

IS OVERQUALIFICATION A PROXY FOR AGE DISCRIMINATION OR A LEGITIMATE, NONDISCRIMINATORY REASON FOR AN ADVERSE EMPLOYMENT DECISION?

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Abstract

Since Congress passed the Age Discrimination in Employment Act (ADEA) in 1967, employers, employees, litigants, and courts have wrestled with the question of whether basing adverse employment decisions on seemingly age-neutral factors, such as closeness to vesting of pension benefits, salary, years of service, or overqualification, are proxies for age discrimination. Or, in the alternative, are these factors legitimate, nondiscriminatory reasons for negative employment decisions? The Second and Ninth Circuits have rejected the overqualification defense, describing the term overqualified as a euphemism for “too old,” while the Fifth, Sixth, Seventh, Eleventh, and D.C. Circuits have found overqualification to be a reasonable, nondiscriminatory basis for refusing to employ an applicant. This article discusses the origin and development of the ADEA, the age proxy theory, and decisions of both appellate and district courts analyzing the issue of overqualification as a proxy for age discrimination in violation of the ADEA. The authors have presented a hypothetical framing this issue in the context of an academic hiring situation and concluded the article by offering recommendations for how employers may prevent age discrimination in their hiring and employment practices.

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INTRODUCTION

Happy Valley University (HVU), a small public university in the Deep South, advertised for a nontenure track instructor to teach two undergraduate classes in business law, a required class for all business and accountancy majors. Larry Law, age seventy, a recently retired dean of the law school at a prestigious private university in the northeast, had recently moved to the town in which HVU was situated to be closer to his children and grandchildren. He wanted to remain involved in both law and education in some capacity but not at the level of a law school professor or dean. Former Dean Larry applied for the business law position, along with twenty-five other applicants, none of whom had qualifications equal to those of Larry. HVU would pay the successful applicant a total of \$25,000 a year and have this person report to Brevard Baxter, dean of HVU's business school.

A search committee composed of faculty in the business school reviewed the applications. While impressed with the credentials and background of recently retired Larry, the committee was concerned that Larry would not remain at HVU for long or be happy in the position because he was simply overqualified for the position. Citing the needs of the business school for faculty who would serve the school for a longer term, the search committee removed Larry from the search pool before the interview stage in favor of other candidates who indicated a desire to work at the institution for a term longer than the one-year contract HVU was prepared to offer the successful candidate.

Dean Baxter, age fifty, glanced at all the applications and agreed with the decision of the search committee to remove Larry from the applicant pool. While the search committee and Dean Baxter were impressed with Larry's academic accomplishments, publications, and successful administrative record, they were both concerned that he would not find an undergraduate business law course challenging, would not work in a collegial manner with other faculty teaching lower-level courses, would not refrain from telling them how to teach on a level more consistent with law school pedagogy, and assumed that he would not remain in the position for more than a year. Dean Baxter was also concerned that Larry would eventually demand higher pay commensurate with his credentials, resist following directions given by a dean twenty years younger with less experience, and soon leave the institution for a more attractive position elsewhere. Consequently, Larry was not given an offer or even an interview because, in the opinion of the search committee and Dean Baxter, Larry was "overqualified" for this business law position.

Convinced that he was not offered the position or even given an interview because of his age, Larry filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) against HVU, members of the search committee, and Dean Baxter. After receiving his right-to-sue letter, Larry filed a suit in federal court against the same parties, alleging that all defendants had flagrantly violated the provisions of the Age Discrimination in Employment Act (ADEA or the Act).

This article explores the evolution and development of age discrimination law from the Wirtz Report to the Age Discrimination Act of 1967 through cases of the last thirty years in which the circuits have split in their holdings regarding whether overqualification is a legitimate reason for an adverse employment action or a form of age discrimination. The authors have framed their discussion around this hypothetical and ended with offering recommendation for how employers may prevent age discrimination in their employment practices.

I. ORIGIN AND DEVELOPMENT OF THE ADEA

For over fifty-five years, the ADEA¹ has been used to protect older workers from discrimination based on age in the workplace. Enacted in 1967, the ADEA was, in part, an outgrowth of the civil rights movement. However, by this time, concern about age discrimination in employment was not new. Even as early as the 1950s there were legislative and executive efforts to address age discrimination in employment.² In 1964, President Johnson issued Executive Order No. 11,141 banning age discrimination in employment by federal contractors and subcontractors.³ The Order provided no mechanism for enforcement or a private cause of action for its violation. Thus, the Order was largely ineffective.⁴

Efforts to insert a provision prohibiting discrimination based on age in Title VII of the Civil Rights Act of 1964 were rejected in both the House and the Senate. Congress did, however, instruct the Secretary of Labor, W. Willard Wirtz, to make a full study of the subject and propose recommendations for legislation “to prevent arbitrary discrimination in employment because of age.”⁵

A. *The Wirtz Report*

In response to Congress’s directive, Secretary Wirtz submitted a two-volume research report, *The Older American Worker: Age Discrimination in Employment*⁶ [hereinafter *The Wirtz Report v.1* or *v.2* or *The Report*], documenting the state of “arbitrary” discrimination against older workers in the United States as they attempted to gain or retain employment. The Report revealed widespread age discrimination in employment was common practice in nearly ninety percent

1 Pub. L. 90-202 (codified at 29 U.S.C. §§ 621–623).

2 Tom J. Querry, *A Rose by Any Other Name No Longer Smells as Sweet: Disparate Treatment Discrimination and the Age Proxy Doctrine After Hazen Paper Co. v. Biggins*, 91 Cornell L. Rev. 530, 532 (1996), (citing Age Discrimination in Employment: Hearings Before the Subcomm. on Lab. of the Senate Comm. on Lab. and Pub. Welfare, 90th Cong., 1st Sess. 23 (1967)).

3 Exec. Order No. 11141, 3 C.F.R. 179 (1964).

4 *See id.* at 532 n.16.

5 Civil Rights Act of 1964, Pub. L. 88-352 § 715 (codified at 42 U.S.C. 2000e).

6 2 U.S. Dep’t of Lab. & W. Willard Wirtz, *The Older American Worker: Age Discrimination in Employment* (1965) [hereinafter *The Wirtz Report v.2*]; 1 U.S. Dep’t of Lab. & W. Willard Wirtz, *The Older American Worker, Age Discrimination in Employment: Research Materials* (1965) [hereinafter *The Wirtz Report v.1*].

of the surveyed employers but noted that “ageism,”⁷ unlike race or gender discrimination, was not due to any dislike or intolerance toward older workers, but was based instead “on inaccurate stereotypes about older workers’ declining abilities and productivity.”⁸ Among the many reasons⁹ given by defendants for refusing to hire older applicants or for making other adverse employment decisions affecting this protected group are, for example, incompetence, economic factors, lesser comparative qualifications, inability to get along with (younger) supervisors or fellow employees, insubordination, poor performance, lack of enthusiasm, too long with the company, salary too high, veteran preference, and overqualification.¹⁰ Wirtz’s findings echo these reasons; specifically, employers reported not hiring older workers because of their “lack of skills, experience, or educational requirements,” “training costs and low productivity,” “ability to hire younger workers for less money,” and “limited work expectancy.”¹¹

Wirtz’s Report focused heavily on hiring practices and on employers’ imposition of specific age limitations. The Report also addressed “arbitrary”¹² discrimination against workers, when exclusion of workers due to a common characteristic (i.e., age) assumes that age affects their ability to do the job, despite that assumption having no basis in fact.¹³ Wirtz highlighted the injustice of judging workers based on group characteristics rather than on individual abilities.¹⁴ Importantly, Wirtz

7 “Ageism” has been defined as the “process of systematic stereotyping of and discrimination against people because they are old.” See James E. Birren & Wendy L. Loucks, *Age Related Change and the Individual*, 57 Chi.-Kent L. Rev. 833 (1981) (quoting R. Butler, *Why Survive Being Old in America* 12 (1975) (cited in Query, *supra* note 2, at 532 n.17)).

8 Query, *supra* note 2, at 535 (quoting The Wirtz Report v.2, *supra* note 6, at 2).

9 Some of these reasons are legitimate and nondiscriminatory, while others may violate the ADEA. Literature in the human resources arena abounds in addressing the topic of overqualification and whether it is a code word for “too old.” See, e.g., Dana Wilkie, “Overqualified”: Is It Code for “Too Old?” SHRM, Dec. 12, 2013 <https://54.83.97.131/workforce/overqualified-is-it-code-for-too-old> (noting remarks interviewers make that, unwittingly or not, convey message that an over-fifty-five applicant is “too old” for a job); Tim Sackett, *Overqualified Is Just Another Word for Age Discrimination*, TLNT.com, Sept. 25, 2018 <https://www.tlnt.com/articles/overqualified-is-just-another-word-for-age-discrimination> (discussing mistake employers make by refusing to hire applicants they consider to be overqualified for a position); *Being Overqualified” May Be a Thin Excuse for Age Discrimination*, Leeds Brown Law Firm Newsletter; Jack Kelly, *Overqualified Job Seekers Are Discriminated Against: Here’s How to Combat the Built-In Bias*, Forbes (Aug 21, 2019) (discussing bias many employers have toward hiring overqualified applicants expressed in statements or questions such as, “why this applicant wants this lower-paying job, has this applicant ‘flamed out’?, overqualified employee with degree from elite university will be conceited, arrogant, and hard to work with, fear attention will be diverted away from supervisor to older, more experienced person, person with more experience will soon want more money, overqualified employee will look down on less experienced colleague and not fit into the culture of the company”).

10 Query, *supra* note 2, at 539 nn.65–72.

11 The Wirtz Report v.2, *supra* note 6, at 8.

12 *Id.*

13 See, Michael Clinton, *The Seismic Shift That’s About to Change the American Workplace? Older Employees*, Esquire (Feb. 13, 2024), <https://www.esquire.com/news-politics/a46754477/american-workplace-change-older-employees/> (citing studies stating that cognitive impairment is not much more common among older workers than employees aged forty-five to sixty-five).

14 *Id.* at 2, 14.

distinguished between the following two types of age discrimination: policies with specific age limitations—which he found were always arbitrary discrimination—and discrimination based on age when there is a relationship between age and the ability to do the job¹⁵—which he found could constitute arbitrary discrimination when workers are judged by the average (or perceived average) for their age group rather than their individual abilities.¹⁶ Wirtz recommended legislative action to remedy this “arbitrary” age discrimination.¹⁷ From this recommendation and report, the ADEA was born.

The language of the ADEA’s central prohibition was taken word for word from Title VII of the Civil Rights Act of 1964.¹⁸ Thus, the ADEA on its face provides the same basic protections from discrimination based on age that Title VII provides based on race, sex, religion, color, and national origin. The principal differences are in the required number of employees (ADEA—twenty or more, Title VII fifteen or more), the remedial provisions, and some of the defenses.¹⁹ Both acts, however, apply only to employers in industries affecting interstate commerce.

B. The ADEA

The Age Discrimination in Employment Act, 29 U.S.C. section 623 states,

Sec. 4(a) It shall be 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 privilege 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; or
3. to reduce the wage rate of any employee in order to comply with this chapter.²⁰

15 *Id.* at 2.

16 *Id.* at 14–15.

17 *Id.* at 22.

18 *See Smith v. City of Jackson, Mississippi*, 544 U.S. 228, 233–34 (2005) (citing *Lurillard v. Puns*, 434 U.S. 575, 581 (1978)).

19 *See generally* Judith J. Johnson, *Reasonable Factors Other Than Age: The Emerging Specter of Ageist Stereotypes*, 33 *Seattle U. L. Rev.* 49, 57–77 (2009) (discussing passage of ADEA, history of RFOA, and defenses to claims of discrimination by employers). Julie A. Lierly, Comment, *A Cross-Circuit Comparison of the Burden-Shifting Analysis in Disparate Treatment Cases Under the Age Discrimination in Employment Act of 1967 as Amended*, 44 *Drake L. Rev.* 107, 108–10 (1995) (explaining that original intent of drafters of ADEA was to include age within the protected classes under Title VII but eventually determining that age should be a different classification because, unlike race or gender, all workers would eventually be within the protected class) (citing Joseph E. Kalet, *Age Discrimination in Employment Law 1* (1986) (citing 113 Cong. Rec. 34743–44 (1967))).

20 Age Discrimination in Employment Act, 29 U.S.C. § 623(4)(a).

When Congress passed the ADEA in 1967,²¹ it went further than The Wirtz Report, extending its proscriptions against arbitrary age discrimination in employment not only to hiring practices, but also to promotion, compensation, and termination.²² The ADEA prohibits local, state, and private employers engaged in interstate commerce who employ at least twenty employees for twenty or more weeks annually from refusing to hire, discharging, or otherwise discriminating against older workers with respect to compensation, terms, and conditions of employment “because of age.”²³ As originally enacted, the ADEA only protected individuals working in the private sector between the ages of forty and sixty-five. Congress amended the ADEA in 1978, extending the upper age limit to seventy and eliminating the age ceiling altogether in 1986.²⁴ Under some state laws, protection may extend to earlier ages.²⁵ Congress amended the Act in 1972 to cover public employers, but it did not include small employers with less than the previously requisite twenty. In a unanimous decision written by Justice Ginsburg, the Court in 2018 clarified that all public employers, even those with under twenty employees, were covered.²⁶

In a significant negative decision for public employees, the U.S. Supreme Court in 2000 held in *Kimel v. Florida Board of Regents*²⁷ that the Eleventh Amendment prohibits state employees from suing states for monetary damages under the ADEA in federal court. The Eleventh Amendment, however, does not bar suits against municipalities or political subdivisions of a state, thus enabling public employees to sue local public school districts. The EEOC may still enforce the ADEA on behalf of public employees against states, including public universities, and state employees may still sue state officials for declaratory and injunctive relief.

Congress’s purpose in enacting the ADEA is set forth in the Act’s preamble: “to promote employment of older persons based on their ability rather than age; and to prohibit arbitrary age discrimination in employment.”²⁸ Consistent with recommendations made in The Wirtz Report (and unlike Title VII), the ADEA proscribes only “arbitrary” age discrimination. Although the Act’s preamble mentions “arbitrary” three times, the rest of the Act’s text failed to define what

21 For thorough background, legislative history, and purpose of the ADEA, see generally Query, *supra* note 2, at 531–36; EEOC, *Age Discrimination: Overview of the Law*, <https://www2.ed.gov/policy/rights/guid/ocr/ageoverview.html/?exp=1> (last visited Sept. 21, 2023).

22 See 29 U.S.C. § 623(4)(a)(1).

23 *Id.*

24 *Id.*

25 See, e.g., *Ace Elec. Contractors, Inc., v. Int’l. Brotherhood of Elec. Workers*, 414 F.3d 896 (8th Cir. 2005) (interpreting § 363A.03 of the Minn. Human Rights Act); *Bergen Com. Bank v. Sisler*, 157 N.J. 188, 723 A.2d 944 (1999); see also Jacob Dennis, Nat’l Youth Rts. Ass’n “Age Discrimination Under 40,” (Apr. 19, 2020), <https://www.youthrights.org/age-discrimination-under-40/>.

26 See *Mount Lemmon Fire Dist. v. Guido*, 139 S. Ct. 22 (2018) (holding that the ADEA applies to all state and local government employers, regardless of the number of employees).

27 528 U.S. 62 (2000); see also *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 522 (2000); *Flint v. City of Phila.*, 2000 U.S. Dist. LEXIS 3091, Civil Action No. 98-96 (Mar. 17, 2000).

28 Robert J. Gregory, *There Is Life in That Old (I Mean, More “Senior”) Dog Yet: The Age-Proxy Theory After Hazen Paper Co. v. Biggins*, 11 Hofstra Lab. & Emp. L.J. 390, 393 n.14 (1994)

types of discrimination can be “arbitrary.”²⁹ Nevertheless, in The Report, Secretary Wirtz defined “arbitrary discrimination” as the “rejection [of older workers] because of assumptions about the effect of age on their ability to do a job *when there is in fact no basis for these assumptions.*”³⁰

In enacting the ADEA, Congress sought to prohibit the arbitrary use of age as a proxy or indicator for an applicant’s or an employee’s productivity, ability, or competence.³¹ The ADEA, however, contains an “escape clause,” the *bona fide occupational qualification* (BFOQ). This statutory defense permits employers under certain circumstances to make age-based employment decisions.³² For example, employers “may lawfully engage in discriminatory practices that would otherwise be prohibited by the ADEA when ‘age is a *bona fide occupational qualification* reasonably necessary to the normal operation of the particular business.’”³³ The BFOQ is statutory, strictly construed, and difficult to prove under both Title VII and the ADEA.³⁴

In addition, the ADEA permits employers to differentiate among employees or job applicants “where the differentiation is based on reasonable factors other than age [RFOA].”³⁵ “Unlike the BFOQ exception, where the employer admits to age-based discrimination and maintains its necessity, an employer who claims an RFOA exception asserts that there has been no age discrimination at all.”³⁶ Reasonable factors other than age may include “factors that sometimes accompany advancing age, such as declining health or diminished vigor and competence.”³⁷

29 Querry, *supra* note 2, at 535 n.38; *see*, Age Discrimination in Employment Act, 29 U.S.C. § 621(a)(2) “the setting of arbitrary age limits regardless of potential for job performance has become a common practice;” *Id.* § 621(a)(4) “the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce;” and *Id.* § 621(b) “It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.”

30 The Wirtz Report, *supra* note 6, at 2.

31 Querry, *supra* note 2, at 537 (quoting *Duffy v. Wheeling Pittsburg Steel Corp.*, 738 F.2d 1393, 1399 & n.2 (3d Cir. 1984) (Adams, J., dissenting) (“Apparently cognizant that the aging process can affect capability, Congress drafted the ADEA to distinguish carefully between those employment decisions that are arbitrary and those that are performance-related.”), *cert. denied*, 469 U.S. 1087 (1984) (citation omitted).

32 *Id.*

33 29 U.S.C. § 623(f) (emphasis added); *see also* *W. Airlines v. Criswell*, 472 U.S. 400, 400–02 (1985) (holding that airline’s policy of requiring flight engineers to retire at age sixty was a BFOQ reasonably necessary to the safe operation of its business); *Usery v. Tamiami Tours, Inc.*, 531 F.2d 224, 236 (5th Cir. 1976) (upholding bus company’s policy of refusing to hire persons over forty as intercity bus drivers as a BFOQ reasonably necessary for the safe transportation of passengers from one point to another).

34 *See* Johnson, *supra* note 19, at 71.

35 *Id.*

36 *See* Querry, *supra* note 2, at 576.

37 *See id.* (quoting *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1016 (1st Cir. 1979)).

Other legitimate available defenses to an ADEA action are set forth in Morneau's article, *Too Good, Too Bad: "Overqualified" Older Workers*,³⁸ that is, plaintiff's unsuitability or incompetence, economic factors, lesser comparative qualifications, inability to get along with supervisors or other employees, insubordination, lack of enthusiasm, veteran preference, job elimination, poor performance, and refusal to follow company policies.³⁹

C. ADEA Exclusive Remedy

Congress passed the ADEA⁴⁰ to promote the employment of older persons and prohibit arbitrary discrimination by employers based on age.⁴¹ When Congress passed the ADEA, it crafted a detailed administrative scheme with complex enforcement mechanisms to accomplish these goals. Until 2012, every circuit to consider the issue viewed the ADEA as the exclusive remedy for claims of age discrimination in employment,⁴² even those seeking to vindicate constitutional rights under 42 U.S.C. section 1983.⁴³

The leading case holding that the ADEA precludes section 1983 actions in age discrimination in employment is *Zombro v. Baltimore City Police Department*.⁴⁴ In *Zombro*, a police officer asserted a section 1983 claim contending the police department discriminated against him because of age when it transferred him to a job of lesser status. The district court granted summary judgment in favor of the department. On appeal, the Fourth Circuit concluded that the ADEA forecloses section 1983 claims and affirmed the district court's grant of summary judgment.⁴⁵ The Ninth Circuit followed suit in *Ahlmeyer v. Nevada System of Higher Education*⁴⁶ holding, "The ADEA is the exclusive remedy for claims of age discrimination in

38 Jeff Morneau, *Too Good, Too Bad: "Overqualified" Older Workers*, 22 W. New Eng. L. Rev. 58 nn.62–77 (2000) (opining that rejecting applicants on ground of overqualification may be a legitimate, nondiscriminatory reason but may also be used as a mask for age discrimination).

39 *Id.* at 58–59; *see also* Gregory, *supra* note 28.

40 29 U.S.C. §§ 621–623.

41 *See id.* § 623(b).

42 *See, e.g.,* Migneault v. Peck, 204 F.3d 1003, 1004 n.1 (10th Cir. 2000); Lafleur v. Tex. Dep't of Health, 126 F.3d 758, 760 (5th Cir. 1997); Murray A. Duncan, III, *The Proper Preclusion Standard: Why the ADEA is Not the Exclusive Remedy for Age Discrimination in Employment*, 8 Seventh Circuit Rev. 217 (2012) (discussing *Levin v. Madigan*, the first circuit to hold that the ADEA does not preclude section 1983 equal protection, claims) <https://scholarship.kentlaw.itt.edu/seventhcircuitreview/vol8/iss1/9> (last visited Jan. 17, 2024); Erin L. Donnelly, *The Preclusion of § 1983 Claims By the Age Discrimination in Employment Act Following Hildebrand v. Allegheny County*, 757 F. 3d 99 (3d Cir. 2014), St. John's Law Scholarship Repository, 90 St. John's L. Rev. 109 (2016).

43 *Ahlmeyer v. Nev. Sys. of Higher Educ.*, 555 F.3d 1051, 1060–61 (9th Cir. 2009).

44 868 F.2d 1364, 1368–69 (4th Cir. 1989) (holding ADEA's remedies sufficiently comprehensive to demonstrate congressional intent to preclude section 1983 actions in area of age discrimination in employment).

45 *Id.* at 1365, 1369.

46 555 F.3d at 1060.

employment, even those claims with their source in the Constitution."⁴⁷

It is important to distinguish the ADEA from the Age Discrimination Act of 1975,⁴⁸ which prohibits discrimination based on age in programs or activities that receive federal financial assistance. For example, the U.S. Department of Education gives financial assistance to schools and colleges. Charges of age discrimination in this area are enforced by the Office for Civil Rights (OCR). Its implementing regulations are found in the Code of Federal Regulations at 34 C.F.R. part 110. The Age Discrimination Act of 1975 does not cover employment discrimination.⁴⁹

D. Litigation under the ADEA

An applicant or employee who has suffered an adverse action based on age by his or her employer may make two claims against the employer: disparate treatment and disparate impact. The former occurs when the employee is intentionally treated differently than other employees because she or he is a member of the age protected class (forty and over). Proof of discriminatory motive is required. Disparate impact, on the other hand, exists where the employer has a rule or policy that is not discriminatory on its face but has a disparate effect on those forty or over.⁵⁰ Most ADEA claims, including those arising from failure to hire because of overqualification, are brought under the disparate treatment theory. It was not until 2005 that the Supreme Court, overruling the Court of Appeals for the Fifth Circuit, held in *Smith v. City of Jackson, Mississippi*,⁵¹ that disparate impact claims are actionable under the ADEA.⁵²

A plaintiff suing under the ADEA must come forward with either direct evidence of discrimination, which is often difficult to produce, or rely on circumstantial evidence. Cases based on circumstantial evidence utilize the *McDonnell Douglas/Burdine* analysis, under which the plaintiff bears the initial burden of establishing the elements of his or her prima facie case of age discrimination. In an ADEA failure to hire case, a plaintiff may establish a prima facie case by showing that (1) the plaintiff was a member of the protected group of persons over forty, (2) the plaintiff was subject to an adverse employment action (not hired), (3) a substantially younger person was hired for the position, and (4) the plaintiff was qualified to do the job for which he/she was rejected.⁵³

If a plaintiff establishes a prima facie case, the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason" for the employer's actions.⁵⁴

47 *Id.* at 1060–61.

48 Pub. L. 94-135 (codified at 42 U.S.C. § 6101).

49 See EEOC, *Age Discrimination: Overview of the Law 1*, <https://www2.ed.gov/policy/rights/guid/ocr/ageoverview.html?exp=1> (last visited Sept. 21, 2023).

50 *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

51 544 U.S. 228 (2005).

52 *Id.* at 243.

53 *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1432 (11th Cir. 1998).

54 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973); see also Judith J. Johnson, *A*

If the employer offers such a reason, the burden shifts back to the plaintiff to show that the employer's reason was pretext for prohibited discrimination.⁵⁵ Prior to the Supreme Court's decision in *St. Mary's Honor Center v. Hicks*,⁵⁶ an ADEA plaintiff could establish pretext simply by showing that the employer's proffered evidence was unworthy of credence.⁵⁷ The plaintiff could prevail if he or she disproved the defendant's explanation for the alleged discriminatory action.⁵⁸ In *Hicks*, however, a 5-4 majority "upped" the evidentiary "ante" for the plaintiff⁵⁹ and held that to establish pretext, an employee must prove "'both that the [employer's] reason was false, and that discrimination was the real reason.'"⁶⁰

Once reluctant to use summary judgment in civil rights cases involving intent, motive, and credibility,⁶¹ courts now frequently decide disparate treatment age discrimination cases at this stage.⁶² This movement gained legal support in a trilogy of Supreme Court cases decided by the Court in 1986—*Anderson v. Liberty Lobby*,⁶³ *Celotex v. Catrett*,⁶⁴ and *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*⁶⁵ These cases changed the way courts approach summary judgment, making it much easier for defendants to obtain summary judgment and depriving many deserving ADEA plaintiffs of their rights to a jury trial in civil rights cases, which involve complex issues of intent, motive, and credibility.⁶⁶ While courts should be cautious about granting summary judgment in cases where motive, intent, or state

Cross-Circuit Comparison of the Burden-Shifting Analysis in Disparate Treatment Cases Under the Age Discrimination in Employment Act of 1967 as Amended, 44 Drake L. Rev. 107 (1995) (explaining the shifting burden of proof in discrimination cases and outlining the various approaches taken by the circuits to this burden-shifting analysis for ADEA claims).

55 *McDonnell Douglas*, 411 U.S. at 804.

56 509 U.S. 502 (1993).

57 *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 (1981).

58 *Id.*

59 See Query, *supra* note 2, at 561 (citing 2 Howard C. Eglit, *Age Discrimination* § 7-05, at 7-36 (2d ed. 1994); see also Robert Brookins, "Hicks, Lies, and Ideology: The Wages of Sin is Now Exculpation," 28 Creighton L. Rev. 939, 943 (1995)).

60 See Query, *supra* note 2, at 561 (quoting *Hicks*, 509 U.S. at 516) (quoting *Burdine*, 450 U.S. at 253)).

61 See generally Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 Yale L.J. 73, 74–76 (1990) (discussing history of the summary judgment procedure).

62 See Query, *supra* note 2, at 425.

63 477 U.S. 242 (1986).

64 477 U.S. 317 (1986).

65 475 U.S. 574 (1986).

66 Query, *supra* note 2 at 562–63 n.195; see also Frank J. Cavaliere, *The Recent 'Respectability' of Summary Judgments and Directed Verdicts in Intentional Age Discrimination Cases: ADEA Case Analysis Through the Supreme Court's Summary Judgment "Prism,"* 41 Clev. St. L. Rev. 103, 118 (1992) (discussing standards for granting summary judgment in ADEA cases and noting the advantage held by the employer); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. Rev. 203, 207 (1993) ("In response to the [Supreme Court] trilogy, lower courts have granted summary judgment in cases where there exist questions of fact concerning the employer's motive, thereby denying to employment discrimination plaintiffs their 'day in court' historically promised by the American model of litigation.")

of mind are at issue, “the salutary purposes of summary judgment—avoiding protracted, expensive and harassing trials—apply no less to discrimination cases than to other areas of litigation.”⁶⁷ To avoid summary judgment on employment discrimination claims, the plaintiff must introduce significantly probative evidence both that the proffered reason for the adverse employment action is false and that discrimination is the real reason for the action.⁶⁸

E. Age Proxy Theory

Prior to the Supreme Court’s decision in *Hazen Paper Co. v. Biggins*,⁶⁹ many lower courts held that an employment decision based on a seemingly neutral equivalent of an overt, age-based employment decision could operate as the functional equivalent of an overt age-based decision itself. Applying what has become known as the “age proxy” doctrine or theory, these courts equated employment decisions based on certain age-correlated factors (“age proxies”) with unlawful age discrimination under the ADEA.⁷⁰

Professor Howard Eglit in the first edition of his treatise on age discrimination, described the age proxy doctrine as follows:

Sometimes an employer, rather than using age as the basis of its decisions, will rely on such factors as cost or seniority. As it turns out, however, these factors are so closely correlated with age that most courts have pierced the rhetoric and rejected employers’ efforts. In other words, because typically (although not inevitably) seniority—i.e., years on the job—will correlate with age, use of seniority by an employer as a basis for decision making, such as selecting the most senior employees for discharge, will be seen as a disguised reliance on age.⁷¹

The same theory underlies the concept of overqualification as a proxy for age discrimination as discussed in the hypothetical with which the authors introduced this article.

Overqualification, according to Merriam-Webster, is the state of “having more education, training, or experience than a job calls for.”⁷² Employers may view overqualified candidates as inappropriate hires for fear that they may become bored, seek a different position that is more at their level, feel underpaid, or be insubordinate if hired into a position for which they are overqualified.

Although the ADEA does not explicitly proscribe the use of age proxies, its

67 *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir. 1985); *see also* *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 146–47 (2000) (quoting *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 524 (1993)).

68 *Brooks v. Cnty. Comm’n of Jefferson Cnty., Alabama*, 446 F.3d 1160, 1163 (11th Cir. 2006).

69 507 U.S. 604 (1993).

70 *See* Query, *supra* note 2, at 538.

71 Howard C. Eglit, *Age Discrimination*, § 16.03a, at 2S97–2S98 (Supp. 1992).

72 Merriam-Webster.com Dictionary: *Overqualified* (Merriam Webster).

creation of the RFOA exception⁷³ implicitly incorporates what has become known as the “age proxy theory.” This theory “refers to a method of proof that permits a finding of age discrimination to be based on an employer’s reliance on an age-related factor.”⁷⁴ The proxy theory simply posits that “the age-related factor is a stand-in for age itself.”⁷⁵ In other words, whether age itself or the proxy for age, the employer has relied on stereotypes of older workers rather than facts about the individual older worker(s) in question when making a decision that results in an adverse employment action.

F. Objective vs. Subjective Hiring Criteria

Despite more than thirty years of precedent, the federal courts continue to disagree about how to address the proxy theory of age discrimination. Many courts addressing overqualification have consistently held that there must be some objective reason why the excessive qualifications are a negative trait.⁷⁶ “Although the ADEA does not prohibit rejection of overqualified job applicants *per se*, courts have expressed concern that such a practice can function as a proxy for age discrimination if ‘overqualification’ is not defined in terms of objective criteria.”⁷⁷ Objective criteria mean specific, concrete, identifiable information based on facts such as number of words typed per minute, college, or university degrees. Subjective criteria refer to information based on personal feelings or gut reactions such as the applicant lacks enthusiasm or motivation. Subjective criteria can also be based on personal biases, where objective criteria are based on facts, not feelings. Some courts have held that objective criteria that are uniformly and equally applied regardless of age fail to amount to age discrimination.⁷⁸ Some courts have found that “secret, unannounced, subjective criteria cannot satisfy the employer’s burden of producing legitimate, nondiscriminatory reasons for an applicant’s rejection.”⁷⁹ Others have held that subjective criteria can also be lawful and legitimate.⁸⁰

73 29 C.F.R. § 1625.7 (2012). The reasonable factor other than age (RFOA) provision provides that it shall not be unlawful for an employer to take any action otherwise prohibited under [the Act] where the differentiation is based on reasonable factors other than age discrimination. “A reasonable factor other than age is a non-age factor that is objectively reasonable when viewed from the position of a prudent employer exercising reasonable care mindful of its responsibilities under the ADEA under like circumstances.” *Id.*; see also Judith J. Johnson, *Rehabilitate the Age Discrimination in Employment Act: Resuscitate the “Reasonable Factors Other than Age” Defense and the Disparate Impact Theory*, 55 *Hastings L.J.* 1399, 1403 (2004) (arguing forcefully for placing emphasis on “reasonable factor other than age” in applying an RFOA defense by an employer).

74 Gregory, *supra* note 28, at 393 n.14.

75 *Id.*

76 *Buckner v. Lynchburg Redev. & Hous. Auth.*, 262 F. Supp. 3d 373, 378 (W.D. Va. 2017) (citing *EEOC v. Ins. Co. of N. Am.*, 49 F.3d 1418, 1420 (9th Cir. 1995)).

77 *EEOC v. Ins. Co. of N. Am.*, 49 F.3d at 1420.

78 See, e.g., *Stein v. Nat’l City Bank*, 942 F.2d 1062, 1066 (6th Cir. 1991); *Phillips v. Mabus*, 894 F. Supp. 2d 71 (D. Haw. 2012).

79 See, e.g., *Woody v. St. Clair Cnty. Comm’n*, 885 F.2d 1557, 1565 (11th Cir. 1989); *Buckner*, 262 F. Supp. 3d at 378.

80 See, e.g., *Gray v. N.Y. State Elec. & Gas*, No. 02–CV–6214, 2004 WL 15702, at *4 (W.D.N.Y.); *Chapman v. Al Transp.*, 229 F.3d 1012, 1033 (11th Cir. 2000).

Prior to the decision of the Supreme Court in *Hazen Paper*,⁸¹ many lower courts found that an employment decision based on a seemingly age-neutral factor could be the equivalent of an overt, discriminatory, age-based decision in violation of the ADEA.⁸² In *Hazen Paper*, the Court addressed the question of whether an employer's interference with the vesting of pension benefits violated the ADEA and concluded that it did not.⁸³

II. THE SUPREME COURT'S RULING IN HAZEN PAPER

Petitioner, Hazen Paper Company (Hazen Paper/petitioner), manufactured coated, laminated, and printed paper and paperboard. The company was owned and operated by two cousins, Robert and Thomas Hazen. The Hazens hired respondent, Walter Biggins (Biggins/respondent), as their technical director in 1977. They fired him in 1986, when he was sixty-two years old and just a few weeks shy of the date his pension benefits would vest.⁸⁴

Biggins sued the petitioners in the U.S. District Court for the District of Massachusetts, alleging a violation of the ADEA. He claimed that age had been a determinative factor in the petitioners' decision to fire him. Petitioners claimed instead that they fired Biggins for doing business with competitors of Hazen Paper.⁸⁵ The case was tried before a jury, which rendered a verdict for Biggins on his ADEA claim, found violations of the Employee Retirement Income Security Act of 1974 (ERISA), and state law. On the ADEA claim, the jury found that the petitioners "willfully" violated the statute that gave rise to liquidated damages.⁸⁶ Petitioners moved for judgment notwithstanding the verdict, which the district court granted with respect to the state law claim and the finding of "willfulness" but otherwise denied it.⁸⁷

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

82 *See, e.g.*, *Tuck v. Henkel Corp.*, 973 F.2d 371, 376 (4th Cir. 1992), *cert. denied*, 507 U.S. 916 (1993) (holding that employer's reliance on employee's years of service in making hiring decision gave rise to inference of age discrimination); *White v. Westinghouse Elec. Co.*, 862 F.2d 56, 62 n.9 (3d Cir. 1988) (same); *Laugesen v. Anaconda Co.*, 510 F.2d 307 (6th Cir. 1975) (employee dismissed because he had "too many years on the job"); *Castleman v. Acme Boot Co.*, 959 F.2d 1417 (7th Cir. 1992) (termination of employee only eight months before he reached retirement age evidence of age discrimination); *Leftwich v. Harris-Stowe State Coll.*, 702 F.2d 636, 691 (8th Cir. 1983) (ADEA prohibits business practices that eliminate "older workers who had built up, through years of satisfactory service, higher salaries than their younger counterparts"); *Taggart v. Time, Inc.*, 924 F.2d 43, 44-48 (2d Cir. 1991) (stressing that for those in the protected age group being overqualified may be simply code word for too old); *see also EEOC v. Gen. Elec. Co.*, 773 F. Supp. 1470, 1473 (D. Kan. 1991) (holding that employer's statement that younger candidate had more potential to advance in the company sufficient to raise inference of discrimination since "[p]otential often coextensive with age").

83 *Hazen Paper*, 507 U.S. at 604; *see also* Judith Johnson, *Semantic Cover for Age Discrimination: Twilight of the ADEA*, 42 Wayne L. Rev. 1 (1995) (criticizing the Supreme Court's *Hazen Paper* decision for determining that the use of a factor that simply correlated with age was a legitimate, nondiscriminatory reason for an adverse action unless the reason correlated perfectly with age).

84 *Hazen Paper*, 507 U.S. at 606.

85 *Id.*

86 *Id.*

87 *Id.* at 607.

On appeal, the Court of Appeals for the First Circuit affirmed judgment for the respondent on both the ADEA and ERISA counts and reversed judgment notwithstanding the verdict for the petitioners as to “willfulness.” In affirming the judgments of liability, the court of appeals relied heavily on evidence that the petitioners had fired Biggins to prevent his pension from vesting at the ten-year mark had Biggins worked “a few more weeks” after being fired.⁸⁸

Writing for a unanimous Supreme Court, Justice O’Connor emphasized that in a disparate treatment case, such as the instant one, liability depends on whether the protected trait (under the ADEA, age) motivated the employer’s decision, played a role in that process, and had a determinative influence on the outcome.⁸⁹ When the employer’s decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears even if the motivating factor is correlated with age, as pension status typically is.⁹⁰ Usually, an older employee has had more years in the workforce than a younger employee and has gained more years of service from a particular employer. “Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily ‘age-based.’”⁹¹ The court, holding for petitioners, summarized its decision by saying, “Our holding is simply that an employer does not violate the ADEA just by interfering with an older employee’s pension benefits that would have vested by virtue of the employee’s years of service.”⁹²

The age-proxy theory in its entirety was not before the Court in *Hazen Paper*. The holding there was limited to whether an employer violates the ADEA by interfering with vestment of an employee’s pension benefits. The issue was not whether the employer’s reliance on pension status could mask an age bias, but whether reliance on such a factor was, *ipso facto*, age discrimination. According to *Hazen Paper*, “there is no intentional discrimination under the ADEA when it is clear that the proxy, rather than age, motivated the employer.”⁹³

Gregory notes in his article on the importance and effect of *Hazen Paper* that “the proxy at issue in *Hazen Paper* was objective and measurable.”⁹⁴ He points out that courts have long recognized that subjective employment practices are reviewed carefully because of the danger that such practices are susceptible to being “a ‘covert means’ to discriminate intentionally.”⁹⁵ Where an employer bases its employment decision on objective and measurable criteria, as in *Hazen Paper*, there is no direct basis for finding intentional discrimination. On the other hand,

88 *Id.* at 607.

89 *Id.* at 610.

90 *Id.* at 611.

91 *Id.*

92 *Id.* at 613.

93 Gregory, *supra* note 28, at 408; *see also* Johnson, *supra* note 19, at 23.

94 Gregory, *supra* note 28, at 408.

95 *Id.* (citing *Jauregul v. City of Glendale*, 852 F.2d 1128, 1136 (9th Cir. 1988)).

“where ... the employer bases its decision on subjective, age-related criteria, there is a substantial risk that the employer is using the proxy as a mask for age discrimination.”⁹⁶

III. THE COURTS SPEAK AND THE CIRCUITS SPLIT

Cases addressing overqualification as a reason for rejecting a job applicant or taking other adverse employment actions have been found in most of the federal circuits, the district courts within the circuits, and in some state court decisions. Clear splits exist among the courts. Some hold that “overqualification” is a legitimate, nondiscriminatory reason for rejecting a job applicant,⁹⁷ while others declare that the use of “overqualification” is a proxy for age discrimination in violation of the ADEA.⁹⁸ Still others send mixed signals, holding that overqualification, if not clearly defined by objective criteria, can easily be a mask for discrimination while in the same case acknowledging that relying on a factor closely correlated with age, as is overqualification, does not violate the ADEA.⁹⁹

The cases discussed Parts III.A–C have been organized both by circuits and by the positions these courts take regarding overqualification and adverse employment decisions. Part III.A discusses the cases at both the circuit and district court levels in which the courts have ruled overqualification to be a proxy for age discrimination. Part III.B reviews the cases in which overqualification has been found not to be a proxy for age discrimination, but rather to be a legitimate nondiscriminatory reason for an adverse employment action. Part III.C addresses those cases that send mixed signals, recognizing, on the one hand, that overqualification, unless clearly defined by an objective standard, can be a proxy for age discrimination while noting, on the other hand, that while overqualification might be closely correlated with age, the ADEA does not make use of this criterion necessarily a violation of the Act.¹⁰⁰

A. “Overqualification” as a Proxy for Age Discrimination

Courts in various federal circuits since 1990 (i.e., D.C., Second, and Ninth) have

96 Gregory, *supra* note 28, at 410. For a more in-depth discussion of subjective versus objective criteria, see *infra* Part IV.A.

97 See, e.g., *Timmerman v. IAS Claim Servs.*, 138 F.3d 952 (5th Cir. 1998) (affirming summary judgment for employer whose stated reason for terminating plaintiff (overqualification) was legitimate, nondiscriminatory reason and noting that the plaintiff cited no cases in opposition to summary judgment that indicate ‘overqualification’ is a pretext to discrimination).

98 See, e.g., *Taggart v. Time, Inc.*, 924 F.2d 43 (2d Cir. 1991) (reversing summary judgment for employer finding overqualification code word for too old and holding that jury could find overqualification to be mask for age discrimination).

99 See, e.g., *Jianqing Wu v. Special Couns., Inc.*, 54 F. Supp. 3d 48, 55 (D.D.C. 2014) (distinguishing period of service and experience (objective criteria) and age (protected status)), *aff’d* USCA No. 14-7159, 2015 U.S. App. LEXIS 22477 (D.C. Cir., Dec. 22, 2015), *cert denied* 136 S. Ct. 2473, June 2016; *Buckner v. Lynchburg Redev. & Hous. Auth.*, 262 F. Supp. 3d 373, 378 (W.D. Va. 2017) (finding that the defendants’ belief that the plaintiff would cost too much to employ due to his experience was an objective criterion).

100 Despite the use of three clearly defined headings in this article, these ADEA cases are fact dependent, and the courts’ holdings are a matter of interpretation.

ruled that overqualification is a proxy for age discrimination under the ADEA.¹⁰¹ As Julia Lamber explains, “[W]hile the issue of overqualification is often raised in employment discrimination cases, Taggart [was] the first court of appeals decision to grapple with the potentially discriminatory nature of excluding applicants because they are ‘overqualified’ in the age discrimination context.”¹⁰² These cases are often fact dependent, however, as evidenced by rulings of most of these same circuits finding overqualification to be a legitimate, nondiscriminatory reason for adverse employment actions in other factually distinct cases (see Part III.B).

1. *EEOC v. District of Columbia Department of Human Services*¹⁰³

This case concerns Dr. Kielich, a dentist who had spent over thirty years as a board-certified periodontist working with children and the handicapped.¹⁰⁴ After concluding his tenure as a professor of dentistry, dental resident coordinator, and clinic manager at Georgetown University’s District of Columbia Children’s Hospital, Kielich applied for both permanent and temporary positions as a dental officer for the District of Columbia Department of Human Services. At the time of his initial application, Dr. Kielich was sixty-three years old. He was not hired for any of the positions.

In all these searches, however, the ranking panel had listed Dr. Kielich as “highly qualified.”¹⁰⁵ The two permanent positions were filled by dentists aged forty-six and thirty-four, while the temporary positions were filled by dentists aged thirty-one and twenty-eight.¹⁰⁶ After learning that he was not selected for any of the positions, Dr. Kielich filed a timely charge of age discrimination with EEOC. On May 5, 1987, the EEOC filed suit against the defendant on behalf of Dr. Kielich under the ADEA, contending that the defendant violated the Act by refusing to hire Dr. Kielich as a public health dental officer because of his age. At the time of the alleged violation, Dr. Kielich was sixty-four years old.¹⁰⁷

The defendant put forward a myriad of reasons for not hiring Dr. Kielich, including the defendant’s panel members’ beliefs that the positions in question were entry level positions for which Dr. Kielich was overqualified and overspecialized.¹⁰⁸ The court was not persuaded by defendant’s reasons, found them to be pretextual,

101 See, e.g., *Taggart*, 924 F.2d 43; *Binder v. Long Island Lighting Co.*, 933 F.2d 187 (2d Cir. 1991); and *Warrilow v. Qualcomm, Inc.*, No. 02cv0360 DMS (JMA) 2004 U.S. Dist. LEXIS 33468 (S.D. Cal. Sept. 16, 2004), *aff’d*, 268 F. App’x 561 (9th Cir. 2008)). The D.C. District Court case in the next section also ruled overqualification was a proxy for age discrimination but the opinion was rendered moot by the settlement of the case, the opinion was therefore vacated, and the case remanded for dismissal.

102 Julia Lamber, *Overqualified, Unqualified or Just Right: Thinking About Age Discrimination and Taggart v. Time*, 58 *Brook. L. Rev.* 347, 348 (1992).

103 729 F. Supp. 907, 909 (D.D.C. 1990).

104 *Id.*

105 *Id.* at 910.

106 *Id.* at 911.

107 *Id.* at 908.

108 *Id.* at 912.

and concluded instead that Dr. Kielich was “an extraordinary, highly qualified 64 year old dentist.”¹⁰⁹

The court countered the defendant’s pretextual reasons by saying, “the testimony ... suggested that the reason Dr. Kielich was not selected was because the individual panel members believed that the position for which Dr. Kielich applied was ‘entry level’ and that Dr. Kielich was simply overqualified.”¹¹⁰ The court concluded, “[T]he Court believes that individual members of the selection panel had preconceived notions about what a successful candidate for an ‘entry level’ position would look like which did not include a 64 year old [sic] dentist with almost 40 [sic] years of experience.”¹¹¹ Finding that the EEOC had produced clear evidence to prove that the defendant was motivated by illegitimate reasons to reject Dr. Kielich’s application, the court “held that plaintiff had met its burden of proving that Dr. Kielich was discriminated against because of his age in violation of the ADEA.”¹¹²

The parties settled. The circuit court stated that the settlement rendered the lower court’s decision moot, vacated its opinion, and remanded the case for dismissal.¹¹³

2. *Taggart v. Time, Inc.*¹¹⁴

Thomas Taggart was employed as a print production manager by Preview Subscription Television, Inc. (Preview), a subsidiary of Time, Inc. (Time). In May of 1983, Time notified Preview employees that it intended to dissolve Preview and lay off its employees. Shortly thereafter, Time did just that and invited the laid-off employees to apply for job openings at Time. Taggart applied for thirty-two jobs, obtained eight interviews, but was not hired by any division of Time. Seven of the employers concluded that he was unqualified. Home Box Office (HBO), the eighth employer to interview Taggart, declined to hire Taggart for a print purchaser position because he was overqualified. Taggart was sixty years old at that time. Taggart filed a timely charge of age discrimination with the EEOC and subsequently, appearing *pro se*, filed a complaint in the district court for the Southern District of New York. He contended that all the interviews were mere courtesy interviews, a sham, and that his age was the real reason he was denied employment.¹¹⁵

The record revealed that the hiring manager at HBO stated that because Taggart was overqualified, she did not think the position for which he was applying would interest or challenge him. She gave no other reason for not hiring Taggart. Time admitted that its sole reason for refusing to hire Taggart for the print purchaser

109 *Id.* at 915.

110 *Id.*

111 *Id.* at 915.

112 *Id.*

113 *EEOC v. D.C. Dep’t. of Human Servs.*, No. 90–7065, 1991 WL 18498 (D.C. Cir. Jan. 31, 1991).

114 924 F.2d 43 (2d Cir. 1991). For further analysis of this case, see generally Lamber, *supra* note 102, at 347.

115 *Taggart*, 924 F.2d at 47.

position was because he was overqualified.¹¹⁶ The employer believed that the job would not challenge Taggart, and he would likely leave soon to seek other employment.¹¹⁷ Taggart responded that he was willing to take any job available simply to continue to earn a decent living.¹¹⁸

The district court concluded that Taggart failed to show that he was qualified for seven of the positions for which he applied. Neither had he shown that the employer's reasons for not hiring him were mere pretexts but were instead reasonable business judgments to which the court must defer.¹¹⁹ The district court granted summary judgment for Time and dismissed Taggart's complaint.¹²⁰ "The court's grant of summary judgment turned on its finding that, because Time's decision was a reasonable business judgment, a reasonable jury could not find or infer intentional discrimination."¹²¹

Taggart appealed to the Second Circuit Court of Appeals, which disagreed with the district court, saying, "Denying employment to an older job applicant because he or she has too much experience, training or education is simply to employ a euphemism to mask the real reason for refusal, namely, in the eyes of the employer the applicant is too old."¹²² As Lamber explained,

[The district] court accepted Time's rationale that the job would fail to challenge Taggart and that he would thus continue to seek other employment. In contrast, the Second Circuit accepted Taggart's characterization: it is unlikely that an older employee will continue to seek jobs, in part because there are not many job opportunities for an older employee.¹²³

The Second Circuit reversed the summary judgment for Time on the print purchaser position at HBO, where Time had maintained that Taggart was not hired because he was "overqualified," and remanded the case to the district court for a trial on the merits consistent with its opinion.¹²⁴

116 *Id.*

117 Jeff Morneau, *Too Good, Too Bad: "Overqualified" Older Workers*, 22 W. New Eng. L. Rev. 45, 70 (2000) (containing good discussion of overqualification and the courts, including major cases).

118 *Id.*

119 *Taggart v. Time Inc.*, No. 87 CIV. 3408 (MBM), 1990 WL 16956, at *3–4. (The district court in *Taggart* concluded that "[i]t is a reasonable business judgment for an employer to decide not to hire a prospective employee because that person would be bored in that job, or would leave upon finding a better job, or both.").

120 *Id.* (quoting Lamber, *supra* note 102 at 352) (The court's grant of summary judgment turned on its finding that, because Time's decision was a reasonable business judgment, a reasonable jury could not find or infer intentional discrimination.).

121 Lamber, *supra* note 102 at 352.

122 *Id.* (quoting *EEOC v. Dist. of Columbia, Dept. of Hum. Servs.*, 729 F. Supp. 915 (D.D.C. 1990) (stating that overqualified and over-specialized are buzzwords for too old)).

123 Lamber, *supra* note 102, at 355.

124 *Taggart v. Time, Inc.*, 924 F.2d 43, 48 (2d Cir. 1991).

3. *Binder v. Long Island Lighting Co.*¹²⁵

David Binder, a former employee of Long Island Lighting Co. (LILCO), graduated from college in 1955 with a bachelor's degree in mechanical engineering and began working for LILCO. In 1968, shortly after earning a master's degree in nuclear engineering, he began supervising the construction of LILCO'S Shoreham Nuclear Power Station. In 1970, he became the first project engineer for Shoreham, a managerial position with decision-making responsibilities regarding the plant's size, configuration, and equipment. Numerous promotions followed until in 1984 he became Consulting Engineer to the Vice President of Engineering and Administration, Dr. Matthew Cordaro.¹²⁶

The mid-1980s were difficult years for LILCO. By 1984, when William Catacosinos took over as LILCO'S Chair and Chief Executive Officer, the company's financial condition was perilous. Catacosinos tried to make the company's bureaucracy leaner by laying off more than five hundred employees and eliminating the positions of "staff assistant" to senior LILCO executives. Binder was not one of the employees laid off. However, when Dr. Cordaro was elevated to Senior Vice President of Operations and Engineering, this put Binder in conflict with Catacosinos's policy against staff assistants for senior executives. Cordaro eventually succumbed to Catacosinos's directive and eliminated Binder's position.¹²⁷

During this time, multiple positions in the newly formed project management department opened, but Binder was not considered for these positions despite his obvious qualifications. Robert Kelleher, LILCO'S Vice President of Human Resources, stated in his affidavit that he did not contact Binder about any of these positions because he did not think any of the positions were suitable for someone with Binder's qualifications and experience. Kelleher stated further,

One of my concerns in placing someone of Mr. Binder's education and experience is that I not "underemploy" the individual. By that I mean that if you place a person in a position which uses little of their knowledge or places them in a subordinate role to that which they had been filling, the individual becomes frustrated and suffers from low morale.¹²⁸

Both Catacosinos and Kelleher acknowledged that there were positions available for which Binder was qualified that were filled by younger persons. However, both stated that none were "suitable" or "appropriate" for Binder because none were at the salary and grade level achieved by him or required the technical skills he possessed. That being the case, both Catacosinos and Kelleher concluded in their affidavits that Binder would have been "underemployed," which would lead to his low morale and frustration.¹²⁹

125 933 F.2d 187 (2d Cir. 1991, *rev'd in part and remanded: Binder I*), 847 F. Supp. 1007 (E.D.N.Y. 1994) (*Binder II*), *rev'd in part and remanded* 57 F.3d 193 (2d Cir. 1995) (*Binder III*).

126 *Binder I*, 933 F.2d at 187.

127 *Id.* at 189.

128 *Id.* at 190.

129 *Id.* at 192.

The court noted that the only relevant difference in the instant case (Binder) and Taggart was that Taggart said he would take any job available to stay employed, while Binder made no such similar statement. The court further noted, however, that Binder had no opportunity to express his views on lower available positions because none were discussed with him. The suitability of positions for Binder were decisions made by Kelleher and Catacosinos, not Binder. Acknowledging that the jury would be free to conclude that LILCO staff might have been acting out of a genuine desire not to place Binder in a position in which he might be frustrated, exhibit low morale, and perform poorly by not discussing lower paying jobs with him, it would also be free to conclude that this explanation was pretextual. Quoting the Act itself, the court stated,

The ADEA does not forbid employers from adopting policies against “underemploying” persons in certain positions so long as those policies are adopted in good faith and applied evenhandedly. However, such policies may also serve as a mask for age discrimination, and the issues of good faith and evenhanded application cannot be resolved on a motion for summary judgment.¹³⁰

The Second Circuit vacated the district court’s grant of summary judgment in favor of LILCO and remanded for further consideration consistent with this opinion.¹³¹

In a concurring opinion, Judge Altimari acknowledged that the *Taggart* opinion was binding and, thus, the opinion in *Binder* was correct. He worried, however, that *Taggart* would make summary judgment much harder to come by in ADEA cases. If the term “overqualified” were invariably a buzzword for “too old,” an employer might have legitimate reasons for declining to employ overqualified persons. “Certainly,” he wrote, “an employer might reasonably determine that placing an ‘overqualified’ individual in a particular position would . . . demoralize the individual and engender frustration, low morale, and poor job performance.”¹³² “When such a judgment is made, under circumstances that fail to give rise to an inference of age discrimination, summary judgment should be available. To hold otherwise bestows talismanic significance on the term ‘overqualified’ and needlessly permits ADEA plaintiffs to evade meritorious motions for summary judgment.”¹³³ “Such a result would be contrary to precedents of this circuit and contrary to the spirit of Fed. R. Civ. P. 56(c).”¹³⁴

The trial was held before a jury, which deliberated less than two hours before returning a verdict in Binder’s favor of \$828,505 in lost wages and \$497,738 for pain and suffering.¹³⁵

130 *Id.* at 193.

131 *Id.*

132 *Id.* at 194.

133 *Id.*

134 *Id.* (citing *Meiri v. Dacon*, 759 F.2d 989 (2d Cir. 1985), *cert. denied*, 474 U.S. 829 (1985)).

135 *Binder III*, 57 F.3d at 200.

After the trial judge overturned the jury verdict for Binder, the court of appeals revisited this case for the second time and reversed again, saying, "In short, the district court should not have granted judgment n.o.v. because the jury was entitled to conclude, as it did, that the explanation offered by LILCO (its policy against underemployment) was pretextual and to draw a permissible inference of discrimination."¹³⁶

4. *Gray v. New York State Electric & Gas*¹³⁷

Timothy Gray, the plaintiff, proceeding *pro se*, brought this action for damages against his former employer, New York State Electric and Gas Corporation (NYSEG/defendant), arising from the defendant's declining to interview or hire him because of his age for any of its openings after a significant layoff. The plaintiff had worked for the defendant for five years before he was laid off due to economic reasons. The plaintiff was forty-two years old when he applied for the first of six open positions.¹³⁸ He maintained that there was no reason other than his age to warrant his not having received an offer or at least an interview for any of the six positions to which he applied.¹³⁹

The defendant received nearly two hundred applications for the laborer's position. Gerald Masters, the hiring supervisor, knew Gray from being his supervisor during Gray's previous employment with NYSEG in the early 1990s. He did not select Gray for interview or hiring because he doubted that he would be intellectually challenged as a laborer or interested in staying in this position for any length of time, but rather would leave NYSEG after a few months to return to college.¹⁴⁰ Masters also cited several subjective reasons for not interviewing Gray such as his opinion that Gray was not "proactive or willing to improvise" and was a "loner, standoffish and quiet, almost morose."¹⁴¹ The court noted that the use of subjective criteria in evaluating job applicants is not unlawful.¹⁴² "Indeed," the court said, "[a] subjective reason can constitute a legally sufficient, legitimate nondiscriminatory reason under the McDonnell Douglas/Burdine analysis."¹⁴³

Gray, relying heavily on *Taggart*, argued that Masters's statement about believing Gray would not be intellectually challenged was an indirect way of denying him consideration because he was judged "overqualified."¹⁴⁴ Gray further argued that, in the context of age discrimination, being told that one is "overqualified" for a position raises an inference upon which a reasonable juror could find support

136 *Id.* at 193.

137 No. 02-CV-6214, 2004 WL 15702 (W.D.N.Y. 2004).

138 *Id.* at *1.

139 *Id.* at *4.

140 *Id.* at *16.

141 *Id.* at *17-18.

142 *See id.* (quoting *Sattar v. Motorola, Inc.*, 138 F.3d 1164, 1170 (7th Cir. 1998) ("Nothing in Title VII bans outright the use of subjective evaluation criteria.")).

143 *Id.* at *12 (quoting *Chapman v. Al Transp.*, 229 F.3d 1012, 1033 (11th Cir. 2000)).

144 *Id.*

for Gray's arguments regarding "overqualification." However, the court was persuaded by previous rulings of the Second Circuit that "the court must respect the employer's unfettered discretion to choose among qualified candidates"¹⁴⁵ and that its "role is to prevent unlawful hiring practices, not to act as a 'super personnel department' that second guesses employers' business judgments."¹⁴⁶ The court went on to emphasize the role of courts in addressing employment discrimination issues under the ADEA, saying, "Employers are not required to make wise employment decisions, they are merely prohibited from making discriminatory ones."¹⁴⁷ "The ADEA prohibits discrimination, not poor judgment."¹⁴⁸

Nevertheless, in the context of a summary judgment motion, the court found that the conflicting evidence with respect to the laborer position created an issue of fact requiring the court to deny NYSEG judgment on this position but grant summary judgment on the other five positions.¹⁴⁹

5. *Warrillow v. Qualcomm, Inc.*¹⁵⁰

Plaintiff Lisa Warrillow sued her former employer, Qualcomm, Inc., contending that defendant Qualcomm violated the ADEA by terminating her and not selecting her for the open position of marketing coordinator during a reduction in force. At the time of her termination, Warrillow was fifty-seven years old.¹⁵¹ The defendant stated that it did not select Warrillow for the marketing position because she was overqualified and because of its concern that she would not be interested in performing the lower-end tasks this position required or being paid a modest salary.¹⁵² Qualcomm argued that its rejection of Warrillow "as overqualified is a legitimate nondiscriminatory reason"¹⁵³ for not selecting her.

Warrillow relied on *EEOC v. Insurance Co. of North America (ICNA)*¹⁵⁴ to support her argument of pretext. In that case, the Ninth Circuit declined to adopt the Second Circuit's suggestion "that rejection of an older worker because he or she is 'overqualified' is *always* tantamount to age discrimination," but instead looked at whether the determination of overqualified was based on at least one defined concern.¹⁵⁵ The court found that the defendant in ICNA met the defined concern standard by explaining its fear that someone with the plaintiff's extensive

145 *Id.* at *12 (quoting *Byrnie v. Town of Cromwell Bd. of Educ.*, 243 F.3d 93, 103 (2d Cir. 2001)).

146 *Id.* (quoting *Bagdasarian v. O'Neill*, No. 00-CV-0258E(SC) 2002 U.S. Dist. LEXIS 13328, at *12 (W.D.N.Y. July 17, 2002)).

147 *Id.*

148 *Id.* (quoting *Richane v. Fairport Cent. Sch. Dist.*, 179 F. Supp. 2d 81, 89 (W.D.N.Y. 2001)).

149 *Id.* at *20. The case was subsequently settled before trial.

150 No. 02cv0360 DMS (JMA) 2004 U.S. Dist. LEXIS 33468 (S.D. Cal. Sept. 16, 2004), *aff'd*, 268 F. App'x 561 (9th Cir. 2008).

151 *Qualcomm*, 2004 U.S. Dist. LEXIS 33468, at *4.

152 *Id.* at *17, 19.

153 *Id.* at *18.

154 49 F.3d 1418 (9th Cir. 1995).

155 *Qualcomm*, 2004 U.S. Dist. LEXIS 33468, at *6 (citing *id.*).

background in loss control would delve too deeply into the accounts he was assigned and impose upon insureds' time to an inappropriate degree."¹⁵⁶

The district court found Qualcomm's rejection of the plaintiff as overqualified to be a legitimate nondiscriminatory reason, as had the court in *Coleman v. Quaker Oats Co.*¹⁵⁷ But, the analysis did not stop there.¹⁵⁸ Plaintiff Warrillow, unlike Coleman, provided evidence that she would have accepted a thirty to forty percent cut in her pay to stay at Qualcomm. In the eyes of the court, the plaintiff's testimony rendered her case more akin to *Taggart* in that Warrillow, like Taggart, was willing to take any job available simply to continue to earn a (decent) living.¹⁵⁹ Considering those circumstances, the court found that the defendant Qualcomm's reason of overqualification to be pretextual and unworthy of credence. In sum, the district court found that Warrillow raised a genuine issue of material fact as to Qualcomm's proffered overqualification reason for the plaintiff's nonselection for the marketing position and denied the defendant's summary judgment motion on the plaintiff's disparate treatment claims as to her nonselection.¹⁶⁰ Trial by jury was held. The jury decided in favor of the defendant.¹⁶¹

The plaintiff moved for judgment as a matter of law and for a new trial. The district court denied both motions. On appeal, the Ninth Circuit ruled that the jury verdict was not plainly erroneous, would not result in a manifest miscarriage of justice, denied the plaintiff's posttrial motions, and affirmed the ruling of the district court granting summary judgment to Qualcomm.¹⁶²

6. *Magnello v. TJX Cos.*¹⁶³

Peggy Magnello, a fashion buyer with decades of experience, was recommended to TJX by her former employer after it had gone out of business.¹⁶⁴ When she was not hired repeatedly by TJX for positions for which she was qualified, she applied to their educational training program. Magnello was not accepted into the training program either, allegedly because she was "overqualified." The program's marketing targeted mainly recent college graduates, and Peggy already had many years of relevant experience. Nevertheless, the training program personnel recommended her to TJX Human Resources for other possible employment. Magnello was interviewed for relevant positions by two subsidiaries of TJX. She was then told that she lacked experience in their exact subset of retail and that "she had moved around too much."¹⁶⁵

156 *Id.* at *18.

157 232 F.3d 1271 (9th Cir. 2000).

158 *Qualcomm*, 2004 U.S. Dist. LEXIS 33468, at *19.

159 *Id.* at *20.

160 *Id.* at *20, 26.

161 *Qualcomm*, 268 F. App'x 561, 563 (9th Cir. 2008).

162 *Id.* at 562-63.

163 556 F. Supp. 2d 114 (D. Conn. 2008).

164 *Id.* at 117.

165 *Id.* at 121-22.

Magnello filed suit under the ADEA alleging disparate impact and disparate treatment theories of age discrimination.¹⁶⁶ The U.S. District Court for Connecticut denied the defendant's motion for summary judgment on the disparate treatment claim stating that Magnello's alleged overqualification for the educational program may have been pretextual and thus was an issue of fact for a jury to decide.¹⁶⁷ The court granted summary judgment to the defendant on the disparate impact claim for failure to accept her into the educational program, because Magnello failed to demonstrate "that defendant's use of college recruitment is unreasonable."¹⁶⁸

7. *Focarazzo v. University of Rochester*¹⁶⁹

Marjorie Focarazzo was an administrative assistant to the associate dean for academic affairs in the University of Rochester School of Nursing.¹⁷⁰ In 2008, seven years into this position, Focarazzo's supervisor began documenting issues with her failure to perform her duties.¹⁷¹ Focarazzo received multiple written communications explaining her performance issues and noting actions she could take to remedy her supervisor's concerns, but the issues apparently worsened over the course of 2008. In January 2009, Focarazzo was terminated for failure to "meet the requirements of her position."¹⁷²

After receiving her right-to-sue letter from EEOC, Focarazzo commenced the instant action against the university for age discrimination.¹⁷³ In her claim of age discrimination, Focarazzo pointed to a particular comment by her supervisor that in earning a master's degree and continuing to take graduate courses, she had become "overqualified" for her position as an administrative assistant.¹⁷⁴ The court acknowledged the precedents from *Taggart* and *Binder* (also in the Second Circuit) that "a conclusory statement that a person is overqualified may easily 'serve as a mask for age discrimination'"¹⁷⁵ but differentiated the circumstances of this case by noting that in those cases "overqualification [was] the sole 'nondiscriminatory reason' offered by the employer for the adverse employment action."¹⁷⁶ The comments made in those earlier cases "were made solely in the context of cases wherein overqualification is the sole 'nondiscriminatory reason' offered by the employer for an adverse employment action, and relate to whether employers might use the facially nondiscriminatory reason of 'overqualification' as a euphemistic pretext

166 *Id.* at 118–19.

167 *Id.* at 122.

168 *Id.*

169 947 F. Supp. 2d 335 (W.D.N.Y. 2013).

170 *Id.* at 336.

171 *Id.* at 336–37.

172 *Id.* at 337.

173 *Id.*

174 *Id.* at 339.

175 *Id.* at 340 (quoting *Bay v. Times Mirror Magazines, Inc.*, 936 F.2d 112, 118 (2d Cir. 1991), and *Binder v. Long Island Lighting Co.*, 933 F.2d 187, 192–94 (2d Cir. 1991)).

176 *Id.*

for refusing to hire older workers.”¹⁷⁷ In the instant case, the university never claimed to have terminated Focarazzo on the basis of overqualification. The only reason offered by the university for her termination was the plaintiff’s failure to perform her duties. Thus, finding that performance issues were legitimate, nondiscriminatory reasons for the plaintiff’s termination and comments in *Taggart* and *Binder* were irrelevant here, the court granted the defendant’s motion for summary judgment and dismissed the complaint with prejudice.¹⁷⁸

8. Summary of Part III.A

One common theme throughout the cases discussed above is that the plaintiffs are often not given the opportunity to express their interest in positions that the employer has (preemptively) deemed “beneath” the plaintiff. In *EEOC v. District of Columbia, Department of Human Services*, for instance, the plaintiff was never even interviewed; thus, he was not able to defend his legitimate interest in an allegedly “entry-level” position. Likewise, in *Taggart* and *Binder*, overqualification was the only explanation given for denying their rehiring, despite their testimony explicitly stating that they would prefer any job over no job in order to continue making a living. *Taggart* is important in employment discrimination law because it is the first court of appeals decision to confront the issue of excluding applicants because they are “overqualified.” Most striking, according to Lamber, is the “question of paternalism, seen clearly in *Binder* where the employer does not even tell Binder there is no ‘suitable’ job, let alone talk to him about a lower-paying, lower-status jobs. Also, there is the sense that when employers say a person would not be interested or challenged by a job, the employers are really saying that the person would not be sufficiently enthusiastic or grateful.”¹⁷⁹

In *Gray*, *Magnello*, and *Warrillow* issues of material fact regarding whether the reasons proffered by the defendants were pretextual precluded summary judgment. Finally, in *Phillips* and *Focarazzo*, the courts granted summary judgment to the defendants while recognizing that—with proper evidence—the Ninth and Second Circuits, respectively, have found overqualification to be pretextual in ADEA cases.

B. “Overqualification” as a Legitimate, Nondiscriminatory Reason for Adverse Action

1. *Woody v. St. Claire County Commission*¹⁸⁰

177 *Id.* (“This holding does not relate, nor has it been applied, to the issue of whether a supervisor’s stray remarks referencing an employee’s bona fide overqualification for her job comprise evidence of pretext, where overqualification is neither given by the employer as the nondiscriminatory reason for its actions, nor suggested by any evidence as having played any role in them.”); see also *Ulrich v. Moody’s Corp.*, No. 13-CV-8 (VSB) 2017 U.S. Dist. LEXIS 50438 (S.D.N.Y. Mar. 31, 2017), *aff’d*, 721 F. App’x. 17 (2d Cir. 2018) (quoting *Focarazzo* and explaining that where overqualification is the “sole nondiscriminatory reason” for an adverse employment action, an inference of discrimination may arise, but no such inference arises when a “supervisor’s stray remarks reference an employee’s bona fide overqualification for her job” and overqualification is not given as the reason for an adverse action nor is there evidence suggesting that it played a role in such actions).

178 *Focarazzo*, 947 F. Supp. 2d at 341.

179 Lamber, *supra* note 102, at 366.

180 885 F.2d 1557 (11th Cir. 1989).

This was a Title VII race discrimination case, not one based on the ADEA, but its discussion of overqualification and subjective factors in hiring decisions is informative.¹⁸¹ Also, it is important to note that the same legal principles in Title VII cases apply in ADEA cases.¹⁸²

Mary Woody, a Black female, applied on three separate occasions for various positions within the St. Clair County Probate Office. Judge Wallace Wyatt, head of the probate office, had authority to hire and fire his own employees. The county commission, however managed the number of employees, insurance, payroll, and retirement records within the probate court, and worked with the Alabama Employment Service (AES) in advertising vacant positions and in conducting initial screenings to determine if applicants met minimum qualifications. Woody first applied for a vacant position with AES. She failed the typing test. AES did not forward her name to Judge Wyatt as a possible candidate. Because she was not hired, she filed a charge of discrimination with EEOC alleging racial discrimination. When she discovered why she had not been hired (failing the typing test), she dismissed the charge.¹⁸³

Shortly thereafter, Woody applied for two other positions in the probate office, along with thirteen other applicants. Judge Wyatt met with the entire group together and then with each applicant individually. He eventually filled all three positions with White females, all of whom had faster typing skills and better secretarial skills than Woody.¹⁸⁴ Later that same year, AES advertised another opening for the position of general office worker. This job primarily required typing automobile registrations. Again, Judge Wyatt interviewed Woody, during which time she emphasized her skills in the clerical field and her experience in law and administration. Judge Wyatt hired a White woman who had previously been employed as a legal secretary and typed seventy-five words per minute. Woody typed fifty-four words per minute. Woody filed a charge of discrimination with EEOC and eventually sued in federal court alleging unlawful hiring practices and race discrimination.¹⁸⁵

During the trial, Judge Wyatt gave three reasons why he did not hire Woody: (1) she was not the best qualified applicant for the job for which he was hiring; (2) she was overqualified for the position; and (3) because of her qualifications,

181 Several Title VII cases have been included in this article even though they are not exclusively ADEA cases and do not all deal with age discrimination. They are included because they all address the issue of overqualification as a factor in an adverse employment decision. Some are based on race discrimination alone under Title VII or Title VII and 42 U.S.C. section 1981 (*Woody, Phillips v. TXU Corp., Barnes v. Ergon, Carter v. George Washington University*); others are based on a combination of race and national origin (*Jianqing Wu v. Special Counsel*); others on a combination of race and religion (*Kang v. Omni Tech*); others on both race and retaliation (*Barnes v. Ergon*); others on a complaint of discrimination under both the ADEA and Title VII (*Carter v. George Washinton University*). It has been noted previously that analysis under Title VII of the Civil Rights Act of 1964 is the same as that under the ADEA (29 U.S.C. § 621).

182 Both cases use the McDonnell Douglas test. *See, McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973).

183 *Woody*, 885 F.2d at 1558.

184 *Id.*

185 *Id.*

she would leave the job sooner than the person hired for the position.¹⁸⁶ Both the district and the appeals courts found that Judge Wyatt validly rejected Woody because she was overqualified for the position of general office worker; he had a genuine concern that she would become bored with the job and leave sooner than the hired applicants; and he had bad experiences in the past with constant turnover in his office. While some of these reasons were subjective, they were not pretextual or discriminatory.¹⁸⁷ The Eleventh Circuit affirmed the district court's opinion that the defendant articulated legitimate reasons for not hiring Woody—she was overqualified for the position, would be bored, and would leave the job sooner than the other applicants. Woody failed to prove that these reasons were pretextual or a proxy for discrimination.¹⁸⁸ The district court dismissed the case.

2. *Barnes v. Ergon Refining, Inc.*¹⁸⁹

While this is a Title VII race discrimination case, the opinion in favor of the employer contains helpful language pertaining to overqualification, which was Ergon's proffered reason for failing to hire Barnes. Alfred Barnes sued Ergon Refining, Inc. (Ergon) for refusing to hire him as a pool operator at Ergon's oil refinery in Vicksburg, Mississippi. Ergon interviewed Barnes but declined to offer him the position, contending that he was overqualified for a pool operator, would not be satisfied with an entry-level position, and would leave. Moreover, Ergon stated that it had difficulty retraining experienced persons to perform their duties according to Ergon's procedures instead of those they had used in prior employment. Ergon believed that Barnes would not be satisfied with an entry-level position and would not stay long term. Based on its previous difficulty retraining experienced persons to perform their duties according to Ergon's procedures, rather than those used in prior positions, Ergon did not hire Barnes. Barnes filed a charge of racial discrimination with the EEOC. When the EEOC declined to pursue his claim, Barnes filed suit against Ergon based on race discrimination under Title VII.¹⁹⁰

The district court found that Ergon did not intentionally discriminate against Barnes and presented legitimate, nondiscriminatory reasons for refusing to hire him, that is, its unsatisfactory experience with prior "overqualified" applicants¹⁹¹ who were difficult to retrain in Ergon's ways of performing certain tasks.¹⁹² The appellate court found that Ergon's stated reasons for not hiring Barnes (his overqualification, not being satisfied with an entry-level position, and the company's experience with other "overqualified" applicants) provided objective, legitimate bases for its

186 *Id.* at 1560.

187 *Id.* at 1561.

188 *Id.* at 1562.

189 No. 93-7375, 1994 WL 574190 (5th Cir. October 4, 1994).

190 *Id.* at *1.

191 *See, e.g., Woody v. St. Clair Cnty. Comm'n*, 885 F.2d at 1561 ("[I]t was not error to find that Wyatt validly rejected Woody because she was over-qualified for the position of general office worker. ... [P]eople are often turned away from employment because they are 'overqualified.'").

192 *Barnes*, 1994 WL 574190, at *4.

negative employment decision.¹⁹³ The Fifth Circuit affirmed the district court's summary judgment for Ergon.¹⁹⁴

3. *Pagliarini v. General Instrument Corp.*¹⁹⁵

The employer/defendant, General Instrument Corp., hired Pagliarini, the employee/plaintiff, to manage its acoustical engineering department in 1986. Four years later when Pagliarini was fifty-five years old, the employer terminated him as part of an overall reduction in force due to business setbacks. Pagliarini sued his employer under both Title VII and the ADEA, claiming that he was laid off because of his age. Pagliarini conceded that his Title VII claim warranted dismissal, as the exclusive federal remedy for age discrimination is under the ADEA.¹⁹⁶

The defendant sought summary judgment, contending that it terminated the plaintiff as part of its reduction in work force caused by financial woes and that Pagliarini's expertise did not lend itself to the defendant's short-term objective of financial viability.¹⁹⁷ The plaintiff claimed that this reason was a pretext for age discrimination, as was the defendant's assertion that Pagliarini was "overqualified." He cited in support of this argument *Taggart*.¹⁹⁸ The district court found Pagliarini's argument without merit and his reliance on *Taggart* misplaced because it was distinguishable on the facts.

Pagliarini asserted that the defendant's classifying him as "overqualified" could be construed as evidence of pretextual intent, just as in *Taggart*. The district court disagreed, finding that in *Taggart* the employer's only justification for refusing to hire an older applicant was the assertion that he was overqualified, despite his expressed willingness to take any job available. In contrast, Pagliarini's retention in his existing position was not viable considering the defendant's business necessities.¹⁹⁹ In this context, the defendant's characterizing of the plaintiff as "overqualified" was a simple reflection of the fact that his talents were, in the eyes of his supervisors, "poorly matched to the available work."²⁰⁰

Granting summary judgment to the defendant, the court wrote, "No reasonable jury could interpret [the defendant's] assessment of the lack of fit between Pagliarini's skills and its perceived business needs as implied criticism of Pagliarini's age."²⁰¹ The First Circuit Court of Appeals summarily affirmed the decision of the district court.²⁰²

193 *Id.* at *4-5.

194 *Id.* at *6.

195 855 F. Supp. 459 (D. Mass. 1994).

196 *Id.* at 460 n.1 (citing *Williams v. General Motors Corp.*, 656 F.2d 129, 127 (5th Cir. 1981)).

197 *Id.* at 463.

198 *Taggart v. Time, Inc.*, 924 F.2d 43, 47 (2d Cir. 1991).

199 *Pagliarini*, 855 F. Supp. at 464.

200 *Id.*

201 *Id.*

202 *Pagliarini v. Gen. Instr. Corp.*, 37 F.3d 1484 (1st Cir. 1994) (per curiam).

4. *Sperling v. Hoffman-La Roche, Inc.*²⁰³

On February 4, 1984, Roche, employer/defendant, discharged or demoted 1100 employees pursuant to a reduction in force. Based on Roche's conduct during the reduction in force, Richard Sperling, one of the named employees and later plaintiff in this case, filed an age discrimination claim with EEOC on behalf of himself and all employees similarly situated. Thereafter, in May 1985, Sperling, along with other named plaintiffs, filed this action in federal court alleging, among other things, that Roche discriminated against them in violation of the ADEA. Subsequently, 476 of the 1100 employees affected by the reduction in force opted in as members of the putative class.²⁰⁴

The magistrate judge directed Roche to serve on plaintiffs a set of contention interrogatories, which would ask plaintiffs to identify the theories on which they based their claims of discrimination. Fourteen interrogatories were served. Each asked plaintiffs whether Roche considered specific factors in making the decision to terminate any employee forty or older.²⁰⁵

After several years, plaintiffs' responses were completed. Most of the responses were filed prior to the Supreme Court's decision in *Hazen Paper*. After *Hazen Paper*, some of the plaintiffs' contentions that were previously in violation of the ADEA, such as high salary, ample retirement benefits, and proximity to retirement, could no longer provide the basis for an ADEA claim.²⁰⁶

Overqualification was listed as Factor No. 8 in the contention interrogatories. The district court noted that this factor was arguably correlated with age because people achieving lengthy qualifications achieved this status through years of service, which correlated with age. Relying on *Hazen Paper*, the district court stated that when an employer's decision is wholly motivated by factors other than age, even when those factors are correlated with age, there is no violation of the ADEA. The court further explained that the Supreme Court justified the finding in *Hazen Paper* by emphasizing that "when an employer's decision is entirely motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes is not present."²⁰⁷ In conclusion, the district court held that "a claim that Roche made an employment decision based solely on the perception that an employee was over-qualified and/or over-experienced does not state a cause of action under the ADEA."²⁰⁸

The district court's reading of *Hazen Paper* in this case seems not to allow for a proxy theory of age discrimination. For purposes of this article, *Sperling* aligns with those cases that hold that overqualification does not give rise to a violation of the ADEA.

203 924 F. Supp. 1396 (D.N.J. 1996).

204 *Id.* at 1398.

205 *Id.* at 1399.

206 *Id.* (citing, *e.g.*, *White v. Westinghouse Elec. Co.*, 862 F.2d 56 (3d Cir. 1988)).

207 *Id.* at 1403.

208 *Id.* at 1409.

5. *Senner v. Northcentral Technical College*²⁰⁹

Senner, an unsuccessful applicant for an instructor position at Northcentral Technical College (NTC), sued the college for age and gender discrimination. The district court for the Western District of Wisconsin entered summary judgment for the college. Senner appealed. The Court of Appeals for the Seventh Circuit held that Senner failed to support his theory that the college discriminated in its candidate screening and hiring process.²¹⁰

The criteria used to evaluate candidates were created by two members of the hiring department (psychology). When evaluating the plaintiff's application materials, the hiring committee members did not give his Ed.D. in counseling and masters in school counseling much weight because they were degrees in education rather than psychology. Defendants argued that a colleague holding a doctorate might have trouble relating to undergraduate students.

Senner argued that the hiring committee applied a numerical rating system to application evaluation post-hoc after having chosen the candidates to be interviewed.²¹¹ The court disagreed. Senner also accused the hiring committee of arbitrarily (if not sinisterly) selecting only three applicants for interviews.²¹² Once again, the court was not persuaded. Finally, Senner argued that the rating criteria were subjective and would be better assessed in an in-person interview rather than simply in the application materials submitted.²¹³ Rejecting Senner's arguments, the appellate court wrote,

The problem is that [Senner's] arguments, even when construed most favorably toward Senner, only show that NTC did not give his credentials the emphasis they may have deserved. It may be unfair for instructors at a technical college to think that a colleague with a doctorate is over-qualified to teach their students, but it is hardly proof of gender or age discrimination—and holders of academic doctorates are not a protected class under the discrimination laws. Neither are education majors, and it appears from the evaluation sheets that the assessors discounted Senner's educational background because his degrees were in education (B.S., M.S., Ed.D.), instead of arts (B.A., M.A., Ph.D.). Indeed, Senner's claim that he is more qualified than the woman NTC hired goes more to his *prima facie* case.²¹⁴

The grant of summary judgment to the college was affirmed on appeal. In this early Seventh Circuit case of overqualification as proxy for alleged age discrimination, the circuit court did not address a proxy theory of age discrimination but instead focused on the facts of the case. Thus, as of 1999, the Seventh Circuit had not established an age proxy jurisprudence under the ADEA. For the purposes of this

209 113 F.3d 750 (7th Cir. 1997).

210 *Id.* at 757.

211 *Id.* at 755.

212 *Id.* at 756.

213 *Id.*

214 *Id.*

article, this opinion states that any factors (whether proxies for age or not has been left undecided) that played a role in the defendant's decision were legitimate and nondiscriminatory.

6. *Sembos v. Phillips Components*²¹⁵

Phillips Components (Phillips) sold the division of the company in which Sembos worked to Beyersschlag Centralab Components (BCC). The purchasing company offered Sembos a position that he declined because he did not think the pension benefits at BCC were equal to those to which he had been entitled at Phillips.²¹⁶ Sembos remained at Phillips and continued to express interest in numerous open positions but never actually applied for the jobs. Sembos claimed that the human resources department had his resume on file and that was a sufficient expression of interest on his part in other positions within Phillips that were filled during the time Sembos was searching for a new position. The court disagreed, saying, "An employer cannot be liable for failing to hire a person who does not apply for a job."²¹⁷ Sembos did not find another job with Phillips. Eventually, the company fired him. Sembos was fifty-one at the time.²¹⁸

Sembos filed a charge of age discrimination with EEOC, received his right-to-sue letter, and sued Phillips for age discrimination. Phillips defended by asserting both that Sembos did not apply for several jobs with the company about which he now complains and that he was overqualified for positions for which he did apply. The district court granted summary judgment to Phillips. Sembos appealed to the Seventh Circuit.²¹⁹ In affirming summary judgment for Phillips, the Seventh Circuit noted that Sembos failed to present any evidence that the defendant's asserted reasons for not hiring him were pretextual.²²⁰ The appellate court also quoted with approval the Ninth Circuit's opinion in *Coleman v. Quaker Oats Co.*: "employer is entitled to summary judgment on a plaintiff's ADEA claim where the plaintiff was rejected for a position because he was overqualified."²²¹ This quote seems to indicate that the Seventh Circuit went from *Senner*—not addressing the age proxy theory at all—to an outright finding that overqualification is a legitimate nondiscriminatory reason for an adverse employment action.

7. *Summary of Part III.B*

In the preceding cases, courts in the First, Third, Fifth, and Seventh Circuits found that worker or applicant overqualification was a legitimate, nondiscriminatory reason for employers' adverse actions. In *Senner* the Seventh Circuit held that the alleged undervaluing of the plaintiffs' credentials or experience did not constitute unlawful discrimination. The Seventh Circuit did not address the issue of an age

215 Case No. 00C4651 (N.D. Ill., Nov. 4, 2003), *aff'd*, 376 F.3d 696 (7th Cir. 2004)).

216 *Id.* at 699.

217 *Id.* at 701.

218 *Id.* at 699.

219 *Id.* at 702 (quoting *Konowitz v. Schnadig Corp.*, 965 F.2d 230, 234 (7th Cir. 1991)).

220 *Id.* at 701.

221 *Id.* at 701 n.4 (quoting *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1290 (9th Cir. 2000)).

proxy theory. In *Sembos*, the Seventh Circuit held simply that overqualification was a lawful nondiscriminatory reason for not hiring an applicant under the ADEA, even though the plaintiff did not appear to have been given an interview or an opportunity to make a case for his interest in the jobs for which he was allegedly overqualified. The Seventh Circuit has perhaps the clearest track record when it comes to the question of overqualification as a proxy for age discrimination, presumably because only one case has addressed it.

In *Pagliarini* (D. Mass.), the court agreed with the defendants that the mismatch of the plaintiffs' skills with the job responsibilities constituted a lawful reason not to hire the plaintiffs under the ADEA. In *Sperling* (D.N.J.), the court held that overqualification is not a proxy for age discrimination because it does not align with the unlawful stereotypes about older workers that the ADEA was passed to address, namely, that older workers are incompetent and/or unable to learn. In direct contrast, the Fifth Circuit held in *Barnes* that the defendant's reason for not hiring the plaintiff—because in the past, the overqualified workers the defendant had hired were resistant to training in the defendant's proprietary procedures—was lawful and nondiscriminatory, even though it was not based on the individual characteristics of the plaintiff.

C. Mixed Signals Regarding Overqualification as a Proxy

Cases of overqualification as an alleged proxy for age discrimination under the ADEA tend to be fact dependent. While the majority of these cases are decided on summary judgment for the defendants, some courts still hedge their language in these opinions to allow for potential future findings of overqualification as a proxy for age discrimination from different facts. How the courts do this, and in which circuits it has been done, is the discussion of this subpart.

1. *Jianqing Wu v. Special Counsel, Inc.*²²²

Pro se plaintiff Jianqing Wu was a native Mandarin speaker and a well-educated man holding three separate graduate degrees, including a J.D. and a Ph.D., as well as a member of the New York, D.C., and patent bars. He sought positions performing Mandarin document review on a contract basis with defendant law firms, Wilkie Farr & Gallagher LLP and Morrison & Foerster LLP. He applied for these positions through defendant staffing agencies, Special Counsel, Inc. and Hire Counsel Inc. Each required him to sit for a Chinese language exam administered and developed by the fifth defendant, ALTA Language Services. All defendants denied him employment, according to the plaintiff's complaint, based on his age, race, and national origin, in violation of both Title VII and the ADEA.²²³

Unhappy with his inability to gain employment, the plaintiff filed a charge of age discrimination with EEOC, alleging violations of both Title VII and the ADEA. The agency issued a right-to-sue letter, and Jianqing Wu filed suit against all defendants under both disparate treatment and disparate impact theories. He

²²² 54 F. Supp. 3d 48 (D.D.C. 2014), *aff'd*, USCA No. 14-7159, 2015 U.S. App. LEXIS 22477 (D.C. Cir. Dec. 22, 2015), *cert denied*, 136 S. Ct. 2473 (2016).

²²³ *Jianqing Wu*, 54 F. Supp. 3d at 49–50.

argued that the defendants intended to exclude old and experienced candidates through their language testing procedures which did not factor in valuable experience of older candidates.²²⁴ The court found that he failed to allege any facts to support his claim of intentional discrimination by defendants by not giving sufficient credit to his experience. Dismissing his disparate treatment age claim, the court said the ADEA “does not require an employer to accord special treatment to employees over forty years of age, [but rather to treat] an employee’s age ... in a neutral fashion.”²²⁵

Addressing the plaintiff’s claim that defendants’ hiring policies have a disparate impact on people with too much experience, rather than on old people, the court said that this argument does not save the plaintiff’s claim because “age and experience in the field are not logical equivalents for the purpose of the ADEA.”²²⁶ “[T]he statute’s operative provisions all turn only on chronological age: the law makes it unlawful to discriminate against people over age 40 [sic],”²²⁷ not people who have more than twenty years’ experience in their job. “The statute, therefore, clearly contemplates a distinction between ‘period of service’ or ‘work history’ and ‘age.’”²²⁸ Courts have confirmed this distinction. “While the rejection of more experienced and overqualified candidates may eventually lead to a finding of age discrimination, the ADEA does not prohibit the practice.”²²⁹ For the above reasons, the district court dismissed the plaintiff’s federal and state claims without prejudice.²³⁰

The plaintiff appealed to the D.C. Circuit Court, which affirmed the district court orders of July 16, 2014, and September 12, 2014. The U. S. Supreme Court denied certiorari.²³¹ Due to the court’s recognition that rejection of overqualified candidates may eventually lead to a finding of age discrimination, this case has been included in the “mixed signals” category. The court clearly acknowledged that overqualification could be a proxy for age discrimination even if that were not true in Jianqing Wu’s case.

2. *Bay v. Times Mirror Magazines, Inc.*²³²

Times Mirror Magazines (Times Mirror) acquired *Field & Stream* magazine, the company for which Eugene Bay (Bay) had previously worked. In a series of restructuring moves, Times Mirror reduced Bay’s responsibilities and eventually discharged him. At the time of his termination, Bay was fifty-four years old, earning a base salary

224 *Id.*

225 *Id.* at 53 (quoting *Slenzka v. Landstar Ranger, Inc.* 122 F. App’x 802, 813 (6th Cir. 2001)) (citing *Parcinski v. Outlet Co.*, 673 F.2d 34, 37 (2d Cir. 1982)).

226 *Jianqing Wu*, 54 F. Supp. at 55.

227 *Id.*

228 *Id.*

229 *Id.* (quoting *EEOC v. Ins. Co. of N. Am.*, 49 F.3d 1418, 1420 (9th Cir. 1995)).

230 *Jianqing Wu*, 54 F. Supp. at 56.

231 136 S. Ct. 2471 (2016).

232 936 F.2d 112 (2d Cir. 1991).

of \$150,000, and eligible for an annual bonus of approximately \$45,000.²³³ Bay's downgraded position at *Field & Stream* was then filled by a thirty-five-year-old at a much lower salary.²³⁴

Prior to the acquisition and restructuring, Bay had been responsible for most of *Field & Stream's* business affairs and operated with virtual autonomy. After the restructuring, he had real authority only over advertising and was required, for the first time, to report to second-level executives. Bay chafed at the diminution of his responsibilities and expressed his dissatisfaction with both the downgrading of his position and the reorganization itself.²³⁵

Bay then commenced this litigation, claiming that the decisions by Times Mirror violated the ADEA and were part of a deliberate effort to replace older, highly compensated employees with younger, less costly employees. Times Mirror responded that its decisions were based on Bay's resistance to the restructuring program, his stated dissatisfaction with reporting to a second-level supervisor, his high salary, and his overqualification for one of the available open positions for which he applied.²³⁶

After discovery, Times Mirror moved for summary judgment. Bay argued that recent decisions of the Second Circuit, *Taggart*, and *Binder*, precluded entry of summary judgment against him. The appellate court disagreed, saying, "Neither decision forbids employers from declining to place employees in positions for which they are overqualified on the ground that overqualification may affect performance negatively."²³⁷ This quote adds nuance to the Second Circuit's jurisprudence established in *Taggart* and *Binder* by establishing that overqualification, in certain circumstances, may constitute a legitimate nondiscriminatory reason for rejecting an applicant, if the defendants are concerned overqualification may negatively affect performance.

The Second Circuit affirmed the trial court's decision, noting that Bay had failed to demonstrate that Times Mirror's reasons for discharging him were pretextual.²³⁸ Bay appealed the entry of summary judgment against him, but the appeals court affirmed the trial court's granting of summary judgment in favor of Times Mirror.²³⁹

D. Buckner v. Lynchburg Redevelopment & Housing Authority²⁴⁰

Jeffrey Buckner worked for the Lynchburg Housing Authority (Housing Authority) for several years in a Mechanic II position, tending to the maintenance needs of the

233 *Id.* at 115.

234 *Id.* at 116.

235 *Id.* at 115.

236 *Id.* at 117–18.

237 *Id.* at 118 (citing *Binder v. Long Island Lighting Co.*, 933 F.2d 187, 192–94 (2d Cir. 1991)).

238 *Id.* at 118–19.

239 *Id.* at 115–116.

240 262 F. Supp. 3d 373 (W.D. Va. 2017).

Housing Authority's properties. He was paid \$17.43 per hour. A Mechanic II is a skilled position that requires working independently, while a Mechanic I generally serves more as a manual laborer and often works as a helper for a Mechanic II. In 2013, the Housing Authority terminated Buckner for budgetary reasons. The following year, a Mechanic I employee of the Housing Authority resigned, and the Housing Authority decided to fill that position. Buckner, fifty-two at that time, applied for the Mechanic I position, which paid \$12.01 per hour. In his application, Buckner highlighted his twenty years of experience and training, as well as certificates he had received that were relevant to the Mechanic I position. The Housing Authority did not hire Buckner, but instead hired Will Suddith who was thirty-six at the time. Suddith did not have any relevant certification, a high school diploma, or a GED.²⁴¹

Buckner filed a charge of discrimination with EEOC. After receiving his right-to-sue letter, he brought this failure to hire claim under the ADEA against defendant Housing Authority, alleging that the defendant discriminatorily hired a younger mechanic instead of him, even though he (Buckner) had more relevant skills and experience than, Suddith, the younger candidate. The defendant asserted, however, that the plaintiff was overqualified for the Mechanic I position, would not be happy in the lower-level position, and would cost the Housing Authority too much. The defendant sought summary judgment on the ground that the plaintiff's overqualification was a legitimate reason not to hire him.²⁴²

The district court noted that although the Fourth Circuit had not yet addressed the issue of overqualification as a legitimate reason not to hire an older worker under the ADEA, several circuits had accepted overqualification as a legitimate, nondiscriminatory basis for such a decision.²⁴³ The court further noted that "courts addressing overqualification have consistently held that there must be some objective reason why the excessive qualifications are a negative trait."²⁴⁴ In the instant case, the court found that the defendant's articulated reasons for not employing the plaintiff (he might cost too much and he would be unhappy in the position) to be reasonable objective concerns that he was not an appropriate hire for the Mechanic I position.²⁴⁵

Granting summary judgment for the Housing Authority the court said that the plaintiff had failed to present evidence sufficient to permit a reasonable jury to

241 *Id.* at 375.

242 *Id.* at 373.

243 *Id.* at 378; *see, e.g.*, *EEOC v. Ins. Co. of N. Am.*, 49 F.3d 1418, 1420 (9th Cir. 1995) ("[I]f ICNA's rejection of Pugh was truly based on its belief that he was overqualified for the position at issue, ICNA did not violate the ADEA."); *Stein v. Nat'l City Bank*, 942 F.2d 1062, 1066 (6th Cir. 1991) (differentiating the case from that of *Taggart* because the defendants had instituted an objective and measurable criteria for hiring, that is, college degrees); *Pagliarini v. Gen. Instr. Corp.*, 855 F. Supp. 464 (D. Mass. 1994) (rejecting reasoning and ruling in *Taggart* and holding that the statement that Pagliarini was "overqualified" is a simple reflection of the fact that his talents were poorly matched to available work); *Sembos v. Phillips Components*, 376 F.3d 696, 701 n.4 (7th Cir. 2004) (holding that employer entitled to summary judgment on the plaintiff's ADEA claim where the plaintiff was rejected for the position because he was overqualified).

244 *Buckner*, 262 F. Supp. 3d 378.

245 *Id.*

infer that the defendant's rationale (overqualification) for not hiring him was pretextual, and he failed to provide any probative evidence that his age was the "but-for" reason he was not hired.²⁴⁶ The district court dismissed plaintiff's case with prejudice.²⁴⁷

1. *Timmerman v. IAS Claim Services*²⁴⁸

In September 1993, defendant-appellee IAS Claim Services (IAS) hired plaintiff-appellant, Janet Timmerman, as a temporary employee in its accounting department. In May 1994, Timmerman resigned and accepted a position at another company, but within approximately two weeks she returned to her previous temporary position at IAS. In August 1994, IAS reorganized its accounting department, eliminated some temporary accounting positions, and created new permanent ones. IAS notified Timmerman shortly thereafter that her services would no longer be needed because she was overqualified for the available permanent position and her temporary position was being eliminated. At the time of her termination, Timmerman, who is a White female, was fifty-five years old. IAS hired a Black man who was younger than Timmerman for the permanent position.²⁴⁹

Timmerman sued IAS under Title VII for age discrimination, reverse race discrimination, and retaliation in violation of federal and state law.²⁵⁰ IAS rebutted Timmerman's claim of age discrimination by asserting that it refused to offer Timmerman permanent employment because its restructuring of the accounting department eliminated her temporary position and because she was "overqualified for the newly created permanent position dealing exclusively with the collection of past-due accounts and had expressed dissatisfaction when doing such work in the past."²⁵¹ The district court found that Timmerman offered no evidence to create a genuine issue of material fact showing that the IAS's proffered reason (overqualification) was pretextual and, therefore, granted summary judgment to IAS.²⁵²

On appeal, the Fifth Circuit noted that Timmerman called the court's attention to *Taggart* in which the Second Circuit cautioned that "overqualification is sometimes a pretext for age discrimination," but noted that Timmerman cited no cases from the Fifth Circuit indicating that overqualification is always an illegitimate reason for refusing to hire someone and offered no evidence that overqualification was a pretext for age discrimination in this case.²⁵³ The Fifth Circuit affirmed the district court's granting of summary judgment to the defendants on the age discrimination claim.²⁵⁴

246 *Id.* at 381.

247 *Id.* at 381.

248 138 F.3d 952 (5th Cir. 1998).

249 *Id.* at *2.

250 *Id.*

251 *Id.* at *5.

252 *Id.* at *3.

253 *Id.* at *9 n.5.

254 *Id.* at *13.

2. *Stein v. National City Bank*²⁵⁵

Plaintiff Stein, a fifty-eight-year-old retired employee of the Internal Revenue Service and a college graduate, applied for a customer service position with the defendant employer, National City Bank (employer/defendant). The defendant categorized the position as nonexempt and relied on a general policy of not hiring college graduates for nonexempt positions.²⁵⁶ The policy was an effort to prevent high turnover in customer service positions based on the assumption that persons with college degrees would leave after a short period of time because the work would not be sufficiently challenging.²⁵⁷

Stein was not hired and filed a charge of discrimination with EEOC alleging discrimination based on age and religion. The EEOC determined that the defendant did not discriminate against Stein, who then filed suit in federal district court. Both parties moved for summary judgment. Stein dropped his religion claim. The district court granted the defendant summary judgment on the age claim and held that the plaintiff did not establish a *prima facie* case of age discrimination.²⁵⁸

On appeal, the Sixth Circuit affirmed the district court on the age discrimination claim because the evidence failed to show any disparate treatment or that the defendant's policy was not uniformly applied or unreasonable. The appeals court further found that Stein failed to prove that the hiring policy was a pretext for age discrimination, an essential element of his claim.²⁵⁹

The plaintiff relied heavily on *Taggart* in which the district court held that "refusing to hire an individual because he was overqualified constituted circumstances from which a reasonable juror could infer discriminatory animus and thus find that the reason given was pretextual."²⁶⁰ However, the defendant's "overqualified" criterion in *Taggart* had no objective content. The criterion would allow the employer to shift the standard at will and provide a reviewing court with no way to determine whether the criterion was uniformly applied to all applicants. It was this characteristic that was fatal to the employer's policy in *Taggart*.²⁶¹

The district court noted, however, in the instant case that the defendant City Bank had instituted a policy with an objective and measurable criterion: college degrees. "This objective criterion removes the fear of a shifting standard and, as such, ensures that both the employer and applicant will be bound by the policy. . . . Unlike the criterion at issue in *Taggart*, defendant's criterion allows a reviewing court to readily determine whether it discriminates against a suspect class on its face or in its application."²⁶²

255 942 F.2d 1062 (6th Cir. 1991).

256 *Id.* at 1064.

257 *Id.* (The court noted that no studies were introduced to support the assumptions underlying this policy, and an affidavit of a professor indicated that no such studies existed.)

258 *Id.* at 1063.

259 *Id.* at 1066.

260 *Taggart v. Time, Inc.*, 924 F.2d 43, 48 (2d Cir. 1991).

261 *Stein*, 942 F.2d at 1066.

262 *Id.*

In affirming the district court's grant of summary judgment for the defendant, the appeals court held that the plaintiff failed to prove that the "no college degree" hiring policy in question was a pretext for age discrimination, an essential element of his claim upon which he would bear the burdens of production and persuasion at trial.²⁶³

3. *EEOC v. Insurance Co. of North America*²⁶⁴

In June 1988, Insurance Company of North America (ICNA) placed an advertisement in a Phoenix newspaper for a "loss control representative." The advertisement stated that the ideal candidate would have a B.S. degree or equivalent work experience, two years of property / casualty loss control, demonstrated verbal and written communication skills, the ability to travel, and be a self-motivated professional.²⁶⁵

Richard Pugh, who had over thirty years' experience in loss control and engineering, submitted a resume in response to the advertisement. He was not selected for an interview. Instead, ICNA interviewed four candidates, all of whom were younger than Pugh and had little or no loss control experience. Eventually, ICNA hired a twenty-eight-year-old woman with no loss control experience. Pugh filed a charge with EEOC alleging age discrimination. During the EEOC investigation, ICNA stated that it had not considered Pugh for the position because he was overqualified.²⁶⁶

Walter Merkel, one of the ICNA managers who reviewed Pugh's resume stated later in deposition that the reason he decided not to interview Pugh was that Pugh was overqualified and that with his training and experience, he would probably have delved too deeply into accounts, thus consuming too much of the insured's time. Another ICNA manager, who also would have seen Pugh's resume, stated that although he could not remember having seen the resume, he probably rejected Pugh's application because his application was unprofessional in appearance (had handwritten notes on it and did not include a cover letter).

The district court accepted ICNA's assertion that the principal reason it did not interview or hire Pugh was that it considered him overqualified for the position.²⁶⁷ The court did not find that this reason served as a proxy for age discrimination and granted summary judgment to ICNA.²⁶⁸

The Ninth Circuit affirmed the district court relying on language from *Hazen Paper*, that "[t]he fact that overqualification might be strongly correlated with advanced age does not make use of this criterion necessarily a violation of

263 *Id.*

264 49 F.3d 1418 (9th Cir. 1995).

265 *Id.*

266 *Id.* at 1419.

267 *Id.* at 1420 n.2.

268 *Id.* at 1419.

ADEA."²⁶⁹ Instead, the appeals court found that ICNA genuinely did not want someone who had thirty years' experience in loss control because he might have become too involved in uncomplicated risks and take up too much of clients' time.

The Ninth Circuit noted that while the ADEA does not prohibit rejection of overqualified job applicants *per se*, several courts have expressed concern that such a practice can function as a proxy for age discrimination if "overqualification" is not defined in terms of objective criteria.²⁷⁰ Distinguishing *ICNA* from *Taggart*, *Stein*, and *Bay*, the Ninth Circuit found the employer's reason in *ICNA* for rejecting Pugh (overqualification) to be "objective and non-age-related."²⁷¹

4. *Phillips v. Mabus*²⁷²

Phillips applied for and was interviewed for a GS-9 financial management analyst position with the Department of the Navy. When he was not offered the position because the defendant considered him to be overqualified, he sued Ray Mabus in his capacity as Secretary of the Navy (defendant/Navy). The defendant moved for summary judgment. Phillips argued that the stated reasons for his nonselection were mere pretexts for discriminatory animus based on his race, gender, and age.²⁷³ In addressing his age discrimination claim, he urged the district court to follow *Taggart*,²⁷⁴ in which the Second Circuit held that denying employment to an older applicant on the ground that he is overqualified "is simply to employ a euphemism to mask the real reason for refusal, namely, in the eyes of the employer the applicant is too old."²⁷⁵

The Ninth Circuit declined to do so. Citing *EEOC v. Insurance Co. of North America*, the appeals court stated that in appropriate circumstances, an employer in the Ninth Circuit can reject an applicant who is more than forty years old because he or she is overqualified, if the overqualified label has objective content.²⁷⁶ In the

269 *Id.* at 1418 (citing *Hazen Paper* "when an employer makes a decision on the basis of a criterion that is that is correlated with age, as opposed to age itself, the employer does not violate the ADEA.").

270 *See, e.g., Taggart v. Time, Inc.*, 924 F.2d 43, 43 (2d Cir. 1991); *Stein v. Nat'l City Bank*, 942 F.2d 1062 (6th Cir. 1991); and *Bay v. Times Mirror Magazines, Inc.*, 936 F.2d 112, 116 (2d Cir. 1991).

271 *Ins. Co. of N. Am.*, 49 F.3d at 1421; *see also Morneau, supra* note 38, arguing that "in contrast to the employer in *Stein*, *ICNA* did not maintain an objective hiring policy that could justify its reason for not hiring Pugh." In addition, the employer in *Stein* failed to offer evidence to support its conclusion that an older worker would "delve too deeply" into accounts or how this could be a problem for *ICNA*. *Morneau* further maintains that because *ICNA's* "conclusions were unsupported by any statistical, empirical or otherwise measurable evidence, the rejection based solely on "overqualification" was likely a mask for age discrimination." The employer's summary judgment in *ICNA* should have been defeated, in *Morneau's* opinion, and the case gone to trial. "Unfortunately," he argues, "for the plaintiff and all older applicants, "the Ninth Circuit ruled otherwise."

272 894 F. Supp. 2d 71 (D. Haw. 2012), *aff'd*, 607 F. App'x 762 (9th Cir. 2015).

273 *Phillips*, 607 F. App'x at 763.

274 *Taggart*, 924 F.2d at 43.

275 *Phillips v. Mabus*, No. 12-00384 LEK-RLP, 2013 WL 4662960, at *17 (D. Haw. Aug. 29, 2013) (quoting *Taggart*, 924 F.2d at 47).

276 *Id.* (citing *Ins. Co. of N. Am.*, 49 F.3d at 1421).

instant case, the court ruled that “the overqualified label had ‘objective content.’”²⁷⁷ The court explained that the objective content by which Phillips was judged to be overqualified for the position included “Phillips’s resolute belief that he was already an expert,” which “suggested to the interviewers that he would not be receptive to the training they believed he needed, and his superior management experience suggested that he was not a fit for the lower-level, data-entry position with few opportunities for promotion.”²⁷⁸ Finding no issues of material fact as to any of the plaintiff’s claims, the Ninth Circuit affirmed the lower court’s granting of summary judgment to the defendant.²⁷⁹ This precedent leaves open the possibility for a finding that overqualification is a proxy for age discrimination in the Ninth Circuit in the future.

5. *Coleman v. Quaker Oats Co.*²⁸⁰

Jerry Jeney, Joseph Gentile, and Perry Coleman, along with hundreds of other employees nationwide, were laid off by the Quaker Oats Company (Quaker) in Arizona during a series of reductions in force from 1994 to 1995. When the three named former employees were rejected for other available positions within the company, they sued, claiming that they were illegally fired because of their age in violation of the ADEA.²⁸¹ After a contentious discovery period, both sides moved for summary judgment. The district court granted summary judgment in favor of Quaker on all claims.²⁸²

The employees appealed to the Ninth Circuit, contending that Quaker’s reasons for terminating them and not rehiring them for any new positions within the company were based on a subjective evaluation system that was a cover for unlawful discrimination.²⁸³ The appeals court disagreed, stating that while a subjective evaluation system can be used as cover for illegal discrimination, subjective evaluations are not unlawful *per se*.²⁸⁴ Most of the criticism of Quaker’s evaluation system centered on the company’s not doing a good job of evaluating the employees and that other methods, such as standardized testing, would have done better.²⁸⁵ This allegation, according to the court “does little to help [the plaintiffs] establish that Quaker used a subjective system in order to discriminate against older employees. That Quaker made unwise business judgments or that it used a faulty evaluation system does not support the inference that Quaker discriminated on the basis of age.”²⁸⁶

277 *Phillips*, 607 F. App’x at 763.

278 *Id.*

279 *Id.*

280 232 F.3d 1271 (9th Cir. 2000).

281 *Id.* at 1280.

282 *Id.* at 1281.

283 *Id.* at 1290.

284 *Id.* at 1271

285 *Id.* at 1285.

286 *Id.*; see *Cotton v. City of Alameda*, 812 F.2d 1245, 1249 (9th Cir. 1987) (“The ADEA does not make it unlawful for an employer to do a poor job of selecting employees. It merely makes it unlawful to discriminate on the basis of age.”).

Turning to *Coleman*, the court noted that Quaker rejected Coleman because he was overqualified. The court concluded that Coleman's previous position as an account executive constituted an objective criterion. Placing him in the open customer manager position would have meant a two-step demotion, a sharp cut in salary, and loss of morale. Thus, explained the court, Quaker's rejection of Coleman as overqualified "is a legitimate, nondiscriminatory reason not in violation of the ADEA."²⁸⁷ As in *Phillips* and *ICNA*, the Ninth Circuit once again applied the "objective criteria" standard to the instant case. In doing so, the court continued to leave open the possibility of a future finding of overqualification as a proxy for age discrimination; however, once again the managers' assumptions about a potential worker's reaction to being overqualified for a position were treated as "objective" by the courts (the opposite of *Taggart*). It is therefore difficult to say whether such a case could exist where the Ninth Circuit could find overqualification as a proxy for age discrimination based on subjective criteria.

6. Summary of Part III.C

The D.C. district court recognized that rejection of overqualified candidates may eventually lead to a finding of age discrimination in *Jianqing Wu*. In *Bay*, the Second Circuit said of *Taggart* and *Binder*, "Neither decision forbids employers from declining to place employees in positions for which they are overqualified on the ground that overqualification may affect performance negatively."²⁸⁸ This quote adds nuance to the Second Circuit's jurisprudence established in *Taggart* and *Binder* by establishing that overqualification, in certain circumstances, may constitute a legitimate nondiscriminatory reason for rejecting an applicant, if the defendants are concerned overqualification may negatively affect performance.

The Sixth Circuit's only case—*Stein*—established an "objective criteria" standard under which overqualification as determined by objective criteria is a legitimate nondiscriminatory reason for adverse employment actions under the ADEA. *ICNA*, in the Ninth Circuit, also established the objective criteria standard. Nevertheless, the so-called "objective criteria" in *ICNA* was the hiring managers' beliefs that the plaintiff's experience would lead the plaintiff to spend too much client time on unnecessary details. Beliefs that were, notably, not based on interactions with the individual plaintiff.²⁸⁹

Finally, in *Phillips* and *Coleman* (Ninth Circuit) and *Buckner* (W.D. Va.), the courts held that in order for overqualification to be a lawful reason for an adverse employment action under the ADEA, the defendant must provide an objective reason for why overqualification is a negative trait in the given context. In *Coleman*,

287 *Coleman*, 232 F.3d at 1289.

288 *Bay v. Times Mirror Magazines, Inc.*, 936 F.2d 112, 118 (2d Cir. 1991) (citing *Binder v. Long Island Lighting Co.*, 933 F.2d 187, 192–94 (2d Cir. 1991)).

289 If the purpose of the objective criteria standard is to differentiate the reliance on stereotypes of older workers from general policies based on nonage-related factors to right-size the applicant pool, then one particularly insidious stereotype of older people can be summed up in the adage "you cannot teach an old dog new tricks." If assuming twenty years of experience on the job means one is incapable of learning to do one's job differently for different employers does not reflect precisely such a belief, what does?

the Ninth Circuit held that a sharp salary cut, two-step demotion, and thus loss of morale constituted objective reasons legitimate under the ADEA. In *Buckner*, a district court in West Virginia similarly held that the defendants' beliefs that the plaintiff would be unhappy and would cost more were legitimate objective reasons under the ADEA.

In large part, the mixed signals sent by the cases reviewed in this subpart were due to imprecise language and inconsistent application of precedent. The idea that a hiring manager's contention that older workers will not learn to perform their job duties according to the employer's expectations could be characterized as an objective criterion defies belief. As far as stereotypes of older workers are concerned, this behavior seems to reinforce the most common among them, namely, you cannot teach an old dog new tricks. If there were clear evidence that the individual in question indicated as much (as in *Phillips*) then summary judgment may very well be appropriate, but it is nevertheless a stretch to claim any "objective criteria" was involved. Such decisions should simply hinge on lack of evidence of pretext, rather than legitimate nondiscriminatory use of objective criteria.

IV. DISCUSSION AND RECOMMENDATIONS

Several of the cases reviewed in this article are clear-cut—for instance, *EEOC v. District of Columbia, Department of Human Services* was undoubtedly a case in which the hiring committee members held tightly to their beliefs that the positions in question were to be filled by young or new dentists, not well-established ones like the plaintiff. In this case, the denial of an interview for the position, when he was highly qualified according to all the hiring criteria, was essentially a smoking gun.²⁹⁰ All of the assumptions the committee may have made based on his application were stained by their age bias. The same can be said of the plaintiff in *Binder* who was also denied an interview. When an older applicant is at least as qualified for the position in question as the younger applicants who interview, but the older applicant is denied an interview, it becomes difficult to deny that age was a factor.

The focus of the ADEA was on eliminating age-based stereotyping and giving older workers the opportunity to demonstrate their individual qualifications, skills, and proficiencies in the workplace and hiring processes. When older workers are denied the opportunity to demonstrate their individual abilities, they are left to wonder if age might have played a role in the decision. Because older applicants and workers are often stereotyped, institutions must ensure they are given proper individual consideration, just as every applicant deserves. Notably many common assumptions about older workers are themselves discriminatory stereotypes, as experts have explained:

There is no credible public or corporate evidence that overqualified candidates get bored, are less motivated, are absent more, or have any unique team or performance problems. In fact, academic studies from Erdogan & Bauer

290 *But see*, *Jimenez v. City of New York*, 605 F. Supp. 2d 485, 491 (S.D.N.Y. 2009) (finding that the defendants had not violated the law by denying the plaintiff thirty-one out of thirty-three interviews for the other positions to which he had applied).

at Portland State University concluded that the overqualified, if hired, get higher performance appraisal ratings and perform better than average hires.²⁹¹

If older applicants will not make it to an interview round, where they can speak for themselves regarding some of the stereotypes about which many people are concerned (e.g., too low a salary, potential boredom / lack of intellectual stimulation, mental sharpness, technological proficiency), then it is common courtesy to inform them why they were not given that opportunity.²⁹²

As many courts have recognized, there are numerous reasons why an employer may not want to hire an overqualified applicant for a job.²⁹³ Onwuachi-Willig points out in her article in the *Washington University Law Review*, "Complimentary Discrimination and Complementary Discrimination in Faculty Hiring" that these same considerations take place during faculty searches at colleges and universities where departments may not want to offer a position to an "overqualified" candidate if they fear that he or she will leave for a more desirable job shortly thereafter or to avoid expending resources to investigate and recruit a candidate who will not accept.²⁹⁴ Similarly, academic departments may not want to offer a coveted faculty position to an "overqualified" candidate if they fear that he or she will hold onto the offer until a better one comes along, leaving the department with a vacant position and a failed search.²⁹⁵ Likewise, departments may be concerned that their preferred candidate may be seeking an offer from them to use in negotiating a better offer from the institution of their first choice.²⁹⁶

Running a business requires more than simply hiring employees who can perform their assigned tasks. Employers also must consider workplace morale, collegial relations among employees, retention of employees, and working cooperatively and harmoniously with colleagues and administration. Collegiality has been increasingly recognized by the courts as an important, and even crucial, component of higher education employment decisions and a legitimate reason

291 John Sullivan, *Refusing to Hire Overqualified Candidates—A Myth That Can Hurt Your Firm*, Recruiting Intelligence, Aug. 25, 2014, at 1 (article by internationally recognized expert on strategic talent management and human resources, focusing on the false assumption that hiring candidates who are "overqualified" will result in frustrated employees who will quickly quit. "There is simply no data to prove any of the negative assumptions that are often made about overqualified prospects or candidates.").

292 "An employer rejecting an applicant on the grounds that his or her skills or experience so far exceed those required for the position that they disqualify the applicant for consideration, should not rely upon generalized claims of 'overqualification,' but should identify and enunciate the specific ways in which the applicant's extensive experience or skills may interfere with proper job performance." Insights, "Overqualified" Is Not Necessarily a Proxy for Age Discrimination," July 1, 1995 at 3, <https://www.kmm.com/overqualified-is-not-necessarily-a-proxy-for-age-discrimination>.

293 Angela Onwuachi-Willig, *Complimentary Discrimination and Complementary Discrimination in Faculty Hiring*, 87 Wash. U. L. Rev. 763 (2010) (quoting *Binder III*, 933 F.2d at 194) ("[I]n reality an employer may have legitimate reasons for declining to employ overqualified individuals.").

294 *Id.* (citing *Gumbs v. Hall*, 51 F. Supp. 2d 275, 283 (W.D.N.Y. 1999), *aff'd*, 205 F.3d 1323 (2d Cir. 2000) (identifying fear that an employee "will not remain with the company for long" as one reason for not hiring an overqualified applicant)).

295 *Id.* at 784.

296 *Id.*

for declining to hire a person for a faculty position.²⁹⁷ Nevertheless, as Julia Lamber explains, “employers may exclude ‘overqualified’ employees [because] other employees may be uncomfortable around them. . . . Part of the tradition of employment discrimination laws is to ignore co-worker or customer preferences in deciding whether it is reasonable to exclude applicants based on race, gender, or age.”²⁹⁸

Considering the ongoing uncertainty surrounding how to handle overqualified older workers and applicants, what can institutions do?

- **Transparent Policies** regarding hiring criteria will benefit both institutions and applicants. Even if the hiring criteria vary widely from department to department or job to job, transparency regarding policies that may affect the hiring process could prevent future litigation. For instance, if policy dictates that a departmental committee creates the hiring criteria before the job is posted, letting applicants know about this policy could prevent misunderstanding.
- **Uniform Application of Criteria** is especially important when it comes to who is offered interviews. For example, in *Senner*, the hiring committee compiled a list of eight criteria by which all applicants were assessed and given a rating from 1–5.²⁹⁹ The three applicants with the highest ratings were given interviews.³⁰⁰ Nevertheless, *Senner* did sue when he was not interviewed; thus, transparency in this area may also prevent misunderstandings as well as prevent discrimination. Sharing the objective criteria with the applicants at some stage of the hiring process could help to prevent disputes. For instance, if the hiring manager is concerned with how long the employee will stay in the position (because the company has had issues with turnover), then the criterion should be discussed with and applied to all the applicants equally.³⁰¹
- **Educate** employees that “overqualification” should not be the sole reason given for not offering a qualified applicant an interview. Encourage older employees to extend their working careers by providing training to all workers that can extend work lives into later years.
- **Explanations** of why applicants were not chosen to move forward in the process can also prevent misunderstandings and ensure the proper application of policy by those involved in the hiring process.

297 See Mary Ann Connell et al., *Collegiality in Higher Education Employment Decisions: The Evolving Law*, 37 J.C.U.L. 529, 532–33 (2011) (quoting *Mabey v. Reagan*, 537 F.2d 1036, 1044 (9th Cir. 1976) (holding that an essential although subjective element of professor’s performance is “ability and willingness to work effectively with his colleagues.”)).

298 Lamber, *supra* note 102, at 361.

299 *Senner v. Northcentral Tech. Coll.*, 113 F.3d 750, 753–54 (7th Cir. 1997).

300 *Id.* at 754.

301 ***See *Woody v. St. Clair Cnty. Comm’n*, 885 F.2d 1557, 1562 (stating that the defendant “should have discussed the potential of staying on the job with each applicant if he planned to use this factor in his employment decision”).

- **Abandon** twentieth-century ageist biases by eliminating mandatory retirement ages and job requirements that limit applicants to a specific number of years in practice (a common practice among law schools).

Notably, many of these cases were brought by plaintiffs who occupied multiple protected classes (race, religion, gender, etc.). For many people who experience life from within multiple protected classes, discrimination can be the norm rather than an aberration. When viewing a series of rejections from this perspective, it is understandable why someone like Jimenez may have felt litigation was his only recourse. Thus, providing clear paths to advancement, adequate mentoring and feedback, and transparent procedures are important to earn trust and necessary if retention is a priority, especially for employees in multiple protected classes.

V. CONCLUSION

Over the last thirty years, the courts have split when it comes to questions of overqualification as a proxy for age discrimination. While the evidence of age discrimination in some proxy cases has been clear and convincing, it has not been so in many others. In the Second Circuit, the courts have found that employers may discriminate based on age when they choose not to hire an applicant due to their “overqualification.”³⁰² In the Ninth Circuit, the district court in *Qualcomm* found the defendant’s “overqualification” defense unworthy of credence considering Warrillow’s expressed willingness to take a thirty to forty percent pay cut.³⁰³ Likewise, in *Phillips v. Mabus* the Ninth Circuit stated that because the defendants’ label of “overqualification” “had ‘objective content’” it was not a euphemism to mask age discrimination.³⁰⁴ The Ninth Circuit has thus left open the possibility for overqualification as a proxy for age discrimination when it lacks “objective content.” In contrast, other circuits have held that overqualification is a legitimate nondiscriminatory reason for not hiring (or even interviewing) an applicant (see Part III.B).

Despite the differences in the circuit courts’ current understandings of “overqualification” within the ADEA jurisprudence, institutions hiring or employing older workers across the nation could find themselves in the very same predicament as HVU from our opening hypothetical. To avoid such an expensive and time-consuming conflict, our careful review of the jurisprudence and scholarly literature has resulted in several recommendations (see Part III.A).

When it comes to academia, meritocracy is baked into the milieu, much akin to what we see in other professional careers requiring a great deal of training. Imagine being assigned a physician or airline pilot and then purposely rejecting them solely because they were “overqualified” for your medical situation or flight. That is what happens when hiring managers reject candidates who have “too many” qualifications. Thus, denial of an academic position for which one is overqualified

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

303 *Warrillow v. Qualcomm, Inc.*, No. 02cv0360 DMS (JMA) 2004 U.S. Dist. LEXIS 33468 (S.D. Cal. Sept. 16, 2004), *aff’d*, 268 F. App’x 561 (9th Cir. 2008).

304 *Phillips v. Mabus*, 607 F. App’x 762, 763 (9th Cir. 2015).

may raise eyebrows, if not suspicions. At the very least, it would behoove institutions to interview “overqualified” applicants to allow each interviewee the opportunity to present their own individual skills, qualifications, and interests relevant to the position. This can prevent unchecked bias by ensuring each applicant is evaluated as an individual rather than according to age-based stereotypes. Likewise, preventive measures, such as developing clear policy, and educating hiring managers and committees on how to develop and apply uniformly objective criteria as well as provide precise feedback as to objective reasons for not hiring older workers, can be implemented to ensure institutions are true to their meritocratic values.