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## Targeted Job Advertisements on Social Media: An Age-Old Practice in a New Suit

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# TARGETED JOB ADVERTISEMENTS ON SOCIAL MEDIA: AN AGE-OLD PRACTICE IN A NEW SUIT

JOSEPH NELSON JR.\*

Abstract .....	1
I. Introduction .....	2
II. Background.....	8
A. <i>Job Advertising Before Social Media</i> .....	9
B. <i>Job Advertising After Social Media</i> .....	10
C. <i>The Contours of the ADEA</i> .....	13
D. <i>Theories of Liability Under the ADEA</i> .....	15
E. <i>The ADEA and Job Advertisements</i> .....	16
F. <i>Federal Courts’ Response to Targeted Recruitment Practices</i> .....	18
III. Proof of Claim.....	20
A. <i>Targeted Online Advertising May Help Promote the ADEA’s Purpose</i> .....	21
1. <i>Conflicting views on whether job applicants can bring a disparate impact claim under the ADEA</i> .....	21
2. <i>Courts should defer to the EEOC’s interpretation of the ADEA</i> . .....	30
IV. USING PREVIOUS CASES FOR GUIDANCE .....	36
A. <i>Courts should Focus on the Context of Targeted Job Advertisements</i> . .....	36
B. <i>Courts Should Follow the Hodgson Court’s Analysis when Confronted with an ADEA Claim involving Targeted Advertisements on Social Media</i> . .....	39
V. CONCLUSION .....	40

## ABSTRACT

This Note argues that an employer’s use of social media sites to “micro-target” potential job applicants is not *per se* unlawful under the Age Discrimination in Employment Act (“ADEA”). Rather, recruitment practices that target a specific age group are permissible under the ADEA

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when those recruitment practices are part of a broader recruitment strategy. When analyzing job advertisements on social media platforms, courts should not only consider the context of the advertisement, but also whether the advertisements are available through other resources. Such an analysis would allow employers to take advantage of the streamlined recruitment platforms available through social media sites, such as Facebook, in order to efficiently recruit new employees and effectively diversify the workplace.

## I. INTRODUCTION

Meet Daniel. He works at a national retail company and just won employee of the month for the second consecutive month. He is one of several high-performing employees recently hired by the company. How did the company find these employees? The company did not place a “Now Hiring” sign in any of its stores. And it did not hire a professional recruitment agency during its hiring process. Instead, the company simply posted an advertisement targeted at specific Facebook users and within 48 hours, it received hundreds of resumes from highly qualified applicants.<sup>1</sup>

Facebook’s job recruitment platform highlights an age-old practice in a new suit: targeted advertisements in job recruiting.<sup>2</sup> Employers have long understood the benefits of focusing their recruitment efforts on prospective applicants while the applicants are attending college.<sup>3</sup> For

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<sup>1</sup> Facebook is a social media site that allows companies to pinpoint Facebook users who view their advertisements. *See* Pamala N. Danziger, *Facebook’s Advertising Fallacy: That it Works!*, FORBES (Aug. 13, 2017, 7:04 AM), <https://forbes.com/sites/pamdanziger/2017/08/13/facebooks-advertising-fallacy-that-it-works/#329f37d662e3>. One writer described Facebook’s platform as a “win-win for everyone” and serves as a perfect solution for blue-collar workers who are “afraid to create a LinkedIn profile because of [their] experience.” Robbie Abed, *Why Facebook’s New Job Feature is a Smart Move: Should LinkedIn be worried?*, INC. (Feb. 28, 2018), <https://www.inc.com/robbie-abed/facebook-is-taking-on-linkedin-with-its-new-jobs-feature-heres-why-thats-a-genius-move.html>.

<sup>2</sup> *What is Targeted Advertising?* GCF GLOBAL, <https://edu.gcfglobal.org/en/thenow/what-is-targeted-advertising/1/> (last visited Jan. 11, 2020) (“Targeted advertising is a form of online advertising that focuses on the specific traits, interests, and preferences of a consumer.”).

<sup>3</sup> Amy Gulati, *Get Strategic About Campus Recruiting*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (Aug. 8, 2015), <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/strategic-campus-recruiting.aspx> (“Organizations have long understood the benefits of recruiting on college and university campuses as a way to attract the best and the brightest. Historically, employers developed relationships with schools as a way to source niche talent or fill a general pipeline of interns and entry-level hires.”).

example, employers routinely hold “meet and greets” and conduct interviews that only students at that specific university are eligible to attend.<sup>4</sup> Generally, this is not considered a form of age discrimination because, theoretically, older people (i.e., individuals who are at least 40 years old)<sup>5</sup> are allowed to attend college and would be eligible to apply for such jobs. Nevertheless, most college students are under the age of 25.<sup>6</sup> Is this situation significantly different from Daniel’s situation? Daniel saw the retail company’s advertisement on Facebook because he was within the company’s targeted age range.

Effective recruitment and selection methods are essential tools for businesses and other organizations to run smoothly and remain competitive.<sup>7</sup> Prior to online recruiting, the most popular recruitment mediums were local and national newspapers.<sup>8</sup> During that time, employers also turned to recruitment agencies to screen out unqualified applicants and determine which applicants to interview.<sup>9</sup> These recruitment agencies, however, were sales-intensive and charged

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<sup>4</sup> Julie Ellis, *From Coed to Corporate Employee: Tips for Recruiting on College Campuses*, BUSINESS.COM, (Nov. 30, 2015), <https://www.business.com/articles/from-coed-to-corporate-employee-tips-for-recruiting-on-college-campuses/>.

<sup>5</sup> This Note will refer to “older people” as those who are 40 years old and older, which is a protected class under the Age Discrimination in Employment Act. 29 U.S.C. § 631(a) (stating that “the prohibitions in this chapter shall be limited to individuals who are at least 40 years of age”).

<sup>6</sup> In 2018, 61% of college and university students were under age 25. NAT’L. CTR. FOR EDUC. STATS., <https://nces.ed.gov/fastfacts/display.asp?id=372>.

<sup>7</sup> Ruth Mayhew, *The Importance of Good Recruitment & Selection*, BIZFLUENT, <https://bizfluent.com/info-8166508-importance-good-recruitment-selection.html> (last updated Sept. 26, 2017).

<sup>8</sup> Kelly Desormes, *The Recruitment Method’s Evolution Throughout the History*, J.B.F. NEWS (Sept. 15, 2014), <https://www.jobboardfinder.com/news/the-recruitment-methods-evolution-through-the-history/>; see also *A Brief History of Recruitment*, OPUS., <http://www.opusrecruitmentsolutions.com/a-brief-history-of-recruitment> (last visited Feb. 26 2019) (“The initial main tools of recruitment consisted of bulletin board, which led to paid advertisements in the newspapers.”).

<sup>9</sup> Michael Overell, *The History of Innovation in Recruitment Technology and Services*, TECHCRUNCH, <https://techcrunch.com/2016/10/29/the-history-of-innovation-in-recruitment-technology-and-services/> (last visited Feb. 26, 2019).

employers a premium for locating appropriate candidates.<sup>10</sup> Throughout the late 2000s, employers started managing the recruitment process internally.<sup>11</sup> In addition, employers relied on online job boards, such as LinkedIn, which allowed employers to post their job advertisements and purchase access to applicants' resumes.<sup>12</sup> Although online job boards provided a cost-efficient method for recruiting candidates, employers often received an unmanageable number of applications from both over and under-qualified applicants.<sup>13</sup>

In 2017, Facebook created an advertisement platform that revolutionized the art of job recruiting.<sup>14</sup> With over two billion active users, Facebook provides an ideal pool of individuals who voluntarily provide a myriad of personal information to the social media site.<sup>15</sup> By gaining access to such information, companies can take job advertising to a new level. This new level, which is often referred to as "microtargeting," allows employers to choose their ideal candidate by selecting who views their advertisements based on the individuals' skills, interests and

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<sup>10</sup>Agency recruiters often used proprietary databases, which gave them an information arbitrage over employers; and as a result, recruitment agencies were able to charge a premium for their services. Overell, *supra* note 8.

<sup>11</sup> *Id.*

<sup>12</sup> Desormes, *supra* note 8.

<sup>13</sup> Kenneth G. Dau-Schmidt, *The Impact of Emerging Information Technologies on the Employment Relationship: New Gigs for Labor and Employment Law*, 2017 U. CHI. LEGAL F. 63, 65 (2017).

<sup>14</sup> Julia Angwin et al., *Facebook Job Ads Raise Concerns About Age Discrimination*, N.Y. TIMES (Dec. 20, 2017), <https://www.nytimes.com/2017/12/20/business/facebook-job-ads.html>.

<sup>15</sup> See Taylor N. Brailey, Article, *Discrimination in the Age of Social Media: The New Dangers of Cat's Paw Liability*, 35 J.L. & COM. 271 (2017) (noting that "[o]ften, the personal information shared with those connections contains details revealing an individual's attributes that may be protected, such as national origin, race, gender, religion, age, pregnancy, and disability status."); see also Reid v. Ingerman Smith LLP, No. CV 2012-0307 ILG MDG, 2012 WL 6720752, at \*1 (E.D.N.Y. Dec. 27, 2012) ("Courts have found, particularly in cases involving claims of personal injuries, that social media information may reflect a 'plaintiff's emotional or mental state, her physical condition, activity level, employment, this litigation, and the injuries and damages claimed.'") (citing Sourdif v. Texas Roadhouse Holdings, LLC, 2011 WL 7560647, at \*1 (N.D.N.Y.2011)).

background.<sup>16</sup> Facebook’s advertisement platform has dramatically simplified the recruitment process.<sup>17</sup> Some companies describe this platform as an effective and efficient recruiting tool.<sup>18</sup> However, Facebook’s advertising method has drawn a whirlwind of legal controversies—especially in the context of age discrimination.

The Age Discrimination in Employment Act (“ADEA”),<sup>19</sup> prohibits employment discrimination on the basis of age against persons forty years old and over.<sup>20</sup> Moreover, the ADEA prohibits age-related specifications in job postings.<sup>21</sup> Courts have found ADEA violations where job advertisements deter older workers from applying by including phrases such as “recent graduate.”<sup>22</sup> Nevertheless, questions remain as to whether a company’s use of Facebook’s advertisement platform, which targets a specific group of individuals (e.g., advertisements that limit the viewers to those who are between the ages of 25-45), violates the ADEA.

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<sup>16</sup> Tony Puckett, *Digital Discrimination: Targeted Ads Don’t Reach all Potential Applicants*, 26 NO. 1 OKLA. EMP. L. LETTER 5 (2018); Larry Kim, *How to Use Facebook Ads to Recruit Top Talent*, WORDSTREAM: BLOG, <https://www.wordstream.com/blog/ws/2016/08/23/facebook-recruiting> (last updated June 19, 2018).

<sup>17</sup> *Take the Work out of Hiring*, FACEBOOK (February 15, 2017), <https://www.facebook.com/business/news/take-the-work-out-of-hiring>.

<sup>18</sup> *Id.*; see also Puckett, *supra* note 16.

<sup>19</sup> 29 U.S.C. §§ 621-634 (2012).

<sup>20</sup> *Id.* § 631.

<sup>21</sup> 29 C.F.R. § 1625.4 (2017).

<sup>22</sup> See, e.g., *Hodgson v. Approved Pers. Serv., Inc.*, 529 F.2d 760, 766 (4th Cir. 1975) (holding that an employment agency advertisement directed to “recent graduates” as part of a broad, general invitation to a specific class of prospective customers coming into the job market at a particular time of year to use the services it offers does not violate the [ADEA].”).

Some critics argue that Facebook's advertisement platform is *per se* unlawful.<sup>23</sup> In December 2017, the Communications Workers of America ("CWA") filed a class action lawsuit in the United States District Court for the Northern District of California against companies who use Facebook's advertisement platform for job recruiting.<sup>24</sup> Specifically, the CWA sued T-Mobile US, Inc., Amazon.com, Inc., and "hundreds of major American employers and employment agencies" who use Facebook to post job advertisements.<sup>25</sup> In its complaint, the CWA alleged that the defendants violated the ADEA by targeting their job advertisements toward certain age groups and therefore limiting the audience for their employment advertisements on Facebook to younger users.<sup>26</sup> As a result, CWA argued, the targeted advertisements disparately impacted workers over the age of forty because the defendants determined who received job advertisements and hiring opportunities solely based on age.<sup>27</sup>

CWA's assertions raise novel issues that must be addressed by the courts. Should courts hold advertisements that microtarget specific individuals are, by itself, in violation of the ADEA? On the one hand, microtargeting may cause some groups of individuals to be categorically, excluded from certain jobs.<sup>28</sup> While on the other hand, microtargeting may

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<sup>23</sup> See Angwin et al., *supra* note 14; Suzanne Lucas, *Does Facebook Facilitate Age Discrimination in Job Ads?: Is there a Difference Between Recruiting at a University and Posting a Job Ad that Only 18-30 Year Olds Can See?*, INC., <https://www.inc.com/suzanne-lucas/does-facebook-facilitate-age-discrimination-in-job-ads.html> (last visited Jan. 13, 2020).

<sup>24</sup> Complaint, Communications Workers of America et al. v. T-Mobile US, Inc. et al., No. 5:17-cv-07232, 2017 WL 6539268 (N.D. Cal. Dec. 20, 2017).

<sup>25</sup> *Id.* at \*2.

<sup>26</sup> *Id.* at \*4–5.

<sup>27</sup> *Id.* at \*5–6.

<sup>28</sup> See Jeffrey Campolongo and Emily Wisniewski, *Age discrimination and Facebook: Micro-targeting comes under fire*, BENEFITS PRO (Jan. 30, 2018 4:01 AM), <https://www.benefitspro.com/2018/01/30/age-discrimination-and-facebook-micro-targeting-co/?sreturn=20190127180508> (explaining that the problem with micrtargeting on social media "is that the end users being excluded from seeing the ads are never given the opportunity to see or know of the opportunities in the first place. Yes, anyone can pick up a magazine or watch an ad

promote the purpose of the ADEA, especially when the recruitment efforts are part of a broader recruitment strategy. Indeed, federal courts have ruled that recruitment practices that target specific age groups are permissible under the ADEA when those recruitment practices are part of a broader recruitment strategy.<sup>29</sup>

This Note argues that courts should adopt a similar, flexible rule when analyzing ADEA claims in the context of advertisement platforms like Facebook's. Such a rule would allow companies to take advantage of the streamlined recruitment platform popularized by Facebook as part of a broad recruitment strategy designed to reach all age groups. Thus, simply showing that certain job advertisements directed towards different age groups on sites like Facebook are not *per se* unlawful—just like running job advertisements in magazines and on TV shows that target specific groups of people. Accordingly, if courts adopt such a rule, employers will be able to take advantage of the abundance of information provided to social media sites to efficiently recruit new employees and effectively diversify the workplace.

Part II of this Note discusses social media's impact on employee recruitment strategies and lays out the legal implications of targeted recruitment advertisements under the ADEA. Part III argues that targeted recruitment advertisements used on social media sites may promote the purpose of the ADEA so long as job applicants can sue under a disparate impact theory of liability. Part IV discusses how federal courts have offered a useful lens to analyze cases that deal with Facebook's advertisement platform. Part V concludes this Note.

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during the Super Bowl, even if the ad or commercial does not appeal to him or her. But at least that consumer can process what he or she is seeing, in real time, and make a conscious decision on whether to partake in the goods or products being peddled.”).

<sup>29</sup> See *Mistretta v. Sandia Corp.*, No. 74-536-M, 1977 WL 17, at \*7 (D.N.M. Oct. 20, 1977), *decision supplemented*, No. 74-536-M, 1978 WL 17 (D.N.M. Sept. 28, 1978), *aff'd in part, rev'd in part on other grounds*, 639 F.2d 588 (10th Cir. 1980), *aff'd and remanded sub nom.* *Equal Emp't Opportunity Comm'n v. Sandia Corp.*, 639 F.2d 600 (10th Cir. 1980).



## II. BACKGROUND

“Americans have gotten used to the idea that ads are crafted to reach specific groups in specific ways: Ads for beer appear during sports games, while ads for toy stores pop up during children’s programs. Sites that cull data from users’ behavior and content offer advertisers even more customization.”<sup>30</sup> These increasingly sophisticated methods of advertising allow companies to reach a particularly narrow audience and communicate the right message to the right prospective customer.<sup>31</sup> Indeed, companies have become so effective at reaching specific individuals that their advertisements may change the way those individuals view themselves.<sup>32</sup>

In a similar vein, online job recruitment advertisements seem to pop up whenever you are on social media, especially when you may be interested in a new job but not actively searching for an open position.<sup>33</sup> Such an effective system of advertising, however, has not always been in place.

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<sup>30</sup> Gillian B. White, *When Algorithms Don’t Account for Civil Rights: Do Lucrative Deals with Advertisers have to come at the Expense of Users’ Civil Rights?*, THE ATLANTIC (March 7, 2017), <https://www.theatlantic.com/business/archive/2017/03/facebook-ad-discrimination/518718/>.

<sup>31</sup> Elizabeth Mott, *Effectiveness of Advertising to a Target Audience*, CHRON, <https://smallbusiness.chron.com/effectiveness-advertising-target-audience-80695.html> (last visited Nov. 11, 2018).

<sup>32</sup> In one study, researchers found that a group of students who viewed an advertisement for a high-end watch brand—which they believed to be individually targeted to them—evaluated themselves as more sophisticated after viewing the advertisement. Rebecca Walker Reczek et al., *Targeted Ads Don’t Just Make You More Likely to Buy—They Can Change How You Think About Yourself*, HARV. BUS. REV. (April 4, 2016), <https://hbr.org/2016/04/targeted-ads-dont-just-make-you-more-likely-to-buy-they-can-change-how-you-think-about-yourself> (“The data show that participants [in the study] evaluated themselves as more sophisticated after receiving an ad that they thought was individually targeted to them, compared to when they thought the same ad was not targeted. In other words, participants saw the targeted ad as reflective of their own characteristics. The ad told them that, based on their browsing history, they had sophisticated tastes. They accepted this information, saw themselves as more sophisticated consumers, and this shift in how they saw themselves increased their interest in the sophisticated product.”); for the full study, see Christopher A. Summers et al., *An Audience of One: Behaviorally Targeted Ads as Implied Social Labels*, 43 J. CONSUMER RES. 156 (2016).

<sup>33</sup> Social media sites may be effective at appealing to the “passive candidate,” one who is interested in a new job but not actively searching for one. Todd Wasserman, *Why Social Media Should Be Part Of Recruiting — But Just A Part*, FORBES (Feb. 16, 2018, 10:00 AM), <https://www.forbes.com/sites/adp/2018/02/16/why-social-media-should-be-part-of-recruiting-but-just-a-part/#37ccc7ca5ca1>. One executive stated that these “passive candidates” demonstrate their talents via social media postings even if they are not officially on the searching for a new job. *Id.*

### A. *Job Advertising Before Social Media*

Historically, employers relied on written applications, questionnaires, interviews, references, and background checks to screen job applicants.<sup>34</sup> From the 1950s to the 1980s, the most popular tools of recruitment consisted of bulletin boards, which led to paid advertisements in the newspapers.<sup>35</sup> Indeed, more than 75% of applicants discovered job openings through newspaper advertisements.<sup>36</sup> During this time, targeted advertising did not exist.<sup>37</sup> With the exception of age and gender, companies could not separate specific groups of individuals within the mass audience.<sup>38</sup>

After the 1970s, however, social scientists created a new concept: psychographics.<sup>39</sup> At first, psychographics were primarily used in the marketplace by separating consumers categorically based on other characteristics in addition to age and gender.<sup>40</sup> Psychographics considered not only consumers' age and gender, but also their "lifestyle," and separated consumers based on attitudes, beliefs, opinions and personality traits.<sup>41</sup> Once the audience was segmented in this manner, companies could target specific groups within the mass audience.<sup>42</sup>

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<sup>34</sup> See, generally, Rochelle B. Ecker, Comment, *To Catch a Thief: The Private Employer's Guide to Getting and Keeping an Honest Employee*, 63 UMKC L. REV. 251, 255–61 (1994) (describing traditional methods of pre-employment screening).

<sup>35</sup> Desormes, *supra* note 8.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Roy de Suza, *A Short History of Targeted Advertising*, ZEDO (May 27, 2015), <https://www.zedo.com/short-history-targeted-advertising/>.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

By the mid-1990s, the creation of the World-Wide-Web revolutionized the art of advertising.<sup>43</sup> The World-Wide-Web allowed employers to pull advertising away from conventional means, such as newspapers, and recruit candidates from across the world through online job boards such as LinkedIn.<sup>44</sup> Online job boards allowed employers to post their advertisements and purchase access to applicants' resumes.<sup>45</sup> It logically flows that the creation of the World-Wide-Web, in conjunction with companies' knowledge of psychographics, employees would be matched with the most suitable jobs. In practice, however, that did not happen.<sup>46</sup> While information technology improved companies' ability to search through applications, it also immensely increased the number of applications that employers received.<sup>47</sup> In addition, computer algorithms lacked the ability to screen through subjective information, such as quality, motivation, and whether the applicant was a good fit for the company.<sup>48</sup>

### *B. Job Advertising After Social Media*

Social media sites provide a solution for the shortcomings of online job boards and psychographic technology. Social media advertising is defined as “an online ad that incorporates user interactions that the consumer has agreed to display and be shared. The resulting ad displays

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<sup>43</sup> See *A Brief History of Recruitment*, *supra* note 8.

<sup>44</sup> *Id.*

<sup>45</sup> Desormes, *supra* note 8.

<sup>46</sup> Dau-Schmidt, *supra* note 13, at 65–67.

<sup>47</sup> *Id.* at 65–66 (“A survey of the 100 most popular job posting sites from 2002 to 2011 showed that in 2011, the average number of job postings on an examined site was 42,063, while the average number of resumes was 530,743.”).

<sup>48</sup> *Id.*

these interactions along with the user's persona (picture and/or name) within the ad content."<sup>49</sup>

With the creation of social media sites, companies have taken targeting advertising to a new level.<sup>50</sup>

A major advantage of social media sites is that they are home to a wide range of information that social media users have voluntarily shared with one another.<sup>51</sup> Companies can use information voluntarily provided by social media users such as age, geographic location, education, profession, and personal connections to precisely reach the type of individuals who are likely to be influenced by the company's advertisements.<sup>52</sup> This personalized system of interaction is done by activity and relationship analysis that ensures companies' advertisements reach their intended audience.<sup>53</sup> Therefore, companies can lower recruitment costs by efficiently targeting those who view their job advertisements.<sup>54</sup> This recruitment method, however, has been welcomed with mixed reactions.

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<sup>49</sup> *Social Advertising Best Practices*, IAB (May 1, 2009), <https://www.iab.com/guidelines/social-advertising-best-practices/>.

<sup>50</sup> This "new level" allows a company to know the interests of each individual whom views the company's advertisement. See Louise Matsakis, *Facebook's Targeted Ads are More Complex than it Lets on*, *Wired* (April 25, 2018 4:04 PM), <https://www.wired.com/story/facebooks-targeted-ads-are-more-complex-than-it-lets-on/> ("A local coffee shop, for instance, might understandably target people who already like Starbucks and pages like "Need My Morning Coffee."").

<sup>51</sup> Pauline T. Kim, *Data-Driven Discrimination at Work*, 58 WM. & MARY L. REV. 857, 863–64 (2017).

<sup>52</sup> See *Social Advertising Best Practices*, *supra* note 48, at 6 ("Consumers of social media actively provide information to the social domain they are visiting in order to get the most benefit and value from their online experience as they connect and interact with friends. Some of the information provided to the site is personal, while some is social or interpersonal. Examples of profile data relevant to social ads include (but are not limited to): age, gender, location, interests and photos.").

<sup>53</sup> Christian Karasiewicz, *17 Ways Marketers Can Leverage Facebook Graph Search*, *SOCIAL MEDIA EXAMINER* (July 22, 2013), <http://www.socialmediaexaminer.com/facebook-graph-search-marketing/>.

<sup>54</sup> *Id.*

Many companies applaud social media as a recruitment platform because it allows them to gather an abundance of information about potential job candidates.<sup>55</sup> This information makes it easier to predict the likely match between the candidate and the prospective job.<sup>56</sup> Indeed, the ability to send a targeted message to a specific talent pool may be the most economically efficient method of diversifying a company's workforce.<sup>57</sup> Consequently, this method of recruitment may categorically excluded some individuals from certain jobs.<sup>58</sup> As one critic stated, "[a]d targeting can make the world look different to different people. Some find the web full of job ads for high-paying CEO jobs, while others see mostly ads for sneakers or pay day loans."<sup>59</sup> As a result, this form of advertising may open the floodgates to discriminatory practices.

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<sup>55</sup> Puckett, *supra* note 16.

<sup>56</sup> See Ian Byrnside, Note, *Six Clicks of Separation: The Legal Ramifications of Employers Using Social Networking Sites to Research Applicants*, 10 VAND. J. ENT. & TECH. L. 445, 458 (2008) ("Up to this point, employers have generally felt that 'they are on safe ground looking at profiles on MySpace or Facebook because there are currently no laws stopping them from doing so.' Furthermore, employers believe they have the right to obtain as much information as possible about applicants and that using social networking sites 'is fair game to find out who will be the 'best fit' for their organization'").

<sup>57</sup> *Targeted Recruiting vs. Non Targeted Recruiting*, DIRECTEMPLOYERS (Dec. 9, 2015), <https://directemployers.org/2015/12/09/targeted-recruiting-vs-non-targeted-recruiting/>.

<sup>58</sup> David Dayden, *Ban Targeted Advertising*, THE NEW REPUBLIC (April 10, 2018), <https://newrepublic.com/article/147887/ban-targeted-advertising-facebook-google> ("Advertisers armed with Big Data can ensure housing or employment advertisements don't reach African-Americans or Hispanics, discriminating on the basis of race.").

<sup>59</sup> Rachel Goodman, *Facebook's Targeting System Can Divide Us on More Than Just Advertising*, ACLU (April 4, 2018, 3:00 PM), <https://www.aclu.org/blog/racial-justice/facebooks-targeting-system-can-divide-us-more-just-advertising>.

### *C. The Contours of the ADEA*

The ADEA prohibits employment discrimination on the basis of age<sup>60</sup> against persons forty years old and older.<sup>61</sup> The purpose of the ADEA is to “promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment.”<sup>62</sup> Employment practices covered by the ADEA include hiring decisions, discharges, discriminatory treatment in conditions of employment, discrimination in referrals by employment agencies, and retaliation against employees or applicants who assert violations under the ADEA.<sup>63</sup>

The ADEA is a complement to Title VII of the Civil Rights Act of 1964 (hereinafter “Title VII”),<sup>64</sup> which prohibits employment discrimination on the basis of race, religion, gender, ethnicity, and color.<sup>65</sup> Title VII did not afford protection on the basis of age because Congress did not have enough evidence of age discrimination in the workplace.<sup>66</sup> In 1964, however,

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<sup>60</sup> 29 U.S.C § 623.

<sup>61</sup> *Id.* § 631(a).

<sup>62</sup> *Id.* § 621(b).

<sup>63</sup> *Id.* § 623(a)(1) (prohibiting an employer “to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age”); *id.* § 623(b) (making it unlawful for employment agencies to discriminate on the basis of age); *id.* § 623(d) (“It shall be unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has opposed any practice made unlawful by” the ADEA or because that individual “has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under” the ADEA).

<sup>64</sup> 42 U.S.C. §§ 2000e-17 (2012); *see also* Howard Eglit, *The Age Discrimination Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog that Didn’t Bark*, 39 WAYNE L. REV. 1093, 1096 (1993) (“[T]he [ADEA] and Title VII of the Civil Rights Act of 1964 have been linked in a common enterprise: combatting bias in the workplace. This shared goal flows in the first instance from the Acts’ virtually identical core proscriptive language.”).

<sup>65</sup> 42 U.S.C. §§ 2000e-2(a).

<sup>66</sup> Adam N. Bitter, Article, *Smith v. City of Jackson: Solving an Age-Old Problem?*, 56 CATH. U. L. REV. 647, 651–52 (2007).

Secretary of Labor, W. Willard Wirtz, investigated the causes and effects of age discrimination in the workplace and found that age-based discrimination differed significantly from other forms of discrimination.<sup>67</sup> In particular, Secretary Wirtz found that age discrimination is usually based upon mistaken, preconceived notions of ability rather than on feelings of hostility and dislike of members of a certain group.<sup>68</sup> Rather than amending Title VII, Congress enacted the ADEA.<sup>69</sup> The goal of these two statutes is to eliminate workplace discrimination.<sup>70</sup> Thus, courts generally interpret the ADEA in conjunction with Title VII because both share the same goal and contain substantially similar language.<sup>71</sup>

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<sup>67</sup> U.S. DEPT. OF LABOR, *The Older American Worker: Age Discrimination in Employment 1* (1965), as reprinted in *Employment Problems of Older Workers: Hearings on H.R. 10634, 89th Cong. 201-387* (1966) [hereinafter “Wirtz Report”]; see also Bitter, *supra* note 66, at 652 (“[I]n contrast to other forms of discrimination, employers did not demonstrate animus or intolerance of older workers. However, the Secretary discovered “substantial evidence of arbitrary . . . discrimination based on unsupported general assumptions about the effect of age on ability.”).

<sup>68</sup> Wirtz Report, *supra* note 65, at 5–6. Secretary Wirtz also found that certain institutional arrangements, such as internal promotion programs and pension, adversely affected older workers. *Id.*

<sup>69</sup> See Kimbelye K. Fayssoux, Note, *The Age Discrimination in Employment Act of 1967 and Trial by Jury: Proposals for Change*, 73 VA. L. REV. 601, 605–06 (1987) (observing that Congress’s decision to enact new legislation rather than amend Title VII “stemmed in part from administrative concerns: the inclusion of age discrimination in Title VII would have overtaxed the capabilities of the [EEOC]”); see also Note, *The Age Discrimination Act of 1967*, 90 HARV. L. REV. 380, 383–85 (distinguishing race discrimination on the ground that race has no correlation to ability to perform well at a job; whereas, “age *is* at some point inherently related to ability”) (emphasis in the original).

<sup>70</sup> Eglit, *supra* note 64, at 1097.

<sup>71</sup> See *Lorillard v. Pons*, 434 U.S. 575, 584 (1978) (noting that “the prohibitions of the ADEA were derived *ad haec verba* from Title VII”); *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (plurality opinion) (stating that “when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended the text to have the same meaning in both statutes.”).

*D. Theories of Liability Under the ADEA*

The ADEA establishes causes of action for both disparate treatment and disparate impact claims.<sup>72</sup> Under the disparate treatment theory, a plaintiff is required to show proof that an employer intentionally “treats some people less favorably than others because of their [age].”<sup>73</sup> Whereas, under the disparate impact theory, a plaintiff need not show proof of discriminatory intent.<sup>74</sup> Rather, the plaintiff must prove that the employer used “employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.”<sup>75</sup>

Specifically, section 4(a) of the ADEA makes it unlawful for an employer:

(1) To fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age; [or]

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of the individual’s age.<sup>76</sup>

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<sup>72</sup> *Smith*, 544 U.S. at 242–43 (2005); *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 69 (3d Cir. 2017) (“ADEA claims may proceed under a disparate-impact or disparate-treatment theory.”)

<sup>73</sup> *International Bhd. of Teamsters v United States*, 431 U.S. 324, 335 (1977).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*; *see also Segar v Smith*, 738 F.2d 1249, 1267 (D.C. Cir. 1984) (“Disparate impact aims at discovery and elimination of facially neutral employment practices that adversely affect minorities and cannot be justified as necessary to an employer’s business.”); *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 69 (3d Cir. 2017) (“Unlike claims of disparate treatment, disparate-impact claims do not require proof of discriminatory intent.” Instead, “[d]isparate impact redresses policies that are ‘fair in form, but discriminatory in operation.’ To that end, disparate-impact claims ‘usually focus on statistical disparities.’”) (internal citations omitted).

<sup>76</sup> 29 U.S.C. § 623(a).



In *Smith v. City of Jackson*,<sup>77</sup> the Supreme Court explained the “key textual differences” between these two subsections. In particular, the two subsections treat motive differently.<sup>78</sup> Subsection (a)(1) makes it unlawful to “discriminate against any individual . . . because of such individual’s age.”<sup>79</sup> This provision focuses on the employer’s motives and is the part of § 4(a) that establishes disparate treatment claims.<sup>80</sup> Whereas, subsection (a)(2) targets employer conduct that “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>81</sup> Subsection (a)(2) “focuses on the effects of the action on the employee rather than the motivation for the action of the employer.”<sup>82</sup> Thus, subsection (a)(2) establishes a cause of action for disparate impact claims under the ADEA.<sup>83</sup>

#### *E. The ADEA and Job Advertisements*

In the context of recruiting and hiring, the ADEA places several limitations on the content of job advertisements:

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.<sup>84</sup>

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<sup>77</sup> 544 U.S. 228, 236 (2005).

<sup>78</sup> See *id.* at 236–37 (explaining that subsection (a)(1) focuses on the motivation of the action of the employer; whereas, subsection (a)(2) focuses on the effects of the action on the employee).

<sup>79</sup> 29 U.S.C. § 623(a)(1).

<sup>80</sup> See *Smith*, 544 U.S. at 236.

<sup>81</sup> 29 U.S.C. § 623(a)(2).

<sup>82</sup> *Smith*, 544 U.S. at 236.

<sup>83</sup> *Id.* at 240.

<sup>84</sup> 29 U.S.C. § 623(e).

Moreover, an advertisement may specify age only if it “is a bona fide occupational qualification reasonably necessary to the normal operation of the . . . business.”<sup>85</sup> The Equal Employment Opportunity Commission (“EEOC”) is responsible for implementing and enforcing the ADEA.<sup>86</sup> EEOC regulations provide the following examples of terms and phrases that will violate the ADEA if they appear in job advertisements:

- age 25 to 35;
- young;
- college student;
- recent college grad;
- age over 65;
- retired person.<sup>87</sup>

Employment applications, however, may ask for the date of birth or age.<sup>88</sup> While inquiring as to an applicant’s age is not a *per se* violation, it will be scrutinized.<sup>89</sup> The EEOC suggests that

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<sup>85</sup> *Id.* § 623(f)(1).

<sup>86</sup> *Id.* § 628 (authorizing the EEOC to issue “such rules and regulations as it may consider necessary or appropriate in carrying out” the ADEA).

<sup>87</sup> 29 C.F.R. § 1625.4(a). The Supreme Court has ruled that the ADEA does not bar employers from favoring older workers over relatively younger ones who are also protected by the Act. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004). In response, on August 4, 2006, the EEOC proposed regulations making clear that the ADEA does not prohibit employers from favoring older workers over younger workers who are also over the age of 40. Coverage Under the Age Discrimination in Employment Act, 71 Fed. Reg. 46,177, 46,177-78 (Aug. 11, 2006). Moreover, the EEOC revised a portion of 29 C.F.R. § 1625.4(a) that barred job advertisements favoring older persons to make it clear that it is permissible to encourage older applicants to apply. 29 C.F.R. § 1625.4(a) (2006).

<sup>88</sup> 29 C.F.R. § 1626.4(a).

<sup>89</sup> *Id.*

employers should use language on the application explaining that the age will not be used unlawfully.<sup>90</sup>

*F. Federal Courts' Response to Targeted Recruitment Practices*

Although the EEOC has taken the position that specific words appearing on job advertisements will violate the ADEA, courts have refused to adopt a *per se* rule for analyzing targeted advertisements.<sup>91</sup> For example, in *Hodgson v. Approved Personnel Service, Inc.*,<sup>92</sup> the Fourth Circuit Court of Appeals ruled that “the discriminatory effect of an advertisement is determined not by ‘trigger words’ [such as ‘young’ and ‘recent college graduates’] but rather by its context.”<sup>93</sup> Accordingly, the inquiry focuses on the advertisement’s potentially deterrent effect on older applicants.<sup>94</sup>

Challenges against targeted recruitment efforts is not a new issue.<sup>95</sup> In *U.S. v. Georgia Power Co.*,<sup>96</sup> a group of employees filed a Title VII lawsuit against a private electric company, alleging, *inter alia*, that the company violated Title VII by recruiting skilled personnel only at all-white institutions. In that case, the Fifth Circuit sustained the employees’ challenge,

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<sup>90</sup> *Id.*

<sup>91</sup> See *Hodgson v. Approved Personnel Serv., Inc.*, 529 F.2d 760 (1975); see also *Boyd v. City of Wilmington*, 943 F.Supp. 585, 590–91 (1996) (rejecting a claim that a job advertisement stating a preference for “[c]andidates for MPA or MSIR” violated the ADEA); *Debuhr v. Olds Prods. Co.*, No. 95 C 1462, 1996 WL 277644, at \*3 (N.D. Ill. May 22, 1996) (ruling that a job advertisement, which stated that the employer was looking for someone with “high energy” and “between 5 and 10 years experience” was not, by itself, sufficient proof of intent to discriminate).

<sup>92</sup> 529 F.2d at 765.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*; see also 29 C.F.R. § 1625.5 (suggesting that when an applicant’s age is the subject of inquiry, employers should assure the individual that the inquiry is being made for a lawful purpose).

<sup>95</sup> One of the earliest cases addressing targeted recruiting practices occurred in the context of a claim arising under Title VII. See *U.S. v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973).

<sup>96</sup> 474 F.2d at 925.

concluding that “[t]he company’s policy of seeking skilled personnel only at white educational institutions is . . . an invidious brake on black employment opportunities.”<sup>97</sup> The court reasoned that “[w]hile the company ought not be enjoined to recruit on all college campuses[,] . . . it also ought not be allowed to continue to restrict its recruitment programs to all—or predominantly all—white institutions while maintaining such a racially imbalanced work force.”<sup>98</sup> The United States District Court for the District of New Mexico, however, took a different approach to a similar situation. This court approved an employer’s recruitment practice of focusing on college campuses for entry-level positions, despite the fact that the employer is more likely to find younger applicants in that setting than older applicants.<sup>99</sup> In upholding the employer’s recruitment practice, the court concluded that “[t]here is nothing inherently suspicious about on-campus recruiting programs. . . . No evidence was presented to show whether applicants in the protected age group had less success in finding employment at [the company] than applicants generally.”<sup>100</sup>

Likewise, the EEOC recently rejected disparate impact claims when the plaintiff failed to provide evidence that a company recruited only on social media.<sup>101</sup> In *Reese v. Salazar*, an applicant filed an age discrimination claim with the EEOC, alleging that a company’s use of

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<sup>97</sup> *Id.* at 926. The court ultimately held that the company must take affirmative steps to encourage black workers, such as advertising job openings in newspapers accessible to predominantly black communities and making public announcements that the company is an equal opportunity employer. *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Mistretta v. Sandia Corp.*, No. 74-536-M, 1977 WL 17, at \*7 (D.N.M. Oct. 20, 1977), *decision supplemented*, No. 74-536-M, 1978 WL 17 (D.N.M. Sept. 28, 1978), *aff’d in part, rev’d in part on other grounds*, 639 F.2d 588 (10th Cir. 1980), *aff’d and remanded sub nom.* Equal Emp’t Opportunity Comm’n v. Sandia Corp., 639 F.2d 600 (10th Cir. 1980).

<sup>100</sup> *Id.*

<sup>101</sup> *See Reese v. Salazar*, EEOC Appeal No. 0120122339, 2012 WL 5901116 (Nov. 15, 2012)

Facebook for recruiting demonstrated the company's intent to hire younger applicants.<sup>102</sup> Specifically, the applicant argued that older workers were at a disadvantage because they used computers less often.<sup>103</sup> The EEOC rejected the applicant's argument on the ground that the applicant failed to put forth evidence showing that the company's recruitment practice had a disparate impact on older applicants (i.e., the employer's use of social media for recruitment was linked to a preference for younger applicants).<sup>104</sup> Further, the EEOC found that the applicant did not present any evidence that the employer exclusively recruited through social media.<sup>105</sup> This decision, and the decisions discussed below, demonstrate that a company's use of social media as part of a broad recruitment strategy does not violate the ADEA.

### III. PROOF OF CLAIM

Most attempts by companies to place an explicit preference against a protected group on job advertisements have found little acceptance by the courts. Nevertheless, courts have not addressed the scenario where companies place a preference on those who view a particular job advertisement on a particular website. Put differently, companies increasingly place job advertisements on social media sites that are directed towards web users—within a particular age range—to efficiently recruit new candidates and diversify the workplace.<sup>106</sup> Do companies violate the ADEA simply by targeting these web users on social media sites?

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<sup>102</sup> *Id.* at \*2.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at \*5.

<sup>105</sup> *Id.* at \*2 (concluding that the applicant did not establish a prima facie case of disparate impact because the applicant “failed to demonstrate that a statistical disparity existed that was linked to the challenged practice or policy.”)

<sup>106</sup> Evan Hessel, *The Looming Battle Over Targeted Ads*, FORBES (Sept. 24, 2009, 4:57 PM), <https://www.forbes.com/2009/09/24/online-advertising-privacy-business-media-regulation.html#7d291836590b>. Using targeted advertisements is also helpful for a company seeking to increase its bottom line. *Id.* Publishers of news and entertainment “typically rely on third-party advertising brokers, called ad networks or ad exchanges, to

This part of the Note proposes a legal standard modeled after analogous situations in the context of advertisements in the mid-20th century that will provide companies with effective guidance on recruitment standards. First argues that job applicants' ability to bring a disparate impact claim under the ADEA is an essential tool that is necessary to ensure that companies are using targeted advertisements to streamline the hiring process and diversify the workplace. Next, this Note proposes a rule that will ensure that companies, as well as potential job applicants, can benefit from the technology used by social media sites. Thus, this Note offers a model that may prove pragmatic enough to be met with the judicial welcomes that have been accepted by traditional frameworks.

*A. Targeted Online Advertising May Help Promote the ADEA's Purpose.*

*1. Conflicting views on whether job applicants can bring a disparate impact claim under the ADEA*

Targeted advertising may help promote the primary purpose of the ADEA. Indeed, an employer's ability to send a targeted advertisement to a specific group, may be the most economically efficient method of diversifying the company's workforce.<sup>107</sup> At the same time, however, older persons may be disparately impacted by the practice of targeted advertising.<sup>108</sup>

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sell more than 90% of ad inventory. . . . Behavioral targeting systems could help big publishers make their lowest-priced ads more useful for advertisers and could lift revenues." *Id.*

<sup>107</sup> See *Targeted Recruiting vs. Non Targeted Recruiting*, *supra* note 57 ("The use of a targeted job board has inherent advantages. . . . Most evident is that a targeted job board allows you to actually pay for the applicants you get as a result of targeting your postings. This as opposed to paying for an entire populous—with a general job board the vast majority of candidates are not qualified let alone the candidates you are looking for."); see also H. KRISTL DAVISON, ET AL., *FRIEND OR FOE? THE PROMISE AND PITFALLS OF USING SOCIAL MEDIA NETWORKING SITES FOR HR DECISIONS*, 155 (Springer, 2011) (explaining that the benefits of targeted recruiting include, among other things, producing more qualified applicants).

<sup>108</sup> See *Complaint, Communications Workers of America et al. v. T-Mobile US, Inc. et al.*, No. 5:17-cv-07232, 2017 WL 6539268 (N.D. Cal. Dec. 20, 2017). Plaintiffs may argue, for example, that targeted job advertisements that are only displayed to those who are younger than a particular age group limits the likelihood that those older than the particular age group will hear about those jobs; and therefore, they will be less likely to act on those opportunities. *Id.* at ¶ 19, 61, 72, 82-83, 91. As a result, the older group of individuals are disparately impacted. *Id.*

When targeted job advertisements are not a part of a broader recruitment strategy, a greater disparity of older workers may remain jobless.<sup>109</sup> For example, if “current employees”—and not job applicants—are permitted to bring a disparate impact claim under the ADEA, employers will be free to limit their applicant pool to the younger workers who viewed the advertisement. Consequently, to ensure that the benefits of targeted job advertisements are met, job applicants, as well as current employees, should be able to bring a disparate impact claim under the ADEA.

Although the Supreme Court has not directly ruled on the question of whether job applicants can bring a disparate impact claim under the ADEA, lower courts have addressed this issue.<sup>110</sup> In *EEOC v. Francis W. Parker School*, the Seventh Circuit held that the ADEA did not cover disparate impact claims—regardless of the plaintiff’s status as an employee or applicant.<sup>111</sup> In reaching its conclusion, the Seventh Circuit relied on the Supreme Court’s analysis in *Hazen Paper Co. v. Briggs*,<sup>112</sup> in which the Court expressly recognized only a disparate treatment theory of liability under the ADEA.<sup>113</sup> The Seventh Circuit further noted, in dicta, the major textual differences between Title VII and the ADEA.<sup>114</sup> It emphasized that, although Title VII expressly protects job applicants, the “‘mirror’ provision in the ADEA omits from its coverage,

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<sup>109</sup> The average length of unemployment for persons over the age of 55 was seven to nine months. Richard Eisenberg, *What the Older, Long-Term Worker Need*, *Forbes* (Aug. 10, 2017 3:55 PM), <https://www.forbes.com/sites/nextavenue/2017/08/10/what-the-older-long-term-unemployed-need/#7caff34e768a>.

<sup>110</sup> See *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 961 (11th Cir. 2016); *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (10th Cir. 1996); *EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073 (7th Cir. 1994); *Rabin v. PricewaterhouseCoopers LLP*, 236 F.Supp.3d 1126 (N.D. Cal. 2017).

<sup>111</sup> 41 F.3d at 1077.

<sup>112</sup> 507 U.S. 604 (1993).

<sup>113</sup> *Francis W. Parker Sch.*, 41 F.3d at 1076–77; *Hazen Paper Co.*, 503 U.S. at 609–11; see also *id.* at 618 (“nothing in the Court’s opinion should be read as incorporating in the ADEA context the so-called “disparate impact” theory of Title VII of the Civil Rights Act of 1964”).

<sup>114</sup> *Francis W. Parker Sch.*, 41 F.3d at 1077–78.

‘applicants for employment.’”<sup>115</sup> Even more so, as the court pointed out, “in light of the ADEA’s nearly verbatim adoption of Title VII language, the exclusion of job applicants from subsection (2) of the ADEA is noteworthy.”<sup>116</sup> Consequently, the Seventh Circuit concluded that even if the ADEA covered a disparate impact theory of liability, job applicants could not bring a disparate impact claim—such a result is “dictated by the statute itself.”<sup>117</sup>

Two years later, the Tenth Circuit addressed a disparate impact claim under the ADEA filed by job applicants.<sup>118</sup> In *Ellis v. United Airlines, Inc.*, two women filed a charge with the EEOC alleging that an employer’s hiring decisions were based on weight requirements that disparately impacted older job applicants.<sup>119</sup> In an analysis similar to the Seventh Circuit’s analysis in *Francis W. Parker School*, the Tenth Circuit held that the job applicants could not bring a disparate impact claim under the ADEA.<sup>120</sup> Notably, in a footnote, the court explained that “Congress expressly added applicants to the parallel provision in Title VII, but not to the ADEA, indicating an intent that § 623(a)(2) of the ADEA not apply to applicants as § 623(a)(1) expressly does.”<sup>121</sup> Accordingly, the Tenth Circuit concluded that, “[b]ased on [its] interpretation of the statutory text and congressional intent, . . . disparate impact claims are not cognizable under the ADEA.”<sup>122</sup>

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 1078.

<sup>118</sup> *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (10th Cir. 1996).

<sup>119</sup> 73 F.3d at 1006.

<sup>120</sup> *Ellis*, 73 F.3d at 1007 (“Based on our interpretation of the statutory text and congressional intent, we . . . hold that disparate impact claims are not cognizable under the ADEA.”)

<sup>121</sup> *Id.* at 1007 n.12 (citation omitted).

<sup>122</sup> *Id.* at 1007.



The trend set forth in *Francis W. Parker School* and *Ellis* did not last long.<sup>123</sup> In *Smith v. City of Jackson*, the Supreme Court, deferring in part to the EEOC's interpretation, effectively overruled *Francis W. Parker School* and *Ellis*, and held that Title VII—as well as the ADEA—authorizes recovery under a disparate impact theory of liability.<sup>124</sup> The Court concluded that the only difference between those two statutes is that “the scope of disparate-impact liability under the ADEA is narrower than under Title VII.”<sup>125</sup> In support of its conclusion, the Court relied on the purpose of the ADEA and the EEOC's interpretation of the statute, which consistently authorized relief on disparate impact claims under the ADEA.<sup>126</sup>

While *Smith* resolved the issue of whether a disparate impact claim is cognizable under the ADEA, the Court left open the question of whether job applicants can bring a disparate impact claim.<sup>127</sup> Since *Smith*, lower courts have struggled to arrive at a consensus on this issue.<sup>128</sup> The conflict arises from courts' interpretation of the ADEA and their decision of

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<sup>123</sup> See *Smith v. City of Jackson*, 544 U.S. 228, 238 (2005) (plurality opinion) (clarifying that the Court's previous *Hazen Paper* decision did not preclude disparate impact claims under the ADEA).

<sup>124</sup> 544 U.S. at 240.

<sup>125</sup> *Id.* at 240. See also *id.* (explaining that the First, Seventh, Tenth, and Eleventh Circuits misapplied the Supreme Court's *Hazen Paper Co.* decision; and that in *Hazen Paper Co.*, the Court was “careful to explain that [it was] not deciding ‘whether disparate impact theory of liability is available under the ADEA.’”).

<sup>126</sup> *Id.* at 239 (noting that both the Department of Labor and the EEOC have “consistently interpreted the ADEA to authorize relief on a disparate-impact theory.”).

<sup>127</sup> *Id.* at 246 n.3 (Scalia, J., concurring in judgment) (“Perhaps applicants for employment are covered only when . . . disparate treatment results in disparate impact; or perhaps the agency's attempt to sweep employment applicants into the disparate-impact prohibition is mistaken. But whatever *in addition* it may cover, or erroneously seek to cover, it is impossible to contend that the regulation does *not cover* actions that ‘limit, segregate, or classify’ employees in a way that produces a disparate impact on those within the protected age group[.]”) (emphasis in the original).

<sup>128</sup> See *Champlin v. Manpower Inc.*, No. 4:16-CV-00421, 2018 WL 572997, at \*7 (S.D. Tex. Jan. 24, 2018) (“*Smith* held that section 4(a)(2) permits disparate impact claims, deferring, in part, to the EEOC's interpretation. As Rabin [*v. PricewaterhouseCoopers LLP*, 236 F.Supp. 3d 1126, 1132–33 (N.D. Cal. 2017)] summarizes, the EEOC has ‘long interpreted the ADEA as permitting disparate impact claims by job-seekers.’ Conversely, the majority of the divided Villarreal Court holds that EEOC deference is unnecessary because the plain language of the statute protects ‘employees, not applicants.’”) (internal citations omitted).

whether or not they should defer to the EEOC's interpretation of the statute.<sup>129</sup> Some courts have relied on Justice O'Connor's concurrence in *Smith*, in which she concluded that "[s]ection 4(a)(2), of course, does not apply to 'applicants for employment,' at all—it is only § 4(a)(1) that protects this group."<sup>130</sup> Other courts, however, have rejected Justice O'Connor's concurrence, finding it unconvincing.<sup>131</sup>

In 2012, the United States District Court for the Northern District of Georgia directly addressed the issue of whether job applicants can bring a disparate impact claim under the ADEA.<sup>132</sup> The underlying case began when an applicant, who was forty-nine years old at the time, applied to R.J. Reynolds Company (hereinafter "R.J. Reynolds") as a territory manager.<sup>133</sup> R.J. Reynolds, however, had a policy of preferring applicants who were "2-3 years out of college" and "adjusts easily to changes."<sup>134</sup> Additionally, the policy instructed R.J. Reynolds to "stay away from" applicants who have been in sales for "8-10 years."<sup>135</sup> At the time the

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<sup>129</sup> *Id.*

<sup>130</sup> *Smith*, 544 U.S. at 266 (O'Connor, J., concurring).

<sup>131</sup> See *Villarreal v. R.J. Reynolds Tobacco Co.*, 806 F.3d 1288, 1296, *reh'g en banc granted, opinion vacated*, No.15-10602, 2016 WL 635800 (11th Cir. Feb. 10, 2016), *and on reh'g en banc*, 839 F.3d 958, *cert. denied*, 137 S. Ct. 2292 ("[T]here is dicta in a binding opinion and there is dicta in a nonbinding concurrence. It's one thing to abide by dicta that is 'three long, citation-laden paragraphs' of 'well thought out . . . and carefully articulated analysis' in a majority opinion, . . . . It's another to do the same for a single sentence in a minority opinion") (quoting *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir.2006)).

<sup>132</sup> *Villarreal v. R.J. Reynolds Tobacco Co.*, No. 2:12-CV-0138-RWS, 2013 WL 823055, at \*1 (N.D. Ga. Mar. 6, 2013), *rev'd and remanded*, 806 F.3d 1288 (11th Cir. 2015), *reh'g en banc granted, opinion vacated*, No. 15-10602, 2016 WL 635800, *and on reh'g en banc*, 839 F.3d 958, *aff'd and remanded*, 839 F.3d 958, *and aff'd* No. 15-10602, 2017 WL 2781522 (11th Cir. June 27, 2017) [*Villarreal I*].

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

applicant applied, he had over eight years of sales experience.<sup>136</sup> Less than one week after applying, the applicant received an email from R.J. Reynolds stating that his application was rejected.<sup>137</sup> Ultimately, R.J. Reynolds hired substantially younger individuals for the position.<sup>138</sup>

The applicant brought an age discrimination lawsuit on behalf of “all applicants for the Territory manager position who applied for the position since the date [R.J. Reynolds] began its pattern or practice of discriminating against applicants over the age of 40.”<sup>139</sup> The district court dismissed the applicant’s complaint and concluded that, pursuant to *Smith v. City of Jackson*,<sup>140</sup> the disparate impact provision of the ADEA is limited to employees—“prospective employees” are not protected under § 4(a)(2).<sup>141</sup> On appeal, the Eleventh Circuit reversed the district court’s decision and ruled that the ADEA supports disparate impact protections for both current employees and job applicants.<sup>142</sup>

In February 2016, the Eleventh Circuit granted a rehearing *en banc*, and vacated the district court’s judgment.<sup>143</sup> Writing for the *en banc* majority, Judge William Pryor narrowly

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* \*1–\*2.

<sup>139</sup> *Id.* at \*3.

<sup>140</sup> 544 U.S. 228, 236 (2005).

<sup>141</sup> Villarreal I, 2013 WL 823055, at \*5 (explaining that the applicant’s reliance on the Supreme Court’s decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) is misplaced because “Griggs pre-dated significant amendments to Title VII—amendments notably absent from the ADEA.”); *see also id.* at \*6 (“when Congress amends one statutory provision but not another, it is presumed to have acted intentionally. . . . [W]e cannot ignore Congress’ decision to amend Title VII’s relevant provisions but not make similar changes to the ADEA.”) (citations omitted).

<sup>142</sup> Villarreal v. R.J. Reynolds Tobacco Co., 806 F.3d 1288, 1301–03 (2015) [Villarreal II].

<sup>143</sup> Villarreal v. R.J. Reynolds Tobacco Co., No. 15-10602, 2016 WL 635800, at \*1 (11th Cir. Feb. 10, 2016).

construed the issue as “whether the [ADEA] allows an unsuccessful job applicant to sue an employer for using a practice that has a disparate impact on older workers.”<sup>144</sup> Judge Pryor held that disparate impact protections under the ADEA are strictly limited to employees.<sup>145</sup> In reaching his holding, Judge Pryor analyzed the text of the statute as well as its context.<sup>146</sup> Specifically, Judge Pryor emphasized that the “key phrase in section 4(a)(2) is ‘or otherwise adversely affect his status as an employee’”<sup>147</sup> And he concluded that “[b]y using ‘or otherwise’ to join the verbs in this section, Congress made ‘depriv[ing] or tend[ing] to deprive any individual of employment opportunities’ a subset of ‘adversely affect[ing] [the individual’s] status as an employee.’”<sup>148</sup> Thus, by narrowly interpreting the ADEA, the Eleventh Circuit concluded that “section 4(a)(2) protects an individual only if he has a ‘status as an employee.’”<sup>149</sup> Moreover, the court refused to look into the purpose of the ADEA through reading its legislative history because “[courts] do not consider legislative history when the text is clear.”<sup>150</sup>

In support of its decision, the Eleventh Circuit also pointed to section 4(c)(2) of the ADEA, which contains language that parallels section 4(a)(2). Section 4(c)(2), unlike section

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<sup>144</sup> *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 961 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 2292 (2017) [*Villarreal III*].

<sup>145</sup> *Id.* at 963.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* (citing 29 U.S.C. § 623(a)(2)).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 969.

4(a)(2), distinguishes between “employees” and “applicants for employment.”<sup>151</sup> Because of this difference, the court explained, “Congress did not leave applicants without recourse.”<sup>152</sup> Rather, Congress provided applicants for employment with a cause of action under a disparate treatment theory.<sup>153</sup>

The *Villarreal* majority misinterpreted the ADEA. As a result, the court circumvented the ADEA’s primary purpose—which is to “promote employment of older persons based on their ability rather than age.”<sup>154</sup> In his dissent, Judge Martin, like the *Villarreal* majority, relied on the text of §623(a)(2) to support his position.<sup>155</sup> Judge Martin stated that the job applicant is an “‘individual’ who was ‘deprived of employment opportunities’ and denied any ‘status as an employee’ because of something an employer did to ‘limit . . . his employment.’”<sup>156</sup> Further, Congress interchangeably applied the term “individuals” and “employees.”<sup>157</sup> Congress could have used narrower terms in § 4(a)(2); nevertheless, it chose to use the terms “‘any individual’ when referring to who can be injured by an employer’s discrimination.”<sup>158</sup> Thus, under Judge

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<sup>151</sup> See 29 U.S.C. §§ 623(a)(1), (c)(2). Section (c)(2) applies to “labor organizations.” The ADEA defines “labor organizations” as “any organization . . . in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.” 29 U.S.C. § 630(d). The Eleventh Circuit’s resort to § 623(c)(2) is misplaced as labor organizations, by definition, only apply to current employees.

<sup>152</sup> *Villarreal III*, 839 F.3d at 970.

<sup>153</sup> *Id.*

<sup>154</sup> 29 U.S.C. § 621(b).

<sup>155</sup> *Villarreal III*, 839 F.3d at 982 (Martin, J., dissenting).

<sup>156</sup> *Id.* (citing 29 U.S.C. § 623(a)(2)).

<sup>157</sup> 29 U.S.C. § 623(a)(2).

<sup>158</sup> *Villarreal III*, 839 F.3d at 982 (Martin, J., dissenting); see also *id.* (“Congress said age discrimination must not ‘deprive any individual of employment opportunities.’ If Congress intended to protect a narrower group, it would have done so. For example, the same sentence of § 4(a)(2) later uses the term ‘such individuals’ to refer back

Martin’s interpretation of § 623(a)(2), current employees—as well as job applicants—can recover under a disparate impact theory of liability.<sup>159</sup>

Likewise, other courts have found that Judge Martin provided the correct interpretation of the ADEA. In *Rabin v. PricewaterhouseCoopers, LLP*,<sup>160</sup> the United States District Court for the Northern District of California indicated that Judge Pryor’s reading of the ADEA in *Villarreal* was not supported by the natural reading of § 4(a)(2), as a natural reading plainly described the job applicant’s situation: “[the job applicant] is an ‘individual’ who was ‘deprive[d]’ ‘of employment opportunities’ and denied any ‘status as an employee’ because of something an employer did to ‘limit . . . his employees.’”<sup>161</sup> Moreover, in *Kleber v. Carefusion Corp.*, the Seventh Circuit also held that Judge Martin’s reading of the ADEA was consistent with the primary purpose of the ADEA.<sup>162</sup> Based on the purpose of the ADEA, the Seventh Circuit “could not imagine . . . a plausible policy why Congress might have chosen to allow disparate impact claims by current employees, including internal job applicants, while excluding outside job applicants.”<sup>163</sup>

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to a set of people who were introduced earlier. And a different part of the same sentence uses the word ‘employees,’ when referring to the people an employer can’t ‘limit, segregate, or classify[.]’”).

<sup>159</sup> *Id.*

<sup>160</sup> 236 F. Supp. 3d 1126 (N.D. Cal. 2017)

<sup>161</sup> 236 F. Supp. 3d at 1130 (quoting *Villarreal III*, 839 F.3d at 982 (Martin, J., dissenting)).

<sup>162</sup> 888 F.3d 868, 877 (7th Cir. 2018), *reh’g en banc granted, opinion vacated* (June 22, 2018) (“We know from the text of the ADEA itself that Congress set out to address ‘the incidence of unemployment, especially long-term unemployment’ among older workers.” (quoting 29 U.S.C. § 621(a)(3))).

<sup>163</sup> *Id.* at 870.

Both, the majority and the dissent in *Villarreal* offer reasonable readings of the ADEA.<sup>164</sup> And both sides argue that the ADEA is unambiguous.<sup>165</sup> Therefore, circuit courts will continue to reach conflicting decisions regarding the reach of the ADEA. Hence, the Supreme Court should find the language in § 4(a)(2) is ambiguous and defer to the EEOC's interpretation of the ADEA in order to resolve the issue of whether a job applicant can bring a disparate impact claim. Such a ruling would be consistent with the Court's precedent and will result in furthering the ADEA's primary purpose.

2. *Courts should defer to the EEOC's interpretation of the ADEA.*

The primary purpose of the ADEA is to address age discrimination in hiring.<sup>166</sup> While older workers are the age group least likely to be unemployed,<sup>167</sup> they still experience longer periods of unemployment and remain disproportionately represented among the long-term unemployed.<sup>168</sup> Part of the reason for such disproportionate representation is because employers are permitted to engage in subtle discriminatory hiring practices such as placing limits on

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<sup>164</sup> Compare *Villarreal III*, 839 F.3d at 964 (majority opinion) (“By making ‘deprive or tend to deprive any individual of employment opportunities’ a subset of ‘adversely affect[ing] his status as an employee,’ Congress limited section 4(a)(2) to discrimination against employees”) with *Rabin*, 236 F.Supp. 3d at 1128 (“The plain language of the [ADEA] supports the more inclusive interpretation. [While] the ADEA uses the phrase ‘any individual,’ rather than ‘employee’ to identify those people section 4(a)(2) protects . . . elsewhere in the same provision, Congress chose the word ‘employees’ to refer to the people an employer may not ‘limit, segregate, or classify.’ The Court assumes that this variation in language was a deliberate choice, and one that reflects Congress’s intent to include all ‘individuals’ within section 4(a)(2)’s ambit.”).

<sup>165</sup> See *id.*

<sup>166</sup> *Pub. Emps. Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 179 (1989) (stating that the legislative history of the ADEA lists its “primary purpose” as the “hiring of older workers”).

<sup>167</sup> Sara E. Rix, *The Employment Situation, May 2011: Average Duration of Unemployment for Older Jobseekers Continues to Rise*, AARP PUBLIC POLICY INSTITUTE, <https://assets.aarp.org/rgcenter/ppi/econ-sec/fs226-employment.pdf> (last visited Nov. 13, 2019).

<sup>168</sup> Alexander Monge-Naranjo & Faisal Sohail, *The Composition of Long-term Unemployment is Changing Toward Older Workers*, FEDERAL RESERVE BANK OF ST. LOUIS, <https://www.stlouisfed.org/publications/regional-economist/october-2015/the-composition-of-long-term-unemployment-is-changing-toward-older-workers> (last visited Dec. 21, 2019).

maximum years of experience and exclusive on-campus recruiting.<sup>169</sup> By permitting employers to engage in these subtle discriminatory hiring practices, courts essentially allow employers to disregard the primary purpose of the ADEA. Despite the lower courts' conflicting views, the EEOC has interpreted the ADEA to allow job applicants to recover under a disparate impact theory.<sup>170</sup> Consequently, the issue becomes whether courts should defer to the EEOC's interpretation of the ADEA.

The Supreme Court has established a two-step analysis to determine when the court will defer to an agency's interpretation.<sup>171</sup> Under the *Chevron* framework, a court determines whether to look beyond the language of the statute for its interpretation in two steps.<sup>172</sup> First, the court analyzes whether Congress has "spoken to the precise question at issue" directly and clearly.<sup>173</sup> If Congress's intent is clear, "that is the end of the matter" as both the court and the agency "must give effect to the unambiguously expressed intent of Congress."<sup>174</sup> But if Congress has not directly addressed the precise issue, the court does not simply impose its own construction on the statute.<sup>175</sup> Rather, where the statute is silent or ambiguous with respect to the specific issue, the

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<sup>169</sup> See Laurie A. McCann, *The Age Discrimination Act at 50: When will it Become a "Real" Civil Rights Statue?*, 33 ABA J. LAB. & EMP. LAW 89, 96 (2017) (arguing that "[w]ithout the disparate impact theory to ferret out subtle hiring discrimination, older workers risk extended long-term employment").

<sup>170</sup> 29 C.F.R. § 1625.7(c) (2012) (stating that "[a]ny employment practice that adversely affects individuals within the protected age group on the basis of older age is discriminatory unless the practice is justified by a 'reasonable factor other than age.'").

<sup>171</sup> See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 842.

<sup>174</sup> *Id.* at 842–43.

<sup>175</sup> *Id.* at 843.



question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>176</sup>

The *Villiarreal en banc* court demonstrated that the ADEA is a fine example of a statute that is ambiguous.<sup>177</sup> For example, Judge Martin described a situation where the ADEA would cover job applicants.<sup>178</sup> Suppose an employer refuses to hire a job applicant who is not in college. According to Judge Martin, “[t]his is plainly a decision to ‘limit . . . his employees’ to college students and college students tend to be young, so this policy may ‘tend to deprive an individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s age.’”<sup>179</sup> Therefore, an older “individual” could find himself ‘deprive[d] . . . of employment opportunities’ or denied any “status as an employee, because of such individual’s age.”<sup>180</sup> On the other hand, if a court focuses on the phrase “or otherwise adversely affect his status as an employee,”<sup>181</sup> the court may conclude that only current employees can bring a disparate impact claim under the ADEA. As stated by the *Villarreal* majority, “[b]y making ‘deprive or tend to deprive any individual of employment opportunities’ a subset of ‘adversely affect[ing] his status as an employee,’ Congress limited section 4(a)(2) to discrimination against employees. Applicants who are not employees when alleged

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<sup>176</sup> *Id.*

<sup>177</sup> 839 F.3d 958 (11th Cir. 2016).

<sup>178</sup> *See id.* at 982 (Martin, J., dissenting).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> 29 U.S.C. § 623(a)(2).

discrimination occurs do not have a ‘status as an employee.’”<sup>182</sup> Because of these two conflicting readings of the ADEA, the court should defer to the EEOC’s interpretation.<sup>183</sup>

Under the EEOC’s regulation on the ADEA, “[a]ny employment practice that adversely affects individuals within the protected age group on the basis of older age is discriminatory unless the practice is justified by a ‘reasonable factor other than age.’”<sup>184</sup> The EEOC has clarified the regulation, stating that “[p]aragraph (d) of § 1625.7 has been rewritten to make it clear that employment criteria that are age-neutral on their face but which nevertheless have a disparate impact on members of the protected age group must be justified as a business necessity.”<sup>185</sup> Accordingly, under the EEOC’s regulations, any individual within the protected age group is able to make a disparate impact claim.<sup>186</sup>

If courts defer to the EEOC’s interpretation of the ADEA, targeted advertisements on social media sites may promote the primary purpose of the ADEA. Indeed, a major advantage of social media is that users share a wide range of information with one another, which enables

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<sup>182</sup> 839 F.3d at 963 (majority opinion).

<sup>183</sup> The Supreme Court has continuously recognized the weight of an agency interpretation should be accorded substantial deference when entrusted to administer regulatory schemes. *See* *Aluminum Co. of Am. v. Cent. Lincoln Peoples’ Util. Dist.*, 467 U.S. 380, 389 (1984) (“Under established administrative law principles, it is clear that the Administrator’s interpretation . . . is to be given great weight.”); *Blum v. Bacon*, 457 U.S. 132, 141 (1982) (“the interpretation of an agency charged with the administration of a statute is entitled to substantial deference”); *see also* *American Paper Inst., Inc. v. American Electric Power Serv. Corp.*, 461 U.S. 402, 422–23 (1983) (“To uphold [the agency’s interpretation] ‘we need not find that [its] construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.’ . . . We need only conclude that it is a reasonable interpretation of the relevant provisions.” (quoting *Unemp’t Comp. Comm’n v. Aragon*, 329 U.S. 144, 153 (1946))).

<sup>184</sup> 29 C.F.R. § 1625.7 (2012).

<sup>185</sup> Final Interpretations: Age Discrimination in Employment Act, 46 Fed. Reg. 47724-01 (1981).

<sup>186</sup> *See* Samantha Pitsch, Comment, *Quick, Stop Hiring Old People! How the Eleventh Circuit Opened the Door for Discriminatory Hiring Practices Under the ADEA*, 92 WASH. L. REV. 1605, 1638 (2017) (arguing that the Supreme Court should hold that the ADEA covers applicants for employment in disparate impact claims and that Congress should amend the ADEA to include the phrase “or applicants for employment” to solidify applicant’s abilities to bring suit under the ADEA).

advertisers to efficiently and effectively reach their targeted market.<sup>187</sup> Advertisers can then use the user-provided information such as age, geographic location, education, profession, and personal connections to precisely reach the type of individuals who are likely to be influenced by the advertisement.<sup>188</sup>

This practice of efficiently reaching users helps advertisers control the amount of money they spend on advertising.<sup>189</sup> Many employers applaud social media sites as a hiring tool because the sites allow them to gather necessary information about job applicants; and therefore, make it easier to predict the likely match between the applicant and the job.<sup>190</sup> Indeed, the ability to send targeted advertisements to a specific demographic's talent pool may be the best and most economical way to diversify an employer's workforce.<sup>191</sup>

Of course, in practice, targeted advertisements may shield those in protected classes from viewing advertisements. Consequently, some critics propose a total ban on targeted advertisements.<sup>192</sup> As one critic stated:

Ad targeting can make the world look different to different people. Some find the web full of job ads for high-paying CEO jobs, while others see mostly ads for sneakers or payday loans. Our news also reaches us and our networks through ad targeting. How can this not have huge implications for our ability to exist in a

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<sup>187</sup> Brailey, *supra* note 15, at 271.

<sup>188</sup> See *Social Advertising Best Practices*, *supra* note 39, at 6 (“Consumers of social media actively provide information to the social domain they are visiting in order to get the most benefit and value from their online experience as they connect and interact with friends. . . . Examples of profile data relevant to social ads include (but are not limited to): age, gender, location, interests and photos).

<sup>189</sup> Dau-Schmidt, *supra* note 13.

<sup>190</sup> Byrnside, *supra* note 54, at 458 (stating that “[u]p to this point, employers have generally felt that ‘they are on safe ground looking at profiles on MySpace or Facebook because there are currently no laws stopping them from doing so.’ Furthermore, employers believe they have the right to obtain as much information as possible about applicants and that using social networking sites ‘is fair game to find out who will be the ‘best fit’ for their organization’”).

<sup>191</sup> *Targeted Recruiting vs. Non Targeted Recruiting*, *supra* note 57.

<sup>192</sup> Goodman, *supra* note 59.

cohesive society? How can we agree on the policies that should govern our world when there are no common reference points for what that world looks like? Targeting, of course, does enable advertisers to efficiently reach particular audiences with messages that are tailored to them, and that can sometimes be a good thing. But that doesn't mean we shouldn't acknowledge what's lost with that efficiency: that people outside of the expected audiences won't see these messages or know they exist."<sup>193</sup>

In a similar vein, excluding older persons from viewing certain employment advertisements may make it less likely that older prospective applicants will hear about employment opportunities, and in turn, apply for or secure jobs that are open.<sup>194</sup> This argument, however, presumes that job applicants cannot bring a disparate impact claim under the ADEA.

If courts allow job applicants to recover on a disparate impact theory under the ADEA, older workers may benefit from targeted advertisements. Allowing job applicants to recover under a disparate impact claim will act as a safeguard to ensure that employers are not using social media sites as a tool to shield certain groups of individuals from jobs—but as part of a broader recruitment strategy designed to reach all protected groups. Thus, employers that recruit employees exclusively through social media sites like Facebook will be inherently suspicious and likely found in violation of the ADEA. For example, in May 2010, a job applicant filed a claim with the EEOC, alleging that a recruitment agency's placement of job advertisements on social media sites put older workers at a disadvantage because older workers use computers less often than younger workers and therefore, are less likely to view the advertisements.<sup>195</sup> The administrative law judge ("ALJ") found that the job applicant did not establish a prima facie case of disparate impact discrimination.<sup>196</sup>

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<sup>193</sup> *Id.*

<sup>194</sup> *See* Goodman, *supra* note 59.

<sup>195</sup> Reese v. Salazar, EEOC DOC 0120122339, 2012 WL 5901116, at \*2 (Nov. 15, 2012).

<sup>196</sup> *Id.*

On appeal, the EEOC affirmed the ALJ's decision because the job applicant did not present any "evidence that the agency exclusively recruit[ed] through social [media]" and therefore, she failed to put forth evidence that the agency reserved jobs for younger applicants.<sup>197</sup> Accordingly, courts should defer to the EEOC's interpretation of the ADEA and rule that job applicants may bring a disparate impact claim under the ADEA. Under this rule, job applicants may recover if they prove that the defendant categorically shielded them from applying to jobs by exclusively using social media sites for recruiting purposes.<sup>198</sup>

#### IV. USING PREVIOUS CASES FOR GUIDANCE

Lower federal courts have squarely addressed the issue of targeted recruitment methods in the context of traditional recruitment platforms. Does the outcome of those cases change when a company uses nontraditional methods of recruiting? This part of the Note argues that placing targeted advertisements on social media sites does not change the outcome. Thus, companies will be able to take advantage of the abundance of information provided to social media sites to efficiently recruit new employees.

##### *A. Courts should Focus on the Context of Targeted Job Advertisements.*

One of the earliest cases addressing targeted recruiting practices occurred in the context of a claim arising under Title VII. In *U.S. v. Georgia Power Co.*,<sup>199</sup> plaintiffs argued that Georgia

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<sup>197</sup> *Id.* at \*5.

<sup>198</sup> Under this rule, a job applicant can provide circumstantial evidence to prove that an employer's social media recruitment policy had a disparate impact on older workers. Then, the burden will shift to the employer, to prove that it did not recruit exclusively on social media sites. Such an analysis is similar to the Fifth Circuit's analysis in *U.S. v. Georgia Power, Co.*, 474 F.2d 906 (1973) where the court found that an employer violated Title VII by recruiting exclusively at predominantly white institutions while maintaining a labor force that was significantly less diversified than the employer's surrounding community.

<sup>199</sup> 474 F.2d 906, 925 (5th Cir. 1973).

Power's practices of advertising vacancies within the company through word-of-mouth and primarily recruiting at all-white educational institutions violated Title VII. In its analysis, the Fifth Circuit acknowledged the disparity between black workers and white workers compared to the percentage of black workers in the available labor force.<sup>200</sup> The court then suggested that Georgia Power should implement other recruitment platforms that are accessible to black communities.<sup>201</sup> Accordingly, the Fifth Circuit concluded that "while the company obviously ought not be enjoined to recruit on all college campuses . . . it also ought not to be allowed to continue to restrict its recruitment programs to all—or predominantly all—white institutions while maintaining such a racially imbalanced workforce."<sup>202</sup> Thus, recruiting techniques that focus on a particular group of people are permissible under Title VII, so long as the recruiting platforms are also accessible by protected classes.<sup>203</sup>

Likewise, the United States District Court for the District of New Mexico, took a similar approach in analyzing a claim arising under the ADEA.<sup>204</sup> In *Mistretta v. Sandia Corp.*, the court approved an employer's recruitment practice of focusing on college campuses to recruit entry-level positions, despite the fact that the employer is more likely to find younger applicants in that setting than older applicants.<sup>205</sup> The court reasoned that "[t]here is nothing inherently suspicious

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<sup>200</sup> *See id.* ("Only 7.2% of the company's labor force was shown to be black, although this race constituted a much larger percentage of the available labor force.")

<sup>201</sup> *Id.* at 926.

<sup>202</sup> *Id.*

<sup>203</sup> *See id.* (holding that Georgia Power's word-of-mouth recruiting practice must be supplemented by other forms of recruiting methods such as advertising in newspapers accessible to black communities).

<sup>204</sup> *Mistretta v. Sandia Corp.*, No. 74-536-M, 1977 WL 17, at \*7 (D.N.M. Oct. 20, 1977), *decision supplemented*, No. 74-536-M, 1978 WL 17 (D.N.M. Sept. 28, 1978), *aff'd in part, rev'd in part on other grounds*, 639 F.2d 588 (10th Cir. 1980), *aff'd and remanded sub nom.* Equal Emp't Opportunity Comm'n v. Sandia Corp., 639 F.2d 600 (10th Cir. 1980).

<sup>205</sup> 1977 WL 17, at \*7.

about on-campus recruiting programs. . . . No evidence was presented to show whether applicants in the protected age group had less success in finding employment at [the company] than applicants generally.”<sup>206</sup>

Moreover, when confronted with targeted job advertisements, courts have focused on the context of the advertisements, rather than crafting a rigid *per se* rule.<sup>207</sup> In *Hodgson v. Approved Personnel Service, Inc.*, the court examined advertisements published by an employment agency and held that some of the advertisements violated the ADEA while others did not.<sup>208</sup> In that case, the employment agency’s advertisements used words and phrases such as: “recent college graduate,” “1-2 years out of college,” “excellent first job,” “any recent degree,” “recent high school grad,” “young executive,” “junior secretary,” and “junior accountant.”<sup>209</sup>

The court’s analysis of each phrase involved close scrutiny of the advertisement in its entirety to determine whether the employment agency violated the ADEA. Specifically, the court stated, “we are inclined to think that the discriminatory effect of an advertisement is determined not solely by “trigger words” but rather by its context.”<sup>210</sup> Therefore, to determine whether the advertisement is in fact discriminatory, the court must read the advertisement in its entirety and consider the effects that the advertisement had on the employer’s hiring practices. The mere presence of “trigger words” does not constitute a violation of the ADEA.<sup>211</sup>

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<sup>206</sup> *Id.*

<sup>207</sup> *See* *Hodson v. Approved Personnel Serv., Inc.*, 529 F.2d 760, 765 (4th Cir. 1975).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 765–66.

<sup>210</sup> *Id.* at 765.

<sup>211</sup> *Id.*

*B. Courts Should Follow the Hodgson Court's Analysis when Confronted with an ADEA Claim involving Targeted Advertisements on Social Media.*

Courts should adopt the *Hodgson* court's analysis when addressing age discrimination claims in the context of Facebook's recruitment platform. In particular, employers that use Facebook's technology to microtarget potential applicants should not be held, *per se*, in violation of the ADEA. However, extending *Hodgson's* analysis to the context of social media advertisements raises the concern that social media's advertisements, unlike traditional job advertisements, shields certain users from viewing the advertisements and in turn knowing about the open position.

This concern was sufficiently raised by the CWA. In December 2017, the CWA filed a class action lawsuit alleging that companies that use Facebook's advertisement platform for recruiting systematically exclude older workers from hearing about job opportunities.<sup>212</sup> In its complaint, the CWA argues that excluding older workers from receiving employment advertisements make it less likely that older workers will apply for and secure open positions.<sup>213</sup> Therefore, companies that recruit prospective applicants through using microtargeted advertisements are less likely to hire older works.<sup>214</sup>

If the court rules in favor of the CWA, it will essentially adopt an overly rigid *per se* rule that was rejected by the *Georgia Power Co.*, *Mistretta*, and *Hodgson* courts. The court should instead, like the *Hodgson* court, focus on the context of the microtargeted job advertisement, which includes considering the effects that the advertisement had on the company's hiring

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<sup>212</sup> Complaint, Communications Workers of America et al. v. T-Mobile US, Inc. et al., No. 5:17-cv-07232, 2017 WL 6539268, at \*27 (N.D. Cal. Dec. 20, 2017).

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at \*28.



process and the accessibility of the advertisement through other platforms. Consequently, a company that primarily recruits workers through microtargeted advertisements on Facebook will run afoul of the ADEA. As discussed above, this recruitment practice can be challenged by unsuccessful job applicants as well as current employees. In such a case, a court could take an approach similar to the court in *Georgia Power Co.* and order the company to either expand its recruitment efforts or change it.

Thus, such an analysis would allow companies to take advantage of Facebook's streamlined recruitment platform as part of a broad recruitment strategy designed to reach all age groups. Moreover, Facebook's advertisement platform allows companies to immediately and effectively diversify the workplace.

## V. CONCLUSION

Social media sites are a fantastic invention that allows us to connect with others, regardless of the distance. Individuals voluntarily release a tremendous amount of personal information while using social media sites. Indeed, the information that social media sites acquire allows the software to estimate your gender, intelligence, life satisfaction, sexual preference and political and religious preferences.<sup>215</sup>

In the context of recruiting and hiring new employees, companies can use this information to attract the right person for the position. Some may consider this as a "wild-wild West" like environment, where individuals' information is sold to the highest bidder. However, like every other aspect of our lives, there are limitations to the permissible use of such information. Laws, such as the ADEA, can encourage companies to efficiently use the

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<sup>215</sup> James Titcomb, *This Online Tool Reveals Your Personality Based on Facebook "Likes"*, THE TELEGRAPH (Sept. 5, 2015, 9:39 AM), <https://www.telegraph.co.uk/technology/facebook/11838515/This-online-tool-reveals-your-personality-based-on-Facebook-likes.html>.

information to benefit the workforce. Indeed, when implemented as part of a broader recruitment strategy designed to reach all groups, microtargeting allows companies to target applicants from each group who are the best fit for the company. Consequently, companies may microtarget potential employees through social media sites as a means of hiring new employees. When properly regulated, this method of recruiting can effectively diversify the workplace.