

# Diverging Doctrine, Converging Outcomes: Evaluating Age Discrimination Law in the United Kingdom and the United States

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## Introduction

A recent symposium issue of the *American Journal of Comparative Law* (AJCL) examined the dramatic divergence in the state of anti-discrimination law in the European Union (EU) and the United States (US).<sup>1</sup> More specifically, in the EU in the last fifteen years there has been a proliferation of new legislation at the supra-national and national level, the creation of new specialized equal employment opportunity agencies, and the active engagement of non-governmental organizations (NGOs) in pursuing strategic litigation. In comparison, the situation in the US was depicted as stalled if not moribund. In the US, over the last fifteen years, legal doctrine has been judicially limited, ideological efforts to contest antidiscrimination law are common, and many types of affirmative action programming, known in the EU as positive discrimination, have been restricted or prohibited.

One contribution to the AJCL symposium issue is of particular salience to this paper. Professor Julie Suk examined the differing legal conclusions about and the normative underpinnings of mandatory retirement. In the EU, compulsory retirement is generally viewed as a justification for differential treatment on the basis of age so long as a given scheme is 'a proportionate means of achieving a legitimate goal.'<sup>2</sup> The legitimacy of mandatory retirement is grounded in the idea that such programs may promote, among other things, older worker dignity. A contrasting approach may be found in the US, where mandatory retirement is generally viewed as a violation of the prohibition of age discrimination. Prohibiting such programs is seen as integral to combating negative, age-based stereotypes about older worker competency. Suk then goes on to query whether the US system, which allows older worker terminations based on individualized criteria, is better for aging employees than a system, such as those in many EU countries, which would mandatorily retire them.

This paper picks up where Professor Suk leaves off. It compares age discrimination legal doctrine in the UK and the US to discern convergences and divergences. Both systems view age stereotyping as an ill to be cured. Yet both countries ultimately provide for lesser protections against age discrimination than other forms of prohibited workplace bias leaving at least some stereotyping to go unchecked. Finally, both approaches to age discrimination against older workers render those workers vulnerable in their later working years even though each nation's laws get there by a different route. Ultimately, vanquishing invidious age bias, insofar as that is possible, requires acknowledging that the present unequal approaches to age discrimination doctrine ensure that the law will be limited in its

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<sup>1</sup>de Búrca, G. (2012) 'The Trajectories of European and American Antidiscrimination Law' *American Journal of Comparative Law* 60 1-22

<sup>2</sup>Suk, J. (2012) 'From Antidiscrimination to Equality: Stereotypes and the Life Cycle in the United States and Europe' *American Journal of Comparative Law* 60 75-98

ability to eliminate the harm it seeks to redress. Putting age on an even footing with other forms of bias – race and sex, for example – is a necessary curative in this respect.

## Ageism

Age discrimination is a manifestation of ageism and ageist attitudes continue to exist both in the UK and the US. The word 'ageism' is said to have first been used by Dr. Robert Butler in 1969. Butler wrote a short article<sup>3</sup> about the strongly negative reaction of white affluent middle class residents to a proposal for a public housing project for the 'elderly poor' in their district of Washington, D.C. He described ageism as 'prejudice by one age group against other age groups'. A more comprehensive definition is contained in a United Nations (UN) report on ageing. It states that 'ageism reinforces a negative image of older persons as dependent people with declines in intellect, cognitive and physical performance....older persons are often perceived as a burden, a drain on resources, and persons in need of care'.<sup>4</sup>

It is this 'negative image' that leads to the less favourable treatment of older people in comparison to others in different age groups. This image does not result from the sort of antipathy that is generated on occasions in relation to say race. Indeed as long ago as 1965, a US government report stated that 'we find no significant evidence of ... the kind of dislike or intolerance that sometimes exists in the case of race, color, religion, or national origin, and which is based on considerations entirely unrelated to ability to perform a job'.<sup>5</sup>

Even if there is no intolerance in attitudes towards older people, there is still much evidence that ageist attitudes are strong. In the US, for example, one survey<sup>6</sup> showed that more than two thirds of the workforce aged 45-74 believed that workers faced age discrimination in the workplace. In the EU a 2007 survey of all 27 member states<sup>7</sup> found that 46 per cent of respondents believed that age discrimination was widespread (although 48% also thought it was rare). The survey also found that there was a difference in perception according to age, with some 36 per cent of 15-24 year olds thinking that age discrimination was widespread, compared to 44 per cent of those aged 55 plus. Women are also more likely to see age discrimination as widespread (44%) when compared to men (39%).

A more recent piece of research in the UK<sup>8</sup> found that some 79 per cent of respondents perceived age discrimination as serious. There were no differences between men and women in their responses with about one third reporting that they

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<sup>3</sup> Butler, R.N. (1969) 'Age-ism: another form of bigotry' *Gerontologist* 9 243-246

<sup>4</sup> 'Follow-up to the Second World Assembly on Ageing; Report of the Secretary-General' July 2009 United Nations; see also, where both these sources are described, Sargeant, Malcolm (2011) *Age Discrimination* Gower Publishing, London, UK.

<sup>5</sup> *The Older American Worker-Age Discrimination in Employment* (1965), report to the US Congress

<sup>6</sup> American Association of Retired Persons (2002) 'Staying ahead of the curve'; Cited in Sarah Rix (2006) 'Age Discrimination in the United States' Paper presented to the International Federation on Ageing conference, Copenhagen 2006

<sup>7</sup> 'Discrimination in the European Union: Perceptions, experiences and attitudes' (2008) Special Eurobarometer 296, European Commission.

<sup>8</sup> Daniel Sweiry and Maxine Willitts *Attitudes to age in Britain 2010/11* In-House Research No 7 Department for Work and Pensions (2012); <http://research.dwp.gov.uk/asd/asd5/ih2011-2012/ih7.pdf>

had experienced some age discrimination in the last year. Interestingly younger age groups were more likely to report age discrimination as serious compared to older age groups. Those under the age of 25 years were at least twice as likely to have experienced age prejudice when compared to any other age group. There was also a correlation between the employment status of individuals and their experience of age prejudice. According to the research those respondents who were employed full time and or who were self-employed were less likely to have experienced prejudice compared with the non-employed and those employed part time, e.g. less than one-third (30 per cent) of respondents who were employed full-time said that they had experienced prejudice compared to over half (50 per cent) of respondents who were not employed. The report also states that stereotyping according to age continues to exist. Those over 70 were viewed by people as more friendly, more competent and having higher moral standards than people in their 20s. This reflects some hostility to younger people which is, nevertheless based upon an age stereotypes.

## Derivations

The 'problem' of the ageing population in the UK is not new. The birth rate actually started to decline in the late nineteenth century.<sup>9</sup> This decline was accompanied by an increase in the life span of older adults. The proportion of the population over the age of 65 years (men) and females over 60 years was 6.2 per cent in 1901, 9.6 per cent in 1931, 12.0 per cent in 1941 and 13.5 per cent in 1951.<sup>10</sup> The debate during this period appeared to be about the declining birth rate, rather than the increasing numbers of older people. This appears to have slowly become an issue prior to, and after, the Second World War. This was evidenced in 1942, for example, with the publication of a report prepared by the Inter Departmental Committee on Social Insurance and Allied Services<sup>11</sup> chaired by Sir William Beveridge. The report was an important survey of the state of pensions and insurance provision at the time and made detailed recommendations for the future. In its analysis of the 'problem of age' the report stated that there were two particular issues.<sup>12</sup> The first issue, which was a reflection of the debate leading up to the adoption of the Equal Employment (Age) Regulations in 2006,<sup>13</sup> was the increasing number of pensioners in relation to the numbers of young people and those working. The second was that the consequences of retirement and old age were not uniform in all cases. For some it might be poverty, but not for others.

The proportion of older people in the population continues to increase. By 1990 those over the age of 65 years in the UK constituted 15.7 per cent of the population and in 2010 this figure had reached 16.5 per cent.<sup>14</sup> This is a Europe wide

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<sup>9</sup>M. Anderson 'The Social Implications of Demographic Change' in F.M.L. Thompson (ed.), *The Cambridge Social History of Britain 1750-1950*, ii (Cambridge 1990), 1-70. S Szreter, *Fertility, Class and Gender in Britain 1860-1940* (Cambridge, 1996); cited in Thane, Pat *Old Age in English History* (2000) Oxford University Press

<sup>10</sup> Thane (2000) supra

<sup>11</sup> Inter Departmental Committee: *Social Insurance and Allied Services Report* by Sir William Beveridge 1942 Cmd. 6404

<sup>12</sup> See Section 2 of the Report entitled *The problem of age*

<sup>13</sup> SI 2006/1031

<sup>14</sup> These figures come from Eurostat; see

[http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php?title=File:Population\\_age\\_structure\\_by\\_major\\_age\\_groups,\\_1990\\_and\\_2010\\_\(%25\\_of\\_the\\_total\\_population\).png&filetimestamp=2011113](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Population_age_structure_by_major_age_groups,_1990_and_2010_(%25_of_the_total_population).png&filetimestamp=2011113)

problem, where the number and proportion of older people will continue to increase for the foreseeable future. It is suggested that there will be a 37.4% increase between 2010 and 2030.<sup>15</sup>

Despite a recognition of the issue of ageing, successive UK governments declined to take any regulatory action in respect of age discrimination. There were a number of attempts by Members of Parliament to introduce modest measures against age discrimination in recruitment advertising prior to 2006. All were opposed by the government of the day and all were therefore unsuccessful.<sup>16</sup> Eventually, in November 1998, the government introduced a voluntary Code of Practice on Age Diversity in Employment, which subsequent evaluations recognised as being unsuccessful.<sup>17</sup> Only one in three companies, for example, was aware of the Code of Practice<sup>18</sup>, but, of these, only 23 per cent had actually seen a copy. More alarmingly perhaps, only one per cent of companies expected to make changes as a result of the Code. The surveys accompanying the evaluation revealed the continuing stereotypical views held by many employers.<sup>19</sup> Employers were asked to indicate whether or not specified attributes applied to older or younger workers, to both or neither. Stability, maturity, reliability, work commitment and good managerial skills were the most frequently stated attributes of older workers, while ambition, IT skills, creativity and a willingness to relocate were attributed to younger workers.

Regulation of age discrimination in employment finally came to the UK as a result of an EU Directive adopted in 2000.<sup>20</sup> Although it is not possible to say definitely that there would not be any legislation against age discrimination in the UK without this Directive, it is possible to doubt whether any such legislation would have been enacted. The previous record of governments of both the major political parties suggests that legislation would have been unlikely. The Directive was finally transposed into British law in October 2006 in the Equal Employment (Age) Regulations 2006.<sup>21</sup> As noted below, the weakness of the legislation in the UK, and indeed of the Directive, is the wide opportunity for justifying exceptions. These have

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0143501 (last accessed January 17 2012); interestingly the figures for the EU27 are even more dramatic with the proportion of those over 65 years increasing from 13.7 per cent in 1990 to 17.4 per cent in 2010.

<sup>15</sup> European Commission Communication 'Confronting demographic change: a new solidarity between generations' COM (2005) 94

<sup>16</sup> These included proposed Bills by Ms Linda Perham MP in 1998, David Winnick MP in 1990 and 1996, Gwynneth Dunwoody MP in 1992, Baroness Phillips in 1989 (in the House of Lords), Barry Field MP in 1989 and Ann Clwyd MP in 1985; information from House of Commons Research Paper 96/19 of January 31 1996.

<sup>17</sup> Deborah Jones (2000) *Evaluation of the Code of Practice on Age Diversity in Employment Interim Summary of Results* Department for Education and Employment June 2001 and *Evaluation of the Code of Practice on Age Diversity in Employment Final Report* October 2001 Department for Work and Pensions.

<sup>18</sup> Not surprisingly, awareness was much higher in large companies where almost two-thirds knew about the Code of Practice

<sup>19</sup> *Evaluation of the Code of Practice on Age Diversity in Employment Interim Summary of Results* (2000)

<sup>20</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation OJ L 303/16 02/12/2000.

<sup>21</sup> Now incorporated into the Equality Act 2010

the effect of making it more possible to objectively justify discrimination than other measures tackling discrimination on different grounds.<sup>22</sup>

In the US, in contrast, regulation against age discrimination is much more long-standing. The possible prohibition of age discrimination was raised during the debates over Title VII the Civil Rights Act of 1964 (Title VII), which bans employment discrimination based on race, colour, religion, national origin, and sex. Although not included in the 1964 bill, Congress did ask the Secretary of Labor to study the issue, ascertain its nature and extent, and recommend possible solutions.<sup>23</sup> The Secretary's subsequent report found that age bias in the workplace was a significant phenomenon meriting legal prohibition but that this form of discrimination was less malicious and destructive than, for example, bias based on race, colour, religion, and national origin. For aging workers, the problem was not hostility but unsupported assumptions about aging and ability. In 1967, Congress, at the direction of then President Johnson, enacted the Age Discrimination in Employment Act (ADEA), which has been subsequently amended. The statute bans employers from discrimination against employees "because of such individual's age."<sup>24</sup>

Despite early prohibition, the ADEA is often characterized as combatting a lesser or different evil than those set forth in other laws against employment discrimination. One prominent commentator has noted that those protected by the ADEA are not a discrete and insular minority with immutable characteristics. Rather, the group protected by age discrimination legislation is "an ever changing cohort of older workers."<sup>25</sup> Accordingly, the rationale for protecting older workers is frequently made in economic terms. More specifically, the life-cycle model of career employment, which holds that end-of-career workers receive compensation in excess of their marginal productivity to make up for earlier periods when their marginal productivity exceeded wages, provides a frequent justification for the legislation. The ADEA aims to protect against opportunistic employer conduct that would deprive older workers of this deferred compensation. Yet older workers who lose or are without jobs are assumed to want that elevated wage, consigning them to long term unemployment.<sup>26</sup>

Over time, and due in part to an incomplete reform of Title VII by Congress in 1991, the U.S. Supreme Court has dismantled a unified approach to employment discrimination law doctrine in favour of an approach that considers the legal rules applying to age discrimination to be less prominent and less important than the rules covering other forms of discrimination.<sup>27</sup> In the US, age discrimination law rules are

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<sup>22</sup> The grounds of protection are referred to as 'protected characteristics' by the Equality Act 2010. The Act contains nine of these, but age, for example, is the only protected characteristic which allows justification for direct discrimination; see Section 13(2) Equality Act 2010.

<sup>23</sup>H. Eglit (1997) 'The Age Discrimination in Employment Act at Thirty: Where It's Been, Where It is Today, Where It's Going' *University of Richmond Law Review* 31 579-756

<sup>24</sup>29 U.S.C. § 623(a)(1)

<sup>25</sup>G. Rutherglen *Employment Discrimination Law: Visions of Equality in Theory and Doctrine* (Foundation Press, 2007)

<sup>26</sup>S. Issacharoff & E. Worth (1997) 'Is Age Discrimination Really Age Discrimination?: The ADEA's Unnatural Solution' 72 *780-840*.

<sup>27</sup>W. Corbett (2010) 'Babbling About Employment Discrimination Law: Does the Master Builder Understand the Blueprint for the Great Tower?' *University of Pennsylvania Journal of Business Law* 12 683-729.

harder for plaintiffs to operationalize than the legal doctrine applicable to race, colour, religion, national origin, and sex.<sup>28</sup>

### The protected class

A significant difference between the two countries is the size of the protected class. In the UK the legislation applies to all those at work, which in practice means all those in work, or applying for work, aged 16 years and above. Since the adoption of age regulation in 2006 there has not been a lowerage limit for employment protection.<sup>29</sup> This is important because there is plenty of evidence that young people suffer from age discrimination<sup>30</sup> albeit with perhaps less severe consequences than for older people. In terms of consequences for the differing age groups one analysis<sup>31</sup>, for example, looked at the 16–19 year age group and their reason for leaving their last job. Some 36 per cent of the group stated that they had resigned. In contrast the same analysis, when looking at why people in their 50s left their last job, found that only 8 per cent had resigned voluntarily. Whatever the actual reason for the resignations, the difference is perhaps explained by the confidence that young people have in finding alternative work, whereas, for people in their 50s, leaving a job can often mean leaving the workforce altogether.

A good example of the consequences of having protection for younger people took place in *Wilkinson v Springwell Engineering*<sup>32</sup> where an 18 year old claimant was awarded £16,000 compensation for being the subject of age discrimination. She started work for a small engineering company in January 2007 and her employment was terminated in March of the same year. She replaced her aunt who was a much older worker and the Tribunal found that the employer adopted stereotypical assumptions such as that there was a relationship between experience, capability

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<sup>28</sup> *Id.*; C. Rozycki & E. Sullivan (2010) 'Employees Bringing Disparate-Impact Claims Under the ADEA Continue to Face An Uphill Battle Despite the Supreme Court's Decisions in *Smith v. City of Jackson* and *Meacham v. Knolls Atomic Power Laboratory*' 26 *ABA Journal of Labor & Employment Law* 26 1-22.

<sup>29</sup> Prior to 2006 Section xx of the Employment Rights Act 1996 deprived those who had reached the normal retirement age of some employment protection such as the right to claim unfair dismissal and the right to redundancy payments.

<sup>30</sup> *Ageism: attitudes and experiences of young people* (2001), Age Positive, Department for Work and Pensions <http://research.dwp.gov.uk/asd/asd5/rports2005-2006/agepos13.pdf> (last accessed January 12 2012). This survey found that the main types of age-related behaviour that younger people experience were: age limits on job applications; younger people being treated differently from other (older) staff; talking (down) to younger people in a patronising fashion and tone of voice; not appointing younger people because they are too young; not appointing younger people because they are too old; not promoting younger people because they are too young; refusing access to training on grounds of age; making junior staff do all the menial tasks; 'rites of passage' involving teasing, bullying; paying younger staff less than others who are doing equivalent work; • excluding young people from pension arrangements; restricting redundancy payments to years of employment after the age of 18.

<sup>31</sup> *Age at Work* (2005) Employers Forum on Age <http://www.efa.org.uk/publications.php?action=search&category=19> (last accessed on January 12 2012).

<sup>32</sup> *L. Wilkinson v Springwell Engineering Ltd* Case number 2570420/07 Newcastle Employment Tribunal October 11 2007; see <http://employment.practicallaw.com/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1247484080998&ssbinary=true> (last accessed January 12 2012).

and age on the one hand, and lack of experience and incapability on the other. The claimant stated that she was told that her employment was being terminated on the grounds that she was too young for the job. The Tribunal accepted her version of events and awarded the compensation, which included a sum of £5000 for injury to feelings.

There have also been other cases at the European Court of Justice (CJEU) where employment policies which weakened the employment rights of young people in order to improve their employability, by making them more attractive to employers, were tested. In a reference from the German court *MsKücüdeveci*<sup>33</sup>, a 28 year old employee, was dismissed after 10 years' service, but there existed a rule which, for the purposes of calculating the notice period, allowed the employer to ignore all service before the age of 25 years. Similarly in *Hütter*<sup>34</sup>, a reference from the Austrian court, there existed a rule concerning an incremental scale of pay for civil servants based on their length of employment. Employment before the age of 18 years, however, did not count. In both cases the claimants claimed that they were the subject of age discrimination. The CJEU upheld their complaints despite the good intentions of those who adopted the rules in order to help young people into employment.

In the US, the class protected is far smaller and the type of age bias prohibited more unitary. As originally enacted, the ADEA protected only those between the ages of 40 and 65. At present, the ceiling has been removed for most workers. The protected class is age 40 and above. Hence, younger workers are not protected from age discrimination based on their youth. Yet even within the protected class, protection runs in one direction. Interpreting the ADEA's preamble, the Supreme Court has held that Congress, when enacting the statute, was moved by the plight of older workers vis-à-vis their younger counterparts and not vice versa.<sup>35</sup> Thus, reverse discrimination suits by younger workers within the protected class are not cognizable.

Lack of protection does not mean that discrimination against the young never occurs. For example, a study published in 2011 by the Business and Professional Women's Foundation involved a survey of 662 women born between the years 1978-1994. Almost 50 percent of those surveyed had observed or experienced gender bias. Moreover, of those, 51 per cent reported generational discrimination based on youth. This finding corroborated prior findings that young women, in particular, suffer from age discrimination.<sup>36</sup>

### **Objective justification**

Article 6 of Directive 2000/78/EC is headed 'justification of differences of treatment on grounds of age:

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<sup>33</sup> Case C-555/07 *SedaKücüdeveci v Swedex GmbH* [2010]

<sup>34</sup> Case C-88/08 *David Hütter v Technische Universität Graz* [2010].

<sup>35</sup> *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004).

<sup>36</sup> Business and Professional Women's Foundation (2011) 'From Gen Y Women to Employers: What they Want in the Workplace and Why it Matters for Business'

Differences of treatment because of age will not constitute age discrimination if 'they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary'.<sup>37</sup>

Article 6 then continues by providing examples of differences in treatment which could be justified. These are:

(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;

(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;

(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

The case of *Mangold v Helm*<sup>38</sup> at the CJEU concerned an individual aged 56 years when he was employed on a fixed term contract. German law placed two curbs on fixed-term contracts of employment, requiring an objective reason justifying the fixed term or, alternatively, imposing limits on the number of contract renewals (a maximum of three) and on total duration (a maximum of two years). These restrictions did not apply to contracts with older people however. German law permitted fixed-term contracts, even without the above restrictions, if the employee was aged 60 or over.<sup>39</sup> That situation changed partly with the enactment of the Law on Part-Time Working and Fixed-Term Contracts of 21 December 2000 (TzBfG). Paragraph 14(1) of the TzBfG re-enacted a general rule whereby a fixed-term contract must be based on an objective reason. In the absence of an objective reason, according to Paragraph 14(2), the maximum total duration of the contract is again limited to two years and, subject to that limit, up to three renewals are again permitted. However, according to Paragraph 14(3) of the TzBfG:

The conclusion of a fixed-term employment contract shall not require objective justification if the worker has reached the age of 58 by the time the fixed-term employment relationship begins. A fixed term shall not be permitted where there is a close connection with a previous employment contract of indefinite duration concluded with the same employer. Such close connection shall be presumed to exist where the interval between two employment contracts is less than six months'.

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<sup>37</sup> Article 6(1)

<sup>38</sup> Case C-144/04

<sup>39</sup> See Paragraph 1 of the Beschäftigungsförderungsgesetz (Law to Promote Employment), of 26 April 1985 as amended by the Law to Promote Growth and Employment of 25 September 1996.

This minimum age for the removal of protection was later lowered to 52 years, thus including Mr. Mangold. The purpose of the legislation was to help older workers gain employment and the Court accepted that this was a 'legitimate' aim. The means, however, were not held to be appropriate and necessary. One reason for this was because the result of the measure was to effectively remove protection with regard to fixed term contracts from all workers over the age of 52 and not just those that were looking for work.

The Equality Act 2010 now contains the provisions for tackling age discrimination in employment in the UK, although the provisions were originally adopted in October 2006. Since then there has been a steady increase in complaints of age discrimination at employment tribunals, e.g. in the year 2010/11 there were 6800 complaints to employment tribunals on the grounds of age, having increased from 5,200 the previous year and 3,800 in the year before that (2008/09).<sup>40</sup> There are some specific areas where the legislation allows for exceptions to be made to the principle of non-discrimination. These include the fact that it is possible to objectively justify direct discrimination, and issues related to benefits based on length of service and mandatory retirement.

In the US, there are several statutory exceptions in the ADEA. The first permits disparate treatment (direct discrimination) where age is a *bona fide occupational qualification* (BFOQ). This defense operates as a very narrow exception to the rule of equal treatment. The employer must show that age, as a qualification, is reasonably necessary to its business's operation, and that substantially all members of the excluded group are unable to meet job requirements or that individual screening is impossible or impractical. Under this defense, an employer might be permitted to use age restrictions to hire an actor to play a particular role.<sup>41</sup> This defense does not generally operate differently than the BFOQ defense under Title VII.

A second defense is the reasonable factor other than age (RFOA) defense. This defense, based on statutory language unique to the ADEA, greatly narrows the reach of disparate impact (indirect discrimination) liability, a topic beyond the scope of this paper. The US Supreme Court has noted that the inclusion of the RFOA language within the ADEA is in harmony with the fact that age, unlike other protected categories, often is relevant to an employee's ability to perform certain jobs.<sup>42</sup> It suffices to say that whilst the Court approved the use of disparate impact theory in *Smith v. City of Jackson*,<sup>43</sup> it also adopted the RFOA defense, which appears easier to meet than the business necessity defense available in disparate impact claims brought on grounds apart from age.<sup>44</sup> Proving one's neutral policy or practice is reasonable would appear to be far simpler than proving that same policy or practice is necessary.

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<sup>40</sup> Information from the website of the Ministry of Justice:  
<http://www.justice.gov.uk/downloads/publications/statistics-and-data/mojstats/employment-trib-stats-april-march-2010-11.pdf>

<sup>41</sup> M. Finkin 'United States' in W.L. Keller & T.J. Darby (eds.), *International Labor and Employment Laws 3d* (BNA Books, 2009) 33a-1 – 33j-74.

<sup>42</sup> *Smith v. City of Jackson*, 544 U.S. 228, \_\_\_ (2005).

<sup>43</sup> *Id.*

<sup>44</sup> J.J. Johnson (2009) 'Reasonable Factors Other Than Age: The Emerging Specter of Ageist Stereotypes' *Seattle University Law Review* 33 49-91

The bona fide employee benefit plan exception allows age to be expressly considered in awarding employee benefits. A bona fide employee benefit plan that either provides employees equal benefits regardless of age or “provides age-differentiated benefits but incurs equal costs” across age groups is lawful. Hence, an employer is permitted to provide lesser life insurance coverage for older as compared with younger workers so long as it spends the same amount on each group.<sup>45</sup>

While mandatory retirement is generally prohibited under the ADEA, there are two exceptions of note. Bona fide executives or those in high policy-making positions within a firm may be retired at 65 years of age provided that the employee has occupied the position for two years prior to retirement and is eligible to defined benefits equaling at least \$44,000 annually.<sup>46</sup> Additionally, state and municipal employers may subject law enforcement (police) and firefighters to mandatory retirement rules. The rationale for this latter exception is that physical fitness and agility are central to those jobs and typically decline with age.

### *Direct discrimination*

Age is the only protected characteristic in British equality law where it is possible to justify direct discrimination. In all the other unlawful grounds of discrimination it is only possible to justify indirect discrimination. The reason for this may be because of the number of specific exceptions that might need to be made if there was not a permissible general exception, although, of course, having a general exception may lead to unforeseen consequences. The Code of Practice issued by the Equality and Human Rights Commission merely states that

A different approach applies to the protected characteristic of age, because some age-based rules and practices are seen as justifiable<sup>47</sup>

Such exceptions would include the extra protection given to young people, especially in relation to health and safety. The exception is not, however, concerned with young workers. It can be used to justify less favourable treatment such as compulsory retirement. *Seldon v Clarkson Wright and Jakes*<sup>48</sup> concerned an equity partner in a firm of solicitors who was made to retire at the end of the year following his 65<sup>th</sup> birthday as provided for in the partnership deed. He brought proceedings claiming that this constituted direct age discrimination. This case is also significant for deciding generally whether an employer justified retirement age is possible, even though the government has abolished the default retirement age (see below).

Rather than providing the possibility of a general justification for disparate treatment on the basis of age (direct discrimination), as does the UK’s Equality Act of 2010, the ADEA treats age discrimination differently than other protected characteristics by making the plaintiff’s prima facie case far more difficult to

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<sup>45</sup> M. Zimmer, C. Sullivan & H. White, *Cases and Materials on Employment Discrimination 7<sup>th</sup> ed.* (Wolters Kluwer, 2008) 483.

<sup>46</sup> 29 U.S.C. §631(c)(1).

<sup>47</sup> Equality Act 2010 Statutory Code of Practice Employment Para 3.36 [www.equalityhumanrights.com](http://www.equalityhumanrights.com)

<sup>48</sup> [2010] EWCA Civ 899; [2010] IRLR 865

establish. Whilst for many years, the US Supreme Court interpreted the ADEA in relative harmony with other anti-discrimination legislation, such as Title VII, in 2009 it clearly rejected that approach. In *Gross v. FBL Financial Services, Inc.*,<sup>49</sup> the plaintiff, a 54-year old man, was a 32-year employee of the firm. He sued over his demotion from claims administration director to claims project coordinator. Many of his duties were reassigned to a woman in her early 40s, who had been his subordinate.

Instead of answering the question upon which it had granted review – Must a plaintiff present direct evidence to obtain a mixed motive instruction in an ADEA case? – the Supreme Court held that mixed motive claims – claims involving both discriminatory and non-discriminatory reasons – are not cognizable under the ADEA. As such, the plaintiff claiming disparate treatment based on age must prove age was the “but for” cause of the challenged decision. Unlike plaintiffs suing for other types of discrimination, ADEA plaintiffs must demonstrate that age had a decisive impact on the employer’s actions, even in cases where the employer admits that age motivated its decision in part. There is no possibility of burden shifting to the employer in such cases, creating a legal hurdle for age discrimination victims that for many may be insurmountable. As one commentator has noted, *Gross* allows some age-biased employers to escape liability without consequence, under-deters illegal employment decision-making, and provides a windfall to discriminating employers who relied on factors in addition to age.<sup>50</sup>

Yet although the most recent, *Gross* is not the only case in which the Supreme Court has made clear that ADEA disparate treatment plaintiffs are provided with less protection than victims of other forms of prohibited discrimination. The first inkling of differentiation came in 1993 in *Hazen Paper Co. V. Biggins*,<sup>51</sup> a case in which the plaintiff was terminated shortly before his pension was to vest based on his years of service with the company. Noting that “[i]t is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence declines with old age,” the Court held that pension status, while correlated with age, is analytically distinct from it and unrelated to prohibited stereotyping. Thus, while it is illegal to fire someone whose pension is about to vest under the Employee Retirement Income Security Act of 1974 (ERISA),<sup>52</sup> unless the plaintiff can muster evidence that the employer used pension status as a proxy for age, the termination does not violate the ADEA.

A similarly cramped interpretation was apparent in the more recent decision, *Kentucky Retirement Systems v. EEOC*.<sup>53</sup> In that case, a state disability retirement plan tied benefit eligibility and calculation to normal retirement eligibility. The latter required either 20 years of service or 5 years of service so long as the worker had attained age 55. Hazardous position workers disabled before retirement eligibility were permitted to retire immediately and have their pensions calculated by imputing to their years of service the number of years they had left to attain pension eligibility. Those disabled after reaching retirement eligibility, however, did not have any additional years imputed for the purpose of calculating their pensions. The plaintiff,

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<sup>49</sup>557 U.S. 157.

<sup>50</sup>M.J. Katz (2010) ‘Gross Disunity’ *Penn State Law Review* 857-889.

<sup>51</sup>507 U.S. 604 (1993).

<sup>52</sup>29 U.S.C. §1140.

<sup>53</sup>554 U.S. 135 (2008).

who was disabled at 61 with 18 years of service, complained that had he become disabled before age 55, he would have had additional years of service imputed for the purpose of his pension calculation.

Even though the disability retirement plan clearly took account of age, the U.S. Supreme Court held that Kentucky was actually motivated by pension status, which is analytically distinct from age. Moreover, Kentucky's disability retirement plan did not rely on any of the core stereotypes about older worker competency that the ADEA aims to eradicate. To prove age discrimination, the plaintiff would need to prove animus beyond the use of age as a factor in the determination of disability retirement benefit determination. This additional burden, which plaintiffs proving other forms of disparate treatment do not bear, may doom many ADEA claims because it is rare to find direct evidence of discriminatory animus.

Narrow interpretation of the statute also drove the U.S. Supreme Court's decision in *General Dynamics Land Systems, Inc. V. Cline*,<sup>54</sup> a case in which employees aged 40-49 sued when their collective bargaining agreement eliminated retiree health insurance for employees then under 50 years of age. Reviewing the ADEA's legislative history, the Court found that Congress intended only to protect employees from discrimination based on "older age." Thus, so-called reverse discrimination suits, available, of example, on the basis of race, sex, national origin, etc., may not be brought under the ADEA.

#### *Length of service and seniority*

Employees are sometimes entitled to benefits based on length of service. Examples might be increased holiday entitlement, membership of pension schemes or private medical care. Certainly, many employees will be paid according to a salary scale which entitles them to an increase in pay each year. All of these provisions, which are related to length of service, are likely to benefit older workers at the expense of younger ones simply because older workers are more likely to have the necessary length of service. The Equality Act allows an employer to award benefits using length of service as the criterion for selection. First, there is no need to justify any differences related to service less than five years. Where it exceeds five years it needs to fulfil a business need of the undertaking.<sup>55</sup> What makes this exception even more significant is the fact that the length of service can be the entire length of time (less absences) that an employee has worked for an employer or it can be the length of time worked at a particular level. Thus if a person were promoted to a new grade at regular intervals this period of 5 years could be considerably extended.<sup>56</sup>

The argument is that having pay scales of a certain length is justified to recognise experience and, perhaps, seniority. It can also be argued strongly that workers who have been with an employer for five years should receive some preferential treatment compared to those who have just joined an organisation. These are, however, exceptions to a rule requiring the principle of equal treatment. It has been an important issue in relation to redundancy payments and there have been a number of cases concerning whether relating redundancy payments to length

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<sup>54</sup> 540 U.S. 581 (2004).

<sup>55</sup> Section 10(2) Schedule 9 Equality Act 2010

<sup>56</sup> Section 19(3) Schedule 9 Equality Act 2010

of service amounts to discrimination in favour of older workers at the expense of younger ones.

*Rolls Royce v Unite the Union*<sup>57</sup> considered two collective agreements which had an agreed matrix to be used to choose who should be selected for redundancy. There were five criteria against which an individual could score between 4 and 24 points. In addition there was a length of service criterion which awarded 1 point for each year of continuous service. Thus older employees would have an important advantage over younger ones. It was, unusually, the employer who claimed that the age elements amounted to age discrimination and the union which, successfully, resisted this claim.

In *MacCulloch v ICI plc*<sup>58</sup> the issue was a redundancy scheme which had been in existence since 1971. The amount of payment was linked to service up to a maximum of ten years, and the size of the redundancy payment increased with age. The claimant was 37 years old and received 55 per cent of her salary as a payment, but she claimed that someone aged between 50 and 57 years would have received 175 per cent of salary under the scheme.

Finally, in *Loxley v BAE Systems*<sup>59</sup> there was a contractual redundancy scheme in which each employee received two weeks' pay for the first five years of employment, three weeks' pay for each of the next five years and four weeks' pay for each year after ten years. There was also a further age related payment of two weeks' pay for each year after the age of 40 years. All this was subject to a maximum of two years' pay. The scheme was amended for older workers approaching retirement when the retirement age was raised, but essentially the claimant, who was 61 years of age, was not entitled to any enhanced payments for voluntary redundancy as he had an entitlement to a pension. Indeed the EAT stated that preventing such a windfall could be a legitimate aim.

In the US, the ADEA has a bona fide seniority system exception.<sup>60</sup> So long as a seniority system was "not intended to evade the purposes of the Act," an employer may take actions that more generally benefit one age group over another. Involuntary retirement based on age is specifically prohibited under this section of the ADEA. Since rights typically increase with years of service, and by default by chronological age as well, seniority systems that offer lesser rights to older workers will be suspect.<sup>61</sup> Additionally, since severance (redundancy) pay is not statutorily required in the US, most private sector workers are not covered by collective bargaining agreements, and in order receive severance payments US workers typically are required to sign a release of all claims, opportunities to challenge severance schemes as discriminatory on the basis of age are limited in comparison with the UK.

### *Mandatory retirement*

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<sup>57</sup> *Rolls Royce plc v Unite the Union* [2009] IRLR 576.

<sup>58</sup> *MacCulloch v ICI plc* [2008] IRLR 846.

<sup>59</sup> *Loxley v BAE Systems (Munitions and Ordnance) Ltd* [2008] IRLR 853.

<sup>60</sup> 29 U.S.C. §623(f)(2)(A).

<sup>61</sup> Finkin, *supra*, at 33g-45.

The United Kingdom, at the time of transposing the Framework Directive, adopted a default retirement age of 65 years. It is almost inexplicable that a measure which permits mandatory retirement should be introduced at the same time as measures to tackle age discrimination in employment. The likely reason is that the government gave way to employer pressure for an age at which workers could be removed without recourse to claims for unfair dismissal or age discrimination.<sup>62</sup> The process was accompanied by a procedure that allowed employees to ask to work beyond the retirement age. The employer was obliged to give each applicant a hearing but was not obliged to give any reasons for acceptance or rejection. In effect it was a mandatory retirement age imposed at the discretion of the employer. The introduction of the default retirement age was challenged by the age NGO, Age Concern<sup>63</sup>, in the High Court.<sup>64</sup> Aspects of the case were referred to the CJEU<sup>65</sup>, but the challenge was unsuccessful. In the event the government, in 2011, abolished the measure<sup>66</sup>, so that any compulsory retirement that now takes place would need to be justified by the employer as having a legitimate aim and that the means of achieving that aim (i.e. retirement) were appropriate and necessary.

The issue of compulsory retirement has been raised at a number of cases in the CJEU. An important issue was whether having a compulsory retirement age could be justified by having a legitimate aim with the means being appropriate and necessary. The Court of Justice has seemed willing to accept that issues such as inter-generational change, or removing older workers to make room for younger ones, is one of the possible legitimate aims for having such an exception.

In *Petersen*<sup>67</sup>, for example, the Court stated that it did not appear unreasonable for the authorities of a member state to consider that the application of an age limit, leading to the withdrawal from the labour market of older practitioners, which might make it possible to promote the employment of younger ones. This case concerned the application of a maximum age of 68 years for 'panel dentists' in Germany. The Court further stated that:

It follows that, if the aim of a measure such as that at issue in the main proceedings is the sharing out of employment opportunities among the generations within the profession of panel dentist, the resulting difference of treatment on grounds of age may be regarded as objectively and reasonably justified by that aim, and the means of achieving that aim as appropriate and necessary, provided that there is a situation in which there is an excessive number of panel dentists or a latent risk that such a situation will occur.

The making way for younger dentists appeared to be justified by Article 6(1) of the Directive and the encouragement of employment was a legitimate employment policy

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<sup>62</sup> For further discussion of these see Sargeant, Malcolm The Employment Equality (Age) Regulations 2006: A Legitimation of Age Discrimination in Employment *Industrial Law Journal*(2006) 35(3) 209-228

<sup>63</sup> Now Age UK

<sup>64</sup> *R (on the application of Age UK) v Secretary of State for Business Innovation and Skills* [2009] IRLR 1017

<sup>65</sup> C-388/07 *R (on the application of the Incorporated Trustees of the National Council on Ageing) v Secretary of State for Business, Enterprise and Regulatory Reform* Case [2009] IRLR 373

<sup>66</sup> The Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011 SI 2011/1069

<sup>67</sup> Case C-341/08 *Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*

measure and the compulsory retirement of older dentists could be an appropriate and necessary measure to achieve this.

Similarly in *Georgiev*<sup>68</sup>, which concerned a professor in a Bulgarian University, the Court reached a similar general conclusion. The legislation in question allowed for the compulsory retirement of professors at the age of 68 years. The aim of the legislation, according to the Bulgarian government was to allocate the professorial posts amongst the generations to promote an exchange of experience and innovation. Despite Mr Georgiev arguing that the legislation did not encourage the recruitment of young people, the Court repeated its statement in *Petersen* that ‘it does not appear unreasonable for the authorities of a member state to consider that the application of an age limit, leading to the withdrawal from the labour market of older practitioners, may make it possible to promote the employment of younger ones’.

There is no evidence that supports the argument generally that removing older workers provides opportunities for younger ones, but the Court has appeared willing to accept it nevertheless.<sup>69</sup> That argument has recently been embraced by the UK’s highest court, the Supreme Court, in *Seldon v. Clarkson Wright & Jakes*.<sup>70</sup> As noted above, that case involved the compulsory retirement of an equity partner in a firm of solicitors at the end of the year in which he reached age 65. As the UK’s default retirement age has been abolished, compulsory retirement constitutes direct discrimination unless the employer can objectively justify the dismissal. Moreover, the Court in *Seldon* held “that the approach to justifying direct age discrimination cannot be identical to the approach to justifying indirect discrimination....” Where direct discrimination is in issue, justification requires that an employer’s aims are “of a public interest nature” and “are consistent with the social policy aims of the state.” Additionally, proportionate means must be used to achieve the aims – means that are “appropriate...and (reasonably) necessary to achieve it.”

Three of the firm’s articulated aims for the compulsory retirement age were before the UK Supreme Court: 1) ensuring associates were provided partnership opportunities in order to retain them; 2) facilitating workforce planning by being able to ascertain when partnership vacancies will arise; and 3) contributing to the firm’s collegial culture by limiting partner expulsion based on performance deficiencies. As to whether those aims were lawful, the UK Supreme Court highlighted two legitimate social policy objectives that are deemed permissible by the European Court of Justice. The first is an “intergenerational fairness” aim, which the Court characterised as uncontroversial. This objective would include “facilitating access to employment by young people” and “sharing limited opportunities to work in a particular profession fairly between the generations” presumably by removing older workers from their jobs. The second aim, seen by the Supreme Court as more controversial, seeks to promote employee “dignity” by eschewing “costly and divisive disputes about [older worker] capacity or underperformance.” As for whether the firm’s aims pass muster, the first two – staff retention and workforce planning – were deemed connected to intergenerational fairness. The third – limiting partner

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<sup>68</sup>Cases C-250/09 and C-268/09 *VasillvanovGeorgiev v TehnicheskiUniversitet*

<sup>69</sup>This more widely known as the lump of labour fallacy; a phrase which is said to have originated in the nineteenth century by a UK economist David F. Schloss (1891).

<sup>70</sup>*Seldon v Clarkson Wright and Jakes (A Partnership)* [2012] UKSC 16

expulsion due to performance deficiency – was held related to the CJEU’s dignity objective. Thus, all three of the firm’s aims were held to be legitimate.

In terms of whether age 65 was a proportionate means to achieve the aims, the UK Supreme Court noted that the Employment Tribunal should determine whether this chosen age is an appropriate means for achieving the firm’s stated objectives. As noted by Lady Hale, “There is a difference between justifying a retirement age and justifying *this* retirement age.” Whilst certainly a mandatory retirement age is possible where an employer can justify it, it may be difficult for employers to demonstrate that a particular age – whether age 65 or some other age – was the appropriate age regarding the individual in question. Even so, an employer justified retirement age remains possible in the UK. Age discrimination is clearly on different and lesser footing than other grounds of discrimination.

Mandatory retirement, in contrast, is clearly illegal in the US in most sectors, with very few exceptions, which were noted above. So concerned was Congress about older workers being asked to waive their rights when presented with voluntary exit incentives or involuntary mass layoffs (collective redundancies) that it passed the Older Worker Benefit Protection Act of 1990 (OWBPA),<sup>71</sup> which mandates employers follow strict requirements before employees may be asked to waive their rights under the ADEA.<sup>72</sup> The protections afforded older workers in this respect are far greater than those available for workers in other protected categories. More specifically, the OWBPA enumerates seven factors required at a minimum for ADEA waivers to be considered “knowing and voluntary.”<sup>73</sup> Minimally, such a waiver:

1. Must be written in plain language;
2. Must expressly refer to ADEA rights or claims;
3. Must advise the employee to consult with legal counsel;
4. Must provide the employee at least 21 days to consider the employer’s offer;
5. Must provide the employee with a 7-day revocation period;
6. Must not be prospective; and
7. Must be for valuable consideration.<sup>74</sup>

Additionally, the OWBPA has further requirements when group layoffs are contemplated. Where a layoff is taking place, employees must be given 45 days (rather than 21 days) to consider the offer, be informed of the unit at issue, and be provided with the job titles and ages of all those in the unit selected for the layoff as well as those not selected. These provisions aim to enhance employee free choice by making sure that waivers are executed voluntarily by those who are fully informed of their rights.<sup>75</sup>

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<sup>71</sup>29 U.S.C. §§ 623, 626, 630.

<sup>72</sup>J.D. Keyes & D. J. Farmer (1996) ‘Settlement of Age Discrimination Claims – The Meaning and Impact of the Older Workers Benefit Protection Act’ *Labor Lawyer* 12 261.

<sup>73</sup>29 C.F.R. Part 1625.

<sup>74</sup>U.S. Equal Employment Opportunity Commission (2009) ‘Understanding Waivers of Discrimination Claims in Employee Severance Agreements’ [http://eeoc.gov/policy/docs/qanda\\_severance-agreements.html](http://eeoc.gov/policy/docs/qanda_severance-agreements.html)

<sup>75</sup>C.R. Senn (2011) ‘Fixing Inconsistent Paternalism Under Federal Employment Discrimination Law’ *UCLA Law Review* 58 947-1024

Yet as helpful as such an approach may be, one must ponder how it works in practice. As the U.S. Equal Employment Opportunity Commission notes:

Employee reductions and terminations have been an unfortunate result of the current economic downturn. ...Often, employers terminate older employees who are eligible for retirement, or nearly so, because they generally have been with the company longest and are paid the highest salaries.<sup>76</sup>

Indeed, the global economic crisis has presented significant challenges to older workers in the US. Although workers age 50 and over continue to have lower unemployment rates than other age groups, these employees saw a doubling in the size of those unemployed between 2007 and 2011. In 2007, there were 1.3 million unemployed older workers compared with 3.2 million in 2011. Moreover, between those years, the number of older workers categorized as long term unemployed more than quintupled, rising from .3 million to 1.8 million employees. Additionally, older workers were the most likely group to fall into the category of the very long-term unemployed – those out of work for 52 weeks or more. In fact, in 2011, 41.6 percent of unemployed older workers were on the job market for a year or more, an increase of 27 percentage points from 2007.<sup>77</sup>

Commentators now warn that US older workers' historical protections from layoff – either because they are protected by seniority provisions in collective bargaining agreements or due to normative practices unconnected to contractual provisions – are diminishing.<sup>78</sup> The overall reduction in job tenure for older workers is of concern because, among other things, suffering “job separation between ages 50 and 56, for whatever reason, is associated with substantial reductions in the probabilities of working full-time, or working at all, at age 60.”<sup>79</sup> It is becoming clear that older workers who involuntarily lose their jobs might face great difficulty in delaying retirement.<sup>80</sup> Anecdotal accounts also confirm this.<sup>81</sup> Given these facts, it may be legally accurate to say that that compulsory retirement is prohibited in the US. But given reality, are employers accomplishing the very same thing under different guise? True, under the OWBPA, employers must observe strict formalities and provide severance pay, which otherwise would not be legally mandated. And an older worker can refuse the consideration and sue instead. Yet many, in the face of imminent unemployment, will choose the severance pay and moving on with their lives over litigation. Moreover, those that sue face a set of legal rules that make establishing a prima facie case of age discrimination very difficult indeed.

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<sup>76</sup>EEOC, *supra*, at 1.

<sup>77</sup>C. McKenna *Economy in Focus: Long Road Ahead for Older Unemployed Workers* Issue Brief (National Employment Law Project, 2012)

<sup>78</sup>*Id.*

<sup>79</sup>S. A. Sass & A. Webb *Is the Reduction in Older Workers' Job Tenure A Cause for Concern?* Working Paper 2010-20 (Center for Retirement Research at Boston College, 2010)

<sup>80</sup>L. Levine, *Older Displaced Workers in the Context of an Aging and Slowly Growing Population* CRS Report for Congress (Congressional Research Service, 2010)

<sup>81</sup>K. Evans & S. E. Needleman 'For Older Workers, a Reluctant Retirement' *Wall Street Journal* Dec. 8, 2009; M. Rich 'For the Unemployed Over 50, Fears of Never Working Again' *New York Times* Sept. 19, 2010

## Conclusion

A comparison of age discrimination protections in the UK and US yields convergences and divergences. Regarding the former, both countries have age discrimination legislation aimed at eliminating ageist stereotypes about older worker competency and diminished performance. Both countries have similar theories of legal action – direct discrimination (disparate treatment), indirect discrimination (disparate impact), for example. And both countries provide lesser protection for the victims of age discrimination than the victims of other forms bias.

As for divergences, UK legislation embraces a much larger protected class than that protected in the US. The problem of discrimination against younger workers falls within the ambit of British legislation while bias against younger workers is not cognizable in the US, at least on the federal level.<sup>82</sup> In the UK, justification presents an obstacle to successful claiming, including claims involving compulsory retirement. In the US, in contrast, legal doctrine regarding the prima facie case presents a significant obstacle to successful claiming, even though compulsory retirement is illegal. Finally, declining protection against layoffs leaves many US older workers with greatly diminished employment prospects and, in some cases, facing involuntary early retirement regardless of the law.

Is the US system, which allows these conditions to flourish better than the UK approach, which provides for an employer justified retirement age? Considering that the outcome for many older workers in both countries is consignment to precarious working status, we have trouble rating one system as more beneficial for older workers than the other. Ultimately, if our countries are to vanquish age discrimination in the workplace, that form of bias must be placed on equal footing with other forms of protected status.

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<sup>82</sup>There are a few states that recognize age bias against younger workers.