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THE ADEA @ 50 – MORE RELEVANT THAN EVER

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to the

U.S. Equal Employment Opportunity Commission

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"Age is a number, not a credential. … By removing the lens of age as a way to view existing or potential employees, we shift the focus to their abilities, skills, and knowledge."[1]

Chair Lipnic and Commissioners Feldblum, Yang, and Burrows, thank you for organizing today's hearing to discuss the Age Discrimination in Employment Act (ADEA) in this 50th anniversary year of its enactment, and for inviting AARP to testify today. On behalf of our more than 37 million members, and workers age 40 and older who constitute roughly 55 percent of the labor force, AARP appreciates this opportunity to share our views and expertise at today's Commission meeting, and we hope that today's hearing will convince the Commission to take action to improve the enforcement of the ADEA.

Introduction

In his 1967 message to Congress urging the enactment of legislation to prohibit employment discrimination against older workers, President Lyndon Johnson emphasized that "[h]undreds of thousands not yet old, not yet voluntarily retired, find themselves jobless because of arbitrary age discrimination."[2] Prior to the ADEA's passage, according to a 1965 report issued by the Secretary of Labor, approximately *half* of all private sector job openings *explicitly* barred applicants over age 55, and a quarter barred consideration of those over age 45.[3] Help wanted ads could say "only workers under 35 only need apply" and employers had unbridled authority to retire older workers based solely on age. Not surprisingly, workers 45 and older then comprised 27% percent of the unemployed and 40 percent of the long-term unemployed.[4]

The ADEA is firmly grounded in this nation's civil rights era. Age discrimination was proposed to be part of the Civil Rights Act of 1964.[5] Though not ultimately included, that law directed the Secretary of Labor to conduct a study of age discrimination and report back to Congress.[6] The enactment of the ADEA in 1967 – amidst the enactment of the Equal Pay Act of 1963, the Civil Rights Act of 1964 and the Voting Rights Act of 1965 and the Fair Housing Act in 1968 – was an important and integral part of Congressional actions to define and protect civil rights in the 1960s. President Johnson viewed the passage of the ADEA as a fundamental part of his civil rights legacy as well as his efforts to address the significant problems facing older Americans.[7]

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[1] L. Trawinski, *Disrupting Aging in the Workplace: Profiles in Intergenerational Diversity Leadership* 3 (AARP Pub. Policy Inst., Oct. 2016), *available at* http://www.aarp.org/content/dam/aarp/ppi/2016-11/213719%20Disrupt%20Aging%20in%20the%20Workforce%20Report_FINAL_links.pdf [hereinafter *Disrupting Aging in the Workplace]*.

[2] President Lyndon B. Johnson: *Special Message to the Congress Proposing Programs for Older Americans* (Jan. 23, 1967) (proposing several legislative measures including the ADEA), *available at* http://www.presidency.ucsb.edu/ws/?pid=28139.

[3] U.S. Dep't of Labor, *The Older Worker: Age Discrimination in Employment*, Report of the Secretary of Labor Under Section 715 of the Civil Rights Act of 1964, 6 (1965) ("Wirtz Report"); 113 Cong. Rec. 1089-90 (Jan. 23, 1967).

[4] *Aid to the Aged, Message from the President of the United States transmitting a Review of Measures Taken to Aid the Older Americans and Recommendations for Legislation to Provide Further Aid*, H.R. Doc. No. 90-40, 7 (1967).

[5] D. O'Meara, *Protecting the Growing Number of Older Workers: The Age Discrimination in Employment Act* 11-12, n. 24 (Univ. of Penn., The Wharton School, Industrial Research Unit, 1989) (citing 110 Cong. Rec. 9911 (1964)).

[6] Section 715 of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 265 (1964).

[7] President Johnson also shepherded the enactment of Medicare and Medicaid, the Older Americans Act, and improvements to Social Security.

Since the ADEA's original enactment, the employment landscape for older workers has significantly brightened, owing in large part to the fact that the law has been amended several times and gradually strengthened. Upper age limits on coverage were eliminated – banning mandatory retirement for almost all workers – discrimination in employee benefits has diminished, and significant protections for older workers who are laid off were added. Yet, there is ample evidence that there is still much room for improvement.

In the 50th anniversary year of the enactment of the ADEA, ageism unfortunately remains pervasive in the American labor force. In a 2013 AARP study, nearly two-thirds of older workers reported witnessing or experiencing age discrimination in the workplace, a figure that has remained stubbornly persistent.[8] Of those, 92 percent said such discrimination was very or somewhat common.[9] Some older workers facing age discrimination are higher paid and have the resources to prosecute their complaints, but most are not so privileged:

- In the first quarter of 2017, among wage & salary workers, median weekly earnings for men ages 45-54 were $1,141, while the median for men ages 55-64 was only $1,061. Median weekly earnings for women ages 45-54 were $863, but only $836 for women ages 55-64.[10] Workers earning the median are barely middle-income, and half earn less than these medians.

- Many older workers are low-income. For example, a minimum wage increase to $15/hour would affect a larger share of workers age 55 and older (16.1%) than teens (9.8%). Another 21.8% of those who would benefit from this increase are ages 40-54.[11] Another indication of the significant number of older workers who work for relatively low wages is that nearly one-third of the workers who would benefit from increasing the threshold for overtime pay from the current level of $23,660 up to a proposed level of $50,440/year[12] are age 50 and older.[13]

- Forty-four percent of workers age 58 and over are employed either in physically demanding jobs or jobs with difficult working conditions.[14] Of those, 38% are women and 62% are men.[15] These jobs include retail salespersons, maids and housecleaners, personal care & home care aides, hairdressers, and cashiers – occupations dominated by women – as well as occupations dominated by men such as truck drivers, laborers, construction workers, and janitors.

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[8] AARP, *Staying Ahead of the Curve 2013: The AARP Work and Career Study, Older Workers in an Uneasy Job Market* 28, Table 10 (January, 2014) (64% in 2012, 60% in 2007, and 67% in 2002), *available at* http://www.aarp.org/content/dam/aarp/research/surveys_statistics/general/2014/Staying-Ahead-of-the-Curve-2013-The-Work-and-Career-Study-AARP-res-gen.pdf.

[9] *Id*., at 30.

[10] U.S. Bureau of Labor Statistics, *Usual Weekly Earnings of Wage and Salary Workers, First Quarter 2017*, Table 3 (Apr. 18, 2017), *available at* https://www.bls.gov/news.release/pdf/wkyeng.pdf.

[11] D. Cooper, *Raising the minimum wage to $15 by 2024 would lift wages for 41 million American workers* 10, Fig. E (EPI, Apr. 26, 2017), *available at* http://www.epi.org/files/pdf/125047.pdf.

[12] U.S. Dept. of Labor, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Proposed Rule*, 80 Fed. Reg. 38516 (July 6, 2015).

[13] Comments of AARP re: RIN 1235–AA11, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees 3 (Sept. 4, 2015), *available at* https://www.regulations.gov/document?D=WHD-2015-0001-5327 (but note the DOL final rule adopted a lower threshold level of $47,476 annually, so the number of age 50+ workers helped will be slightly lower).

[14] C. Bucknor & D. Baker, *Still Working Hard: An Update on the Share of Older Workers in Physically Demanding Jobs* 1 (CEPR, Mar. 2016), *available at* http://cepr.net/images/stories/reports/still-working-hard-2016-03.pdf.

[15] *Id*., at 9, Table 3a.

The ADEA and other civil rights laws are intended to ensure equal opportunity, regardless of a worker's occupation, salary, or status. Over the last seven years, AARP has testified before this Commission and participated in meetings about several manifestations of age discrimination that persist: hiring discrimination against older workers (including age-related inquiries on job applications), blatant discrimination against older workers by the high-tech industry, mandatory retirement imposed on employees who are "partners" in name only, and the age-based harassment many older workers face on the job.

Both in terms of statutory language, and how that language has been interpreted by the courts, in many respects the ADEA has become a second-class civil rights law, providing older workers far less protection than other civil rights laws. Too often over the years, the Supreme Court has failed to interpret the ADEA as a remedial statute, but instead narrowly interpreted its protections and broadly construed its exceptions. As was the case with the Americans with Disabilities Act (ADA) – where Congress was compelled to restore the statute's strength by enacting the Americans with Disabilities Act Amendments Act of 2008 – AARP believes that it is well past time to update and strengthen the ADEA to respond to the challenges facing today's older workers in today's workplace. While statutory amendments are a job for Congress, the EEOC – unlike for Title VII – has substantive regulatory power under the ADEA, and there is much that the agency can do within its authority to improve protections under and enforcement of the ADEA. Today, we focus our testimony on steps the EEOC can take to more effectively address age discrimination.

I. ADEA Achievements, Continuing Problems

A. Hiring Discrimination

Addressing age discrimination in hiring was Congress' "primary purpose" when it enacted the ADEA.[16] The ADEA makes it unlawful to "fail or refuse to hire"[17] any individual because of age, and age-related specifications in job postings are clearly prohibited.[18] Today, older workers are the least likely age group to be unemployed, a concrete achievement of the ADEA. In fact, over the past few decades, older workers have been staying in the workforce longer,[19] with workers age 65 and older the fastest growing age category in the workforce.[20] Yet, we also know that age discrimination is alive and well, because once older workers *do* lose their jobs, they experience far longer spells of unemployment than younger workers.[21] During the Great Recession, older workers experienced record levels of unemployment,[22] with the *average* duration of unemployment during the depths of the recession exceeding one year – many times longer than

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[16] *See Ohio Pub. Emp. Ret. Sys. V. Betts*, 492 U.S. 158, 179 (1989) (quoting S. Rep. No. 90-723, at 4) (1967)).
[17] 29 U.S.C. § 623(a)(1).
[18] 29 C.F.R. § 1625.4.
[19] S. Rix, *America's Aging Labor Force* 1, Exh. 1 (AARP Sept. 2014), *available at* http://www.aarp.org/content/dam/aarp/ppi/2014-10/aging-labor-force-fact-sheet-aarp.pdf.
[20] M. Toossi, & E. Torpey, *Older workers: Labor force trends and career options*, Charts 1 & 2 (BLS, May 2017), *available at* https://www.bls.gov/careeroutlook/2017/article/older-workers.htm.
[21] K. Kosanovich & E. Theodossiou Sherman, "Trends In Long-term Unemployment" 5 *Spotlight on Statistics* (BLS, Mar. 2015), *available at* https://www.bls.gov/spotlight/2015/long-term-unemployment/pdf/long-term-unemployment.pdf.
[22] U.S. Bureau of Labor Statistics, "Record unemployment among older workers does not keep them out of the job market," *Issues in Labor Statistics*, Summary 10-04 (Mar. 2010) *available at* https://www.bls.gov/opub/ils/pdf/opbils81.pdf.

that for younger workers[23] – with many being out of work for two years or more (the "99ers" who collected extended unemployment benefits for 99 weeks). The EEOC's own docket – in cases such as *Texas Roadhouse*[24] where the restaurant chain had a pattern and practice of refusing to hire older workers for front-of-the-house positions – demonstrates that blatant age discrimination in hiring persists. Age-based stereotypes are even more prevalent in certain industries. As the EEOC has heard, for example, there is substantial evidence that age discrimination in hiring is unconcealed and rampant in the high-tech industry;[25] the entertainment industry is also well-known for its flagrant age discrimination in hiring.[26]

Many employers, however, are engaged in practices that are only slightly less blatant but equally discriminatory. For instance, specifying a minimum number of years for a position is legitimate, but specifying a *maximum* number of years of experience (i.e., no more than 10 years of experience) has a clear and predictable disparate impact on older applicants.[27] Similarly, restricting all recruitment efforts for entry-level positions to college campuses and requiring a college-affiliated email address in order to apply will have the foreseeable effect of excluding the vast majority of older applicants.[28] Other employers have required job candidates to be "digital natives." A digital native is an individual who grew up using technology from an early age, versus a "digital immigrant," which refers to someone who adopted technology later in life. This distinction is clearly age-based and can be used to unreasonably and thus unlawfully screen out older applicants.[29]

Some online job-search sites and applications also can screen out older applicants. For example, some require applicants to include dates of birth or graduation dates in fields that cannot be bypassed. In other words, the applicant cannot submit the application without answering the questions. These practices deter older individuals from applying, as many will wonder why they should bother trying when their age will be obvious to the employer. Some sites have taken this type of age-related inquiry a step further: instead of asking for dates of graduation or dates of prior employment, they use drop-down menus that only go back, say, to the 1980s, thereby excluding older applicants whose relevant experience pre-dates the earliest cut-off date. The

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[23] *See e.g.,* S. Rix *The Employment Situation, May 2013: Some Good News for Older Workers Tempered by Continuing Problems* 2 (AARP, June 2013), *available at* http://www.aarp.org/content/dam/aarp/research/public_policy_institute/econ_sec/2013/the-employment-situation-may-2013-AARP-ppi-econ-sec.pdf.

[24] EEOC, *Texas Roadhouse to Pay $12 Million to Settle EEOC Age Discrimination Lawsuit* (press release) (Mar. 31, 2017), *available at* https://www.eeoc.gov/eeoc/newsroom/release/3-31-17.cfm.

[25] *Innovation Opportunity: Examining Strategies to Promote Diverse and Inclusive Workplaces in the Tech Industry*, Testimony of Laurie McCann, AARP, to the EEOC, May 18, 2016, *available at* https://www.eeoc.gov/eeoc/meetings/5-18-16/mccann.cfm [hereinafter *AARP D&I Testimony*]; Noam Scheiber, "The Brutal Ageism of Tech," *New Republic*, (March 23, 2014), *available at* https://newrepublic.com/article/117088/silicons-valleys-brutal-ageism.

[26] *See, e.g*., C. Agard, "90210 actress Gabrielle Carteris wants IMDb, casting sites to remove actors' ages," *EW* (Aug. 24, 2016), *available at* http://ew.com/article/2016/08/24/90210-gabrielle-carteris-actor-ages-removed-bill/; K. Buchanan, "Leading Men Age, But Their Love Interests Don't," *Vulture.com* (Apr. 18, 2013) *at* http://www.vulture.com/2013/04/leading-men-age-but-their-love-interests-dont.html?mid=twitter_vulture.

[27] This lawfulness of maximum-years-of-experience requirements is currently being litigated in *Villarreal v. R.J. Reynolds Tobacco Co.,* 839 F.3d 958 (11th Cir. 2016*)* (en banc), *petition for cert. filed* Feb. 2, 2017 (No. 16-971) [hereinafter *Villarreal*], and in *Kleber v. CareFusion Corp.*, 2015 U.S. Dist. LEXIS 157645 (Nov. 23, 2015, N.D. Ill) (on appeal to the U.S. Court of Appeals for the Seventh Circuit) (No. 17-1206) [hereinafter *Kleber*].

[28] *See e.g*., *Rabin v. PricewaterhouseCoopers, LLP*, 2017 U.S. Dist. LEXIS 23224 (Feb. 17, 2017, N.D. Cal.) [hereinafter *Rabin*].

[29] V. Giang, "*This is the latest way employers mask age bias, lawyers say," Fortune* (May 4, 2015), *available at* http://fortune.com/2015/05/04/digital-native-employers-bias/.

Illinois Attorney General recently sent a letter[30] to nationwide online job-search companies including Monster and CareerBuilder requesting information and warning them that such practices are age discriminatory. The newest and perhaps most pernicious frontier of age discrimination in hiring screens, though, may be the use of "big data" – the collection and compilation of data from multiple sources, to which a robo-recruiting algorithm is applied – to recruit and refer job applicants.[31] Discrimination buried deep in multiple datasets and mathematical algorithms will likely be more difficult to detect. However, at least one study has found that, under such algorithms, age was the biggest predictor of being invited to interview, with the youngest and the oldest applicants least likely to be successful."[32] At minimum, all of these age-related hiring practices often deter older job-seekers from applying.

The Supreme Court affirmed that disparate impact discrimination is cognizable under the ADEA,[33] and both the statute[34] and the EEOC's ADEA disparate impact regulations,[35] which AARP strongly supported, are clear that "individuals" are protected, whether they are job applicants or employees. In light of the fact that hiring discrimination was the driving force behind the enactment of the ADEA, it is thus disheartening that some courts have held that job applicants cannot challenge hiring discrimination practices such as those discussed above under the disparate impact theory.[36] The ADEA cannot fulfill its central mandate to abolish age discrimination in hiring unless it fully protects applicants for employment, as well as current employees.

B. Mandatory Retirement

The 1986 amendments to the ADEA eliminated the previous age-70 cap and made it unlawful for employers to compel most employees to retire. The amendments did, however, retain a few statutory exemptions (e.g., state and local public safety officers). Significantly, there is no exception that allows for the mandatory retirement of "partners." Instead, partnership is a coverage issue. By definition, a "partner" is an "employer" not an "employee," and thus is not entitled to protection under the ADEA, Title VII, the ADA, the Fair Labor Standards Act (FLSA), or the Employee Retirement Income Security Act (ERISA). Accordingly, it is critical that, as part of discharging its responsibilities, the EEOC must ensure that employers do not evade the ADEA and other civil rights laws by simply labeling its employees as "partners."[37] The EEOC's Compliance Manual lays out six factors to consider to help determine whether an individual is really a partner or director – and thus more akin to an "employer" rather than an "employee"[38] –

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[30] IL Attorney General Lisa Madigan, *Madigan Probes National Job Search Sites Over Potential Age Discrimination* (press release) (Mar. 2, 2017), *available at* http://www.illinoisattorneygeneral.gov/pressroom/2017_03/20170302.html; A. Elejalde-Ruiz, **"**Illinois attorney general warns CareerBuilder, other job-search firms about age bias," *Chicago Tribune* (Mar. 2, 2017) *available at* http://www.chicagotribune.com/business/ct-age-discrimination-careerbuilder-job-search-0303-biz-20170302-story.html.

[31] EEOC, *Use of Big Data Has Implications for Equal Employment Opportunity, Panel Tells EEOC* (press release) (Oct. 13, 2016), *available at* https://www.eeoc.gov/eeoc/newsroom/release/10-13-16.cfm.

[32] *See* S. O'Connor, "The risks of relying on robots for fairer staff recruitment," *Financial Times*, *available at* https://www.ft.com/content/ad40b50c-6e9a-11e6-a0c9-1365ce54b926.

[33] *Smith v. City of Jackson*, 544 U.S. 228 (2005).

[34] 29 U.S.C. § 623(a)(1).

[35] EEOC, Disparate Impact and Reasonable Factors Other Than Age under the Age Discrimination in Employment Act, 77 Fed. Reg. 19080, (Mar. 30, 2012), codified at 29 C.F.R. § 1625.7.

[36] *See Villarreal* and *Kleber, supra* n. 27. *But see Rabin*, *supra* n. 28.

[37] *See Hishon v. King & Spalding*, 476 U.S. 69, 80 n.2 (Powell, J. concurring) (1984).

[38] *See EEOC Compliance Manual*, Threshold Issues § 2-III(A)(1)(d) (undated, page last modified on August 6, 2009) *at* https://www.eeoc.gov/policy/docs/threshold.html#2-III-A-1-d.

or whether the worker is really an employee who is a "partner" in title only. In addition, the EEOC's Office of Legal Counsel informal discussion letters on Accounting Firm Partner Coverage[39] state that whether an individual is really a partner-employer or a covered employee is not determined by a job title, but is instead a factual question.

Although the U.S. Supreme Court followed the EEOC's analysis and looked beyond titles,[40] evasion of the statute continues, most notably by accounting firms, law firms, and medical practices. Employees who have no ownership interest in the firm and no managerial control are often mislabeled as "partners" and sign "partnership" agreements requiring them to retire when they reach their early-to-mid 60s. Mandatory retirement policies taint all aspects of employment from start to finish, including hiring and promotion; a workplace that forces employees out at age 65 is unlikely to want to invest in workers who are in their 50s.

Older workers in these circumstances may be in no position to challenge the imposition of a mandatory retirement age because these experienced workers may want to keep working, and daring to file a complaint could sour their chances for a lateral hire by another firm. Also, even those who make the courageous choice to challenge a partnership agreement mandating involuntary retirement usually find that the agreement is governed by a boilerplate, mandatory (i.e., "forced") requirement to resolve any such dispute in private arbitration, making the EEOC the *only* party that can mount a challenge and protect employee rights.

C. Cases in which Private Enforcement Is Not Meaningfully Available

In addition to cases involving forced arbitration, there are other types of cases in which meaningful redress is not genuinely available through private enforcement, primarily because adequate damages are not available. The ADEA was amended in 1974 to extend coverage to federal, state, and local government employees.[41] Unfortunately, those protections were significantly undermined by court decisions such as *Kimel*[42] that limited congressional power to abrogate state sovereign immunity, with the effect that state government employees who prove discrimination under the ADEA (and ADA) may not collect any money damages to compensate for their losses, they can only receive injunctive relief and attorneys fees. In order to pursue monetary remedies, they must resort to state law, which may be inadequate and less effective than the ADEA.

Similarly, cases of harassment based on age are rarely challenged because the ADEA only permits damages for unpaid wages or other forms of lost compensation (or front pay as an alternative to reinstatement). Liquidated damages equal to double backpay can be awarded for willful violations,[43] but unlike Title VII, the ADEA does not provide for compensatory or punitive damages. Because the ADEA provides no remedy for harassment alone, these cases are not economically feasible for private counsel to bring, and workers who are still employees are unlikely to risk a legal challenge that does not redress their pain and suffering. This is why "virtually all age harassment cases also involve constructive discharge or other age

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[39] EEOC Office of Legal Counsel, *ADEA: Accounting Firm Partner Coverage* (Informal Discussion Letter) (July 25, 2013), *at* https://www.eeoc.gov/eeoc/foia/letters/2013/adea_accounting_firm_coverage_7_25.html;
[39] EEOC Office of Legal Counsel, *ADEA: Accounting Firm Partner Coverage* (Informal Discussion Letter) (July 29, 2013), *at* https://www.eeoc.gov/eeoc/foia/letters/2013/adea_accounting_firm_coverage_7_27.html.
[40] *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003).
[41] Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, §§ 28-29, 88 Stat. 55, 74-76 (1974).
[42] *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000). The same problem arises under *Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001), which also affects older workers with ADA claims.
[43] 29 U.S.C. § 626(b); L.S. Platt & C. Ventrell-Monsees, *Age Discrimination Litigation*, vol. 1, § 6:70.20 (2012 ed.).

discrimination claims – harassment is used as evidence of discriminatory intent to support a prima facie case of discriminatory discharge or some other employment practice – and why there are virtually no harassment-only or harassment-while-still-employed cases under the ADEA."[44]

Limited damages *are* available under the ADEA in most private sector cases in which the worker has experienced an economic loss. However, court decisions such as *Gross v. FBL Financial Services, Inc.*[45] that have heightened the legal standard for prevailing in court have made cases that were already extremely difficult to prove even more difficult. There are reports that private attorneys, and the workers who walk into their offices seeking representation, have been discouraged from bringing ADEA cases.[46]

II. The EEOC Should Strengthen ADEA Protections and Enforcement

When enacting the ADEA, Congress borrowed the statutory language used in Title VII of the Civil Rights Act of 1964 to prohibit other forms of discrimination and imported it *in haec verba* into the ADEA.[47] Doing so should have ensured that age discrimination victims would enjoy rights comparable to other groups, and for the ADEA's first thirty years or so, it mostly did. Lately, however, that has not been the case.[48] Instead, the Supreme Court and other federal courts have emphasized the differences between the two statutes, and used those differences to diminish the ADEA's protections and erect barriers to age discrimination suits. Some misguided court decisions and shortcomings of the ADEA can only be fixed by Congress. Nevertheless, there is much the EEOC can do within its existing authority to update and strengthen substantive policies and to bolster its enforcement activities under the ADEA.

A. ADEA Policy Improvements

1. Strengthen regulations on "help wanted notices and advertisements" and "employment applications"

As noted above, some employers persist in using age-based qualifications in their job postings, or use age-related inquiries and screening procedures in their job application process, especially online. Originally drafted by the Labor Department in 1968, the EEOC's current regulations[49] contain weak and internally contradictory language that does little to deter improper employer behavior or protect the rights of older workers. The regulations expressly disclaim that asking for an applicant's age or date of birth, in and of itself, constitutes unlawful behavior, stating only that such requests will be "closely scrutinized." Whether this ever happens – and how, when, and by

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[44] *Age Harassment in the American Workplace and What the EEOC Can Do About It*, Remarks of Dan Kohrman, AARP, to the EEOC Select Task Force on the Study of Harassment in the Workplace, Dec. 7, 2015, *available at* https://www.eeoc.gov/eeoc/task_force/harassment/12-7-15/kohrman.cfm [hereinafter *AARP Harassment Testimony*]. The facts of *Taaffe v. Drake* actually illustrate both this point and the challenges faced by state employees in being able to mount a case after *Kimel*. *Taaffe v. Drake*, No. 2:15-CV-2870 (filed Sep. 29, 2015, S.D. Ohio), *available at* http://www.leagle.com/decision/In%20FDCO%2020160502D15/Taaffe%20v.%20Drake.

[45] 557 U.S. 167, 129 S. Ct. 2343 (2009).

[46] *See* E. Olson, "Claims of Age Bias Rise, but Standards of Proof Are High," *N.Y. Times*, Mar. 18, 2016, *available at* https://www.nytimes.com/2016/03/19/your-money/trying-to-make-a-case-for-age-discrimination.html?_r=0.

[47] *See Lorillard v. Pons*, 434 U.S. 575, 584 (1978).

[48] *See* A. Cohen, "After 40 Years, Age Discrimination Still Gets Second-Class Treatment," *N.Y. Times*, Nov. 6, 2009, *available at* http://www.nytimes.com/2009/11/07/opinion/07sat4.html.

[49] 29 C.F.R. §§ 1625.4 & 1625.5.

whom – is uncertain, but appears to be rare. Moreover, the regulations state that job postings that limit applicants to college students, recent college graduates, and the like *do* violate the law, yet they are silent on other wording or practices that amount to the same thing. AARP urges the EEOC to make it a top priority to revise its regulations to:

- make age-related inquiries and specifications presumptively unlawful;
- reinforce that practices like maximum experience requirements and requirements for applicants to be affiliated with a university *are* age-related;
- bar requests for date of birth, graduation dates, or similar information unless age is bona fide occupational qualification;
- prohibit practices of online job sites and others that require entry of age to complete an application, use drop-down menus that contain age-based cut-off dates, or utilize selection criteria or algorithms that have the effect of screening out older applicants.

These regulations should be issued as substantive "legislative" regulations, not as interpretative regulations.[50]

2. Strengthen Guidance on Age-Based Harassment

Earlier this year, the Commission sought public input on proposed enforcement guidance on harassment, based on the findings and report of its Select Task Force on Harassment.[51] AARP testified before the Task Force,[52] and we submitted comments on the proposed guidance.[53] Final guidance has not yet been issued, and AARP urges the Commission to heed the concerns expressed in our comments on the guidance and its treatment of age-based harassment. In particular, it is critical for the guidance to make clear that no additional showing of discriminatory animus should be required in order for a worker to demonstrate age-based harassment. Remarks that are dismissive and derogatory can be based on negative, age-based stereotypes that set older workers apart, without being based on or evincing animus. Yet, they still have the effect of creating a discriminatory environment, and deny equal opportunity in a workplace for older workers. The EEOC's final guidance should reflect this and include appropriate examples.

3. Issue Clarifications to Other Guidance

There are some ADEA cases in which courts have reached questionable results that are contrary to what AARP believes is required by the law and the EEOC's regulations. For instance, as noted above, some courts have ruled that job applicants may not challenge age discrimination in hiring under the ADEA based on disparate impact, when there is no such distinction in the law or regulations. Others have ruled that compensatory and punitive damages are not available for retaliation in violation of the ADEA,[54] despite the EEOC's longstanding guidance that clearly states the opposite.[55] There have also been decisions in which courts have misconstrued the

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[50] *See generally*, EEOC, *What You Should Know about EEOC Regulations, Subregulatory Guidance and other Resource Documents* (undated), *at* https://www1.eeoc.gov//eeoc/newsroom/wysk/regulations_guidance_resources.cfm?renderforprint=1.
[51] EEOC Office of Legal Counsel, *Proposed Enforcement Guidance on Unlawful Harassment* (posted Jan. 10, 2017), *at* https://www.regulations.gov/document?D=EEOC-2016-0009-0001.
[52] *AARP Harassment Testimony, supra* n. 44.
[53] Comments of AARP re: *Proposed Enforcement Guidance on Unlawful Harassment* (Mar, 21, 2017), *available at* https://www.regulations.gov/document?D=EEOC-2016-0009-0106.
[54] *Vaughan v. Anderson Reg'l Med. Ctr.*, 849 F.3d 588 (5th Cir. 2017) *petition for cert. filed* May 16, 2017 (No. 16-1386).
[55] *EEOC Enforcement Guidance on Retaliation and Related Issues*, IV(B)(2), at 59-60 (Aug. 25, 2016), *available at* https://www.eeoc.gov/laws/guidance/upload/retaliation-guidance.pdf. This guidance supersedes

"but-for" standard enunciated in *Gross,* and others that have placed unwarranted limits on cases brought by public employees.

Consequently, AARP also urges the EEOC to clear up some of these problems by making the following straightforward changes to relevant regulations/guidance in order to make the Commission's position absolutely clear to the courts and provide stronger protection against age discrimination:

- Add a definition of "individuals" to §1625.1 that includes both applicants and employees, so that it is abundantly clear that applicants may bring disparate impact claims to challenge discriminatory hiring policies and practices;
- Clarify that, despite *Gross (*and *Nassar*[56]*)*:
    - "But-for" does not mean "*sole* cause" – discrimination need only be "a" but-for cause, not "the" but-for cause;[57]
    - Cases involving mixed/multiple motives under the ADEA remain cognizable even if a but-for standard is applied;[58]
    - Cases involving intersectional discrimination such as sex and age discrimination against older women remain cognizable (*Gross* does not demand a single basis);[59]
    - Federal sector employees can still proceed under the pre-*Gross*, burden-shifting framework for mixed motive claims.[60]
- Regarding public employees under the ADEA:
    - Federal sector employees may assert claims based on a disparate impact theory of liability;[61]
    - A cause of action for injunctive relief exists under the ADEA against state employers.[62]

B. More Robust Enforcement of the ADEA

According to the EEOC General Counsel's annual report for FY 2016, of the 86 merits suits filed last year, only two ADEA cases were brought,[63] and neither appear to have been systemic

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prior 1998 guidance, but that earlier guidance took the same position on damages available under the ADEA for retaliation, *EEOC Compliance Manual*, Section 8, Retaliation 8-III(B)(1), at 29 (May 20, 1998), *available at* https://www.supremecourt.gov/opinions/URLs_Cited/OT2005/05-259/05-259.pdf.

[56] *Univ. of Texas Southwestern Medical Center v. Nassar*, 570 U.S. __, 133 S. Ct. 2517(2013).

[57] *Accord, Burrage v. U.S*., 571 U.S. __, 134 S. Ct.881 (2014).

[58] By now it should be clear that bringing claims on multiple bases is not prohibited by *Gross'* but-for standard, *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1273 (11th Cir. 2009) (ruled employees can plead in the alternative), but this principle is still challenged. Also, this clarification is needed because sometimes the *McDonnell Douglas* proof framework is described such that once a legitimate nondiscriminatory reason is articulated by the employer, it seems as if the employee must *disprove* the legitimate nondiscriminatory reason, but that is not appropriate. The employee should need only to prove that age was a but-for cause, regardless of other motives.

[59] *See e.g.,* Brief of the Equal Employment Opportunity Commission As Amicus Curiae in Support of Plaintiff-Appellant, filed Jan. 24 2012, in *Robinson v. City of Phila*. (3d Cir.) *available at* https://www.eeoc.gov/eeoc/litigation/briefs/robinson.txt.

[60] 29 U.S.C. § 633a(a) (All personnel actions … shall be made free from any discrimination based on age"); *Alotta v. Dept. of Transportation*, EEOC Appeal No. 0120093865 (June 17, 2011).

[61] *Allard v. Holder*, 840 F. Supp. 2d 269 (D.D.C. 2012); *Allovio v. Holder*, 923 F. Supp. 2d 151 (D.D.C. 2013) (ADEA federal sector provisions include no authorization for disparate impact claims).

[62] Contrary to *Garrett*, *supra* n. 42, which addressed this question directly, the availability of injunctive relief was not directly addressed in *Kimel, supra* n. 42. The decision in *Taaffe v. Drake, supra* n. 44*,* held that injunctive relief *was* available, but the number of such decisions is quite limited and clarification for many reasons.

cases.[64] Age discrimination was alleged in about 23% of all charges filed with the EEOC in FY 2016,[65] yet ADEA cases constituted only 2% of its merits docket. AARP appreciates the EEOC's work on the Texas Roadhouse and Darden cases, and we note the EEOC just filed an age discrimination case against the Ruby Tuesday chain, but the EEOC can and should do much more, particularly in light of an aging workforce. The following types of cases are important to pursue.

1. The EEOC Should Step Up Enforcements of Its RFOA Regulations

Although it seems clear to AARP that the disparate impact theory is often the most appropriate means of challenging hiring discrimination, defendant-employers have mounted an offensive to convince the courts that job applicants may not bring disparate impact claims under the ADEA. And, as you well know, some courts are buying it. A cert petition is now pending in the case of *Villarreal v. R.J. Reynolds Tobacco Co*.,[66] wherein the Eleventh Circuit sitting en banc ruled that section 4(a)(2) does not allow applicants to bring disparate impact claims. However, after *Villarreal* was decided, a district court in California came to the opposite conclusion in *Rabin v. PricewaterhouseCoopers, LLP*.[67] In the relatively near future, both the Seventh[68] and Ninth Circuits[69] will weigh in on the issue, if the Supreme Court does not decide the issue first.[70]

Older workers need the EEOC to step up and vigorously defend its own disparate impact/reasonable factor other than age (RFOA) regulations – to take a clear stand that thinly veiled efforts that have the effect of excluding older applicants from consideration or deterring them from applying are unlawful and cognizable under the ADEA. We need the EEOC to bring these cases, and to file amicus briefs in those brought by others. The law is evolving quickly on this issue, and the time to step up is right now.

2. Step Up Enforcement in High-Violation Industries

Last year, the EEOC held meetings and a hearing on diversity, including age diversity, in the high-tech sector. AARP testified[71] that negative age-based stereotypes and discrimination in that sector are pervasive: the median age of employees at top tech firms is in the late 20s, and the predominant ethos is that "in the tech world, gray hair and experience are really overrated."[72] Another witness at that hearing, Ben Jealous, who had been working on venture capital and diversity in Silicon Valley, called the age discrimination there "extreme and well-known."[73] We also testified as to how technology firms that ignore the talents of older workers are doing themselves a disservice. Recent research conducted by AARP reported that very few firms (only

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[63] EEOC, *Office of General Counsel: Fiscal Year 2016 Annual Report* 19 (2016), https://www.eeoc.gov/eeoc/litigation/reports/upload/16annrpt.pdf.
[64] *Id*. at 4.
[65] EEOC, *Charge Statistics (Charges filed with EEOC): FY 1997 Through FY 2016*, *at* https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm
[66] *Villarreal*, *supra* n. 27.
[67] *Rabin*, *supra* n. 28
[68] *See Kleber, supra* n. 27.
[69] *See Rabin*, *supra* n. 28.
[70] *Villarreal*, *supra* n. 27.
[71] *AARP D&I Testimony, supra n. 25*.
[72] A. Bryant, "Brian Halligan, Chief of HubSpot, on the Value of Naps," *N.Y. Times* (Dec. 5, 2013), *available at* http://www.nytimes.com/2013/12/06/business/brian-halligan-chief-of-hubspot-on-the-value-of-naps.html?_r=0.
[73] EEOC Meeting of May 18, 2016 - Promoting Diverse and Inclusive Workplaces in the Tech Sector, Transcript, at https://www.eeoc.gov/eeoc/meetings/5-18-16/transcript.cfm.

8%) include "age" in their diversity and inclusion policies,[74] despite the demonstrated value of multigenerational workforces. Age-discriminatory layoffs have also been a huge problem in the technology sector.[75]

Another sector in which ageism is widespread is the entertainment industry. The age+sex discrimination against older actresses appears to start as soon as their early 30s.[76] Age discrimination is not limited to those in front of the cameras, though. Despite a hard-won suit on behalf of older writers (brought by AARP),[77] "the employment rate of industry writers still declines sharply with age."[78] And according to SAG-AFTRA, it is also prevalent in the hiring of film crews.[79] AARP urges the EEOC to use all tools at its disposal to initiate investigations and charges, to file amicus briefs, and to undertake proactive diversity & inclusion efforts to address age discrimination in industries where it is known to be prevalent.

3. Enforce EEOC Regulations and Guidance on Mandatory Retirement

As noted above, the EEOC's compliance manual and informal discussion letters have been consistent. An individual's title is not determinative of whether she or he is really a partner; agency investigators need to look beyond titles and apply six factors to determine if the worker is really an employee or if the exemption is warranted.

AARP is aware that, on more than one occasion, the EEOC has received recommendations to file suit challenging mandatory retirement practices by "Big 4" accounting firms, based on both directed investigations and individual complaints. Yet, in every instance, the EEOC has not taken action. In some cases, the so-called partners were bound by forced arbitration agreements and could not mount a legal challenge themselves; their only recourse rested with the EEOC taking action. As noted above, mandatory retirement not only hurts those employees directly affected, it also infects the entire workplace with age discrimination in hiring and promotions. It is not acceptable to ignore enforcement of a central tenet of the ADEA. Especially at a time when older workers need to work and are working longer – and many on both sides of the aisle want them to – the EEOC needs to step up and actively enforce its own position.

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[74] *Disrupting Aging in the Workplace, supra* n. 1 (citing S. Snowden & P. Cheah, *A Marketplace without Boundaries? Responding to Disruption* 31, Fig 18, 18th Annual Global CEO Survey (PwC, 2015), *available at* https://www.pwc.com/gx/en/ceo-survey/2015/assets/pwc-18th-annual-global-ceo-survey-jan-2015.pdf).

[75] *See e.g*., M. Rogoway, Intel layoffs skew older, spotlighting plight of aging workers, *Oregonlive/The Oregonian* (June 4, 2016), *available at* http://www.oregonlive.com/silicon-forest/index.ssf/2016/06/intel_layoffs_skew_older_spotl.html; C. Fleck, "IBM Halts Practice of Disclosing Ages of Fired Older Workers," *AARP Blog* (May 12, 2014), *at* http://blog.aarp.org/2014/05/12/ibm-halts-practice-of-disclosing-fired-older-workers/.

[76] S. Mendelson, "At Age 32, Is Anne Hathaway Already Too Old To Be A Movie Star?" *Forbes* (Sept. 7, 2015), *available at* https://www.forbes.com/sites/scottmendelson/2015/09/07/on-anne-hathaway-and-the-jennifer-lawrence-problem/#16a22e8d1b59; J. Anglis, "Anne Hathaway & 6 Other Actresses Who Have Opened Up About Ageism In Hollywood," *Bustle* (Sept. 5, 2015), *available at* https://www.bustle.com/articles/108650-anne-hathaway-6-other-actresses-who-have-opened-up-about-ageism-in-hollywood.

[77] B. Jones, *Court Approves Settlement of Largest Age Discrimination Lawsuit in History* (Apr. 13, 2012), *available at* http://www.aarp.org/aarp-foundation/our-work/legal-advocacy/info-2012/television-writers-age-discrimination-litigation.html.

[78] Brief Of Screen Actors Guild-American Federation of Television And Radio Artists and Association of Talent Agents as *Amici Curiae* in Opposition to Plaintiff's Motion for Preliminary Injunction at 3, filed in *IMDb.com, Inc. v. Becerra*, No. 3:16-cv-06535-VC (Feb. 16, 2017).

[79] *Id*.

4. Bring the Cases that Workers Cannot

As noted above, there are several types of cases in which older workers cannot meaningfully vindicate their rights, primarily because adequate damages are not available and thus are not able to attract private counsel. For example, the EEOC needs to *take the lead* and bring cases on behalf of state government workers. The EEOC also needs to be on the look-out for and bring cases involving age-based harassment, where the employee may not have experienced economic losses but endured discriminatory treatment all the same. Until we can fix shortcomings in the statute, the EEOC needs to assume a more proactive role in vindicating the rights of older workers who find they cannot bring cases themselves.

Conclusion

AARP has long battled ageism – especially in the workplace – and our CEO, Jo Ann Jenkins, has made it AARP's mission to "Disrupt Aging"[80] and change what it means to age in America. In addition to championing the rights of older workers who have been discriminated against, AARP is involved in many activities aimed at preventing discrimination from happening in the first place, such as by documenting the business case for recruiting and retaining older workers,[81] initiating an employer pledge program,[82] and collaborating with organizations such as the Society for Human Resource Management (SHRM) on best practices for managing an aging workforce.[83] However, these activities supplement, but are no substitute for, strong legal protections against age discrimination in the workplace, and enforcement of those protections. The ADEA should not be treated as a second-class civil rights statute. On this 50th Anniversary of the ADEA, AARP urges the EEOC to take bolder action to ensure older workers are treated fairly at work, and we look forward to continuing to work with the Commission over the next 50 years.

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[80] J. Jenkins, *Disrupt Aging* (2016).

[81] AARP, *A Business Case for Workers Age 50+: A Look at the Value of Experience* (2015), *available at* http://www.aarp.org/content/dam/aarp/research/surveys_statistics/general/2015/A-Business-Case-Report-for-Workers%20Age%2050Plus-res-gen.pdf.

[82] *AARP Employer Pledge Program* (undated), *at* http://www.aarp.org/work/job-search/employer-pledge-companies/.

[83] *See* "HR and the Aging Workforce: Two CEO Points of View," 9 *HR Magazine, Special Supplement* 11 (Nov. 2014), *available at* http://www.aarp.org/content/dam/aarp/work-and-retirement/find-a-job/2014-10/2014%20SHRM-AARP%20HR%20Mag%20insert%20final.pdf;