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## Expanding the Hostile Environment Theory to Cover Age Discrimination: How Far is Too Far?

Julie Vigil

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## Expanding the Hostile Environment Theory to Cover Age Discrimination: How Far Is Too Far?

I.	INTRODUCTION .....	567
II.	AN OVERVIEW OF THE PROBLEM .....	569
	A. <i>Age Discrimination Defined</i> .....	571
	B. <i>The Burdens of Proof and Persuasion</i> .....	571
	C. <i>Recent Developments Regarding the ADEA</i> .....	574
	D. <i>The Victims</i> .....	575
III.	THE EVOLUTION OF THE HOSTILE ENVIRONMENT THEORY AS IT WAS FIRST APPLIED TO NATIONAL ORIGIN AND THEN TO SEXUAL DISCRIMINATION .....	578
	A. <i>Rogers v. EEOC</i> .....	578
	B. <i>Meritor Savings Bank, FSB. v. Vinson</i> .....	580
	C. <i>Harris v. Forklift Systems, Inc.</i> .....	581
	D. <i>Kotcher v. Rosa &amp; Sullivan Appliance Center, Inc.</i> .....	583
IV.	SYNTHESIS OF TITLE VII HOSTILE ENVIRONMENT THEORY AND AGE DISCRIMINATION CASES .....	586
	A. <i>How the Hostile Environment Theory Has Been Applied to Cases Arising Under the ADEA</i> .....	586
	B. <i>The Distinction Between Constructive Discharge and the Hostile Environment Theory as Applied to Age Discrimination in ADEA Cases</i> .....	589
	C. <i>The Next Natural Step Is to Apply the Hostile Environment Theory to Age Discrimination Cases</i> .....	590
V.	THE IMPACT OF APPLYING THE THEORY TO AGE DISCRIMINATION .....	595
	A. <i>Potential Impact of the Theory's Adoption on Plaintiffs</i> .....	595
	B. <i>Effect on the Employer</i> .....	600
	1. Will Employers Take the Drastic Measure of Filing a Countersuit Against Plaintiffs? .....	600
	2. Will Businesses Be Forced to Flee Certain Geographic Areas? .....	601

3.	The Rising Cost of Jury Verdicts in Discrimination Cases .....	601
4.	Employer's Other Alternatives .....	603
C.	<i>First Amendment Concerns</i> .....	604
VI.	CONCLUSION .....	605

## I. INTRODUCTION

He is fifty-one years old. Two of his children are in college and his wife works full-time. He has been with his current employer for twenty years. Lately his boss has been casually asking him when he plans to retire. But the man's children are in school and he has a mortgage and bills to pay; he does not plan to retire for another fifteen years. He continues to resist retirement despite the fact that his employer begins to talk more earnestly, maybe even coercively. His fellow employees think he is past his prime and also pressure him to retire. His boss has all but told him he will not advance any further in the company. His work environment becomes so polluted with pro-retirement sentiment that he finds his work performance suffering. He has few options as he cannot afford to quit or take an early retirement package. Has this man been a victim of age discrimination? He has neither been fired nor constructively discharged, but has his working environment become so hostile that the conditions of his employment have been altered? Under current law, this man has no legal recourse; however, under the hostile environment cause of action this man has indeed been a victim of discrimination based on age.

Victims of workplace discrimination went unprotected for years. It was not until the civil rights activities in the early 1960s that Congress passed Title VII of the Civil Rights Act of 1964.<sup>1</sup> The Act's passage was historic because it was the first comprehensive federal law prohibiting job discrimination on the basis of race, religion, national origin, and sex.<sup>2</sup> Title VII, however, did not cover age discrimination. Congress first passed federal legislation addressing discrimination on the basis of age in 1967.<sup>3</sup> This legislation was titled the Age Discrimination in Employment Act (ADEA).<sup>4</sup>

Despite the passage of the ADEA,

[n]umerous obstacles to older worker employment persist in the workplace, including negative stereotypes about aging and productivity; job demands and schedule constraints that are incompatible with the skills and needs of older

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1. 42 U.S.C. § 2000e-2(a)(1) (1988). The Title VII provides, "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge . . . or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Id.*

2. *Id.*

3. 29 U.S.C. § 621 (1988).

4. *Id.*

workers; and management policies that make it difficult to remain in the labor force, such as early retirement incentives.<sup>5</sup>

One study concluded that eight out of ten Americans believe older workers face age discrimination in the workplace.<sup>6</sup> In fact, the older population suffers from unemployment to a greater extent than its younger counterparts.<sup>7</sup>

Age discrimination is problematic because it involves nuances and ambiguities unlike other areas of employment discrimination.<sup>8</sup> The notable distinction between age and other bases for discrimination is that with advanced age one's physical and mental capabilities are invariably negatively affected.<sup>9</sup> Unfortunately, many individuals who do have a valid age discrimination case "fail to realize when they are being discriminated against . . . [and] many do not understand their rights and protections under the Age Discrimination in Employment Act [ADEA]."<sup>10</sup>

Under the hostile environment cause of action, an employer may be liable for discriminatory harassment even if an employee does not suffer economic harm.<sup>11</sup> As long as the terms and conditions of the employee's employment are affected by pervasive harassment, the employee has an actionable claim.<sup>12</sup> Thus, an employer may be responsible even where the employee was not discriminatorily fired or denied a promotion and did not lose any wages or other economic benefits because of the discrimination.<sup>13</sup>

The hostile environment cause of action has been applied to Title VII discrimination,<sup>14</sup> but as yet has not been accepted in the age discrimination arena.<sup>15</sup> As this country's population grows older, society cannot continue to ignore age discrimination. In light of all the

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5. S. REP. NO. 40(I), 103rd Cong., 1st Sess. 81 (1993), [hereinafter REPORT 40(I)].

6. *Id.* at 81-82 (citing nationwide surveys by Louis Harris & Associates conducted in 1975 and 1981).

7. 29 U.S.C. § 621(a)(3) (1988) (noting that long-term unemployment is particularly problematic among older workers, resulting in "deterioration of skill, morale, and employer acceptability").

8. JOSEPH E. KALET, AGE DISCRIMINATION IN EMPLOYMENT LAW ix (2d ed. 1990).

9. *Id.*

10. S. REP. NO. 249(I), 101st Cong., 2d Sess. 123 (1990) [hereinafter REPORT 249(I)]. The report goes on to cite a 1981 Louis Harris Survey that found "approximately half of the older workers polled were unaware of their ADEA rights and protections." *Id.* The Senate Report concluded that these statistics were unlikely to have changed in the nine-year interim because of the lack of a "concerted awareness campaign." *Id.*

11. *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

12. *Id.*

13. *Id.*

14. *See infra* notes 85-99.

15. *See infra* notes 146-70.

attention paid to sexual harassment, the Equal Employment Opportunity Commission (EEOC) "believes it important to reiterate and emphasize that harassment on any of the bases covered by the Federal anti-discrimination statutes is unlawful."<sup>16</sup>

This Comment examines the use of the hostile environment theory in age discrimination cases arising under the ADEA. Part II gives an overview of the problem, focusing on the current definition of age discrimination, who the real victims of age discrimination are, and current statistics describing those affected.<sup>17</sup> Part III traces the development of Title VII hostile environment theory as it was first applied to national origin and then to sexual discrimination cases.<sup>18</sup> Part IV discusses the three federal court cases that have applied the hostile environment theory to age discrimination, focusing on the underlying rationale of each decision.<sup>19</sup> Part IV concludes that the language of the ADEA, its legislative history, its similarities to Title VII, and the proposed EEOC guidelines support the use of the hostile environment analysis in ADEA cases.<sup>20</sup> Part V then examines the impact of the hostile environment theory on age discrimination cases, focusing on the perspective of the plaintiff as well as the employer.<sup>21</sup> Finally, this Comment concludes by analyzing whether the theory will likely be adopted and advocating that it should be.<sup>22</sup> It is imperative to have consistent and consolidated guidelines that apply to all types of discrimination, not only to streamline discrimination cases and provide a reasonable basis upon which both plaintiffs and defendants can rely, but also to send the message that age discrimination is just as abhorrent as any other type of discrimination.

## II. AN OVERVIEW OF THE PROBLEM

The courts have failed to adequately address age discrimination.

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16. 58 Fed. Reg. 51266, 51267 (1993) (to be codified at 29 C.F.R. § 1609) (proposed Oct. 1993). See generally Frank S. Ravitch, *Beyond Reasonable Accommodation: The Availability and Structure of a Cause of Action for Workplace Harassment Under the Americans With Disabilities Act*, 15 CARDOZO L. REV. 1475 (1994) (arguing that a modified form of the hostile environment theory should apply to cases arising under the Americans With Disabilities Act).

17. See *infra* notes 23-84 and accompanying text.

18. See *infra* notes 85-145 and accompanying text.

19. See *infra* notes 146-209 and accompanying text.

20. See *infra* notes 145-209 and accompanying text.

21. See *infra* notes 210-81 and accompanying text.

22. See *infra* notes 282-83 and accompanying text.

It remains neglected in a field where sex, race, national origin, and religion have been given greater attention.<sup>23</sup> A 1990 Senate Report indicated that discrimination on the basis of age negatively impacts "the work efforts of older persons [by] encouraging premature labor force withdrawal."<sup>24</sup> From an economic standpoint, age discrimination is harmful to society as a whole. It prevents millions of productive older workers from contributing to the national economy and thereby increases the draw on the federal treasury and social security.<sup>25</sup> These problems will continue if effective solutions to age discrimination are not implemented.<sup>26</sup>

The largest growing segment of the population consists of people over the age of forty years.<sup>27</sup> Contrary to popular stereotypes, the people protected by the ADEA are "steadily improving in terms of overall competency, potentiality, and availability."<sup>28</sup> In fact, people

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23. In 1993 there were 17,491 age discrimination complaints filed with the EEOC. Carolyn Magnuson, *What they said: 'There's No Job.' What they meant: 'You're Too Old!'*, GOOD HOUSEKEEPING, Oct. 1994, at 137. Comparing this number with the 3097 age discrimination cases filed with the EEOC in 1979 makes apparent the overall growth of this field. Karl R. Kunze, *The Use of Effective Personnel Systems To Obviate Underutilization and Legal Problems of Older Workers: A Practical Guide For Employers*, in AGE DISCRIMINATION EMPLOYMENT ACT—A SYMPOSIUM HANDBOOK FOR LAWYERS AND PERSONNEL PRACTITIONERS 297, 310 (1983). Approximately 20% of all discrimination cases filed with the EEOC involve age. Magnuson, *supra*, at 242. However, of the 17,491 complaints, only 4% of these resulted in a finding of employer violation. *Id.* As a spokeswoman for the EEOC explained, "Age cases are very difficult for the victim to prove." *Id.* The study described in Good Housekeeping involved undercover old and young people with similar resumes applying for the same position, the outcome being that the younger people got more job offers for better positions. *Id.* at 242, 244. The study also revealed a great amount of "subtle discrimination at the application stage." *Id.*

24. REPORT 249(I), *supra* note 10, at 228. Age discrimination "increas[es] the draw on Social Security and private pensions." *Id.*

25. EEOC v. Wyoming, 460 U.S. 226, 231 (1983) (holding that the Commerce Clause power allowed Congress to apply the ADEA to state and local governments).

26. REPORT 249(I), *supra* note 10, at 228.

27. *Where the Growth Will Be—State Population Projections: 1993 To 2020*, U.S. Census Bureau's Projections, Aug. 15, 1994, available in WESTLAW, CENDATA Database. Not only will the elderly population increase from 13% to 16% of the total U.S. population from the year 1993 to 2020, but the percentage of those persons under age 20 will drop by 2%. *Id.* According to the U.S. Census Bureau, "one out of every 8 persons, or 31.2 million people, in the United States today is 65 years of age or older." *Housing for the Elderly is as Diverse as the Elderly Population, Census Bureau Says*, U.S. Census Bureau Press Release, Dec. 1, 1993, available in WESTLAW, CENDATA Database.

28. Kunze, *supra* note 23, at 301.

over forty years old benefit from improved health and longer life expectancies, which result in the potential for an extended work life and increased "education levels."<sup>29</sup>

#### A. Age Discrimination Defined

Prior to the ADEA, older workers had little protection from employment discrimination or discharge.<sup>30</sup> Congress declared that "in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs."<sup>31</sup> Thus, the ADEA was born.<sup>32</sup>

The express purpose of the ADEA is to "promote employment of older persons based on their ability rather than age."<sup>33</sup> However, the statute does not completely define or explain age discrimination. In fact, the only thing the ADEA does say is that "it shall be unlawful . . . [to] discriminate against any individual . . . because of such individual's age."<sup>34</sup> Thus there is no outright prohibition nor endorsement of the hostile environment theory within the ADEA.

#### B. The Burdens of Proof and Persuasion

The standard test for employment discrimination was first established in *McDonnell Douglas Corp. v. Green*.<sup>35</sup> The United States Su-

29. *Id.*

30. *See id.*

31. ADEA 29 U.S.C. § 621(a)(1)-(2) (1988). Congress lent support to this statement by noting that "the setting of arbitrary age limits regardless of potential for job performance had become a common practice." *Id.*

32. The ADEA applies to private employers with 20 or more workers; labor organizations with 25 or more members or that operate a hiring hall or office which recruits potential employees or obtains job opportunities; federal, state and local governments; and employment agencies. 29 U.S.C. § 630(a)-(c), (e) (1988), § 633(a) (1988).

33. 29 U.S.C. § 621(b) (1988).

34. *Id.* It also is unlawful "to limit, segregate, or classify . . . 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." 29 U.S.C. § 623(a)(2) (1988). Additionally, the ADEA prohibits employers from "reduc[ing] the wage rate of any employee in order to comply with this chapter." 29 U.S.C. § 623(a)(3) (1988).

35. 411 U.S. 792, 802 (1973); *see also* *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 260 (1981) (clarifying that the burden of persuasion remains with the plaintiff at all times). *McDonnell Douglas* was a race discrimination case in



preme Court held that Title VII cases require that the plaintiff: (i) be in the protected class; (ii) be qualified for the job; (iii) be rejected, despite his qualifications; and (iv) after his rejection, show that “the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.”<sup>36</sup>

In applying the *McDonnell Douglas* test to the ADEA, the plaintiff must prove a prima facie case of age discrimination. He must first demonstrate that he is within the protected age group.<sup>37</sup> This requirement is met fairly easily since the plaintiff’s age is the touchstone determination. The plaintiff must then demonstrate, however, that he or she is qualified for the position and was discharged or otherwise discriminated against despite his or her qualifications.<sup>38</sup> Finally, the plaintiff must provide evidence showing that the position remained vacant and applications were sought from people with the plaintiff’s same qualifications.<sup>39</sup>

Once the plaintiff makes out his or her prima facie case, there is an inference of discrimination.<sup>40</sup> The burden of production then shifts to the defendant, who must now express a legitimate, non-discriminatory reason for the employment action.<sup>41</sup> If the defendant fails to do so, the court must rule in favor of the employee.<sup>42</sup> It is important to note that the employer does not have to prove the truth of its reason, but must only verbalize an explanation for its actions.<sup>43</sup> The defendant must only raise “a genuine issue of fact as to whether it discriminated against the plaintiff”<sup>44</sup> in order for the plain-

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which the plaintiff alleged he was not rehired after his layoff because he was black. 411 U.S. at 794-96. The Court held that the employer successfully rebutted the plaintiff’s case by offering evidence that the employee had engaged in disruptive acts against the employer and because of that was not rehired. *Id.* at 806-07. The Court remanded the case because the plaintiff had not been given the opportunity to prove that the employer’s proffered explanation “was a pretext or discriminatory in its application.” *Id.* at 807.

36. *McDonnell Douglas*, 411 U.S. at 802.

37. Under the ADEA, the person must be over the age of 40. 29 U.S.C. § 631(a) (1988 & Supp. 1995). Under most state legislation the person need only be over the age of 18. *See, e.g.*, CONN. GEN. STAT. § 46a-66(a) (1986 & Supp. 1995), IOWA CODE § 216.6(1)(a), (3) (1994), N.Y. EXEC. LAW § 296 3-a (McKinney 1993), OR. REV. STAT. § 659.030(1)(a) (1989), VT. STAT. ANN. tit. 21 § 495(a)(1), (c) (1987 & Supp. 1995).

38. *McDonnell Douglas*, 411 U.S. at 802.

39. *Id.*

40. *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981) (citing *Furno Const. Corp. v. Waters*, 438 U.S. 567, 577 (1978)).

41. *Id.*

42. *Id.*; *see also* *St. Mary’s Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2748, 2753-54 (1993) (affirming *Texas Dep’t of Community Affairs*’s description of the sequence of burdens in discrimination cases).

43. *Texas Dep’t of Community Affairs*, 450 U.S. at 254-55.

44. *Id.* at 254. “Placing this burden of production on the defendant thus serves si-

tiff to avoid summary judgment. Ultimately, the plaintiff still has the burden of persuasion in making out his or her discrimination claim.<sup>45</sup>

If the defendant rebuts the plaintiff's prima facie case, the burden of production shifts back to the employee to prove that the defendant's reasons are a pretext or excuse for discrimination.<sup>46</sup> Essentially, the plaintiff at this point has both the burden of production and the burden of persuading the trier of fact that he or she is a victim of age discrimination.<sup>47</sup> Ultimately, the factfinder must determine "whether the rejection was discriminatory" within the meaning of the ADEA.<sup>48</sup>

In 1993, the third element of the *McDonnell Douglas* standard was clarified. In *Crady v. Liberty National Bank & Trust Co.*,<sup>49</sup> the plaintiff failed to satisfy the third element of the *McDonnell Douglas* test.<sup>50</sup> The plaintiff filed an age discrimination suit against his employer upon learning he was to be transferred to what he felt was a less desirable position.<sup>51</sup> Because neither the employee's salary nor benefits would be decreased under his new job, the court held that he failed to show that his job transfer was a materially adverse change in the terms and conditions of his employment.<sup>52</sup> The court

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multaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." *Id.* at 255-56.

45. *Id.* at 253.

46. For example, the plaintiff may show that his or her age was the true motivation behind the employer's decision or that the employer's proffered excuse is untrustworthy and unbelievable. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973); see *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 559-61 (7th Cir.), *cert. denied*, 484 U.S. 977 (1987) ("A reason honestly described but poorly founded is not a pretext, as that term is used in the law of discrimination."); *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 255 (1st Cir. 1986) (stating that it is insufficient to show employer made an unwise business decision); see also *St. Mary's Honor Ctr.*, 113 S. Ct. at 2752 (clarifying that a "reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason").

47. *Texas Dep't of Community Affairs*, 450 U.S. at 256.

48. *St. Mary's Honor Ctr.*, 113 S. Ct. at 2753 (quoting *United States Postal Serv. Bd. v. Aikens*, 460 U.S. 711, 714-15 (1983)).

49. 993 F.2d 132 (7th Cir. 1993).

50. *Id.* at 135.

51. *Id.* at 133-34.

52. *Id.* at 135-36.

explained that materially adverse means more than “mere inconvenience or an alteration of job responsibilities.”<sup>53</sup>

Even though the *McDonnell Douglas* test is critical in discrimination cases, the courts have “repeatedly held that age discrimination suits should be decided on a case by case basis, and that rigid adherence to *McDonnell Douglas* should be discouraged.”<sup>54</sup> This is especially true where the plaintiff offers direct evidence of discrimination, and does not rely on circumstantial evidence.<sup>55</sup>

### C. Recent Developments Regarding the ADEA

While the *McDonnell Douglas* test is an essential tool in employment discrimination actions, it is not the sole test for liability. In 1989, the United States Supreme Court, in *Price Waterhouse v. Hopkins*,<sup>56</sup> established an alternative test to be used for “mixed motive” cases.<sup>57</sup> The plaintiff in this case alleged that the reason her employer failed to promote her was because of gender animus.<sup>58</sup> The employer defended the charge, however, by offering legitimate concerns as to the woman’s “interpersonal skills.”<sup>59</sup> The Court held that where the employer’s decision was a result of such “mixed motives” the plaintiff must first prove that an illegitimate reason was one of the “motivating” factors.<sup>60</sup> If the plaintiff satisfies this element then the burden shifts to the employer to prove it “would have made such a decision even if [it] had not taken the plaintiff’s gender into account.”<sup>61</sup>

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53. *Id.* at 136. The court listed examples of what would constitute a materially adverse change in employment conditions, including: “termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.” *Id.*

54. *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1161 (6th Cir. 1990).

55. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985). Where direct evidence is offered by the plaintiff, the employer loses unless he proves an affirmative defense. *Id.*; see also *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

56. 490 U.S. 228 (1989).

57. *Id.* Mixed motive means that the employer’s decision regarding the employee was a mixture of legitimate and illegitimate motives. *Id.* at 246-47.

58. *Id.* at 232.

59. *Id.* at 236.

60. *Id.* at 258. The Court found that the employer’s decision was primarily a result of the employee’s gender. *Id.*

61. *Id.* The standard of proof for the defendant employer is the preponderance of the evidence standard, not the clear and convincing standard used by the Court of Appeals. *Id.*

Four years later, in *Hazen Paper Co. v. Biggins*,<sup>62</sup> the Court clarified the standard of willfulness required for a valid ADEA claim. According to the Supreme Court, the employer must have known "or showed reckless disregard for the matter of whether" conduct violated an anti-discrimination statute.<sup>63</sup> The case reaffirmed the Court's 1985 decision in *Trans World Airlines, Inc. v. Thurston*<sup>64</sup> where the Court found that the employer acted in good faith in trying to determine if its transfer plan violated the ADEA.<sup>65</sup>

Just as the courts have expanded the field of age discrimination, there has been a corresponding growth in the ADEA as well.<sup>66</sup> Additionally, as a supplement to this federal legislation, "most of the fifty states have enacted state anti-discrimination laws which also govern employment discrimination."<sup>67</sup>

#### D. The Victims

Older workers face a variety of forms of age discrimination, including termination, refusal to hire, early retirement packages, re-assignment to a less desirable location, and receiving poor evaluations to justify a later dismissal.<sup>68</sup>

One of the reasons behind this employer discrimination is the misperception that older workers are less efficient than younger ones.<sup>69</sup> This belief relies in part on the fact that younger workers

62. 113 S. Ct. 1701 (1993). The facts of *Hazen Paper Co.* involve the impact of the ADEA upon an employer who fired his "older" employee to prevent the employee's pension benefits from vesting. *Id.* at 1704-05. The Court held that such employer action would not violate the ADEA. *Id.* at 1707.

63. *Id.* at 1710. In *Hazen Paper Co.*, the plaintiff benefitted by not having to prove that the employer's conduct was "outrageous" or offer any direct evidence of the motivation behind the employer's actions or prove that the plaintiff's age was the "predominant factor" behind the employer's actions. *Id.*

64. 469 U.S. 111 (1985). This case defined and limited the standard later reiterated in *Hazen Paper Co.* *Id.* The Court held that an employer's knowledge of only "the potential applicability of the ADEA" did not constitute "willfulness." *Id.*

65. *Id.* at 129.

66. See *infra* notes 188-90 and accompanying text.

67. Ira A. Turret, *Age Discrimination In Employment: Recent Trends and Developments*, in *SECURITIES ARBITRATION* 349 (PLI Corp. Law & Practice Course Handbook Series No. B4-7036, 1993); see, e.g., ARIZ. REV. STAT. ANN. § 41-1463 (1994); FLA. STAT. ch. 112.044(1)-(2) (1994); N.Y. EXEC. LAW § 296 (McKinney 1994).

68. REPORT 40(I), *supra* note 5, at 82.

69. *Id.*

are instructed in new technology.<sup>70</sup> Employers often rationalize this phenomenon by convincing themselves it is economically inefficient to retrain an older employee.<sup>71</sup>

Older workers, however, have been found to be as productive as younger workers.<sup>72</sup> In fact, in a 1989 American Association of Retired Persons poll of 400 companies, many employers stated that "older workers generally are regarded very positively and are valued for their experience, knowledge, work habits and attitudes . . . productivity, attendance, commitment to quality, and work performance."<sup>73</sup> Unfortunately, this sentiment is not universal and many older people are pushed out of the workplace.

A recent study of people over fifty-five years of age found that almost 5.4 million older Americans felt willing and able to work but did not have a job.<sup>74</sup> In light of this information, it is interesting to note the results of a 1981 survey that found that while most employers felt their company was devoid of age discrimination, "*more than half* believe[d] older workers are discriminated against in the employment market, presumably by *other* firms."<sup>75</sup>

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70. *Id.*

71. *Id.* Actually, Bureau of Labor statistics indicate that the current employee's median job tenure is "as little as 4.2 years." *Id.* This statistic does not corroborate employers' fear, rather it, disproves them. *Id.* Thus, it does not appear a younger worker will stay at a job any longer than an older one.

72. Charles H. Edwards & Stephen R. McConnell, *The Future of the ADEA: Pressure Builds to Abolish Mandatory Retirement*, in AGE DISCRIMINATION EMPLOYMENT ACT—A SYMPOSIUM HANDBOOK FOR LAWYERS AND PERSONNEL PRACTITIONERS 384, 394 (1983). Older workers "have lower absenteeism, higher reliability and, in many cases, better decision-making ability." *Id.*

73. REPORT 40(I), *supra* note 5, at 83. A 1985 study found that "although chronological age may be a convenient means for estimating performance potential, it falls short in accounting for the wide range of individual differences in job performance for people at various ages." *Id.*

74. *Untapped Resource: [T]he Final Report of the Americans over 55 At Work Program*, Commonwealth Fund, 1993, available in WESTLAW, AGELINE Database (results of a five-year study). Another study found that, in the future, workers over age 55 will probably want to work longer but may "face barriers similar to those currently experienced by older workers." *Id.*

75. Edwards & McConnell, *supra* note 72, at 392 (citing a 1981 survey of employers by William M. Mercer, Inc.). Specifically, the 1981 Mercer study found that

61% of employers believe older workers are discriminated against on the basis of age; 22% claim it is unlikely that without negative legal consequences a company would hire someone over age 50 for a position other than senior management; 20% admit that older workers, other than senior executives, have less opportunity for promotions or training; and 12% admit that older workers' pay raises are not as large as those of younger workers in the same category.

REPORT 40(I), *supra* note 5, at 82.

Even though the parties involved in age discrimination cases are increasingly relying on such statistics, "there are some possible differences in the use of statistics in age cases as a result of the natural aging process."<sup>76</sup> This may be one explanation why less attention has been paid to age discrimination than to Title VII cases.<sup>77</sup> A report prepared by the Secretary of Labor and confirmed by the Executive and Legislative branches has even conceded that age discrimination "rarely [is] based on the sort of animus motivating some other forms of discrimination."<sup>78</sup> Yet, the report hastened to add that age discrimination is "based in large part on stereotypes unsupported by objective fact."<sup>79</sup>

In fact, the victims of age discrimination seem to have much in common with their Title VII counterparts. Research supports the concept that sexual harassment "sends a message of inferiority and objectification directed against individual women and women as a class."<sup>80</sup> These messages undoubtedly affect a person's performance at work. It seems logical that victims of age discrimination would suffer similar effects.

There are numerous costs associated with leaving a job. Aside from the employee's loss of income and seniority, he or she has a "disrupted work history, problems with obtaining references for future jobs, loss of confidence in seeking a new job, and loss of career ad-

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76. Arthur E. Joyce, *Defense of Age Discrimination in Employment Act Charges Relating to Promotion Issues*, in AGE DISCRIMINATION EMPLOYMENT ACT—A SYMPOSIUM HANDBOOK FOR LAWYERS AND PERSONNEL PRACTITIONERS 285, 292 (1983).

77. While the number of discrimination complaints doubled over the past five years, the number of age discrimination cases continues to be low compared to Title VII cases. Ann Grimes, *The Federal Page Inside: EEOC—Reinvigorating the Fight Against Discrimination*, WASH. POST, Oct. 27, 1994, at A21. From 1993 to 1994, the increase of disability cases filed was 27% (due in large part to the recent passage of the Americans with Disabilities Act), retaliation cases rose 14%, sex cases went up 5%, religion was up 3%, equal pay claims rose by 2%, national origin saw a decrease of 3%, race also decreased by 4%, and age rounded out the claims with an overall decrease of 6%. *Id.*

78. *EEOC v. Wyoming*, 460 U.S. 226, 230-31 (1983).

79. *Id.* at 231.

80. Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151, 187 (1994). In one study of 92 women, 66% of victims of sexual harassment left their job, either voluntarily or involuntarily, because of sexual harassment. *Id.* (citing PEGGY CRULL, *THE IMPACT OF SEXUAL HARASSMENT ON THE JOB: A PROFILE OF THE EXPERIENCES OF 92 WOMEN* (1979)). Forty-two percent of the women left their job in order to escape the emotionally harming harassment. *Id.* (citing CRULL, *supra*).

vancement.<sup>81</sup> This is especially true for older individuals who invested a great amount of time and energy in their jobs. Older workers also face longer bouts of unemployment than younger workers and thus "are more likely to exhaust available unemployment insurance benefits and suffer economic hardships. This is especially true because many persons over 45 still have significant financial obligations."<sup>82</sup> In addition to the monetary costs associated with unemployment, there are also psychological and physical side effects involved.<sup>83</sup> This is not to mention the costs that employees who remain at their job endure. Certainly the working conditions are hostile and unpleasant for the victim employee, but he or she also has little chance to advance in his or her career.<sup>84</sup>

Age discrimination exists on a widespread scale. While the ADEA offers some protections and case law has expanded these protections, many victims of age discrimination are left without sufficient legal recourse.

### III. THE EVOLUTION OF THE HOSTILE ENVIRONMENT THEORY AS IT WAS FIRST APPLIED TO NATIONAL ORIGIN AND THEN TO SEXUAL DISCRIMINATION

#### A. *Rogers v. EEOC*

*Rogers v. EEOC*<sup>85</sup> first recognized a cause of action based upon a discriminatory work environment. This Fifth Circuit case held that an employer's segregation of his Hispanic clientele could constitute an offensive work environment to a Hispanic employee.<sup>86</sup> The court reasoned that the language "terms, conditions, or privileges of employment"<sup>87</sup> of Title VII "is an expansive concept" that envelops "a working environment heavily charged with ethnic or racial discrimination."<sup>88</sup>

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81. Dolkart, *supra* note 80, at 187 (citing Jean A. Hamilton, *Emotional Consequences of Victimization and Discrimination in "Special Populations" of Women*, 12 PSYCHIATRIC CLINIC N. AM. 35, 161 (1989)).

82. REPORT 40(I), *supra* note 5, at 82-83.

83. *Id.* For example, an older worker may suffer serious stress, "including hopelessness, depression, and frustration . . . [and] medical evidence suggests that forced retirement can so adversely affect a person's physical, emotional, and psychological health that a lifespan may be shortened." *Id.* In addition, these employees may "not feel welcome as credible colleagues, may feel excluded or segregated, or may lose confidence in themselves as workers. Those in supervisory positions may feel undermined as managers." Dolkart, *supra* note 80, at 188 (citations omitted).

84. Dolkart, *supra* note 80, at 188.

85. 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

86. *Id.* at 239.

87. 42 U.S.C. § 2000e-2(a)(1) (1988).

88. *Rogers*, 454 F.2d at 238.

Because of the ever-increasing complexities of employment discrimination, the court asserted that it was proper to protect not only an employee's economic interests, but also his psychological well-being.<sup>89</sup> The court's vivid description of a "working environment[] so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers"<sup>90</sup> is clearly encompassed under Title VII. Judge Goldberg did caution the use of the hostile environment though, stating that "an employer's mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not fall under the boundaries of section 703 of Title VII.<sup>91</sup>

Courts have since uniformly applied this theory to discrimination cases based on race,<sup>92</sup> religion,<sup>93</sup> national origin,<sup>94</sup> sex,<sup>95</sup> and most

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89. *Id.*

90. *Id.*

91. *Id.*

92. See *Firefighters Inst. for Racial Equality v. City of St. Louis*, 549 F.2d 506 (8th Cir. 1977), *cert. denied*, 434 U.S. 819 (1977); *Gray v. Greyhound Lines, E.*, 545 F.2d 169 (D.C. Cir. 1976). *Firefighters Inst. for Racial Equality* involved black firefighters who were excluded from the informal dining area of the firehouse. 549 F.2d at 514. This area was known as a "supper club" and consisted of kitchen appliances, utensils and food. *Id.* Although the supper clubs were not regulated by the fire department, the court reasoned that the excluded black firefighters were subjected to an offensive environment that the fire department could correct. *Id.* Since the supper clubs used city property, the fire department must require the inclusion of black firefighters in order to facilitate a "nondiscriminatory working environment." *Id.* at 515.

In the *Gray* case, the court found that a black employee would have a viable claim against the defendant company if he had indeed suffered "the effects of Greyhound's [the defendant] allegedly discriminatory hiring policies on his treatment at work and on his own psychological well-being," as he alleged. 545 F.2d at 173, 176. If the plaintiff experienced a hostile work environment, that is clearly encompassed under Title VII's "protection against discrimination in the 'terms, conditions, or privileges of employment.'" *Id.* at 176 (quoting 42 U.S.C. § 2000(e)(2)).

93. *Compston v. Borden, Inc.*, 424 F. Supp. 157 (S.D. Ohio 1976). Shortly after the plaintiff's supervisor learned of his religious affiliation, the supervisor verbally abused him. *Id.* at 158. The court reasoned that such intentional conduct would "necessarily have the effect of altering the conditions of his [the plaintiff's] employment." *Id.* at 160-61.

94. *Cariddi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87, 88 (8th Cir. 1977). In this case, the plaintiff, of Italian-American descent, alleged that he suffered numerous ethnic slurs while employed by the defendant. *Id.* The Court of Appeals for the Eighth Circuit recognized that "derogatory comments could be so excessive and opprobrious as to constitute an unlawful employment practice under Title VII." *Id.* The court went on to state that the comments in this case were not indicative of a hostile environment, but rather that they were part of casual conversation. *Id.*

95. See *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982); *Bundy v. Jack-*



recently to Title IX cases.<sup>96</sup> From these cases, the EEOC proposed guidelines in 1980 recognizing the hostile environment for sexual harassment.<sup>97</sup> These guidelines list examples of what constitutes sexual harassment, assuming the conduct “has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”<sup>98</sup> Such conduct includes “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.”<sup>99</sup>

*B. Meritor Savings Bank, FSB. v. Vinson*<sup>100</sup>

The United States Supreme Court officially adopted the use of the hostile environment cause of action for Title VII cases in *Meritor Savings Bank, FSB. v. Vinson*.<sup>101</sup> A female bank employee charged her employer with sexual discrimination, claiming her supervisor fondled and raped her at work and exposed himself to her on numerous occasions.<sup>102</sup> The woman failed to report these occurrences to anyone at the company because of her fear of the supervisor.<sup>103</sup> When she was later fired for abusing sick leave, she brought this action,

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son, 641 F.2d 934, 943-44 (D.C. Cir. 1981) (holding that hostile environment “follows ineluctably from numerous cases finding Title VII violations where an employer created or condoned a substantially (racially) discriminatory work environment, regardless of whether the complaining employees lost any tangible job benefits”) (citing *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)).

96. See *Doe v. Petaluma City School Dist.*, 830 F. Supp. 1560, 1563 (N.D. Cal. 1993) (approving the hostile environment theory for Title IX cases). “Title IX of the Educational Amendments Act of 1972 [20 U.S.C. § 1681(a) (1988)], prohibits sexual discrimination by any federally-assisted educational program.” Stacey R. Rinestine, *Terrorism on the Playground: What Can Be Done*, 32 DUQ. L. REV. 799 (1994); see also Office for Civil Rights, 59 Fed. Reg. 11448 (1994) (including the hostile environment theory in Department of Education Guidelines for compliance with Title VII); Gail Sorenson, *Peer Sexual Harassment: Remedies and Guidelines Under Federal Law*, 92 EDUC. L. REP. (West) 1 (1994) (discussing Title IX violations and remedies in terms of a hostile environment).

97. 29 C.F.R. § 1604.11(a) (1980). The guidelines also apply to race, color, religion, and national origin, codifying the hostile environment theory for all Title VII issues. *Id.*

98. *Id.*

99. *Id.* “Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality.” *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982).

100. 477 U.S. 57, 73 (1986).

101. *Id.* at 73.

102. *Id.* at 60.

103. *Id.* at 61.

alleging that she was subjected to a hostile work environment during her employment.<sup>104</sup>

The Court held that Title VII permits recovery for victims of sexual discrimination where the discrimination "created a hostile or abusive work environment."<sup>105</sup> As support for its holding, the Court emphasized that the EEOC and many judicial decisions had found that there existed a "right to work in an environment free from discriminatory intimidation, ridicule, and insult."<sup>106</sup> In addition to citing the specific language of Title VII, Justice Rehnquist pointed to the 1980 EEOC guidelines that approved the use of the hostile environment theory for sexual harassment.<sup>107</sup> Justice Rehnquist noted that although the guidelines were not controlling upon the Court, they do in fact "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."<sup>108</sup> The fact that the Supreme Court so highly valued the EEOC's 1980 guidelines regarding sexual harassment implies the possibility that the newest proposed guidelines calling for the application of the hostile environment to age discrimination will also be duly acknowledged.

However, *Meritor Savings* failed to address two questions, which were later addressed in *Harris v. Forklift Systems, Inc.*<sup>109</sup> These questions involved what legal standard to apply to determine if a hostile environment existed, and what the necessary level of psychological injury is that a complainant must suffer in order to make a claim.<sup>110</sup>

### C. *Harris v. Forklift Systems, Inc.*

In *Harris*, the plaintiff quit her job and then filed suit against her employer, Forklift Systems.<sup>111</sup> She alleged that her employer taunted and insulted her because she was female and made her the object of sexual innuendoes.<sup>112</sup>

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104. *Id.* at 60.

105. *Id.* at 66.

106. *Id.* at 65.

107. *Id.* at 64-65; see *supra* notes 97-99 and accompanying text.

108. *Id.* at 65 (quoting *General Elec. Co. v. Gilbert*, 429 U.S. 125, 142 (1976)).

109. 114 S. Ct. 367 (1993).

110. *Id.* at 369.

111. *Id.*

112. *Id.*

Prior to *Harris*, there had been conflict among the circuits as to whether a psychological injury was necessary for a hostile work environment claim.<sup>113</sup> The *Harris* court declined to find that any offensive conduct would be actionable under Title VII or that a Title VII claim must be based on conduct that resulted in tangible psychological injury.<sup>114</sup> Rather, the Court adopted a middle ground.<sup>115</sup>

The Court explained that a hostile environment may exist where discrimination affects an employee's performance at work, hampers the employee in advancing at work, or discourages the employee from staying at work.<sup>116</sup> Psychological injury, while relevant in ascertaining the plaintiff's subjective perceptions of her environment, cannot be the touchstone for finding employer liability.<sup>117</sup>

The plaintiff in *Harris* urged the Court to adopt the reasonable woman test.<sup>118</sup> The Court compromised by holding that the standard set out in *Meritor* required an objectively hostile or abusive environment as well as the victim's subjective perception that the environment was abusive.<sup>119</sup> The reasonable person, therefore, must find the environment "hostile" and the victim must have actually perceived it to be so.<sup>120</sup>

"[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at of all the circumstances."<sup>121</sup> This includes the severity of the conduct, "whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."<sup>122</sup> One must

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113. *Id.* at 370.

114. *Id.*

115. *Id.*

116. *Id.* at 371.

117. *Id.*

118. *Id.* For information regarding the advantages and disadvantages of the reasonable woman standard, see Robert S. Adler & Ellen R. Pierce, *The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases*, 61 *FORDHAM L. REV.* 773 (1993); Jolynn Childers, *Is There a Place For a Reasonable Woman in the Law? A Discussion of Recent Developments in Hostile Environment Sexual Harassment*, 42 *DUKE L.J.* 854 (1993); Robert Unikel, "Reasonable" Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence, 87 *Nw. U.L. REV.* 326 (1992).

119. *Harris*, 114 S. Ct. at 371.

120. *Id.*

121. *Id.*

122. *Id.* Justice Scalia's concurring opinion criticized the majority for failing to provide a clearer standard and thereby letting juries make "unguided" decisions. *Id.* at 372 (Scalia, J., concurring). Yet Justice Scalia himself "know[s] of no alternative" to the majority rule. *Id.* (Scalia, J., concurring). Justice Ginsburg also concurred, although she stated, "It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered

also consider "the frequency of the discriminatory conduct" in assessing the totality of the circumstances.<sup>123</sup> As the 1993 EEOC proposed guidelines state, "Courts do not typically find violations based on isolated or sporadic use of verbal slurs or epithets; nevertheless, they recognize that an isolated instance of such conduct—particularly when perpetrated by a supervisor—can corrode the entire employment relationship and create a hostile environment."<sup>124</sup>

While both *Meritor Savings* and *Harris* addressed the hostile environment cause of action, there was still no definitive answer as to when an employer would be responsible for his or her supervisor's discriminatory actions. *Kotcher v. Rosa & Sullivan Appliance Center, Inc.*<sup>125</sup> finally offered some guidance.

#### D. *Kotcher v. Rosa & Sullivan Appliance Center, Inc.*

The plaintiff in *Kotcher* filed a sexual harassment claim against her manager.<sup>126</sup> The district court found that the plaintiff had indeed been subjected to a hostile work environment,<sup>127</sup> yet did not impute any liability to the manager's employer, Rosa and Sullivan.<sup>128</sup> The U.S. Court of Appeals for the Second Circuit, however, found the circumstances sufficient to impute liability.<sup>129</sup> The appellate court held that the plaintiff must first prove that the conditions of her employment were tainted by her supervisor to the extent that she endured an offensive work environment.<sup>130</sup> Once the plaintiff has satis-

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working conditions as to 'ma[k]e it more difficult to do the job.'" *Id.* (Ginsburg, J., concurring) (quoting *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 349 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989)).

123. *Id.* at 371.

124. 58 Fed. Reg. 51267 (1993) (to be codified at 29 C.F.R. § 1609).

125. 957 F.2d 59 (2d Cir. 1992).

126. *Id.* at 61.

127. *Id.*

128. *Id.* at 61-62.

129. *Id.* at 65.

130. *Id.* at 62.

[T]hough she [the plaintiff] need not show that she lost any tangible job benefits . . . [a] court should consider the offensiveness of the defendant's conduct, its pervasiveness, and its continuous nature . . . . The incidents must be repeated and continuous; isolated acts or occasional episodes will not merit relief. The conduct complained of must be unwelcome. Ultimately, whether there is a valid claim under Title VII depends on the totality of the circumstances.

*Id.* at 62-63 (citations omitted); *see also* *Carrero v. New York City Hous. Auth.*, 890

fied this element, she must then attempt to impute the liability of her supervisor to her employer.<sup>131</sup>

The court detailed two instances when an employer will be liable to its employee for creating a hostile environment: (1) where the employer lacks an internal complaint mechanism, or (2) where the employer has knowledge of the harassment, but fails to take any action regarding the harassment.<sup>132</sup> The *Meritor Savings* court first addressed the issue of employer liability but failed to outline exactly when an employer would be held liable for his or her supervisor's actions.<sup>133</sup> The court in *Kotcher* reiterated and explained the factors mentioned above, which are based on "traditional agency principles."<sup>134</sup>

The lower district court in *Kotcher* felt that the second element [of employer liability] was not met because Rosa and Sullivan had current procedures for handling reports of discrimination and actually responded quickly to the plaintiff's complaint.<sup>135</sup> The court concluded that this was satisfactory evidence of Rosa and Sullivan's commitment to a discrimination-free work environment.<sup>136</sup> Yet, the plaintiff successfully argued on appeal that the company's response to her

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F.2d 569, 577-78 (2d Cir. 1989) (finding that a sexual hostile environment exists even where the female employee is not subjected to "an extended period of demeaning and degrading provocation"); *Snell v. Suffolk County*, 782 F.2d 1094, 1103 (2d Cir. 1986) (holding the defendant employer liable for failing to rectify a racially hostile work environment).

131. *Kotcher*, 957 F.2d at 62-63.

132. *Id.*

133. *Id.* at 63.

134. *Id.*; see *Meritor Savings*, 477 U.S. at 72. Section 1609.2(a) (ii) of the EEOC proposed guidelines calls for an employer to be liable "regardless of whether the employer knew or should have known of the conduct, if the harassing supervisory employee is acting in an 'agency capacity.'" 58 Fed. Reg. at 51,268 (to be codified at 29 C.F.R. § 1609). The Commission will assess the totality of the circumstances and the job functions in determining whether the harasser was acting in an agency capacity. *Id.* It is wise for an employer to have a system in place to address harassment complaints. If the company does not have a specific policy against harassment in place, then an employee "could reasonably believe that a harassing supervisor's actions will be ignored, tolerated, or even condoned by the employer." *Id.* Note that an employer may even be liable for the actions of nonsupervisory employees where he or she was "aware or should have been aware of the harassing conduct." *Id.* Under proposed § 1609.2(c), employer responsibility would extend even to non-employee actions. *Id.* Once again, it is where the employer "knew or should have known of the conduct and failed to take immediate and appropriate corrective action, as feasible." *Id.* at 51,269.

135. *Kotcher*, 957 F.2d at 63.

136. *Id.* Ultimately, the U.S. Court of Appeals remanded the case for further consideration.

complaint was, in essence, a sham.<sup>137</sup> Rosa and Sullivan transferred the supervisor to another store,<sup>138</sup> but transferred him back and actually promoted the supervisor when the plaintiff left the company.<sup>139</sup>

In evaluating the lower court's decision, the Court of Appeals acknowledged that "not every response to a complaint should take the form of discharge."<sup>140</sup> Thus, the written warning Rosa and Sullivan gave the supervisor in question in response to a previous allegation by another employee of sexual harassment was not enough to hold Rosa and Sullivan liable.<sup>141</sup>

The plaintiff next argued that the company had constructive notice of the supervisor's misbehavior. A number of individuals in the company knew of the harassment incidents.<sup>142</sup> The supervisor himself, the plaintiff argued, performed a managerial role and the company thus should be held liable under agency law.<sup>143</sup> In response, the court conceded that in some circumstances the supervisor may be at such a high level within the company that the company would be automatically liable for that supervisor's actions.<sup>144</sup> This, however, was not the case in *Kotcher*.<sup>145</sup>

Over time, the hostile environment has been fleshed out and has taken on the character of a workable cause of action for many victims of workplace discrimination. The next natural step is to carry this cause of action over to the area of age discrimination.

137. *Id.*

138. *Id.* at 164. The plaintiff further alleged that the company took "the risk that he might harass others at his new location." *Id.*

139. *Id.* The court remanded this claim to the district court to be "evaluated in light of all the circumstances, including the cloud of suspicion created by Trageser's prompt restoration to his original position, a circumstance tending to indicate that Rosa and Sullivan at least tolerated his unlawful harassing conduct." *Id.*

140. *Id.* at 63.

141. *Id.*

142. *Id.* at 64.

143. *Id.* The 1993 EEOC guidelines state that while "[a] written or verbal grievance or complaint, or a charge filed with the EEOC provides actual notice . . . [e]vidence that the harassment is pervasive may establish constructive knowledge." 58 Fed. Reg. 51,268 (to be codified at 29 C.F.R. § 1609.2(a)(i)).

144. *Kotcher*, 957 F.2d at 64.

145. *Id.* The appeals court held that in this case the lower court "could reasonably have found that the company, whose main office was in Rochester, did not have constructive notice of Trageser's [the supervisor] behavior in Oswego." *Id.*

#### IV. SYNTHESIS OF TITLE VII HOSTILE ENVIRONMENT THEORY AND AGE DISCRIMINATION CASES

##### A. *How the Hostile Environment Theory Has Been Applied to Cases Arising Under the ADEA*

*Drez v. E.R. Squibb & Sons, Inc.*<sup>146</sup> was the first age discrimination case to adopt the hostile environment theory.<sup>147</sup> The *Drez* jury found that the plaintiff, who was still employed by the defendant company, had not been discriminated against because of his age.<sup>148</sup> The jury also found, however, that the company had retaliated against the plaintiff for having filed a charge with the EEOC.<sup>149</sup> The district court, in determining the validity of the defendant's motion for judgment notwithstanding the verdict, found that there was sufficient evidence to support the jury's finding of company retaliation.<sup>150</sup> The court summarized the holding of *Meritor Savings* and concluded, "There is no sound reason why this court should interpret identical statutory language [between the ADEA and Title VII] in the context of age discrimination any differently."<sup>151</sup>

While *Drez* was the first case to accept a hostile environment theory in the context of age discrimination, the case hardly took hold of the country. In fact, it was not until six years later that another case, *Spence v. Maryland Casualty Co.*,<sup>152</sup> utilized the theory.

A thirty-five-year employee, the plaintiff in *Spence* had a good work record with the defendant company until a new supervisor was appointed.<sup>153</sup> For the next year and a half, the fifty-eight-year-old plaintiff received so much criticism and threats of being fired that his health suffered and he eventually felt compelled to resign.<sup>154</sup> During the time leading up to his resignation, the plaintiff did not receive a salary increase or a bonus and was subjected to snide remarks about his old age.<sup>155</sup>

The court affirmed the lower court's ruling that the company was not liable to the plaintiff for a hostile work environment.<sup>156</sup> Although the plaintiff demonstrated an abusive work environment, the court

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146. 674 F. Supp. 1432 (D. Kan. 1987).

147. *Id.* at 1434.

148. *Id.*

149. *Id.*

150. *Id.* at 1436-37.

151. *Id.* at 1436.

152. 995 F.2d 1147 (2d Cir. 1993).

153. *Id.* at 1149.

154. *Id.* at 1149-54.

155. *Id.*

156. *Id.* at 1155.

found that he failed to prove the second factor of the hostile environment theory set out in *Kotcher*.<sup>157</sup> The company had actually investigated the two supervisors at issue and demoted them in response to complaints by another branch office not associated with the plaintiff.<sup>158</sup>

While *Spence* recognized the hostile environment theory for age discrimination cases, it failed to offer much guidance for future decisions. It was not until 1994, when *Eggleston v. South Bend Community School Corp.*<sup>159</sup> was decided, that a detailed, comprehensive case emerged and adopted the hostile environment theory for cases arising under the ADEA.

The plaintiff in *Eggleston* initially filed a complaint with the EEOC in 1988 for a school's failure to give him a teaching position because of his age.<sup>160</sup> A conciliation agreement was later reached between the parties and the plaintiff was rehired.<sup>161</sup> The plaintiff next filed a charge in 1992 that the school had "subjected him to a continuing pattern of harassment and intimidation" because of his 1988 charge against the school.<sup>162</sup> It is this 1992 charge on which the *Eggleston* case rested. The court found that the school had indeed subjected the plaintiff to a hostile environment.<sup>163</sup> In making this determination, the court relied on the EEOC guidelines for the criteria of what constitutes an abusive environment.<sup>164</sup> Quoting the EEOC, the court stated that "the standard is whether a reasonable person in the same or similar circumstances would find the challenged conduct intimidating, hostile, or abusive."<sup>165</sup>

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157. *Id.* As mentioned previously, the second element of the *Kotcher* test involves imputing a supervisor's actions to the employer. To be successful, the plaintiff must show that the employer lacked an internal complaint system or knew of the discrimination and failed to take any action about it. *See supra* note 134 and accompanying text.

158. *Id.* at 1153.

159. 858 F. Supp. 841 (N.D. Ind. 1994).

160. *Id.* at 843. The plaintiff was already employed at the school as a football coach. *Id.*

161. *Id.*

162. *Id.* The plaintiff claimed that a school board member said, "It will be a cold day in hell before I would recommend [the plaintiff] to be a coach in our system." *Id.* at 848.

163. *Id.* at 849.

164. *Id.*

165. *Id.* at 849-50. It is worth noting that the standard enunciated by the EEOC in its proposed guidelines seems in contravention with *Harris v. Forklift Systems, Inc.*,



In attacking the plaintiff's prima facie case of age discrimination, the defendants contended that there was no adverse action by the employer.<sup>166</sup> The defendants pointed out that the plaintiff did not lose his job and that, in fact, "a materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities."<sup>167</sup> However, the *Eggleston* court noted there is "nothing in the Act [ADEA] to suggest that Congress contemplated the limitation urged here [by the defendant employer]."<sup>168</sup>

In finding the hostile environment theory viable under the ADEA, the court also relied on the fact that the Supreme Court has in the past noted the similarities between Title VII language and the ADEA.<sup>169</sup> As further support, Judge Sharp stated that the ADEA "does not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion."<sup>170</sup>

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in which the U.S. Supreme Court adopted a two-tiered objective/subjective standard. See *infra* notes 228-31 and accompanying text (explaining *Harris*).

166. *Id.* at 845. This is the second element of the four-part test set forth in *McDonnell Douglas*. See *supra* note 35 and accompanying text.

167. *Id.* (quoting *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 135 (7th Cir. 1993)). The court further outlined a number of things it would consider a "materially adverse change." *Id.*

168. *Id.* at 846. The court specifically credited the 1980 EEOC guidelines regarding sexual harassment with a great amount of weight because they were consistent with existing case law. *Id.*; see *Cariddi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87 (8th Cir. 1977) (national origin claim may be based on hostile environment); *Firefighters Inst. for Racial Equality v. St. Louis*, 549 F.2d 506 (8th Cir.) (hostile environment for discrimination based on race), *cert. denied*, 434 U.S. 819 (1977); *Gray v. Greyhound Lines, East*, 545 F.2d 169 (D.C. Cir. 1976) (hostile environment for racial discrimination); *Compston v. Borden, Inc.*, 424 F. Supp. 157 (S.D. Ohio 1976) (religious discrimination cases and the hostile environment). The 1993 EEOC guidelines, since withdrawn, also rely on case law with regard to the hostile environment cases involving age discrimination. The court quotes the EEOC's proposed regulation:

For more than 20 years, the federal courts have held that harassment violates the statutory prohibition against discrimination in the terms and conditions of employment. The Commission has held and continues to hold that an employer has a duty to maintain a working environment free of harassment based on race, color, religion, sex, national origin, age, or disability, and that the duty requires positive action where necessary to eliminate such practices or remedy their effects.

*Eggleston*, 858 F. Supp. at 848.

169. *Eggleston*, 858 F. Supp. at 847; see *Lorillard v. Pons*, 434 U.S. 575, 584 (1978) (noting similarities between Title VII and the ADEA).

170. *Eggleston*, 858 F. Supp. at 847 (quoting *Passer v. American Chem. Soc'y*, 935 F.2d 322, 331 (D.C. Cir. 1991)).

B. *The Distinction Between Constructive Discharge and the Hostile Environment Theory as Applied to Age Discrimination in ADEA Cases*

The difference between the hostile environment cause of action and the common-law notion of constructive discharge is that in constructive discharge cases the plaintiff is forced to resign.<sup>171</sup> The test of whether there has been a constructive discharge<sup>172</sup> is not "whether the employee's working conditions were difficult or unpleasant."<sup>173</sup> Rather, the conditions of employment must be such that a "reasonable person in the employee's shoes would have felt compelled to resign."<sup>174</sup>

Conversely, with the hostile environment theory, the plaintiff may bring a charge while he or she is still on the job.<sup>175</sup> The employee who feels compelled to quit because the working conditions are so intolerable does not have to quit under a hostile environment cause of action.<sup>176</sup> Thus, the adoption of the hostile environment theory to age discrimination cases will broaden and expand the options open to victim employees. No longer must employees quit or wait to be fired in order to file a claim with the EEOC.

171. See *Pena v. Brattleboro Retreat*, 702 F.2d 322, 325 (2d Cir. 1983) (quoting *Young v. Southwestern Sav. & Loan Ass'n*, 509 F.2d 140, 144 (5th Cir. 1975)).

172. This test pertains to the first element in *McDonnell Douglas*, which requires the plaintiff in a constructive discharge case to prove a prima facie case before the burden is shifted to the employer. See generally *Turner v. Anheuser-Busch Inc.*, 7 Cal. 4th 1238 (1994) (redefining the standard of proof for constructive discharge cases in California as requiring the employer to have actual knowledge of the employment conditions at issue). Obviously this test is a much harsher standard than the hostile environment cause of action proposed by the EEOC. In fact, the exact standard required in constructive discharge cases varies. See William L. Kandel, *Age Discrimination: Recent Decisions by Appellate Courts Under the Age Discrimination in Employment Act Through Mid-1993*, in *LITIGATION* 1993, at 235, 321, (PLI Litig. & Admin. Practice Course Handbook Series No. 5163, 1993) available in WESTLAW, 475 PLI/LIT 235.

173. *Spence v. Maryland Cas. Co.*, 995 F.2d 1147, 1156 (2d Cir. 1993).

174. *Pena*, 702 F.2d at 325 (quoting *Rosado v. Garcia Santiago*, 562 F.2d 114, 119 (1st Cir. 1977)); see *Spence*, 995 F.2d at 1158 (holding that the plaintiff was not found to have been constructively discharged).

175. *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972).

176. See *id.*

C. *The Next Natural Step Is to Apply the Hostile Environment Theory to Age Discrimination Cases*

"Does not the passage of the ADEA *in haec verba* with Title VII suggest that Congress intended that age discrimination be treated the same as race discrimination?"<sup>177</sup> When one considers the nearly identical language of the ADEA and Title VII, the legislative history behind the ADEA, and the numerous substantive similarities between the two anti-discrimination statutes, the conclusion that the two statutes be treated the same becomes inescapable. In fact, the 1993 proposed EEOC guidelines suggest this same conclusion.

The United States Supreme Court has specifically held, in *Lorillard v. Pons*,<sup>178</sup> that there are a number of similarities between the ADEA and Title VII.<sup>179</sup> This holding makes logical sense, since the ADEA's prohibitions were essentially molded from Title VII's framework.<sup>180</sup> The two statutes share some identical wording, which states, "It shall be unlawful for an employer . . . 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."<sup>181</sup> The two statutes are also both aimed "at related phenomena."<sup>182</sup> In essence, both statutes specifically attempt to eradicate workplace discrimination.<sup>183</sup>

Title VII of the Civil Rights Act of 1964, however, did not include a prohibition against age discrimination because Congress viewed age as different from race or national origin.<sup>184</sup> One reason age is con-

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177. MICHAEL J. ZIMMER ET AL., *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 667 (A. James Gasner et al. eds., 1982).

178. 434 U.S. 575, 584 (1978); *see also* Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979) (stating that the ADEA and Title VII have near identical language, a common purpose and share an overlapping legislative history).

179. *Lorillard*, 434 U.S. at 584.

180. *Id.* The Court noted that the two key differences between the statutes are their remedial and procedural provisions. *Id.* The ADEA allows for broader recovery because its remedial and procedural language was adopted from the FLSA, rather than Title VII. *Id.*

181. 29 U.S.C. § 623(a)(2) (1988). Title VII simply replaces 'age' with 'race, color, sex or national origin.' 42 U.S.C. § 2000e-2(a)(2) (1988). *See generally* Marla Ziegler, *Disparate Impact Analysis and the Age Discrimination in Employment Act*, 68 MINN. L. REV. 1038 (1984) (examining the use of disparate impact analysis).

182. ZIMMER ET AL., *supra* note 177, at 367.

183. *Id.*

184. *See* 113 CONG. REC. 31,254 (1967). At the time of Title VII's passage, there was talk that age should be included. Instead of including age, however, the Civil Rights Act ordered the Secretary of Labor to study the problem of age discrimination. *See* 113 CONG. REC. 31,250 (1967). Based on the secretary's findings, the ADEA movement began. President Johnson issued an Executive Order declaring a public policy against

sidered a distinct characteristic, unlike most of the characteristics covered by Title VII,<sup>185</sup> is that age is not immutable. In addition, membership in the over-forty age group is determined by time rather than by birth. Furthermore, age ultimately affects most people's ability to work.<sup>186</sup>

When the ADEA was first enacted, it covered people between the ages of forty and sixty-five.<sup>187</sup> The Act was designed to prevent an older worker from being discharged simply because he or she had turned a certain age.<sup>188</sup> Eventually, Congress expanded the Act to protect all people over the age of forty.<sup>189</sup> The impact without the upper age limit is that the Act undoubtedly protects workers who are not able to perform effectively because of their advanced age. This creates inefficiency in the workplace and tension between the company and the employee.

The Act, however, protects the employer against this inefficiency by providing the "bona fide occupational qualification" (BFOQ) exception.<sup>190</sup> For the exception to apply, an age restriction must be "reasonably necessary to the normal operation of the particular business."<sup>191</sup> Thus, if an employer can point to specific job requirements whereby advanced age would be a definite handicap to the safe ad-

age discrimination in employment. 1 PUB PAPERS 32 (1967). See KALET, *supra* note 8, at 1-3 (providing detailed legislative history of the ADEA).

185. Although religion is not an immutable characteristic, it is encompassed under the First Amendment guarantees. U.S. CONST. amend. I.

186. See *supra* note 9 and accompanying text.

187. 29 U.S.C. § 631 (1976).

188. 29 U.S.C. § 621 (1988).

189. 29 U.S.C. § 631(a) (1988 & Supp. V 1993). In 1978 Congress amended the ADEA to protect people between the ages of 40 and 70. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256 § 3(a), 92 Stat. 189, 189 (codified as amended at 29 U.S.C. § 631(a) (1988 & Supp. V 1993)). In 1986 Congress eliminated all upper age limits. Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592 § 2(c)(1), 100 Stat. 3342, 3342 (codified as amended at 29 U.S.C. § 631(a) (1988 & Supp. V 1993)). Some upper age limit is allowed for tenured professors, law enforcement officers, and firefighters. 29 U.S.C. § 631(d).

190. 29 U.S.C. § 623(f)(1) (1988). There are four other defenses to an ADEA action. The first of these is when the differentiation "is based on reasonable factors other than age." *Id.* The second defense is when the employer's decision is necessary "to observe the terms of a bona fide seniority system." 29 U.S.C. § 623(f)(2) (1988 & Supp. V 1993). The third defense is where the employer's decision is necessary "to observe a bona fide employee benefit plan." *Id.* Finally, the fourth defense is when the termination or discipline is based on good cause. 29 U.S.C. § 623(f)(3) (1988).

191. 29 U.S.C. § 623(f)(1) (1988).

ministration of the employee's job, then the employer may dismiss the older employee.<sup>192</sup>

Although the purpose of Title VII and the ADEA are similar, there are a number of differences between the two statutes. "One major substantive difference" is that "Title VII generally bars discrimination on the prohibited grounds, whereas the ADEA is far more restrictive because of its narrow definition of 'age.'"<sup>193</sup> In other words, Title VII protects against *all* racial discrimination, while the ADEA protects individuals against age discrimination once they are over the age of forty.<sup>194</sup>

Another difference between the two federal statutes is that the basis for discrimination under Title VII, such as race or gender, is considered either a suspect or quasi-suspect classification by the United States Supreme Court.<sup>195</sup> In *Massachusetts Board of Retirement v. Murgia*,<sup>196</sup> the Court suggested that age is inherently more neutral than either race or national origin.<sup>197</sup> The distinction is that older workers have not faced life-long bias, and eventually age does affect a person's ability to work.

Even in light of these differences between the ADEA and Title VII, there is still support for treating the two statutes in the same manner. In fact, the EEOC advocates the similar treatment in its

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192. An example of where the employer has been successful in exercising the BFOQ defense is in the airline industry; captains are not allowed to continue their job after the age of 60. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 122 (1985).

193. ZIMMER ET AL., *supra* note 176, at 365-66.

194. For instance, discrimination against race is prohibited outright, as is discrimination against females. 42 U.S.C. § 2000e-2(a)(1) (1988). However, age discrimination is not as comprehensive. Under the ADEA, a 30 year-old is not protected from age discrimination because only individuals over the age of 40 receive protection. There is no comparable limitation under Title VII.

195. See *Miller v. Johnson*, 115 S. Ct. 2475, 2480 (1995) (race a suspect classification); *Adarand v. Peña*, 115 S. Ct. 2097, 2100-01 (1995) (race is suspect distinction); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 n.9 (1982) (gender requires substantially related test). Distinctions based on race, religion, and national origin are suspect, while gender classifications are quasi-suspect. *Id.*; see also, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2220 (1993) (religious classification suspect); *City of Cleborne v. Cleborne Living Center*, 473 U.S. 432, 440 (1985) (national origin classification suspect).

196. 427 U.S. 307 (1976) (per curiam).

197. The court held that age classifications are not suspect because older workers: (1) have not "experienced a 'history of purposeful unequal treatment,'" *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973); (2) have not been victimized "on the basis of stereotyped characteristics not truly indicative of their abilities," *Murgia*, 427 U.S. 307, 313; and (3) are not a "'discrete and insular group' in need of 'extraordinary protection.'" *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

most recent proposed guidelines, issued on October 1, 1993.<sup>198</sup> In the guidelines, the EEOC sets out the criteria for a hostile environment,<sup>199</sup> which were to apply to all the components of Title VII as well as the Americans with Disabilities Act (ADA)<sup>200</sup> and the ADEA.<sup>201</sup>

During the initial comment period for these guidelines, the Commission was deluged with letters both in support and opposition.<sup>202</sup>

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198. The EEOC is a federal agency created by statute to handle all charges of discrimination under federal law. Guidelines put out by the EEOC are "accorded substantial weight in EEO [Equal Employment Opportunity] case law," although, unlike statutes or regulations, they are not binding. MICHAEL D. LEVIN-EPSTEIN, *PRIMER OF EQUAL EMPLOYMENT OPPORTUNITY* 7 (3d ed. 1984).

199. The Proposed Guidelines provide in part:

(b) (1) Harassment is verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of his/her race, color, religion, gender, national origin, age, or disability, or that of his/her relatives, friends, or associates, and that:

i) Has the purpose or effect of creating an intimidating, hostile, or offensive work environment;

ii) Has the purpose or effect of unreasonably interfering with an individual's work performance; or

iii) Otherwise adversely affects an individual's employment opportunities.

(b) (2) Harassing conduct includes, but is not limited to, the following:

i) epithets, slurs, negative stereotyping, or threatening, intimidation, or hostile acts, that relate to race, color, religion, gender, national origin, age or disability; and

ii) written or graphic material that denigrates or shows hostility or aversion toward an individual or group because of race, color, religion, gender, national origin, age, or disability and that is placed on walls, bulletin boards, or elsewhere on employer's premises, or circulated in the workplace.

(d) An employer . . . has an affirmative duty to maintain a working environment free of harassment on any of these bases. Harassing conduct may be challenged even if the complaining employee(s) are not specifically intended targets of the conduct.

Guidelines Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 58 Fed. Reg. 51,266 (proposed Oct. 1, 1993 and withdrawn Oct. 20, 1994).

200. 42 U.S.C. § 12101 (1988 & Supp. V 1993).

201. 29 U.S.C. § 623 (1988 & Supp. 1990); see *Rogers v. EEOC*, 454 F.2d 234, 239 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). See generally *EEOC v. International Longshoremen's Ass'n*, 511 F.2d 273 (5th Cir.), *cert. denied*, 423 U.S. 994 (1975) (holding that unions are an essential aspect of employment and therefore may not be segregated by race per Title VII); *Weiss v. U.S.*, 595 F. Supp. 1050 (E.D. Va. 1984) (holding that a Jewish employee was subjected to a racially hostile environment when employer repeatedly taunted him with anti-Semitic remarks).

202. For in-depth reports of the comments received, see *Producer Prices: EEOC's*

The primary concern with the guidelines did not involve the application of the hostile environment theory to age discrimination, but dealt with potential First Amendment problems regarding the inclusion of religious discrimination.<sup>203</sup>

Although the EEOC agreed to reexamine the guidelines, Congress became embroiled in the debate. In May and June of 1994, both houses of Congress introduced resolutions calling for the EEOC to eliminate the religion category from the guidelines altogether.<sup>204</sup> On June 9, 1994, the EEOC testified at a Senate Judiciary Subcommittee that it was looking into the proposed guidelines on religious harassment and stated "that any final document [would] address the wide-ranging concerns voiced by religious organizations and others."<sup>205</sup>

The showdown came in July 1994 when the House added language to appropriations legislation<sup>206</sup> that required the EEOC to withdraw the guidelines and to hold public hearings before they issued any future guidelines.<sup>207</sup> Not long after, the EEOC published its withdrawal of the guidelines in the Federal Register.<sup>208</sup> Significantly, the guidelines were not withdrawn because of the inclusion of age

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*Views of Harris, Scope of Liability Major Concerns in Comments on Harassment Proposal*, 1994 Daily Lab. Rep. (BNA) No. 9, at D-23 (Jan. 13, 1994). Based on the voluminous response, the comment period was extended on May 13, 1994 to June 13, 1994. Proposed Rule; Extension of Comment Period, 59 Fed. Reg. 24998 (1994) (to be codified at 29 C.F.R. § 1609).

203. *Proposal Seeks End to EEOC Religious Rule*, 1994 Daily Lab. Rep. (BNA) No. 108, at D-19 (June 8, 1994).

204. *Id.* Representative Howard McKeon of California introduced his resolution in late May 1994 while Senator Hank Brown of Colorado introduced legislation on June 6, 1994. *Id.* The Senate resolution also suggested that the EEOC hold public hearings on the matter. *Id.* The Senate eventually passed the resolution unanimously. *Id.*; see 58 Fed. Reg. 51,266 (1993) (to be codified at 29 C.F.R. § 1609) (proposed Oct. 1, 1993).

205. *EEOC Promises to Address Concerns over Religious Harassment Proposal*, Daily Lab. Rep. (BNA) No. 110, at D-3 (June 8, 1994). The EEOC received over 50,000 comments regarding the religious issue alone. *Id.* at 1. The guidelines prompted fear that "religious expression and freedom are suppressed." *Id.*

206. H.R. 4603, 103d Cong., 2d Sess. (1994).

207. H.R. CONF. REP. NO. 708, 103d Cong., 2d Sess. 182 (1994) (to accompany H.R. 4603). The EEOC's budget, per the new appropriations language, was "absolutely decrease[d]," an EEOC official remarked. *House-Passed Appropriations Bill Cuts EEOC Budget; Restricts Religious Rules*, Daily Lab. Rep. (BNA) No. 159, at D-4 (Aug. 18, 1994), available in WESTLAW, BNA-DLR Database. An EEOC aide remarked that "the feeling at the agency was that the cut was related to the religious harassment guidelines." *Id.*

208. 59 Fed. Reg. 51396-01 (1994) (to be codified at 29 C.F.R. § 1609) (withdrawn Oct. 11, 1994). The only explanation by the EEOC was that the guidelines "did not achieve the[ir] stated goal." *Id.* The guidelines were officially withdrawn by the EEOC on October 11, 1994. *Id.*

discrimination, but rather because of First Amendment concerns.<sup>209</sup> Thus, there is no reason for not pursuing guidelines similar to the 1993 EEOC guidelines minus the religious component.

The hostile environment theory should be applied to age discrimination for all the reasons mentioned above. Yet, it is also important to adequately assess the impact of such application.

## V. THE IMPACT OF APPLYING THE THEORY TO AGE DISCRIMINATION

### A. *Potential Impact of the Theory's Adoption on Plaintiffs*

District courts have come up with five basic elements of a sexually hostile environment cause of action.<sup>210</sup> The first element incorporates the initial component of the *McDonnell Douglas Corp. v. Green*<sup>211</sup> test mentioned earlier, requiring the plaintiff be in the protected group.<sup>212</sup> Under the hostile environment theory, the plaintiff must then prove that she was subject to "unwelcome sexual harassment" and that "such harassment was based upon sex."<sup>213</sup> Finally, the plaintiff must prove that the supervisor's liability should be imputed to the employer.<sup>214</sup>

It is the fourth element pronounced by *Robinson* that marks a clear departure from the *McDonnell Douglas* test because the victim of a hostile environment need only show the harassment "affected a term, condition, or privilege of employment."<sup>215</sup> The *McDonnell Douglas* standard specifically requires that the employee be discharged or otherwise discriminated against in order for a plaintiff to prevail.<sup>216</sup> Thus, the employee must have been actually or constructively terminated.<sup>217</sup> A hostile environment cause of action does not require actual or constructive termination.<sup>218</sup> Thus, the third and

209. *Id.*

210. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1522 (M.D. Fla. 1991). The EEOC also listed what it considered the proper elements of a hostile environment cause of action. See *supra* note 198 and accompanying text.

211. 411 U.S. 792 (1973).

212. *McDonnell Douglas*, 411 U.S. at 802; *Robinson*, 760 F. Supp. at 1522.

213. *Robinson*, 760 F. Supp. at 1522. *Robinson* involved a plaintiff subjected to a sexually hostile work environment. *Id.* at 1490. There is no reason to assume that this same standard could not be applied to age cases, thus modifying the third element to read "such harassment was based upon age," *id.* 1522.

214. *Robinson*, 760 F. Supp. at 1522.

215. *Id.*

216. See *supra* notes 35-39 and accompanying text.

217. *McDonnell Douglas*, 411 U.S. at 802.

218. Under a hostile environment cause of action, the plaintiff need not prove he or



fourth elements of *McDonnell Douglas* are simply amended for hostile environment cases. The plaintiff, after satisfying the first two elements of the *McDonnell Douglas* test, would then have to set forth the components of the hostile environment action. Once this has been accomplished, the burden then shifts to the defendant.<sup>219</sup>

The burdens of production in a hostile environment case have in fact remained the same. The *Eggleston* court concluded that where an abusive work environment is found, "this creates a rebuttable presumption of [retaliation], and the burden of production shifts to the [defendant] to articulate a legitimate nondiscriminatory reason for the [retaliatory actions]."<sup>220</sup> Essentially, it appears that the *McDonnell Douglas* burden-shifting system remains intact.<sup>221</sup>

*Eggleston* also addressed the types of recovery available under the hostile environment cause of action.<sup>222</sup> The key issue is whether a plaintiff, who has suffered no monetary loss but has instead been subjected to a hostile environment, may recover monetary damages.<sup>223</sup> The plaintiff in *Eggleston* contended he was entitled to monetary compensation because of the remedial nature of the ADEA.<sup>224</sup>

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she was terminated or constructively discharged, as these are not necessary components for an actionable hostile environment. See *Robinson*, 760 F. Supp. at 1522.

219. *McDonnell Douglas*, 411 U.S. at 802.

220. *Eggleston v. South Bend Community Sch.*, 858 F. Supp. 841, 850 (N.D. Ind. 1994) (quoting *McCoy v. WGN Continental Broadcasting Co.*, 957 F.2d 368, 371 (7th Cir. 1992)).

221. *Id.* at 852. A defendant employee in a hostile environment case may not be allowed "to introduce and rely on social context evidence." Nancy L. Abell et al., *Recent Developments in Sexual Harassment Litigation*, in *SEXUAL HARASSMENT LITIGATION 1995* (PLI Litig. & Admin. Practice Course Handbook Series No. H4-5222, 1995), available in WESTLAW, 520 PLI/LIT 9; see *Robinson*, 760 F. Supp. at 1526 (noting that the social context argument "lacks a sound analytical basis" and "cannot be squared with Title VII's promise to open the workplace to women"). Conversely, a victim of a hostile environment is generally allowed to introduce "[e]vidence of the general work atmosphere, involving employees other than the plaintiff" to prove the existence of a hostile environment. *Broderick v. Ruder*, 685 F. Supp. 1269, 1277 (D. D.C. 1988). The court determined that such evidence is directly on point as to whether a hostile atmosphere existed at work. *Id.* at 1277-78. See generally *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987); *Sims v. Montgomery County Comm'n*, 766 F. Supp. 1052 (M.D. Ala. 1990).

222. *Eggleston*, 858 F. Supp. at 852.

223. *Id.*

224. *Eggleston*, 858 F. Supp. at 11. The plaintiff relied on cases that allowed a broad range of remedies. See *id.*; *Franklin v. Gwinnett County Pub. Sch.*, 112 S. Ct. 1028, 1037 (1992) (opening the door to "all appropriate remedies" for Title IX cases); *Moskowitz v. Trustees of Purdue Univ.*, 5 F.3d 279, 283 (7th Cir. 1993) (holding that plaintiff in age discrimination case is entitled to equitable relief, namely reinstatement or front pay when reinstatement is not feasible, and legal or compensatory remedies); *Travis v. Gary Community Mental Health Ctr., Inc.*, 921 F.2d 108, 111 (7th Cir. 1990), *cert. denied*, 502 U.S. 812 (1991) (holding that legal damages are allowed in age dis-

The *Eggleston* court concentrated on the similarities between the federal anti-discrimination statutes. The court stated that "[t]he ADEA is in some sense a hybrid of Title VII and the Fair Labor Standards Act ("FLSA") of 1938; the prohibitions in the ADEA generally follow Title VII, but the remedies are those of the FLSA."<sup>225</sup> The court noted that there is no definitive answer regarding whether compensatory damages are allowed in age discrimination cases for pain and suffering; however, most courts conclude they are not.<sup>226</sup> Yet the court concluded that the plaintiff did have a legitimate claim for compensatory damages based on the retaliation provision of the ADEA, but held that punitive damages were unavailable.<sup>227</sup>

The biggest impact on the plaintiff depends primarily on the interpretation of *Harris v. Forklift Systems, Inc.*<sup>228</sup> It is unclear whether the Court meant to reject the reasonable victim standard altogether. Gender, for instance, certainly has a significant impact "on individuals' perceptions of what constitutes sexual harassment."<sup>229</sup> This is why it is important to define harassment from the victim's perspective, even if it is coupled with an objective element as a safeguard.<sup>230</sup> In fact, the EEOC proposed just that in its 1993 guidelines.<sup>231</sup>

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crimination cases, including punitive damages for retaliatory discharge). The defendant relied on *Espinueva v. Garrett*, 895 F.2d 1164, 1165 (7th Cir.), cert. denied, 497 U.S. 1005 (1990), for the proposition that "[n]either Title VII nor the ADEA authorizes awards of compensatory or punitive damages, as opposed to "equitable" relief such as reinstatement and back pay.

225. *Eggleston*, 858 F. Supp. at 852-53 (quoting BARBARA L. SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 525-27 (2d ed. 1983)).

226. *Id.* at 853.

227. *Id.* at 856 (noting that "Congress has expressly held that punitive damages are not available under the ADEA.")

228. 114 S. Ct. 367 (1993).

229. Dolkart, *supra* note 80.

230. *Id.* See generally Lamont E. Stallworth & Martin H. Malin, *Workforce Diversity*, 49 DISP. RESOL. J., June 1994 at 27, 31.

231.

(c) The standard for determining whether verbal or physical conduct . . . is sufficiently severe or pervasive to create a hostile or abusive work environment is whether a reasonable person in the same or similar circumstances would find the conduct intimidating, hostile or abusive. The "reasonable person" standard includes the consideration of the perspective of persons of the alleged victim's race, color, religion, gender, national origin, age or disability.

Guidelines Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 58 Fed. Reg. 51,266, 51,269 (proposed Oct. 1, 1993 and withdrawn Oct. 20, 1994).

In formulating its guidelines, the EEOC relied heavily on *Ellison v. Brady*.<sup>232</sup> In that case the court held that the "perspective of the victim" should be considered when evaluating "the severity and pervasiveness of sexual harassment."<sup>233</sup> In *Ellison*, a male employee sent his female co-worker bizarre love letters and repeatedly asked her out.<sup>234</sup> While the company transferred him in response to the woman's complaint, the male employee was later allowed to return per a union/company agreement.<sup>235</sup> The court explained that if it focused only on what a reasonable person would do regarding harassment, then the risks for discrimination would be compounded.<sup>236</sup> Rather, the court should factor in the differences between men and women to arrive at a just standard, for what may offend a woman may not offend a man.<sup>237</sup>

*Harris v. International Paper Co.*<sup>238</sup> adopted the same standard and rationale as *Ellison*, but expanded the holding to race.<sup>239</sup> The court held that the trier of fact must "walk a mile in the victim's shoes" in order to comply with the objectives of Title VII and the

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232. 924 F.2d 872 (9th Cir. 1991); see also *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1483 (3d Cir. 1990) (adopting both a subjective and an objective reasonable person standard for determining an actionable hostile environment); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1523-24 (M.D. Fla. 1991) (holding that proper perspective on the impact of harassing behavior is a reasonable woman under the totality of circumstances approach).

233. *Ellison*, 924 F.2d at 878.

234. *Id.* at 873-74.

235. *Id.* at 874. The court ultimately decided that the employee did not allege a prima facie case of sexual harassment due to a hostile working environment and remanded the case for the resolution of factual issues. *Id.* at 883-84.

236. *Id.* at 878.

237. *Id.* (citations omitted); see *Dolkart, supra* note 80, at 186 (deducing that any "evaluation of whether particular conduct is legally cognizable as sexual harassment must take place from the perspective of the victim"); see, e.g., *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988) (reasoning that "[a] male supervisor might believe, for example, that it is legitimate for him to tell a female subordinate that she has a 'great figure' or 'nice legs'; the female subordinate, however, may find such comments offensive."); see also *Yates v. Avco Corp.*, 819 F.2d 630, 637 n.2 (6th Cir. 1987) (holding that "men and women are vulnerable in different ways and offended by different behavior.").

238. 765 F. Supp. 1509 (D. Me. 1991), *vacated in part*, 765 F. Supp. 1529 (D. Me. 1991). The original injunction and order was vacated to the extent that an amended injunction was issued clarifying the terms of the original injunction. 765 F. Supp. 1529, 1530-31 (D. Me. 1991). The court amended the injunction consistent with the earlier court's holding. *Id.*

239. *Id.* at 1516. The plaintiffs in *Harris* were permanent replacements at the defendant's mill. *Id.* The supervisors at the mill verbally abused the plaintiffs with racial epithets, sabotaged the plaintiffs' work, threatened to fight them, and pretended to engage in Klu Klux Klan rituals. *Id.* at 1517-18.

Maine Human Rights Act [MHRA].<sup>240</sup> The factfinder must be able to comprehend the effects of such conduct and speech on the victims in order to remedy the situation.<sup>241</sup> Thus, the "reasonable black person" standard should be applied in cases involving a racially hostile work environment.<sup>242</sup> The court did hasten to add that it was not implying that all African-Americans share the same perspective.<sup>243</sup>

One problematic aspect of incorporating the reasonable victim standard within the ambit of a hostile environment cause of action is whether "triers of fact and third-party neutrals [must] obtain sensitivity training in the social experiences of various demographic groups to apply the victim's perspective standard meaningfully."<sup>244</sup> How would a twenty-three-year-old juror be able to adequately assess a fifty-three-year-old victim of age discrimination? The courts and legislators need to work together in creating a workable, comprehensive standard that will at least consider the victim's sensitivities.

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240. *Id.* at 1516.

241. *Id.*

242. *Id.*

243. *Id.* at 1516 n.12. Some critics of the 1993 EEOC's reasonable person standard note that the standard assumes that all members of a particular class think and feel the same way. *Comments on EEOC Harassment Guidelines Focus on Reasonable Person Test, Free Speech*, Daily Lab. Rep. (BNA) No. 70 at D-5 (April 13, 1994), available in WESTLAW, BNA-DLR Database. Employer groups especially objected to the individual reasonable person standard, claiming it "place[d] undue emphasis on individual characteristics, and replaces a uniform standard of conduct with a confusing, highly fragmented legal standard." *EEOC's View of Harris, Scope of Liability Major Concerns in Comments on Harassment Proposal*, Corp. Couns. Daily (BNA) (Jan. 14, 1994), available in WESTLAW, BNA-DNEWS Database. The Equal Employment Advisory Council (EEAC) attacked the standard as "suggesting that all persons of a particular race or religion or all persons of a certain age share the same perspective." *Id.*

244. Stallworth & Malin, *supra* note 230, at 32.

## B. Effect on the Employer<sup>245</sup>

### 1. Will Employers Take the Drastic Measure of Filing a Countersuit Against Plaintiffs?<sup>246</sup>

With the passage of federal anti-discrimination statutes, employers now are being sued far more than any other time in history. Until now, employers have simply built a strong defense to any charges brought by past or current employees. It has been noted that “[t]he explosion of harassment and discrimination claims has fueled a retaliatory mentality in some employers.”<sup>247</sup>

This possible trend could be explosive, especially in light of the fact that one in three sexual harassment claims handled by the EEOC resulted in a finding of insufficient evidence.<sup>248</sup> What is the main purpose behind the employer’s actions? The court costs would certainly be insignificant to a large company. What the companies are really after is to deter future meritless claims by employees.<sup>249</sup>

There are three main types of out-of-pocket costs that a company can recover from an employee that brings a frivolous lawsuit.<sup>250</sup> The most obvious recovery is for “filing fees, transcript costs, and pho-

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245. Section 1609.2(d) of the proposed guidelines advises employers to have “explicit polic[ies] against harassment that [are] clearly and regularly communicated to employees, explaining sanctions for harassment, developing methods to sensitize all supervisory and nonsupervisory employees to issues of harassment, and informing employees of their right to raise and how to raise the issue of harassment under Title VII, the ADEA, the ADA, and the Rehabilitation Act.” 58 Fed. Reg. 51268 (1993) (to be codified at 29 C.F.R. § 1609.26). An employer may also want to increase insurance coverage for employment discrimination liability, but the availability of coverage for intentional discrimination (and thus claims based on an abusive environment) is controverted. Sean W. Gallagher, *The Public Policy Exclusion and Insurance for Intentional Employment Discrimination*, 92 MICH. L. REV. 1256, 1256-59 (1994).

246. *Failed Bias, Harassment Claimants Face Court Cost Motions, Countersuits*, Employment Pol’y & L. Daily (BNA) (Oct. 14, 1994), available in LEXIS, BNA Library, ELD File (relating employer’s new enthusiasm for the pre-emptive action and counter suits).

247. *Id.* Although Title VII and the ADEA both protect employees from retaliation on the part of their employer, an employer may still rightly recover court costs. *Id.*

248. *Id.*

249. *Id.* Rafael Chodos is representing one California company against six women who have complained of sexual harassment. *Id.* at 1. The company seeks to have the court pronounce that it “properly handled the sexual harassment complaints before the women filed charges.” *Id.* It is a preemptive suit, whereby the employer confronts the women head on; the company is not requesting monetary damages. *Id.* Raytheon Aircraft Corporation is another example of a company that took action and recovered costs from plaintiffs where the company felt the plaintiff did not file their action in good faith. *Id.* Lawyers differ in their opinion of whether the impact of such company action acts as a deterrence to prevent future plaintiffs from filing suit. *Id.*

250. *Id.* at 2.

tocopy expenses.<sup>251</sup> An additional monetary remedy is available to companies who are victims of extremely frivolous lawsuits.<sup>252</sup> The most radical remedy involves companies filing a defamation or malicious prosecution case.<sup>253</sup> Yet, companies must beware of the EEOC intervening for a violation of the anti-retaliation provisions in Title VII and the ADEA.<sup>254</sup>

## 2. Will Businesses Be Forced to Flee Certain Geographic Areas?

A victim of age discrimination recently received \$7.1 million in damages in a California jury trial.<sup>255</sup> The appellate court upheld the award, but warned:

This area of the law [discrimination cases] is quickly running out of control and the citizens of California will be the ultimate victims and losers . . . . [I]t is clear that commerce in California cannot flourish with such multi-million dollar verdicts readily attainable . . . . If the Legislature fails to act in this area, we can see that, in due course, business enterprises will flee the state.<sup>256</sup>

This statement clearly reflects the court's concern with rising verdict amounts. It is an important concern because it stands to reason that more available methods of bringing an age discrimination cause of action will lead to more costly verdicts. Thus, one possible impact of applying the hostile environment theory to age discrimination cases is that it will be the straw that breaks employers' economic backs.

## 3. The Rising Cost of Jury Verdicts in Discrimination Cases

Lately, juries are awarding higher and higher dollar amounts in discrimination cases. According to a five-year study by a California management law firm, the average jury award is highest in sex discrimination claims.<sup>257</sup> Recent amounts of jury verdicts across the

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251. *Id.* Depending on the nature of the lawsuit and the use of the appellate system, this amount can range from hundreds to thousands of dollars. *Id.*

252. *Id.* As one lawyer noted, this remedy is accompanied by strict rules of application, therefore the success rates are very low. *Id.*

253. *Id.*

254. *Id.* at 2, 4.

255. *Hunio v. Tishman Constr. Corp.*, 18 Cal. Rptr. 2d 253, 256 (1993).

256. *Id.* at 266.

257. *Average Jury Award Doubled in 1994, According to California Verdicts Survey*, Employment Pol'y & L. Daily (BNA) (Oct. 27, 1994) available in LEXIS, BNA

country range from a mere \$11,000<sup>258</sup> to \$89.6 million<sup>259</sup> with a wide range in between.<sup>260</sup>

In response to these astronomical jury awards, "a growing number of employees . . . are being asked to sign away their right to sue in cases involving . . . age discrimination as a condition of employment."<sup>261</sup> In fact, the 1991 United States Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>262</sup> held that an agreement to arbitrate a statutory claim under the ADEA was valid.<sup>263</sup>

As a result of these rising jury awards and the EEOC's backlog of claims, employers are using mandatory private arbitration and mediation more and more to deal with discrimination charges;<sup>264</sup> however, some attorneys question whether mandatory arbitration is indeed faster and less expensive than a courtroom trial.<sup>265</sup> Arbitration brings with it some unique problems: "splitting of claims, parallel arbitration and court proceedings [which can lead to increased cost],

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Library, ELD File.

258. *Curry v. Vons Cos.*, No. 663750, 1994 WL 604763 (Cal. June 3, 1994) (racially hostile environment case).

259. *Jury Awards \$89.6 Million on Race Bias Claims Brought by Two Former Hughes Aircraft Employees*, Employment Pol'y & L. Daily (BNA) (Oct. 31, 1994) available in LEXIS, BNA Library, ELD File. The jury found the company liable for racial discrimination. *Id.* The award consisted of \$80 million in punitive damages, \$4 million in economic damages and \$5.5 million in noneconomic damages. *Id.*

260. See *Simon v. San Diego Gas & Elec. Co.*, No. 663138, 1994 WL 679561 (Cal. Sept. 7, 1994) (awarding \$3,113,160 to victim of racial discrimination); *Weddell v. Allstate Ins. Co.*, No. A9111-07641, 1993 WL 0655281 (Or. Nov. 10, 1992) (awarding \$2.77 million for gender/age discrimination claim); *Brocklehurst v. PPG Indus., Inc.*, 865 F. Supp. 1253, 1265, 1267 (E.D. Mich. 1994) (holding that jury award of \$1.5 million should be reduced to \$528,818 where employer was found liable for age discrimination).

261. Frank Swoboda, *Financial Workplace—Employers Find a Tool to End Workers' Right to Sue: Arbitration*, WASH. POST, Sept. 18, 1994, at H08.

262. 500 U.S. 20 (1991).

263. *Id.* at 35 (noting the difference between the agreement described above and "arbitration of contract-based claims [which] precluded subsequent judicial resolution of statutory claims").

264. *Concerns Raised About Trend Toward Using Alternative Dispute Process for Bias Claims*, Employment Pol'y & L. Daily (BNA) (Nov. 1, 1994), available in LEXIS BNA Library, ELD file. Some attorneys feel that the use of private mandatory arbitration in this area is contrary to the idea that a public right ought to be dealt with in the public arena. *Id.* The issue ultimately is whether "an employee can contractually waive the right to bring a lawsuit." *Id.* at 2; see Federal Arbitration Act, 9 U.S.C. § 2 (1988) (offering a presumption in favor of arbitration); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (holding that the ADEA does not prohibit compulsory arbitration agreements).

265. *Discrimination: Mandatory Arbitration is no Panacea, Lawyer tells Defense Representatives*, Employment Pol'y & L. Daily (BNA) (Nov. 8, 1994), available in LEXIS BNA Library, ELD file.

and arbitrators who are inclined to issue compromise awards in favor of employees.<sup>266</sup>

#### 4. Employer's Other Alternatives

Although the hostile environment cause of action does not require the plaintiff to have been terminated, courts have not recognized the hostile environment in age discrimination claims; thus, the bulk of these suits result from terminations. An employer in today's times must carefully consider the possible effect of laying off older workers—an age discrimination charge.<sup>267</sup> The main theme of the 1993 Employment Law Seminar seemed to be the encouragement of alternatives to termination.<sup>268</sup> Thus a company might first try a voluntary layoff before terminating an older worker.<sup>269</sup> While employing the use of buyouts, employers must comply with the 1990 Older Workers Benefit Protection Act (OWBPA).<sup>270</sup> Attorneys advise that a company should have plans to reduce its work force through involuntary terminations in writing and ensure that the people selected for layoff

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266. *Id.* at 1. There are also a number of practical problems associated with arbitration. *Id.* at 2. For instance, are the individual supervisors named in the charge subject to arbitration as well? *Id.* The answer may be that unless the agreement to arbitrate specifically covers the offending supervisor, the supervisor will be handled in court while the company will be dealt with in arbitration. *Id.*

267. *Employers Urged to Explore Layoff Alternatives in Order to Avoid Age Discrimination Claims*, Employment Pol'y & L. Daily (BNA) (Nov. 8, 1994), available in LEXIS BNA Library, ELD file [hereinafter *Layoff Alternatives*]. At the 18th Annual Employment Law Seminar sponsored by the Defense Research Institute, attorneys warned management representatives of the dangers of a discrimination charge to a company. *Id.* Although the company may be restructuring to be more competitive in the marketplace, one attorney stressed that "[b]usiness decisions that may be legally defensible might be explosive if they ever get before a jury presented with sympathetic, laid-off [sic] plaintiffs." *Id.*

268. *Id.*

269. *Id.* The company could offer employees incentives to leave, including buyouts. *Id.* Yet the program must indeed be voluntary, or the company may face an age discrimination claim. *Id.* at 2. For instance, suggesting that certain older workers ought to take the buyout package would open the employer to liability. *Id.* To be safe, some attorneys advise companies to hire "outside consultant[s], such as an accountant or financial planner, to advise individual workers on the consequences of taking the voluntary buyout." *Id.* At a minimum, it aids relations between employer and employee.

270. *Id.* See Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Sts. 978 (1990).



were not picked discriminately.<sup>271</sup> As an added precaution, companies must be wary of replacing older, laid-off workers with younger employees soon after the layoffs.<sup>272</sup> One possible way to guard against age discrimination claims by these older workers is to offer them a “right to [re-employment] for a limited time should the work force be expanded. The employer also might want to offer bumping rights or even a demotion to workers who otherwise would be cut.”<sup>273</sup>

### C. First Amendment Concerns

Imagine an employer calling his employee a “has-been,” a “grandpa,” or telling him he is “too old to even drive a car, let alone work here at this company.” These statements are antagonistic toward the employee. The question, however, is where to draw the line between verbal workplace harassment and the free speech protections guaranteed by the First Amendment.<sup>274</sup>

The hostile environment theory welcomes evidence of speech that is normally considered protected under the First Amendment: calling someone a “grandpa” does not constitute obscenity, defamation, or fighting words<sup>275</sup> and is not speech that is typically substantially disruptive.<sup>276</sup> If that is the case, then how can this speech “be used to prove a hostile-environment” age discrimination case “without violating First Amendment free speech principles?”<sup>277</sup> Harassment proved via the hostile environment theory appears to “single out a particular speech for special treatment based on its content in violation of the First Amendment.”<sup>278</sup>

While the hostile environment theory has been applied to sexual harassment and there have not been any First Amendment constitutional challenges in that context, it is worth noting that “many cases dealing with sexual harassment have very clearly focused on conduct

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271. *Layoff Alternatives*, *supra* note 267, at 1.

272. *Id.*

273. *Id.* The net effect may be a valuable employee retained at a lower salary. *Id.*

274. See U.S. CONST. amend. I. See generally David Schimmel, *Sexual Harassment in the Workplace: When Are Hostile Comments Actionable?*, 89 EDUC. L. REP. (West) 337 (1994).

275. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (holding that neither obscenity, defamation or fighting words are protected under the First Amendment, nor are epithets and personal abuse).

276. See generally *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 514 (1969) (providing a standard to restrict free speech).

277. *Sorenson*, *supra* note 96, at 9.

278. *Id.*

of the most egregious sort.<sup>279</sup> There is no employer grabbing a victim of age discrimination as often occurs with sexual harassment. Thus it may be easier to avoid a confrontation with the Constitution regarding sexual harassment, where "acceptable" speech is often coupled with physical touching.<sup>280</sup> This is not the usual case with harassment based on age. The safeguard for the age context is perhaps that the language or speech must be so pervasive as to create an adverse work environment for the employee. Thus, this qualification of the definition of the hostile environment may be sufficient to pass muster as a compelling interest for the state, "justifying the suppression of speech in those instances where . . . harassment was perpetrated by speech alone."<sup>281</sup>

There is a significant impact in applying the hostile work environment to age discrimination cases. Yet, it is no more drastic a step than when it was first applied to the components of Title VII.

## VI. CONCLUSION

The future of age discrimination and the hostile environment theory is unclear. With the withdrawal of the 1993 EEOC guidelines, there is little push for the expansion of the hostile environment to ADEA cases. Although the guidelines were not withdrawn because of the inclusion of age discrimination, there has been no published activity on pursuing similar guidelines without the controversial religious component.

Yet even without the EEOC guidelines, the hostile environment theory should be applied to cases under the ADEA. Case law, the statutory language of the ADEA, and its many similarities with Title VII all support this application. Individuals over the age of forty are the fastest growing segment of the population and deserve the same attention as victims of race or gender discrimination.

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279. *Id.*

280. *Id.*; see also *Johnson v. County of Los Angeles Fire Dep't*, 865 F. Supp. 1430 (C.D. Cal. 1994). In *Johnson*, the fire department's sexual harassment policy forbade firemen from reading "sexually oriented magazines" on the job. *Id.* at 1434. The court held that the policy violated the First Amendment because the policy was content-based and there was insufficient evidence showing "that the quiet reading of Playboy contributes to a sexually harassing atmosphere." *Id.* at 1440; see also *Tinker*, 393 U.S. 503.

281. Sorenson, *supra* note 96, at 10.

One concern in applying the hostile environment theory to age discrimination cases is whether it will actually be detrimental to victims of age discrimination. The "doctrine of unintended consequences" theorizes that "attempts at reform sometimes produce effects opposite to those intended."<sup>282</sup> For instance, will companies become more adverse to hiring older people because of the future difficulty of letting those individuals go? The question has not been answered. Nonetheless, this is not a sound basis for denying age discrimination victims the same opportunities provided to victims of Title VII discrimination. As Representative Burke declared in 1967, "In the last several years, significant legislation to bar employment discrimination on the basis of race, religion, color, and sex has been enacted. It is only just that we do the same against discrimination on the basis of age."<sup>283</sup>

JULIE VIGIL

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282. Adler & Pierce, *supra* note 117, at 819.

283. 113 CONG. REC. 34, 742 (1967) (statement of Rep. Burke).