

THE REALITY OF AGE DISCRIMINATION IN THE NEW MILLENNIUM: AN EMPIRICAL ANALYSIS WITH LEGAL CONSEQUENCES

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A 2000 Supreme Court decision has dramatically raised the stakes for employers in age discrimination cases, by articulating a new evidentiary standard that favors employees. The present study provides empirical evidence to highlight the salience of this decision: results indicate that over half of the reasons cited for a layoff decision about the older worker had nothing to do with performance, and most were based specifically on age and age-related stereotypes. Over 80% of the reasons that specifically cited age produced a negative outcome for the older worker. We discuss the implications of these results and suggest ways to address them.

INTRODUCTION

The stakes for employers have been raised significantly by a unanimous Supreme Court decision handed down in June 2000 that dramatically changes the way courts must consider evidence in age discrimination cases. The importance of the case, *Reeves v. Sanderson Plumbing Products, Inc.*, lies in the newly articulated evidentiary standard that the Supreme Court placed on businesses to produce a legitimate, non-biased reason for termination of an older worker that the jury finds to be credible. The new standard allows juries to *infer* an employer's intent, which represents a significant shift in the Court's view of the plaintiff's burden of proof in an age discrimination case. The practical implication of the *Reeves* decision is that it will make it very difficult for corporate defendants to win an age discrimination case "as a matter of law." Any case that survives until completion of a jury trial has a reasonable chance for sympathetic jurors to determine that there was intentional discrimination and to award punitive damages. This decision increases the pressure on managers to make employment decisions regarding older workers fairly and to document those decisions in a coherent fashion. The well documented demographics of aging baby boomers compound the pressure. Between 2000 and 2010, the number of Americans between the ages of 55 and 64 will increase 47.2%, as compared to a scant 2.8% increase among those aged 25 to 34, according to the Bureau of Labor Statistics.²

The purpose of this article is to provide some insight into the bases of decisions about older workers by examining the reasons given by individuals to

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¹ 530 U.S. 133(2000).

² *Respect Your Elders*, INC. MAGAZINE, Sept. 2003, at 30.

justify their choices in a specific work situation. We will review the chronology of the Age Discrimination in Employment Act³ (the ADEA or the Act) and some relevant court cases, discuss the findings in the literature with respect to age stereotyping and employment decisions, and report the results of a study in which respondents listed their reasons for decisions they made about laying off an older worker. We will address three specific questions:

1. What decision-making criteria were used to lay off an older worker?
2. What are the outcomes (*i.e.*, positive or negative) of these decisions for the target employee?
3. Do individual differences affect the layoff rankings or the reasons used to justify laying off an older worker?

This study will address these questions by examining the layoff decisions made with respect to a hypothetical older worker and the reasons given for making those decisions. Implications for practitioners and academics will be discussed.

Although Congress's intent in passing the ADEA in 1967 was to protect older workers (defined as those age 40 and older) from illegal discrimination in the workplace, anecdotal and some empirical evidence indicates that it has not been an effective deterrent. As the baby boomer generation moves toward retirement, the tension between that generation and those that follow has been increasing, and longstanding age stereotypes are becoming more salient to a large portion of the population. For example, baby boomers may have experienced a sense of shock when they saw a 1999 cover story in *Fortune* entitled "Finished at Forty" that described individuals over age 40 who had lost their jobs, ostensibly because they had reached the end of their productive work lives.⁴ Why hasn't the ADEA protected these (and other) older workers?

Up until now, employers have found it relatively easy to defend themselves against charges of age discrimination. Despite the instances of large settlements reported in the media, in general plaintiffs have found it hard to "prove" age discrimination. In addition, recent court rulings have allowed employers to consider age when making employment decisions, as long as they could be justified by showing that the decisions would result in lower costs for their organizations.⁵ These rulings effectively treat age discrimination differently than discrimination on the basis of most of the other protected classes. For example, Title VII, which covers workers on the basis of race, gender, religion, color, and national origin, does not permit employers to discriminate against individuals in these classes, even though it might be less costly for them to do so.

³ 29U.S.C. §621.

⁴ Nina Munk, *Finished at Forty*, FORTUNE, Feb. I,1999,at50.

⁵ See *infra* I.B.

I. CHRONOLOGY OF AGE DISCRIMINATION AND THE LAW

A. *The Age Discrimination in Employment Act*

In 1967, Congress enacted the ADEA to combat discrimination based on age, by shielding workers over the age of forty from “arbitrary” age discrimination, and to protect workers from employer practices that fail “to promote employment of older persons based on their ability rather than age.”⁶ The Act provides, in pertinent part, that it is unlawful for an employer:

- (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age;
- (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s age.⁷

The ADEA was in part necessary because the Civil Rights Act of 1964⁸ failed to prohibit age discrimination; instead, the Civil Rights Act of 1964 directed the Secretary of Labor to study the factors leading to discrimination against older workers.⁹ As a result, the study, conducted by Secretary W. Willard Wirtz (known as the “Wirtz Report”), found that older workers were significantly affected by employment discrimination. The Wirtz Report subsequently led to the enactment of the ADEA.¹⁰ Secretary Wirtz’s report noted key differences between age discrimination and other forms of discrimination.¹¹ Unlike other forms of discrimination, such as race, color, religion, or national origin, that are often based on a “kind of dislike or intolerance” that is “entirely unrelated to ability to perform a

⁶ 29 U.S.C. §621(b); see also §631 (establishing that “the prohibitions in this Act shall be limited to individuals who are at least 40 years of age”).

⁷ 29 U.S.C. 623(a).

⁸ 42 U.S.C. § 2000e et seq.

⁹ Judith D. Fischer, *Public Policy and the Tyranny of the Bottom Line in the Termination of Older Workers*, 53 S.C. L. REV. 211,212 (2002).

¹⁰ See *Employment Problems of Older Workers: Hearing on H.R 10634 Before the House Comm. on Educ. & Labor*, 89th Cong. 209 (1965) (report of the Sec’y of Labor); Fisher, *supra* note 9, at 212; see also *Recent Case: ADEA - Reverse Discrimination Suits - Sixth Circuit Permits Reverse Age Discrimination Suit to Proceed*, 116 HARV. L. REV. 1533,1533 (2003).

¹¹ See *Employment Problems of Older Workers*, *supra* note 10; *Reverse Discrimination Suits*, *supra* note 10, at 1533.

job,” age discrimination is more likely to be based on an employer’s negative perceptions of the abilities of older employees stemming from subtle assumptions.¹² In *Hazen Paper Co. v. Biggins*,¹³ the Supreme Court noted 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”; further, Congress was concerned “that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.”¹⁴ Thus, the enactment of a statute specifically addressing age discrimination was necessary, so that the prohibitions could be more narrowly tailored in light of these differences, as opposed to addressing age discrimination under the auspices of the broad prohibitions found in other anti-discrimination legislation.¹⁵

Congress justified the ADEA in 1967 by noting that older workers were (a) disadvantaged both in finding employment and in regaining it when displaced, (b) faced with arbitrary age limits regardless of job performance, and (c) experiencing higher unemployment than younger workers. Its purpose in passing the Act was to “promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers to find ways of meeting problems arising from the impact of age in employment.”¹⁶ Twenty years later, the Seventh Circuit Court of Appeals affirmed these intentions when it held that:

Congress enacted the ADEA precisely because many employers or younger business executives act as if they believe that there are good business reasons for discriminating against older employees. Retention of senior employees who can be replaced by younger lower-paid people frequently competes with other values, such as profits or conceptions of economic efficiency. The ADEA represents a choice among those values. It stands for the proposition that this is a better country for its willingness to pay the costs for treating older employees fairly.¹⁷

The broad scope of protection afforded older workers by the ADEA, as expressed above in the *Graefenhain* case, has been limited somewhat by recent narrowly drawn technical decisions of the Supreme Court.¹⁸ It is not likely, however, that these

¹² See *Employment Problems of Older Workers*, *supra* note 10; *Reverse Discrimination Suits*, *supra* note 10, at 1533 n.3.

¹³ 507 U.S. 604, 610 (1993).

¹⁴ *Id.*

¹⁵ See *Reverse Discrimination Suits*, *supra* note 9, at 1533 n.3.

¹⁶ 29 U.S.C. §621.

¹⁷ *Graefenhain v. Pabst Brewing Co.*, 827 F.2d 13,13 n.13 (1987).

¹⁸ See *infra* I.C.

limitations will destroy the essence of ADEA guaranties of fairness in the workplace to individuals age 40 and older. By its decision in the *Reeves* case, the Supreme Court strengthened the ability of the ADEA to serve its deterrent purpose.

B. Using the Title VII Framework in ADEA Cases

The courts have adopted the “disparate treatment” and “disparate impact” frameworks for suits under the ADEA, in line with the Title VII discrimination claims.¹⁹ This is “[b]ecause of their close linguistic ties, similar legislative histories, and common purposes.”²⁰ Furthermore, “many courts interpreting the ADEA use precedent from cases brought under Title VII and often discuss the two statutes interchangeably.”²¹ Disparate treatment analysis asks whether the employer intentionally “treats some people less favorably than others because of their race, color, religion [or other protected characteristics]. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment”²² The Supreme Court has stated, “The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was a victim of intentional discrimination.”²³ Under this analysis, the court will accept direct or circumstantial evidence of age discrimination.²⁴

A disparate impact claim is more difficult to prove, but does not require the plaintiff to show a discriminatory intent, as with disparate treatment.²⁵ Disparate impact looks at employment practices that are neutral on their face in the treatment of various groups, but that result in a disproportionate affect on one group in particular.²⁶ If the plaintiff shows a disparate impact, the burden then shifts to the employer to establish that the practice is justified by a business necessity.²⁷ More specifically, a federal appeals court held, in *Maresco v. Evans Chemetics*, that a plaintiff must show he “(1) was a member of a protected class; (2) was qualified for the position; (3) was discharged; and (4) the discharge occurred in circumstances giving rise to an inference of discrimination.”²⁸ Furthermore, a disparate impact

¹⁹ See, e.g., *Adams v. Fla. Power Corp.*, 255 F.3d 1322,1324 (2001).

²⁰ Zachary L. Karmen, *Disparate Impact Claims Under Age Discrimination Act of 1967*, 186 A.L.R. Fed. 1, at 2 (2003).

²¹ *Id.*

²² *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) (quoting *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324,335-36 (1977)).

²³ *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133,153 (2000).

²⁴ Fischer, *supra* note 9, at 219.

²⁵ James C. Bailey, *Age Discrimination Models of Proof After Hazen Paper Co. v. Biggins*, 9 ELDER L.J. 175,179(2001).

²⁶ *Id.* at 179.

²⁷ *Id.*

²⁸ 964 F.2d 106,110 (1992).

claim must allege a disparate impact on the protected group as a whole; with age discrimination, that group would consist of those employees over the age of 40.²⁹

In the context of employees being subjected to reductions in force (RIFs) by employer practices, disparate impact claims are especially important.³⁰ As employers become more sophisticated in their employment practices, proving a discriminatory intent is becoming increasingly difficult.³¹ Employers, instead, adopt employment practices that are facially neutral, and therefore, lacking discriminatory intent, but the practices may have an effect that is ultimately equal to that of intent-based discrimination practices.³² RIF policies are designed to be facially neutral.³³ Disparate impact claims are intended to remedy such facially neutral RIF policies when they are in fact discriminatory, whereas disparate treatment claims would typically fail.³⁴

C. *The Hazen Paper Decision*

In *Hazen*, the Supreme Court ruled that “there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee’s age.”³⁵ The Court specifically addressed the issue under a disparate treatment analysis and opted not to consider whether an employee can bring an ADEA claim under the theory of disparate impact theory.³⁶ However, the court did indicate that disparate treatment analysis “captures the very essence of what Congress sought to prohibit in the ADEA.”³⁷ The *Hazen* decision has, however, limited both the age-proxy theory and the disparate impact theory.³⁸ Although there is no dispute that disparate treatment claims are viable under the ADEA, as a result of *Hazen*, the Circuit Courts have split over whether or not to allow a disparate impact claim in an ADEA case.³⁹

29. *Rogers v. First Union Nat'l Bank*, 259 F. Supp. 2d 200 (D. Conn. 2003).

30. Paris G. Filippatos & Sean Farhang, *The Rights of Employees Subjected to Reductions in Force: A Critical Evaluation*, 6 EMP. RTS. & EMPLOY. POL'Y J. 263,285 (2002)

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Hazen Paper Co. v. Biggins*, 507 U.S. 604,609 (1993); Bailey, *supra* note 25, at 181.

³⁶ *See Hazen Paper Co. v. Biggins*, 507 U.S. 604,609 (1993); Bailey, *supra* note 25, at 182.

³⁷ *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

³⁸ Fischer, *supra* note 9, at 222.

³⁹ Bailey, *supra* note 25, at 182.

D. Circuit Court Split Over the Application of Disparate Impact

Currently, the circuit courts are split as to whether or not disparate impact claims are legitimate under the ADEA.⁴⁰ The Second, Eighth, and Ninth circuits have held that disparate impact claims are not cognizable under the ADEA, and the First, Seventh, Tenth, and Eleventh circuits have held that such claims are not cognizable.⁴¹ The Third, Fifth, and Sixth circuits have agreed with the courts disallowing such claims.⁴² Before the Supreme Court decided *Hazen*, the Sixth and the Seventh circuits held that disparate impact claims are viable under the ADEA.⁴³

The courts that have rejected disparate impact claims have focused on two arguments.⁴⁴ First, the courts have followed the dicta from *Hazen* that “disparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA”; further, “when the employer’s decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears”; and finally, “this is true even if the motivating factor is correlated with age”⁴⁵

Second, those courts also argue that the language in the ADEA that “it shall not be unlawful for an employer . . . to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age” is not found in Title VII.⁴⁶

E. Mixed-Motive Case

The Supreme Court recently held, in a unanimous decision, that plaintiffs in Title VII cases can present circumstantial evidence of discrimination and still get a mixed-motive jury instruction, refusing to limit such cases to direct evidence.⁴⁷ The court noted that Title VII is silent as to what type of evidence mixed-motive cases require.⁴⁸ Further, the Court pointed out that, “The reason for treating circumstantial evidence and direct evidence alike is both clear and deep-rooted: Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.”⁴⁹ The circuit courts previously had been split on the issue.⁵⁰

⁴⁰ *Id.*

⁴¹ *Viability of Disparate Impact Under ADEA Continues to Divide Circuits*, 171 Lab. Rei. Rep. (BNA), at 464 (May 24, 2003).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Filippatos & Farhang*, *supra* note 30, at 291.

⁴⁵ *Id.* at 292.

⁴⁶ *Id.* at 291.

⁴⁷ *See Desert Palace Inc. v. Costa*, 539 U.S. 90 (2003).

⁴⁸ *Id.* at 99.

⁴⁹ *Id.* (quoting *Rogers v. Mo. Pac. R. Co.*, 352 U.S. 500, 508 n.17 (1957)).

⁵⁰ *See Title VII Mixed Motive Cases*, 72 U.S.L.W. (BNA), No. 1, at 3002 (July 8, 2003).

II. AGE PERCEPTIONS AND STEREOTYPES OVER TIME

Researchers have been concerned with stereotypes about older workers for many years. The academic literature suggests that there has been little change in attitudes toward older workers in the past forty years. A 1952 study found a “considerable acceptance of erroneous ideas about older workers” that seem to mirror some of today’s perceptions. Examples of statements that over half the respondents in that study agreed with include the following: “They [older workers] resist new ways of doing things;” “they are slow to catch new ideas;” and “they dislike to work under younger supervisors.”⁵¹ Researchers who replicated a 1954 study thirty years later concluded that attitudes toward older workers had exhibited little change.⁵² Despite the results of a 1978 study that refuted the belief that performance necessarily decreases with age,⁵³ research into the 1990s has focused on the perceived influence of age on a variety of issues including managerial decisions,⁵⁴ recommendations for retirement,⁵⁵ work attitudes and behavior,⁵⁶ promotions and rewards,⁵⁷ selection interview decisions,⁵⁸ job performance,⁵⁹ promotability ratings,⁶⁰ and evaluation of job applicants.⁶¹

In the business press, the 1990s have seen an increasing number of articles related to age discrimination, no doubt inspired in part by reports of large damage awards resulting from jury trials. High profile age discrimination claims have been

⁵¹ Jacob Tuckman & Irving Lorge, *Attitudes Toward Older Workers*, 36 J. APPLIED PSYCHOL. 149-53 (1952).

⁵² See Charles Bird & Terry Fisher, *Thirty Years Later: Attitudes Toward the Employment of Older Workers*, 71 J. APPLIED PSYCHOL. 515-17 (1986).

⁵³ See Jeffrey Sonnenfeld, *Dealing with the Aging Workforce*, Harv. BUS. Rev., Nov./Dec. 1978, at 81-92.

⁵⁴ See Benson Rosen & Thomas Jerdee, *The Influence of Age Stereotypes on Managerial Decisions*, 61 J. APPLIED PSYCHOL. 428-32 (1976).

⁵⁵ See Benson Rosen & Thomas Jerdee, *The Influence of Employee Age, Sex, and Job Status on Managerial Recommendations for Retirement*, 22 ACAD. MGMT. J. 169-73 (1979).

⁵⁶ See Susan Rhodes, *Age-related Differences in Work Attitudes and Behavior: A Review and Conceptual Analysis*, 93 Psychol. Bull. 328-67 (1983).

⁵⁷ See Jeanette Cleveland & Frank Landy, *The Effects of Person and Job Stereotypes on Two Personnel Decisions*, 68 J. APPLIED PSYCHOL. 609-19 (1983).

⁵⁸ See M.S. Singer & C. Sewell, *Applicant Age and Selection Interview Decisions: Effect of Information Exposure on Age Discrimination in Personnel Selection*, 42 PERSONNEL PSYCHOL. 135-54 (1989).

⁵⁹ See Bruce Avolio, David Waldman, & Mikel McDaniel, *Age and Work Performance in Nonmanagerial Jobs: The Effects of Experience and Occupational Type*, 33 ACAD. MGMT. J. 407-22 (1990); Glen McEvoy & Wayne Cascio, *Cumulative Evidence of the Relationship Between Employee Age and Job Performance*, 74 J. APPLIED PSYCHOL. 11-17 (1989); David Waldman & Bruce Avolio, *A Meta-analysis of Age Differences in Job Performance*, 71 J. APPLIED PSYCHOL. 33-38 (1986).

⁶⁰ Taylor Cox & Stella Nkomo, *Candidate Age as a Factor in Promotability Ratings*, 21(2) PUB. PERSONNEL Mgmt. 197-210 (1992).

⁶¹ Elisa Perry, *A Prototype Matching Approach to Understanding the Role of Applicant Gender and Age in the Evaluation of Job Applicants*, 24 J. APPLIED SOC. PSYCHOL. 1433-73 (1994).

asserted against some of the most respected U.S. corporate employers. In 1998, for example, payments were made by First Union Corporation (\$58.5 million), Westinghouse Electric Corporation (\$14 million), and Continental Airlines (\$6 million) to resolve the claims and their surrounding negative publicity.⁶² The abundance of headline-producing evidence of the dangers of using age-related stereotypes in the workplace raises the question of how prevalent instances of age discrimination really are. If they are not commonplace, then the *Reeves* case should have little impact. Evidence of decision-making based on age perceptions and stereotypes, however, makes *Reeves* very salient to employers.

III. METHODOLOGY

A. Sample

Participants in this study include 708 executives and business students attending classes at one of two state universities, one located in the Southeastern U.S. and the other in the Western U.S. The executives (26.1% of the sample) were enrolled in an Executive MBA program at one of the universities; the business students were split between graduate (34.3%) and undergraduate (39.5%) programs at the two schools. Many of the graduate students hold managerial positions while attending evening MBA classes. Significantly, nearly three-fourths of the entire sample (71.5%) have supervisory experience, including all of the executives, two-thirds of the graduate students (65.5%), and over half (58.5%) of the undergraduate students. Sixty-one percent of the participants are male and 39% are female; their age categories range from 20 or younger up to 60. Membership in specific age categories is as follows: 2.4% are age 20 or younger; 50.4% are 21-30; 35.7% are 31-40; 10.7% are 41-50; and .9% are 51-60.

B. Procedure

This study was part of a larger research project on promise-keeping in the workplace.⁶³ Participants responded to a scenario in which they were asked to rank five hypothetical employees in their division for purposes of possible layoffs (1 = first to be laid off; 5 = last to be laid off) and to give their reason(s) for each ranking. Each of the employees was described as exceeding the minimum levels of competency, and each had either personal or work attributes representing a variety of workplace values that would have made it difficult to choose among them. The

⁶² Sheldon Steinhäuser, *Is Your Corporate Culture in Need of an Overhaul?*, HRMAGAZINE, July 1998, at 87-91.

⁶³ Elwood F. Oakley, III & Patricia Lynch, *Promise-keeping: A Low Priority in a Hierarchy of Workplace Values*, 27 J. BUS. ETHICS 377-92 (2000).

employee of interest in the present study (Andrews) was a 55-year-old white male who had been with the organization for 25 years. He was described as equally competent to his four peers. He was married with one son who was in the Navy; his pension was fully vested. At his age, it would be difficult to obtain another job with comparable pay. A copy of the scenario is included in Appendix A. Demographic data (gender, age, number of years of supervisory experience) were collected through a survey attached to the scenario.

Of the five employees, who represented five different workplace values, Andrews consistently was ranked as second to be laid off. The five values, in order from most important to least important in making the layoff decisions, were overcoming adversity, competence, work ethic, loyalty/seniority, and promise-keeping. To determine why the older worker fared so badly when decisions about laying off competent employees were made, we examined the reasons for Andrews's rankings.

C. Analysis

The methods of analysis included qualitative analysis, frequencies, t-tests, and Bonferroni tests. Qualitative analysis was used to answer the first research question, *i.e.*, what decision-making criteria were used to lay off an older worker? We examined the reasons why participants made their layoff decisions and categorized them as reported below. Frequencies were used to address the second question, that is, what are the outcomes (positive or negative) of these decisions on the target employee? T-tests and Bonferroni tests were used to respond to the third question: do individual differences affect the layoff rankings or the reasons used to justify laying off an older worker?

After reading all the reasons for the rankings, the authors identified four general categories of responses: (1) age and age stereotypes, (2) business/seniority, (3) ethical, and (4) legal. We then enlisted the assistance of a third person, not previously associated with the study, to provide an outsider's perspective for purposes of categorizing the data. Independently, the three of us sorted the 870 reasons into the four categories. (Many of the respondents gave multiple reasons.) When an individual provided multiple reasons, we classified each one into the appropriate category by comparing the reason(s) to the ranking. Reasons that seemed to be the result of an individual's "thinking out loud," but that did not appear to play a role in the final decision, were not included in any of the categories. For example, the response, "Although he has seniority, cutting his salary (probably large) may prevent discharge of others" resulted in a ranking of 2, or second to be laid off. Though seniority was mentioned, it was not the compelling reason for the ranking and therefore was not counted in the business/seniority category. On occasion, it was difficult to determine with clarity the primary reason for a ranking. For example, the

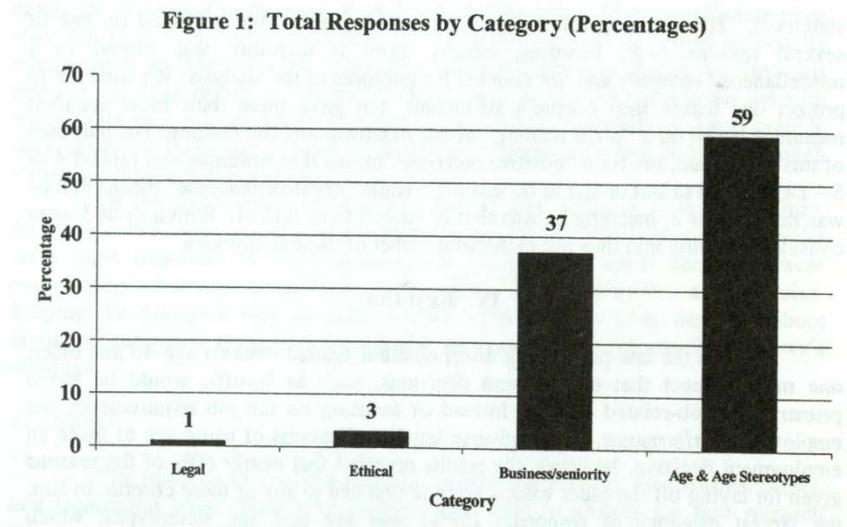
statement, "He can be given an early retirement plan" could be based on one of several reasons (*e.g.*, business, ethical, age). It therefore was placed in a miscellaneous category and not counted for purposes of the analysis. We tried not to project our biases into people's statements, but gave them their most apparent meanings based on a "plain reading" of the statement and the ranking. For purposes of this discussion, the term "positive outcome" means that Andrews was ranked 4 or 5 - *i.e.*, second to last or last to be laid off - while "negative outcome" means that he was ranked 1 or 2, meaning he was first or second to be laid off. Rankings of 3 were considered neutral and thus not included in either of these definitions.

IV. RESULTS

Given the law prohibiting discrimination against workers age 40 and older, one might expect that employment decisions, such as layoffs, would be based primarily on job-related criteria. Instead of focusing on the job requirements, the employee's performance, or the adverse legal implications of using age to make an employment decision, however, the results revealed that nearly 60% of the reasons given for laying off the older worker were not related to any of these criteria. In fact, the largest category of responses (59%) was age and age stereotypes, which encompassed a range of reasons based on perceptions of the older worker, such as his being the least productive or the least likely to learn new skills. None of these reasons were based on facts contained in the exercise. The second largest category (37%) of reasons given for laying off the older worker was business/seniority. The ethical category, represented by only 3% of the total responses, placed a distant third. The number of respondents who expressed an awareness of the legal implications of treating the older worker unfairly was a mere 1%. The percentage of responses for each category is shown in Figure 1.

Figure 1 provides a graphic answer to the first research question: what decision-making criteria were used to lay off an older worker? It illustrates the point that respondents overwhelmingly used non-business age stereotypes for making their decisions about Andrews.

A further examination of the results revealed that each of the four general categories contained identifiable sub-groupings of reasons given for laying off the older worker. These reasons provide greater insight into participants' reasons for their decisions. The age and age stereotypes category contains five subcategories: explicit age-based stereotypes (positive and negative); financial position; family issues; ease of getting another job; and "it's time for him to retire." Despite the dangers of using age as a criterion in employment decisions (including layoffs), many of the reasons given for Andrews's ranking (positive or negative) cited age explicitly.



The business/seniority category includes four subcategories: seniority/tenure, experience, retention of valuable organizational knowledge, and cost. Seniority/tenure includes reasons related both to Andrews's time in the organization and his loyalty to the employer. The justification for incorporating loyalty to the employer in this category is that many respondents seemed to equate tenure with loyalty (despite the reality that staying with the company could be attributed to other causes, such as inability to get another job or unwillingness to look for another job). Others seemed to view seniority/tenure and loyalty as separate criteria, citing both characteristics to justify their decisions.

The ethical category includes three subcategories: an explicit or implied obligation of the organization to the more senior individual (as opposed to mere business reasons); maintenance or enhancement of the company's reputation; and basic fairness. Although many managers consider loyalty only within the context of employees' loyalty to the organization, several respondents described it as a reciprocal obligation. There were only a few reasons related to either the company's reputation or basic fairness. Not included in this category of responses, but worth noting here, are reasons that suggest that individuals perceive they are acting "quasi-ethically," even though the outcome for Andrews is negative. For example, several subjects decided to terminate him first or second but offered to give him benefits, such as early retirement, a "bridge" to his full pension, or a "bonus ... for his years of dedication." Our interpretation of this phenomenon is that people may perceive they're softening the blow of a tough decision by using cash benefits as a good will

gesture toward the older worker. Offering bonuses and other benefits over and above wages to workers who have given many years of service to an organization may be viewed as an ethical act.

Finally, reasons were categorized as legal only if respondents made reference specifically to the ADEA, court cases, lawsuits, or discrimination. What is most striking about responses in this category is how few there are: only 9 out of 870, or 1%. The four categories of reasons and their respective sub-groupings can be found in Table 1.

The second research question asked what outcomes (positive or negative) resulted from these decisions for the target worker. In this study, “positive” outcomes for the older worker were defined as rankings of 4 or 5, because they indicated that he would be the last or second to last to be laid off. “Negative” outcomes were defined as rankings of 1 or 2, because they made him subject to early layoff. Rankings of 3 were perceived as neutral and were not used in classifying outcomes as either positive or negative. With respect to the age and age stereotypes category, the age-specific reasons were split sharply: respondents viewed age either as an asset (13% of the responses in this category), by identifying him as a candidate for late layoff, or as a liability (82% of the responses) by ranking him as a candidate for early layoff. Thus decisions based on age resulted overwhelmingly in a negative outcome for the older worker.

Table 1: Reasons by Category

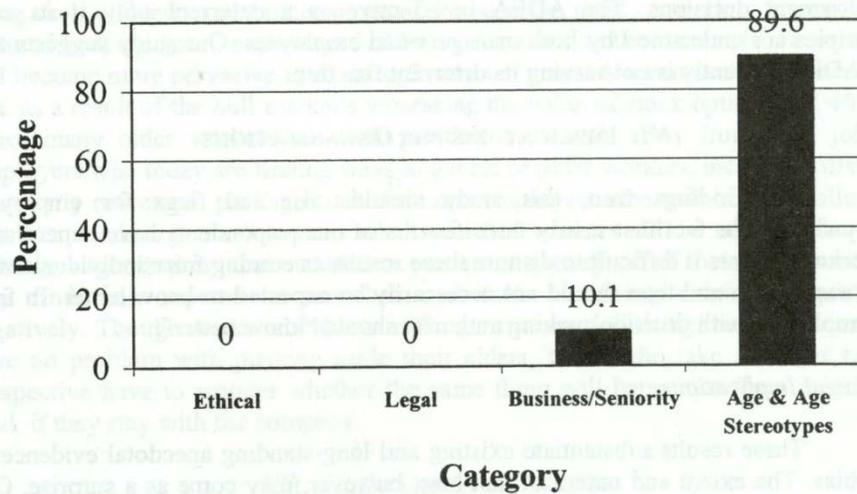
Age and age stereotypes:	Age-based stereotypes (positive and negative)
	Financial position Family issues Ease of getting another job “It’s time for him to retire”
Business/seniority:	Seniority/tenure Experience Retention of valuable organizational knowledge Cost
Ethical:	Explicit or implied obligation of the organization to the more senior worker Maintenance or enhancement of the company’s reputation Basic fairness
Legal:	Age discrimination laws Fear of lawsuits

In the business/seniority category, nearly two-thirds (64%) of the responses identified seniority/tenure as the reason for the ranking. Most of those reasons resulted in positive outcomes for the older worker: 82% of the reasons resulted in later layoff, while the remaining responses ranked him in the middle of the group. The middle ranking implies a reliance on other factors that mitigated the otherwise generally positive value placed on seniority. In fact, many of the responses that resulted in a positive outcome cited additional reasons, implying that seniority alone was not enough to keep Andrews at the company. Significantly, only one respondent who cited seniority as a decision criterion ranked Andrews as a candidate for early layoff. Reasons related to experience and the need to retain valuable organizational knowledge resulted in positive outcomes, although only one-fourth (27%) cited experience as the sole reason for the positive outcome. Most of the cost-based reasons in this category resulted in negative outcomes for the older worker, as participants seemed to feel that it made sense to cut costs by terminating the (presumably) most expensive worker. Many of the cost-based reasons implicitly or explicitly embodied age stereotypes, such as "Andrews is old and has few years left to give the organization."

All of the rankings in the ethical category resulted in positive or neutral outcomes for the older worker. Further, most of the respondents cited moral or ethical reasons alone, suggesting that for most of those individuals, an ethical reason on its own was sufficient justification for the decision. Similarly, the outcomes based on legal reasons generally were positive, with two-thirds being favorable.

A more conspicuous depiction of the impact of subjects' decision criteria is evidenced by analyzing the data in terms of their negative outcomes for Andrews. Figure 2 demonstrates that the category of reasons subjects cited for their rankings influenced the outcomes in a dramatic way. Considering only those responses that resulted in a negative outcome for Andrews - that is, a ranking that would make him subject to early layoff - highlights the stark contrast among the categories. Ninety percent of the reasons cited for Andrews's early termination had nothing to do with job-related criteria, but were based explicitly on age or on age stereotypes. Only ten percent were based on business or job-related reasons.

Overall, nearly half of the respondents (47%) ranked Andrews first or second to be laid off; another 18% ranked him third. Thus just over one-third of the subjects (35%) valued Andrews enough to retain him as long as possible (*i.e.*, ranking of 4 or 5). The t-tests and Bonferroni tests indicated that neither the rankings of Andrews nor the reasons cited for the decisions were influenced by participants' gender, age, or amount of supervisory experience. Thus, the answer to the third research question is that individual differences did not influence decisions about laying off the older worker.

Figure 2: Responses with a Negative Outcome for Older Workers by Category

V. Discussion

Overall, nearly half of the reasons our subjects gave for Andrews's ranking resulted in early layoff of the older worker. Of these reasons, 90% are impermissible under current age discrimination laws. This finding provides concrete evidence of the prevalence of age bias in the workplace today. More than thirty years after the passage of the ADEA, many of the respondents explicitly cited age or age-based stereotypes as sufficient reasons to fire a long-time, competent employee.

Decisions based on age and age stereotypes resulted overwhelmingly in a negative outcome for the older worker and clearly violate the legal mandate of the ADEA. While some age-based decisions resulted in a positive outcome for Andrews, it should be noted that even though age-based decisions that result in a positive employment outcome for an older worker do not violate the ADEA, one must question whether making even a positive decision based solely on age is a wise course of action. The positive outcomes that accompanied reasons based on seniority imply that often seniority is viewed positively by many participants, is equated with loyalty, and is rewarded with continued employment. Cost-based reasons for laying off an older worker may violate the ADEA. Those respondents who cited ethical reasons often did not provide additional justification for their decision, suggesting that, for most of these individuals, an ethical reason on its own was a sufficient basis

for the decision. Finally, the limited number of responses in the legal category, coupled with the fact that other reasons often accompanied them, raises the strong possibility that employees do not understand the implications of the ADEA on employment decisions. The ADEA is effective as a deterrent only if its core principles are understood by both managers and employees. Our study suggests that the ADEA currently is not serving its deterrent function.

VI. IMPLICATIONS FOR ORGANIZATIONS

The findings from this study should raise red flags for employers everywhere. The fact that nearly three-fourths of our respondents have supervisory experience makes it difficult to dismiss these results as coming from individuals who lack experience and thus should not necessarily be expected to know better. In fact, all employees with decision-making authority should “know better.”

A. Legal Implications

These results substantiate existing and long-standing anecdotal evidence of age bias. The extent and nature of that bias, however, may come as a surprise. Our findings are particularly troublesome for several reasons. First, age discrimination is not permitted under federal and (some) state laws. To establish a prima facie case of age discrimination, Andrews would have to show that age was a factor in his termination. Based on our participants' responses, he should have no trouble meeting this criterion. Prior to the *Reeves* decision, the employer simply would have had to articulate a legitimate, non-discriminatory reason for its action, and, unless the employee could rebut this explanation, the employer would prevail. Now, however, the Supreme Court has found that a plaintiff who establishes a prima facie case and provides sufficient evidence for a “reasonable” fact finder to reject the employer's non-discriminatory explanation for its decision may be enough for a jury to find the employer liable for intentional discrimination under the ADEA. That is, if a jury rejects an employer's reason, it then is allowed to *infer* that the employer discriminated intentionally against the employee.⁶⁴ Second, the outcomes of age discrimination lawsuits indicate that juries are sympathetic to plaintiffs in these cases. Thus companies whose managers make impermissible age-based decisions are at risk of being ordered to pay large damage awards, as well as face public relations nightmares that accompany the legal news.

⁶⁴ *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000).

B. Human Resource Implications

Companies that allow their managers to fire competent older workers are being short-sighted in a number of ways. Perhaps the most compelling argument in favor of keeping good, experienced older workers is that the current labor shortage will become more pervasive in the next five to ten years. A recent article pointed out that, as a result of the bull market's increasing the value of stock options and 401(k) plans, many older workers are well positioned to walk away from their jobs.⁶⁵ Employers who today are finding ways to get rid of older workers, including offering them early retirement packages, are the same employers who will be scrambling to lure them back in just a few years when qualified workers will be at a premium. In addition, organizations that establish a pattern of getting rid of their older workers may find their reputations tarnished and their remaining employees reacting negatively. Though some individuals in the generations following the baby boomers have no problem with pushing aside their elders, those who take a longer range perspective have to wonder whether the same thing will happen to them down the road, if they stay with the company.

VII. Guidelines for Action

Our findings highlight the urgency of the need for employers to think ahead a few years and begin to make changes now to meet their future human resource needs. Over a decade ago, one author suggested three primary reasons for the lack of responsiveness to retaining older workers: (1) limited flexible work arrangements; (2) relatively rigid employee benefit policies; and (3) the assumption of higher costs for older workers.⁶⁶ To date, this scenario has remained virtually unchanged. Suggestions for dealing with the coming labor shortage by better using older workers include alternatives such as job redesign, flexible pension plans (which could require government action), and more flexibility overall.⁶⁷ Even more troubling than the lack of progress in these administrative issues is the fact that little, if any, thought seems to have been given to addressing issues such as age bias and stereotypes, intergenerational conflict, motivation, and performance appraisal.⁶⁸ A 1998 study of HR professionals found that 82% of the respondents' organizations have taken no positive steps to retain their competent older workers.⁶⁹ Companies need to take a

⁶⁵ Jennifer Reingold & Diane Brady, *Brain Drain*, Bus. WEEK, Sept. 20, 1999, at 113-16.

⁶⁶ H.E. Johnson, *Older Workers Help Meet Employment Needs*, 67(5) PERSONNEL J. 100-05 (1988).

⁶⁷ Watson Wyatt Worldwide, *Demographics and Destiny: Winning the War for Talent*, Catalog W-233 (1999).

⁶⁸ Reingold & Brady, *supra* note 65, at 113-16.

⁶⁹ Society for Human Resource Management/American Association for Retired Persons (SHRM/AARP), *Older Workers Survey* (1998).

more pro-active stance in educating their managers about age discrimination and ADEA requirements. In-house seminars, training sessions, and policy memoranda will highlight the need for managers to be sensitive to the dictates of the ADEA.

Although no doubt these types of actions will be helpful, our findings show that subjects' reasons for terminating the older worker often were based on attitudes and attributions about age, both of which are very difficult to change. This outcome suggests that employers need to determine their employees' attitudes toward older workers, to set parameters within which managers are to make decisions, and to enforce those limits. Changing current attitudes and behavior may involve an adjustment of the organization's culture, a time consuming yet necessary process if employers expect to avoid costly litigation and be competitive in the future.

The 1960s and 1970s brought the issue of racial discrimination in the workplace to the attention of the nation. The past decade has focused on the problems of sexual harassment and gender discrimination. In both cases, that focus has produced widespread changes in the attitudes and behavior of company managers. There is no reason to suggest that age discrimination cannot be reduced significantly if senior management focuses on that problem with the same intensity it has shown toward racial and gender inequities. The findings of this study show just how big a challenge that might be for employers as they try to address age discrimination in the workplace. Yet unless senior executives make and enforce decisions that allow organizations to retain and hire competent older workers, it is likely that employers will find themselves at a competitive disadvantage due to a shortage of qualified workers in the 21st century.

Appendix A: Five Employees Problem

Assume that you are the manager of a unit of an organization. You have five employees who work for you. All of them do the same kind of work. Because of possible future budget reductions, you have been told to rank the employees in terms of the order in which they should be discharged from the organization if discharges become necessary. Each of the five exceeds the minimum standards of competency for the job in question and they are all about equally competent at their work except as mentioned below. None of the five has a contract of employment. All of them would find it somewhat difficult to find work that pays comparably because of the currently tight labor market. **You have been informed that affirmative action laws need not be considered in determining the order in which the five employees should be discharged.**

ANDREWS is 55 years old and has been with the organization for twenty-five years. He is married and has one child who is in the Navy. His pension is fully vested and if he is discharged, he will receive a large sum of money that will allow him to

get along financially for a year or two. Because of his age, however, it would be especially difficult for Andrews to find a new job that pays comparably.

* **BROWN**, age 23 and single, has been with the organization and your unit for six months. When she first joined your unit, she told you that she had a job opportunity with another organization she was considering taking because she was concerned about possible future budget cutbacks within your organization. At that time you told Brown not to worry, and promised to keep her as an employee for at least two years. You had no authority to make such a promise on behalf of the organization, and the promise could not be legally enforced in court by Brown. The job that Brown passed up is no longer available to her.

CARTER, who is 30 years old, has been with the organization for five years and in your unit for two years. Because of illness in his family, he is in a very difficult financial position, and it is expected his financial difficulties will continue for some time into the future. He is currently working a second job in order to make ends meet.

DAVIS, age 30, has worked for your organization and unit for one year. She is demonstrably the most competent and productive of the five employees. Thus, she would have the easiest time finding comparable employment. She is married, has no children, and her husband is a physician.

EDWARDS is a black female, age 30, and single. She has worked for the organization and unit for five years and your unit for two years. She was raised in poverty in the rural south and has dedicated her life to developing a successful career for herself. She contributes half of her take home pay to the support of her parents, who are elderly and poor. If discharged from her job, she will have difficulty in making ends meet until she finds new work.

** **BROWN**, age 23 and single, has been with the organization and your unit for six months. When she first joined your unit, she told you that she had a job opportunity with another organization she was considering taking because she was concerned about possible future budget cutbacks within your organization. At that time you told Brown not to worry, and promised to keep her as an employee for at least two years. The job that Brown passed up is no longer available to her.

*** **BROWN**, age 23 and single, has been with the organization and your unit for six months. When she first joined your unit, she told you that she had a job opportunity with another organization she was considering taking because she was concerned about possible future budget cutbacks within your organization. At that

time you told Brown not to worry, and promised to keep her as an employee for at least two years. You have been informed by your corporate attorney that the “promise” is a legally enforceable contract. The job that Brown passed up is no longer available to her.

* = Version 1 (unenforceable)

** = Version 2 (silent)

*** = Version 3 (legally enforceable)