounds. (Equality Authority of Ireland, 2004)

This complexity has been recognized judicially. Madame Justice L’Heureux-Dubé, for example, stated in the Canadian Supreme Court that

categorising such discrimination as primarily racially orientated, or primarily gender orientated, misconceives the reality of discrimination as it is experienced by individuals. Discrimination may be experienced on many grounds, and where this is the case, it is not really meaningful to assert that it is one or the

other. It may be more realistic to recognise that both forms of discrimination may be present and intersect. (*Canada (A.G.) v. Mossop*, 1993)

In both the United States and the United Kingdom, however, legal doctrine is in general not open to claims of intersectional discrimination, and there are evidentiary barriers to plaintiffs' suits. Although American academics are credited with producing seminal writings on complex discrimination (e.g. Crenshaw, 1989; European Commission, 2007), U.S. courts have not, in general, developed a uniform approach to multiple discrimination, especially claims of intersectional discrimination. The case law is decidedly mixed, with, for example, some courts embracing the notion of intersectional discrimination when the plaintiff alleges she is the victim of combined sex and race discrimination (*B.K.B. v. Maui Police Dept.*, 2002), and others refusing to do so and requiring a plaintiff to proceed separately on each of the claims (*DeGraffenreid v. Gen. Motors Assembly Div.*, 1976).

There is only one comprehensive empirical study of the litigation success rate of those who bring multiple discrimination claims in the U.S. courts. That study examined a representative sample of equal employment opportunity law decisions issued by U.S. federal courts between 1965 and 1999. The authors stated that they found "that both intersectional demographic characteristics and legal claims are associated with dramatically reduced odds of plaintiff victory. Strikingly, plaintiffs who make intersectional claims are only half as likely to win their cases as plaintiffs who allege a single basis of discrimination" (Best et al., 2011).

There is no provision in U.K. law to handle multiple discrimination cases except as separate claims under each ground of discrimination. Nonetheless, courts have on occasion recognized the existence of ordinary multiple and additive multiple discrimination such as in *Ministry of Defence v. DeBique*, a claim for race and sex discrimination. The court stated:

In general, the nature of discrimination is such that it cannot always be sensibly compartmentalized into discrete categories. Whilst some complainants will raise issues relating to only one or other of the prohibited grounds, attempts to view others as raising only one form of discrimination for consideration will result in an inadequate understanding and assessment of the complainant's true disadvantage. (*Ministry of Defence v. DeBique*, 2010)

Despite such occasional expressions by judges, however, one sees that law, society's chosen tool for combating age bias, is deficient in its ability to protect older workers from the complex ways age discrimination actually occurs.

CONCLUSION

As lawyers and legal academics, we of course support the notion that legal solutions are integral to tackling society's thorniest problems. Yet, when one looks at how age discrimination law falls short of the mark in protecting older workers, one should hesitate to simply propose doctrinal tinkering around the margins. In a recent article on the lifetime disadvantages faced by women and girls, we concluded that the policy-making approach in the U.K. and the U.S., which we refer to as disjointed incrementalism,² would fail to bring about the kind of massive social change necessary to put women on an equal footing with men, and to ensure working women a dignified retirement (Bisom-Rapp and Sargeant, 2014).

The same may be true for older workers overall. The global recession brought about deterioration in the quality of work for older workers. Employment for this group became more fragile, inconstant, and insecure. High rates and lengths of long-term unemployment were especially harmful. The full extent of retirement insecurity for millions was revealed (Bisom-Rapp et al., 2011). Fixing a problem of this magnitude requires more than bringing age discrimination protection in line with the protection workers have from other forms of discrimination.³ Equal prohibitions of bias are necessary but insufficient to achieve economic security for our aging populations. General labor standards, such as those restricting layoff or redundancy and the requirement of adequate severance or redundancy pay for those who lose their jobs, are just as important. Ensuring sufficient unemployment compensation is provided by the government is necessary as well. Finally, tackling the retirement income crisis in the U.K. and the U.S. is of paramount importance. Until our respective governments are willing to take a hard look at the manifest ways in which we consign significant numbers of older people to vulnerability, and to address those problems in a coordinated fashion, the elimination of age bias as a societal fact will remain elusive.

NOTES

1. The intersection of age and gender does not of course apply just to older women. In a British case, two young, Afro-Caribbean women served as waitresses during a dinner attended by 400 men. A speaker at the dinner made sexually and racially offensive remarks to them. The waitresses, lacking other ways of framing their complaint, claimed these actions constituted race discrimination under the Race Relations Act 1995 (now the Equality Act 2010) (*Burton v. De Vere Hotels*, 1997). They were actually, however, singled out because they were young, black, and female. In a different legal

system, which recognized intersectional discrimination, they perhaps should have been able to bring a complaint of being discriminated against because they were young black women.

2. *Disjointed incrementalism* is policy-making characterized by “trial by error,” small rather than grand steps, decision-making without central coordination, and a preoccupation with existing resources (Lindblom, 1979).
3. Some U.S. states have laws with stronger protections from age discrimination as compared with the ADEA. A U.S. study examined whether stronger state-level age discrimination laws moderated adverse effects on older workers during the Great Recession. Counter-intuitively, those older workers living in states with the strongest protection against age discrimination fared worse than those who lived in states with weaker protection from age bias. We do not modify our recommendations for strengthening national age bias law in light of this finding. We do, however, agree with the study’s authors that “making it more difficult to discriminate in hiring” during times of economic turmoil would help (Neumark and Button, 2013).

CASES

European Court of Justice

Félix Palacios de la Villa v. Cortefiel Servicios SA, (C-411/05) [2007] IRLR 989.

Canada

Canada (A.G.) v. Mossop, [1993] 1 SCR 554.

United Kingdom

Burton v. De Vere Hotels [1997] ICR 1, [1996] IRLR 596.

Ministry of Defence v. DeBique, [2010] UKEAT/0048/09, IRLR 471.

Seldon v. Clarkson Wright & Jakes (A Partnership), [2012] UKSC 16, IRLR 590.

United States

B.K.B. v. Maui Police Dept., 276 F.3d 1091 (9th Cir. 2002).

DeGraffenreid v. Gen. Motors Assembly Div., 413 F. Supp. 142 (E.D. Mo. 1976), *aff’d in part, rev’d in part*, 558 F.2d 480 (8th Cir. 1977).

E.E.O.C. v. Wyoming, 460 U.S. 226 (1983).

Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004).

Gross v. FBL Financial Services, Inc., 557 U.S.167 (2009).

Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993).

Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976).

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

Western Airlines, Inc. v. Criswell, 472 U.S. 400 (1985).

REFERENCES

- AARP (2014). *Staying ahead of the Curve 2013: The AARP Work and Career Study – Older Workers in an Uneasy Job Market*. Washington, DC: AARP.
- Acas (2014). *Age and the Workplace: Putting the Equality Act 2010 and the Removal of the Default Retirement Age (DRA) 2011 into Practice*. London: Acas.
- Adams, S., and Neumark, D. (2006). Age discrimination in U.S. labor markets: A review of the evidence. In W.M. Rodgers III (ed.), *Handbook on the Economics of Discrimination* (pp. 187–211). Cheltenham, UK and Northampton, MA, USA: Edward Elgar Publishing.
- Age Discrimination in Employment Act, 29 U.S.C. §§621–634.
- Alon-Shenker, P. (2014). Nonhiring and dismissal of senior workers: Is it all about the money? *Comparative Labor Law and Policy Journal*, 35(2), 159–190.
- Antonucci, T.C., Blieszner, R., and Denmark, F.L. (2010). Psychological perspectives on older women. In H. Landrine and N.F. Russo (eds.), *Handbook of Diversity in Feminist Psychology* (pp. 233–257). New York: Springer.
- Best, R.K., Edelman, L.B., Krieger, L.H., and Eliason, S.R. (2011). Multiple disadvantages: An empirical test of intersectionality theory in EEO litigation. *Law and Society Review*, 45, 991–1024.
- Beveridge, W. (1942). *Social Insurance and Allied Services*. London: HMSO.
- Bisom-Rapp, S., and Sargeant, M. (2013). Diverging doctrine, converging outcomes: Evaluating age discrimination law in the United Kingdom and the United States. *Loyola University Chicago Law Journal*, 44(3), 717–770.
- Bisom-Rapp, S., and Sargeant, M. (2014). It's complicated: Age, gender, and lifetime discrimination against working women – the United States and the U.K. as examples. *Elder Law Journal*, 22(1), 1–110.
- Bisom-Rapp, S., Frazer, A., and Sargeant, M. (2011). Decent work, older workers and vulnerability in the economic recession: A comparative study of Australia, the United Kingdom, and the United States. *Employee Rights and Employment Policy Journal*, 15(1), 43–121.
- Blaine, B.E. (2013). *Understanding the Psychology of Diversity*. Los Angeles: Sage Publications.
- Blanpain, R., Bisom-Rapp, S., Corbett, W.R., Josephs, H.K., and Zimmer, M.J. (2012). *The Global Workplace*. New York: Wolters Kluwer.
- Butler, R.N. (1969). Age-ism: Another form of bigotry. *Gerontologist*, 9, 243–246.
- Campion, M. (2009). Remarks before the U.S. Equal Employment Opportunity Commission: Age discrimination in the 21st century – Barriers to the employment of older workers. Retrieved from: <http://www.eeoc.gov/eeoc/meetings/7-15-09/transcript.cfm>.
- Canetto, S.S. (2001). Older adult women: Issues, resources, and challenges. In R.K. Unger (ed.), *Handbook of Psychology of Women and Gender* (pp. 183–197). New York: John Wiley.
- Council Directive 2000/78, Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. (L303) 16 (EC).
- Craft, C. (1988). *Too Old, Too Ugly, and Not Deferential to Men: An Anchorwoman's Courageous Battle against Sex Discrimination*. Rocklin, CA: Prima Publishing.
- Crenshaw, K.W. (1989). Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist policies. *University of Chicago Legal Forum*, 140, 139–167.

- Department for Work and Pensions (2012). *Attitudes to Age in Britain 2010/11*. London: DWP. Retrieved from: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/214361/ihr7.pdf.
- Employee Retirement Income Security Act, 29 U.S.C. §§1001–1191c.
- Employment Equality (Age) Regulations 2006, SI 2006/1031.
- Equality Act 2010, c.15.
- Equality Authority of Ireland (2004). *Implementing Equality for Older People*. Dublin: Equality Authority of Ireland. Retrieved from: <http://www.equality.ie/en/Publications/Policy-Publications/Implementing-Equality-for-Older-People.html>.
- European Commission (2007). *Tackling Multiple Discrimination: Practices, Policies and Laws*. Brussels: European Commission. Retrieved from: <http://ec.europa.eu/social/main.jsp?catId=738&pubId=51>.
- European Commission (2009). *Discrimination in the EU in 2009*. European Commission. Retrieved from: http://ec.europa.eu/public_opinion/archives/ebs/ebs_317_en.pdf.
- Friedman, L.M. (1984). *Your Time Will Come: The Law of Age Discrimination and Retirement*. New York: Russell Sage Foundation.
- Grant, D. (2011). Older women, work, and the impact of discrimination. In M. Sargeant (ed.), *Age Discrimination and Diversity: Multiple Discrimination from an Age Perspective* (pp. 41–64). Cambridge: Cambridge University Press.
- Johnson, J.J. (2009). Reasonable factors other than age: The emerging specter of ageist stereotypes. *Seattle University Law Review*, 33, 49–91.
- Johnston, D.B. (2010). Statement before the U.S. Commission on Civil Rights: Age discrimination in employment in the current economic crisis. Retrieved from: <http://www.usccr.gov/calendar/trnsrpt/061110ccr1.pdf>.
- Jolls, C. (1996). Hands-tying and the Age Discrimination in Employment Act. *Texas Law Review*, 74, 1813–1846.
- Katz, M.J. (2010). Gross disunity. *Pennsylvania State Law Review*, 114(3), 857–889.
- Krieger, L.H. (1995). The content of our categories: A cognitive bias approach to discrimination and equal employment opportunity. *Stanford Law Review*, 47, 1161–1248.
- Lindblom, C.E. (1979). Still muddling, not yet through. *Public Administration Review*, 39, 517–526.
- McCormick, M.L. (2012). Decoupling employment. *Lewis and Clark Law Review*, 16, 499–525.
- McMullin, J.A., and Berger, E.D. (2006). Gendered ageism/age(ed) sexism: The case of unemployed older women. In T.M. Calasanti and F. Slevin (eds.), *Age Matters: Realigning Feminist Thinking* (pp. 201–223). New York: Routledge.
- Minda, G. (1997). Opportunistic downsizing of aging workers: The 1990s version of age and pension discrimination in employment. *Hastings Law Journal*, 48, 511–576.
- Monteith, M.J., Zuwerink, J.R., and Devine, P.G. (1994). Prejudice and prejudice reduction: Classic challenges, contemporary approaches. In P.G. Devine, D.L. Hamilton, and T.M. Ostrom (eds.), *Social Cognition: Impact on Social Psychology* (pp. 323–346). New York: Academic Press.
- Moore, S. (2009). “No matter what I did I would still end up in the same position”: Age as a factor defining older women’s experience of labour market participation. *Work, Employment and Society*, 23, 655–671.

- Nelson, T.D. (2011). Ageism: The strange case of prejudice against the older you. In R.L. Wiener and S.L. Willborn (eds.), *Disability and Aging Discrimination: Perspectives in Law and Psychology* (pp. 37–47). New York: Springer.
- Neumark, D., and Button, P. (2013). *Did Age Discrimination Protections Help Older Workers Weather the Great Recession?*, Research Paper No. 2013-287. Ann Arbor: Michigan Retirement Research Center.
- Porter, N.B. (2003). Sex plus age discrimination: Protecting older women workers. *Denver University Law Review*, 81, 79–112.
- Posthuma, R., and Campion, P. (2009). Age stereotypes in the workplace: Common stereotypes, moderators, and future research directions. *Journal of Management*, 35, 158–188.
- Rhode, D.L. (2009). The injustice of appearance. *Stanford Law Review*, 61(5), 1033–1102.
- Rothenberg, J.Z., and Gardner, D.S. (2011). Protecting older workers: The failure of the Age Discrimination in Employment Act of 1967. *Journal of Sociology and Social Welfare*, 39, 9–30.
- Rozycki, C.J., and Sullivan, E.J. (2010). Employees bringing disparate-impact claims under the ADEA continue to face an uphill battle despite the Supreme Court's decisions in *Smith v. City of Jackson* and *Meacham v. Knolls Atomic Power Laboratory*. *A.B.A. Journal of Labor and Employment Law*, 26(1), 1–22.
- Sargeant, M. (2013). *Discrimination and the Law*. London: Routledge.
- Schmidt, D.F., and Boland, S. (1986). Structure of perceptions of older adults: Evidence for multiple stereotypes. *Psychology and Aging*, 1, 255–260.
- Suk, J.C. (2012). From antidiscrimination to equality: Stereotypes and the life cycle in the United States and Europe. *American Journal of Comparative Law*, 60, Winter, 75–98.
- Title VII of the Civil Rights Act, 42 U.S.C §2000e *et seq.*
- U.N. Secretary-General (2009). Follow-up to the Second World Assembly on Ageing: Report of the Secretary-General. U.N. Doc. A/64/127.
- U.S. Department of Labor (1965). The older American worker, age discrimination in employment: Report of the Secretary of Labor to the Congress under Section 715 of the Civil Rights Act of 1964. Washington, DC.
- Winerip, M. (2013). Three men, three ages: Who do you like? *New York Times*, July 23. Retrieved from: http://www.nytimes.com/2013/07/23/booming/three-men-three-ages-who-do-you-like.html?pagewanted=all&_r=0.
- Wood, G., Wilkinson, A., and Harcourt, M. (2008). Age discrimination and working life: Perspectives and contestations – a review of the contemporary literature. *International Journal of Management Reviews*, 10(4), 425–442.
- Zimmer, M.J. (1996). The emerging uniform structure of disparate treatment discrimination litigation. *Georgia Law Review*, 30, 563–626.

